

THE WAITANGI TRIBUNAL: "CONSCIENCE OF THE NATION", OR JUST ANOTHER COURT?

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I. INTRODUCTION

The subtitle of a recent book by a distinguished New Zealand barrister (now a judge of the High Court) refers revealingly to the Waitangi Tribunal (the Tribunal) as "the conscience of the nation".¹ This is not a view of the Tribunal universally shared by all Maori and Pakeha² New Zealanders, but there is little doubt that on the whole the Tribunal commands widespread respect and legitimacy. In 1990 Andrew Sharp, Senior Lecturer in Political Studies at the University of Auckland, published a remarkable book called *Justice and the Maori: Maori Claims in New Zealand Political Argument in the 1980s*.³ Sharp's book is undoubtedly the most sophisticated and comprehensive analysis of the political and legal rhetoric

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1 P Temm *The Waitangi Tribunal: Conscience of the Nation* (1989).

2 A New Zealander of European descent.

3 A Sharp *Justice and the Maori: Maori Claims in New Zealand Political Arguments in the 1980s* (1990).

developed around the *Treaty of Waitangi* (the Treaty), although he is open to the accusation that he rather over-intellectualises his subject. The book thoroughly analyses the Treaty debate and puts forward the view (reflecting the situation as it was circa 1988-89) that the Waitangi Tribunal was the second most important institution in the country, ranking only behind parliament itself.⁴ Not all would have agreed with that verdict, but of the Tribunal's centrality to national life at the time there was little doubt. In 1987 it released its *Orakei Report*⁵ and in 1988 the all important *Muriwhenua Fishing Report*.⁶ These two important reports coincided with a number of key decisions in the ordinary courts.⁷ The combined effect was fairly dramatic, leading to widespread media coverage and a real sense that quite significant constitutional reordering was a real possibility.

The Tribunal has a well established position in New Zealand life and there must be few New Zealanders who do not have some kind of opinion about it. This article will attempt to demonstrate that on the whole the Tribunal has managed to achieve and retain a remarkable level of legitimacy and respect. There are, of course, those who vigorously take exception to this happy picture. One notable dissenter is Jane Kelsey of the Faculty of Law at the University of Auckland, who, from the perspective of a critical legal studies scholar, has conducted a stern critique of some Tribunal reports, arguing that the Tribunal has backtracked on the question of whether the *Treaty of Waitangi* guaranteed Maori sovereignty and accusing it of capitulating to a 'redefinition' of the principles of the *Treaty of Waitangi* by the ordinary courts in 1987.⁸

In this article I do not intend to rake over the ashes of this - by now rather stale - controversy, nor indeed to engage in a normative analysis of the Tribunal's reports at all. The objectives of this article are to take a deliberately unsentimental view of the Tribunal, to set it firmly in its ever more complicated context, and to raise some doubts about its suitability as a model for export. The Tribunal has evolved gradually into its present shape. It forms but a part of an institutional structure of

4 *Id.*

5 Waitangi Tribunal *Orakei Report* (Wai-9) November 1987.

6 Waitangi Tribunal *Muriwhenua Fishing Report* (Wai-22) June 1988.

7 Most importantly *Te Weehi v Regional Fisheries Officer* [1986] 1 NZLR 680; *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641; *Huakina Development Trust v Waikato Valley Authority* [1987] 2 NZLR 188; *Tainui Maori Trust Board v Attorney-General* [1989] 2 NZLR 513.

8 See J Kelsey "Treaty Justice in the 1980's", in P Spoonley, D Pearson and C MacPherson (eds) *Nga Take: Ethnic Relations and Racism in Aotearoa/New Zealand* (1991) pp 214-15; J Kelsey *A Question of Honour? Labour and the Treaty 1984-1989* (1990) pp 60-65, 224-27. One could easily read the former article, however, without realising that the Maori litigants had actually been *successful* in the cases she so trenchantly analyses, a naively realist point perhaps, but an important one: after 1986-89 the government could have no confidence that it would succeed in any case that it allowed to go to court.

growing complexity, and is a product of the rather unique - and complicated - New Zealand political climate.

One of the difficulties of commenting on the Tribunal lies in the framing of criteria by which to evaluate its success (or lack of it). The Tribunal may have been successful in raising the profile of Maori grievances or having led to, in the words of one well known scholar, a "radical" revision of New Zealand history.⁹ It may be judged perhaps, for that reason, as a stunning success despite the difficulty of demonstrating that there has been any significant redistribution of land and resources into Maori hands as a result of the Tribunal's inquiries and reports. Furthermore, indicia of success are likely to be differently interpreted according to one's political position. It has to be accepted, for instance, that visible Maori protest by means of direct action (demonstrations, occupations, land marches) has virtually vanished. Whether one views that fact with pleasure or dismay is, however, quite clearly a matter of political preference. Calling the Tribunal a 'safety valve' is opprobrium from some, praise from others. It is also necessary to guard against exaggerating the consequences of the Tribunal's work. A simple equation between growing Maori self confidence and commercial success, noticeable to any observer of the New Zealand scene, and the Waitangi Tribunal's work certainly needs to be avoided.

II. THE STATUTORY FRAMEWORK

The *Treaty of Waitangi* of 6 December 1840 formed the basis for the Crown's proclamation of sovereignty over New Zealand on 21 May 1840.¹⁰ Although the Treaty was dismissed, in a celebrated phrase, by a Supreme Court judge in 1870 as a "simple nullity"¹¹ the definitive pronouncement on the Treaty's status remains that of the Privy Council made in 1941. The Treaty was not a mere nullity but a valid treaty of cession; as such it had no enforceable status in municipal law until

9 MPK Sorrenson "Towards a Radical Reinterpretation of New Zealand History; the Role of the Waitangi Tribunal" (1987) 21 *New Zealand Journal of History* 173.

10 The *Treaty of Waitangi* is now the subject of a substantial literature. On the history of the Treaty generally see C Orange *The Treaty of Waitangi* (1987). See also RM Ross "Te Tiriti o Waitangi: Texts and Translations" (1972) 6 *New Zealand Journal of History* 129. As to legal commentary, the field is now becoming somewhat overburdened. A useful collection of essays which tend to emphasise international legal perspectives is IH Kawharu (ed) *Waitangi: Maori and Pakeha Perspectives of the Treaty of Waitangi* (1989). Basic reading is PG McHugh *The Maori Magna Carta: New Zealand Law and the Treaty of Waitangi* (1991) - a book which is both a textbook and a long and highly idiosyncratic essay. For commentary on specific aspects see RP Boast "The Treaty of Waitangi: A Framework for Resource Management Law" (1989) *Victoria University of Wellington Law Review Monograph* 1; W Renwick (ed) *Sovereignty and Indigenous Rights: The Treaty of Waitangi in International Contexts* (1991).

11 *Wi Parata v The Bishop of Wellington and the Attorney-General* (1877) 3 NZ Jur (NS) SC 72.

recognised in statute.¹² This, a few interesting but on the whole inconsequential judicial dicta aside,¹³ remains the position at the present day. Maori attempts to base resolution of their grievances on the Treaty, rather than on the complexities of the common law or the still greater complexities of New Zealand's home grown legal morass governing Maori land, were uniformly unsuccessful.

The *Treaty of Waitangi Act* 1975 established a tribunal which was to adjudicate claims, made by "any Maori", that acts or omissions of the Crown arising *after* the enactment of the legislation were contrary to "the principles" - not defined - of the *Treaty of Waitangi*.¹⁴ The driving force behind the enactment of the 1975 Act was the Honourable Matiu Rata, Minister of Maori Affairs in the 1972-75 Labour Government. The Tribunal, as envisaged in the original legislation, bore no resemblance to a court of record; it had powers of recommendation only and it could not issue judgments or decisions but only prepare reports addressed to the Minister of Maori Affairs. The establishment of the Waitangi Tribunal passed unnoticed, and on the few occasions on which it was convened in the first seven years of its tenuous existence, it said and did little of interest, was ignored by the government of the day, and made no mark of any kind on national life. It existed "in obscurity tempered by minor obliquity".¹⁵ Nor in terms of its formal structure was there anything especially innovative about the Tribunal. It was, simply, a commission of inquiry which happened to have the unusual feature of its own empowering statute rather than being based on the *Commissions of Enquiry Act* 1908.

The Tribunal's 'obscure' existence changed fairly dramatically in 1983 when it released its first major report, *Motunui*.¹⁶ The hearing of this claim was innovative in a number of ways, but in particular due to the fact that it was heard on a

12 *Hoani Te Heuheu Tukino v Aotea District Maori Land Board* [1941] AC 308.

13 In *Maori Council v Attorney-General* [1987] 1 NZLR 641 at 655-56. Cooke P appears to suggest that the *Treaty of Waitangi* can be used as an extrinsic aid in statutory interpretation even where it is not incorporated in any way in a relevant statute. None of the other four judges of the Court of Appeal in that case made any such observation. Another possibility is that the Treaty has a kind of *sui generis* status in administrative law, as was discussed in the 1990 decision of the Court of Appeal on Maori claims to broadcasting frequencies: see *Attorney-General and Others v New Zealand Maori Council and Others* [1991] 2 NZLR 129. The actual ratio of that decision was, however, a narrow one, the Court holding that if a Minister of the Crown has indicated that the Crown should have regard to the recommendations of the Waitangi Tribunal on a particular issue, then the Minister ought to allow the Tribunal "reasonable time" in which to carry out its inquiry (see per Cooke P at 139). In the most recent Court of Appeal decision orthodoxy on the status of the Treaty has been reasserted by McKay J, speaking for the majority of the Court (Cooke P dissenting): "Treaty rights cannot be asserted in the courts except insofar as they have been recognised by statute". See *New Zealand Maori Council v Attorney-General* [1992] 2 NZLR 576 at 603.

14 *Treaty of Waitangi Act* 1975 s 6. This was amended by s 3 of the *Treaty of Waitangi Amendment Act* 1985 which extended the Tribunal's jurisdiction to claims dating from 1840.

15 Note 3 *supra* p 75.

16 Waitangi Tribunal *Motunui Report* (Wai-6) March 1993.

marae.¹⁷ (This was at the suggestion of the North Taranaki Maori claimants, the Department of Justice initially being very reluctant). The Tribunal's report was comprehensive, lucid and innovative. It brought the contents of the Maori text of the Treaty into national prominence, introducing such novel concepts as rangatiratanga, taonga and kawanatanga¹⁸ into the national political discourse. Since that time the Tribunal has issued a sequence of major reports; has been formally reconstituted and enlarged; and has become a well known institution which has often been surrounded by controversy.

In 1985 the parent Act was substantially amended, backdating the Tribunal's powers of inquiry to acts and omissions of the Crown arising since 1840. The Tribunal was substantially enlarged and was empowered to commission research reports and appoint counsel to represent claimants.¹⁹ In 1987 it released two important reports on the Orakei²⁰ and Waiheke Island claims, which were then succeeded in the following year by its arguably even more important and undoubtedly controversial *Muriwhenua Fishing Report*. Insofar as the Tribunal can be said to have had a golden age, when it was probably the dominant institution involved in the complex processes of resolving Maori claims and grievances, it would have been in the years between the release of the *Manukau Report* in 1985 and the *Muriwhenua Fishing Report* in 1988. Since that time, however, the picture has become somewhat more confused and the role of the Tribunal more problematic.

The Tribunal's purely recommendatory role has now been modified in a number of contexts in that it has been given some binding determinative powers. These binding powers have developed in an ad hoc manner as ingredients of broader negotiated settlements, and do not in any way reflect any carefully determined policy decision to broaden the Tribunal's powers or to convert it into a more judicialised institution. The first of these arrangements came in 1988, when

17 A marae is a Maori ceremonial centre, always featuring a meeting-house (whareniui) and a kitchen and dining room, grouped around a grassed or paved outdoor space at which formal oratory takes place. Sometimes the marae will include a kohanga reo (Maori-language kindergarten) and a church. Marae procedure is complex and formal: for a full discussion see A Salmond *Hui: A Study of Maori Ceremonial Gatherings* (1975).

18 These are some of the key terms used in the Maori text of the *Treaty of Waitangi*. Rangatiratanga is the term used as an equivalent to 'full exclusive and undisturbed possession' in the English text, and taonga and kawanatanga to 'other properties' and 'sovereignty' respectively. Kawanatanga was ceded, rangatiratanga retained - something less than sovereignty, in other words, was ceded to the Crown, and something very much more than a mere right of possession was retained. The Maori and English texts are not in fact translations of each other, and this fact is one starting point for an elaborate body of law as to the means of interpreting the Treaty and of attempting to harmonise the texts.

19 See *Treaty of Waitangi Amendment Act 1985* s 3 (jurisdiction of Tribunal to consider claims); s 2 (constitution of Tribunal); s 7 (Tribunal may commission research and receive reports into evidence); s 8 (appointment of counsel).

20 Note 5 *supra*.

legislation was enacted to give effect to a settlement negotiated between the Crown and Maori negotiators relating to Crown land transferred to state-owned enterprises (SOEs), that is, state-owned commercial organisations.²¹ The Tribunal was given a binding power to order the 'resumption' of such land in appropriate circumstances, even where it had been on-sold to third parties.²² A subsequent nationwide negotiated settlement, this time relating to the sale of timber-cutting rights in Crown-owned plantation forests, led to further binding powers being conferred on the Tribunal by statute in 1989.²³ Lastly, in 1990, further binding powers were conferred on the Tribunal regarding the assets of the state-owned railway system, vested by statute into a company akin to a state-owned enterprise.²⁴ These binding powers have simply been grafted on to the Tribunal's existing structure without changing the Tribunal's essential nature as a permanent commission of inquiry. No right of appeal exists, for instance, even in those circumstances where the Tribunal might be exercising its binding, as opposed to its ordinary recommendatory, powers.

III. JUDGING THE TRIBUNAL: SOME IMPORTANT FACTORS

A. THE SCALE OF THE ISSUES

It is important to bring to this discussion some sense of the scale of the issues which confront the Tribunal. Issues relating to Maori sovereignty, land and well-being have been at the cornerstone of New Zealand history and politics since the foundation of the nation. These include the decision to confiscate large areas of fertile (and much coveted) Maori land in the Waikato and Taranaki and elsewhere pursuant to the notorious *New Zealand Settlements Act* 1863. This confiscation (raupatu) was a major blow against the Tainui confederation of the Waikato, leading to this large tribe's alienation from the political life of the state until the mid-twentieth century. Despite many attempts the confiscation grievance has not been resolved, complicated as it is by the fact that the land involved is now held on many thousands of private titles and is some of the most valuable farmland anywhere in the world. Almost on the same scale are the grievances of the Ngai Tahu tribe of the South Island. Their lands were lost to the Crown by a sequence of transactions from 1844-1865, whereby the Crown acquired, in a few swift

21 State-owned enterprises are governed by the *State-Owned Enterprises Act* 1986, the objective being to allow such organisations to function as state-owned autonomous companies rather than as public sector agencies or sections of departments of state. One principal SOE is Electricorp (ECNZ) which owns and manages the state-owned electricity generation and transmission network.

22 *Treaty of Waitangi (State Enterprises) Act* 1988, adding s 8B to the *Treaty of Waitangi Act* 1975 and ss 27 and 27A-D to the *State-Owned Enterprises Act* 1986.

23 *Crown Forest Assets Act* 1989.

24 *New Zealand Railways Corporation Restructuring Act* 1990 ss 43-48.

strokes, virtually the entire South Island for a few thousand pounds. Ngai Tahu's long standing grievance dates from the time of the first purchases; there has been a long history of complaints and petitions about the adequacy of the price, the Crown's manifest failure to provide adequate reserves for Ngai Tahu, and indeed much dispute as to precisely what the Crown actually purchased.

Of a similar scale but rather different in kind are resource related claims. The one which has claimed most media attention until recently has been oceanic fisheries, the subject of the Tribunal's 1988 *Muriwhenua Fishing Report*. Resource claims are, however, not confined to fisheries. In October 1992 the Tribunal began hearing the first instalment of a group of claims relating to geothermal resources. There was a further hearing at Rotorua in February of this year, which attracted much local media attention, no doubt partly explained by the fact that ownership and management of geothermal resources around Rotorua is, for a number of reasons, already a politicised topic.

Below the level of these gigantic land and resources claims there are a host of claims of regional, local, and sometimes just family importance. It sometimes seems as if every piece of Maori freehold land is enmeshed in a matrix of dispute, misunderstanding, and grievance, often of a complexity which defies understanding, let alone resolution. Claims continue to pour in to the Tribunal. Examples of the most recently heard claims notified in the Waitangi Tribunal Division's monthly newsletter give some sense of the range and flavour of the claims:

Wai-330

Claimants: Ngarau Tupaea and others for the trustees of the Huakina Development Trusts.

Concerning: Waikato-Tainui lands.

Region: South Auckland

Received: 16 November 1992, amendment received 15 December 1992.

Wai-331

Claimants: Waatara Black for Ngati Te Ata iwi.

Concerning: Te Ngaio Reserve.

Region: Manukau, Auckland

Received: 20 January 1993.

Wai-333

Claimants: Te Kotahitanga Tait for the Tuhoë Waikaremoana Trust Board.

Concerning: Hydroelectricity generation on Lake Waikaremoana.

Region: Waikaremoana.

Received: 18 January 1993.

Wai-335

Claimants: Hamuera Taiporutu Mitere and Hamilton Manaia Pihopa for Ngati Whakaue.

Concerning: Geothermal resource at Rotorua.

Region: Rotorua.

Received: 18 February 1993.

Wai-342

Claimants: Toa Haere Faulkner for Ngati He hapu of Ngaiterangi.

Concerning: Ngati He lands, taonga and fishing rights.

Region: Tauranga.

Received: 8 February 1993.

New Zealand's history shows that despite a formal commitment to Maori ownership of the whole of the soil of the country - which has been clearly recognised since 1844 if not before - it has not proved too difficult to dispossess the indigenous population of most of its landed estate. This dispossession has been achieved by a variety of methods, each of them complex in itself and each creating rather different sorts of consequences today.²⁵ The historical processes which the Waitangi Tribunal is obliged to investigate bear no relation to (for instance) the work of the Northern Territory Lands Claims Commission. Far more is involved than determining traditional ownership of a section of unallocated Crown land (which can hardly be said to exist in New Zealand in any case). Instead, the Tribunal must uncover the history of a complex set of transactions, lay bare the relevant legislative and legal context, wade through often divergent historiographies, master the technicalities of land deeds, surveying practices, Native Land Court procedures and so on, and also cope with the specialist evidence of fisheries scientists, archaeologists, and engineers. Many claims now coming before the Tribunal relate to long-standing grievances which have generated their own complicated histories (petitions, earlier inquiries, hearings in the Native Land Court, parliamentary debates) which must themselves be laboriously investigated and summarised.²⁶ These earlier inquiries and investigations resulted in various

25 The most authoritative historical study of the process is *A Ward A Show of Justice: Racial "Amalgamation" in Nineteenth Century New Zealand* (1974).

26 An example of this are the so-called 'surplus lands', an important feature of the Muriwhenua Lands claim (Wai-54) currently being heard by the Tribunal. This issue has been a grievance since 1858 and there was a major inquiry into it in 1948 which is in turn being inquired into by the Waitangi Tribunal at the present time. The 1948 report is reprinted at 1948 *Appendices to the Journals of the House of Representatives* G-8. Two claimant reports on the subject have now been presented at Tribunal hearings, these being (a) RP Boast *Surplus Lands: Policy Making and Practice in the 19th Century: A Report to the Waitangi Tribunal* (June 1992); and (b) M Nepia *Muriwhenua Surplus Lands: Commissions of Enquiry in the Twentieth Century* (1992).

kinds of 'settlements' which have failed to prove enduring; and this too has to be explained.

Any attempt to judge the Tribunal's effectiveness must first therefore acknowledge the scale and complexity of the Tribunal's task. Not only is the task enormous in itself but the individual claims are typically complex and expensive and difficult to research, can take a considerable time to be heard, and typically involve historical and legal issues of great complexity.

B. RESOURCES ASPECTS

The Tribunal is serviced by a small government agency, the Waitangi Tribunal Division (the Division), a division of the Department of Justice. The Division has a staff of 32. The Justice Department's annual reports do not give any details of the costs of the Division, which makes its cost effectiveness vis-a-vis other sections of the department or other agencies such as the Law Commission or the Human Rights Commission rather difficult to assess. The Waitangi Tribunal Division staff is made up of a registrar and other officials, a small research group and secretaries, receptionists and so on, and is based in Wellington. The small size of the agency is shown by the fact that it is normally impossible for the Tribunal to conduct two hearings simultaneously, not because there are insufficient Tribunal members, but because of the shortage of registry and other administrative staff. This does not mean that the Tribunal deals with only one claim at a time: many claims are processed simultaneously in the sense of preparatory research being done, documents collected together and so on. The difficulty comes at the stage when claims are ready to proceed to a hearing. Enormous strains can occur when the Tribunal is obliged to conduct urgent hearings driven by policy developments, government action or inaction, or litigation in the ordinary courts.

The Waitangi Tribunal Division is actively engaged in researching claims and it is administrative practice to assign a Tribunal research officer to a particular claim. The Tribunal researchers prepare collections of materials (styled 'document banks') and write reports which are subsequently tendered in evidence at hearings; at this juncture Division staff may be cross-examined, often at some length, by Crown and claimant counsel. The Tribunal also commissions outside scholars and researchers to prepare evidence on behalf of the Tribunal. Separately from that, the Tribunal will often meet the costs of claimant researchers, although the amount of discretionary funding it has available for this is limited. Thus at the hearings the evidence placed before the Tribunal comes from three quite distinct sources: from the Crown; the claimants; and from the Tribunal itself (the latter category including Tribunal staff and outside researchers appointed to give evidence on the Tribunal's behalf).

At hearings the Crown is represented by Crown counsel from the Crown Law Office. The Crown Law Office also employs, on a permanent basis, a small group of historians who prepare reports to be used in evidence at hearings. The Crown sometimes does commission outside experts to give evidence at hearings as well.

The position regarding claimants is rather more complex. The Tribunal's procedural guidelines, released in 1990, state that the Tribunal "prefers" claimants to have legal representation, "especially when dealing with 'historic' claims based on documentary sources".²⁷ As far as the present writer is aware, at all the claims already heard or currently being heard, claimants have been represented by counsel. At some of the hearings claimants have instructed senior barristers: the Ngai Tahu claim was conducted by Paul Temm, QC, now a judge of the High Court, and at the current geothermal claim some Rotorua claimants are represented by Sian Elias, QC. In some instances lawyers have been willing to donate their time to claimants at a discount or even for free, but claimants can hardly count on that. Legal representation normally has to be paid for somehow, and many claimant groups are not in a financial position to absorb the costs of complex litigation. The *Treaty of Waitangi Amendment Act* 1985 permitted the Tribunal to grant legal aid towards the costs of claimant counsel, and between 1985-1991 the Tribunal received an allocation from the government which it could apply to this purpose. In 1991 a new Act governing the legal aid system as a whole, the *Legal Services Act* 1991, was enacted, one effect of which was to place the funding of Waitangi Tribunal claims under the ordinary civil legal aid system. Funding for this was diverted by the government from the Tribunal into the civil legal aid system, which is run by District Legal Aid Committees (committees of practitioners who process civil legal aid applications). It took something like six months before the new application forms for civil legal aid for Waitangi Tribunal proceedings were ready, with the effect that legal aid applications for Waitangi Tribunal proceedings were simply shelved for much of 1992. Placing Waitangi Tribunal proceedings under the ordinary civil legal aid system has resulted in a number of new difficulties, including differences in regional practice. In addition the total amount of funding made available by the government for funding claims is very low- a total of about \$400,000 per annum. Many claimants will either miss out altogether, or only get a percentage of their costs covered. Even if legal aid is granted, the hourly rates payable to counsel are relatively low: litigation partners in large firms with high overheads are unlikely to find the rates attractive as the amount payable could often be less than half their standard hourly charge-out rate. The expectation almost appears to be that claimants will have to meet most of the

27 Waitangi Tribunal Division, Department of Justice, Wellington *Practice Notes of the Waitangi Tribunal* at [7-3].

costs themselves, or alternatively that claims be wholly or partially subsidised by the legal profession.

The process has been rescued from total collapse only by the *Crown Forests Assets Act* 1988 and the Crown Forestry Rental Trust established pursuant to it. This was established as part of a national settlement in 1988 of Maori claims to land covered by Crown-owned plantation forests, at a time when the Crown was resolved on selling forest cutting rights to the private sector. Income generated by the sale of cutting rights in the forests is paid into a fund and the interest this generates applied to the costs of researching and presenting Waitangi Tribunal claims to the land underneath the forests. A substantial sum of money is available and, so far at least, the Crown Forest Assets Trust, responsible for managing the fund, has been willing to meet legal as well as research costs. The effect has essentially been to create a privileged class of claimants - those who are able to target their claim to the land underneath Crown-owned exotic forests. This excludes many claimants who thus must fall back on the legal aid system to fund counsel and the Tribunal to fund their research.

C. PROCEDURAL ASPECTS²⁸

The Tribunal has won much acclaim for its supposedly innovative procedure. Hearings are conducted on marae, largely in the Maori language, using Maori procedural conventions and etiquette, and in which elders feel encouraged to speak freely. One would not wish to denigrate the Tribunal's achievement in this regard, particularly in view of the fact that until recently the official legal system's record in terms of its willingness to accommodate itself to Maori procedural etiquette has been very poor. Nevertheless it is certainly possible to overcolour the situation; moreover the Tribunal's ability to operate a Maori form of procedure is constrained in a number of important ways. Although there is no right of appeal from the Tribunal's recommendations, the Tribunal might well be subject to judicial review on the ordinary principles of administrative law.²⁹ This possibility obliges the Tribunal to prepare a fully documented record of the proceedings, give full

28 The following comments are drawn largely from the author's personal observations of Waitangi Tribunal hearings from 1989 to the present; these include acting as one of two counsel for the claimants in the *Pouakani Claim* heard at Tokoroa over three hearings in 1989; and by appearances as an expert witness in the *Muriwhenua Lands* (March 1992, June 1992 and November 1993 hearings) and *Geothermal* (October 1992, February 1993) claims. Of the eight hearings attended by the author, six were held on marae, one in a community centre and the other in a hotel conference room.

29 The Tribunal was named as a respondent in review proceedings brought by the New Zealand Fishing Industry Association in 1989; the Tribunal was subsequently removed as a respondent on an interlocutory application and the proceedings as a whole have in any event now been discontinued.

opportunity for witnesses to be questioned, and to generally preserve a rigorous impartiality between Crown and the claimants.

The Tribunal's procedure is, in fact, ordinary tribunal procedure. A Waitangi Tribunal hearing is in many respects not too different from, say, hearings before tribunals adjudicating on town planning or water rights matters, or indeed from a commission of inquiry. The Tribunal's procedure should be seen as a variant of ordinary tribunal procedure rather than as a wholly new alternative. To be sure, there are differences. Hearings where claimants are giving evidence are typically - though not always - held on marae, in the wharenui (meeting house), often an impressive and richly decorated building, evocative and powerful, an architectural manifestation of claimant history. Claimants, the Tribunal, counsel and witnesses mingle freely and informally during tea breaks and lunch in the marae dining room. It has to be admitted that this certainly does give claimant hearings a rather special quality, particularly perhaps for Pakeha participants who may never otherwise have strayed on to a marae at any other time in their lives. Kaumatua and kuia, male and female elders, give evidence in Maori; the day's sessions are opened and closed by prayers in the Maori language, and the opening of a hearing is always commenced by a formal calling-on to the marae and classical Maori oratory, in which the Tribunal's own elders participate fully. These are not small and inconsequential things, and it can certainly be argued that the Tribunal's willingness to conduct its sittings on marae has contributed in no small measure to its success.

However, it needs to be recognised at the same time that on the whole the Tribunal's mode of inquiring into cases is formal and judicialised. It would be a misunderstanding of the Tribunal to see it as conducting 'community hearings' of the kind advocated by and carried out by Judge Berger in Canada and Alaska.³⁰ Crown and claimant counsel make opening and closing submissions, reading from elaborate written texts which bulge with legal citations and arguments. Much of the evidence is given by experts, often Pakeha (even in claimant hearings) who read from or speak to elaborate written reports. Despite indications to the contrary in the Tribunal's Practice Notes,³¹ it seems that cross-examination of witnesses by counsel is now standard practice. The cross-examination can be elaborate and

30 See T Berger *Northern Frontier, Northern Homeland; The Report of the Mackenzie Valley Pipeline Inquiry* (1977), see vol 1 especially chs 8-11; see also M Jackson "The Articulation of Native Rights in Canadian Law" (1984) 18 *University of British Columbia Law Review* 255.

31 Note 27 *supra* at [7-5]: "Generally only limited questions of clarification are put following the formal presentation of a research report. Opposing counsel are invited to submit written questions and comments to which a written rejoinder will later be filed with leave to recall the witness if need be. It is doubted that extensive oral examination assists the resolution of complex historical issues. It is better that counsel flag the matters in dispute and adduce contrary evidence or opinion later." These strictures seem to have virtually no application to actual practice before the Tribunal at present.

lengthy, and can include challenges to the qualifications and expertise of the witness. Claims are tightly structured into claimant and Crown hearings and are concluded by the presentation of lengthy closing submissions by counsel. In short there is nothing about the conduct of the hearings which any lawyer would find especially baffling or unfamiliar. Furthermore the issues in some claims have become very complex and intractable, including such recondite matters as the geophysical nature of geothermal fields or the intentions of the Colonial Office with respect to land acquisitions by settlers on the imperial frontiers in the 1830s. One can only wonder what the claimants make of some the increasingly esoteric and complex issues, comprehensible only to specialists, which occupy increasing amounts of the Tribunal's time.

Some commentators have gone so far as to claim that Pakeha procedures, lawyers and experts have now taken over the Tribunal procedure to such an extent that Maori are now reduced to "paying spectators in their own cause".³² This, too, is to overcolour the situation. Maori participation in the process can hardly be accurately characterised as 'passive'; moreover if claimant lawyers are Pakeha, as they often - but certainly not always - are, they are only there because the claimants have chosen to instruct them. Lengthy cross-examination of a Crown or Tribunal witness by claimant counsel will occur because claimants see this as important. As emphasised above, the issues faced by the Tribunal are often very complex requiring extensive research, and it is hardly surprising that expert witnesses (historians, archaeologists, engineers) will play an important role in the hearings. All the same, it must be reemphasised that it is important not to romanticise Tribunal procedure too much. It should not be seen as an unparalleled example of a bicultural procedure to be offered as a model to the rest of the world.

IV. GROWING COMPLEXITY

A. INTRODUCTION

Nothing could be more wrong than to see the Tribunal as the sole, or even the dominant, institutional means for resolving Maori grievances in New Zealand. New Zealand should not be characterised as a jurisdiction which typifies or exemplifies a Tribunal-type method of resolving land claims and other issues and grievances of the indigenous population of the state. The Tribunal is flanked by a plethora of other institutions and processes. Some of these are new and will be

32 J Kelsey "Treaty Justice" note 8 *supra* p 119; see also J Kelsey *A Question of Honour* note 8 *supra* pp 235-6. In the latter Kelsey argues that Maori claimants have become excluded from the process "as Pakeha lawyers, legal procedures, and legal concepts captured the proceedings".

described below. Here I wish to emphasise two long established processes which preceded the Tribunal and which may be fairly presumed to long outlive it: litigation in the ordinary courts (including the Maori Land Court) and direct negotiation.

New Zealand's legal history is littered with cases Maori have brought in the ordinary courts in order to resolve grievances. Sometimes these cases have raised constitutional, legal and historical issues of great importance.³³ In the 'renaissance' of recent times the ordinary courts have certainly played a role of equivalent importance to the Tribunal. Beginning in 1987 Maori litigants secured an almost unbroken run of successes in the High Court and the Court of Appeal. Some critics have claimed to discern in some of these cases attempts by the judges to limit or redefine Maori rights under the *Treaty of Waitangi*.³⁴ Whether or not that is so, in political terms the most important reality of recent years has been Maori courtroom success: the Crown could have no confidence, as it certainly was wont to have throughout most of the country's history until recently, that it would succeed if issues were allowed to be determined in the courts. It is therefore not surprising that a well known Maori writer and critic, Dr Ranginui Walker, has stated that recent court decisions have established that the country has finally emerged into a post-colonial era.³⁵

One court which is studiously ignored by the New Zealand media is the Maori Land Court, a venerable institution which has been in existence in one shape or another since 1862.³⁶ This court has jurisdiction over Maori freehold and Maori customary land, and it has itself been at the centre of many issues of former years, including contentious claims to the foreshore and lakes. The Maori Land Court continues to be an important institution today (if relatively little-known outside the

33 A potted legal history would be out of place here, save to note that a universal characteristic of these earlier attempts was Maori lack of courtroom success. For a detailed study of one aspect of this legal history see RP Boast "In re the Ninety-Mile Beach Revisited: the Native Land Court and the Foreshore in New Zealand Legal History" [1993] *Victoria University of Wellington Law Review* (forthcoming).

34 See for example J Kelsey "Treaty Justice" note 8 *supra*. For a very different sort of criticism see G Chapman "The Treaty of Waitangi - Fertile Ground for Judicial (and Academic) Myth-Making" [1991] *New Zealand Law Journal* 228, which should be read together with the responses by PG McHugh and J Williams at [1991] *New Zealand Law Journal* 316 and 373.

35 "Maori Partnership Role Stressed" *Evening Post* (Wellington) 30 June 1987 (referring to the 1987 *Maori Council* case); R Walker *Ka Whaiwhai Tonu Matou: Struggle Without End* (1990) p 288 (referring to the decision in *Tainui Maori Trust Board v Attorney-General* note 7 *supra*).

36 The Land Court was established by the *Native Lands Act* 1862 but was significantly reconstituted by the *Native Lands Act* 1865. The Court's prime task was to convert Maori customary title to a formal - and subsequently registrable - title, which was done by the Court issuing a certificate of title which would be subsequently followed by a Crown grant. All land remaining in Maori ownership today has 'passed' the Land Court and is known technically as Maori freehold land. There have been a string of Native Lands Acts since 1865 and at times the law on Maori land has reached positions of almost wholly intractable complexity. The current statute is *Te Ture Whenua Maori (Maori Land Act)* 1993.

Maori world) and its powers have recently been confirmed and modernised by an important recent statute dealing with Maori land.³⁷ The Maori Land Court too, has been involved in some important issues and controversies of recent times, including some fraught land boundary issues which have also been the subject of proceedings in the High Court and the Waitangi Tribunal. By a 1985 amendment to the parent act,³⁸ the Maori Appellate Court - which hears appeals from the Maori Land Court - was given jurisdiction over boundary issues arising out of cross-claims in Waitangi Tribunal proceedings. Acting under this procedure the Maori Appellate Court in 1990 issued a judgment concerned with tribal boundary zones in the upper South Island arising out of cross-claims to the Ngai Tahu claim.³⁹ The Maori Land Court is quite distinct in its purposes from the Waitangi Tribunal. It is a court of record with full power to make binding and authoritative decisions. It is very hard to imagine the system of Maori land tenure today without the Court, and it would seem that the Court now has an assured future.

On quite another plane, many issues and claims in the past have been, and continue to be, directly negotiated between the Crown and the tribes without recourse to formal mechanisms of any kind. There were important negotiated settlements of some issues in the 1940s (although the settlements made at that time have on the whole failed to endure). Many substantial issues of the present day are being negotiated between tribal and Crown representatives. This tends to particularly apply to tribal groups who have a history of preferring direct negotiation, an example being the important Tainui confederation of the Waikato.

B. RECENT ALTERNATIVES TO THE TRIBUNAL

The alternatives described above should be distinguished from further processes of Maori grievance resolution established since the creation of the Tribunal. These alternative processes include both special regimes devised for particular tribes and claims and new institutional arrangements intended to be of general applicability.

In 1988 the Labour Government established a Treaty of Waitangi Policy Unit (TOWPU) within the Department of Justice.⁴⁰ This unit not only prepares general policy advice but is actively involved in the resolution of claims by direct negotiation, thus bypassing the Waitangi Tribunal process altogether. One major claim which is at least to some extent being handled by this means is the Tainui

37 *Te Ture Whenua Maori (Maori Land Act) 1993.*

38 *Treaty of Waitangi Amendment Act 1985, inserting s 6A into the Treaty of Waitangi Act 1975.*

39 *In re a Claim to the Waitangi Tribunal by Henare Rakihia Tau and the Ngai Tahu Trust Board, (1990) 4 South Island Appellate Court Minute Book 672. A copy of this decision is reprinted in the Waitangi Tribunal's Ngai Tahu Report (1991) vol 3 pp 1122-45.*

40 The process of establishment of TOWPU is described in J Kelsey *A Question of Honour?* note 8 *supra* pp 244-47.

raupatu (confiscation) claim, one of the most important and complex of all the claims. As it is being handled by means of confidential negotiations out of the public gaze it is difficult for outsiders to gain any sense as to how matters are progressing. TOWPU also deals with the formulation of responses to Waitangi Tribunal recommendations.

There are also two issue-specific processes, which add yet a further level of complexity to the institutional structure. One is the Crown/Congress Joint Working Party established in 1991 to deal specifically with the return of surplus Railcorp land. The task of the organisation is to identify areas which can be returned to claimants and those to which the title is cleared and which can be sold forthwith. This is thus a wholly separate claim-researching and claim-processing process relating to a particular category of land and which functions independently of both the Waitangi Tribunal and TOWPU. The other is an 'early warning' system devised specifically for the Ngai Tahu claim, by which state assets targeted for sale are temporarily administered in a special holding category by the Department of Survey and Land Information.

V. SOME CURRENT CONTROVERSIES

A. THE TE ROROA REPORT AND PRIVATE LAND

In May 1992 the Tribunal released its *Te Roroa Report*.⁴¹ This report deals with a claim brought by a group of the Ngati Whatua tribe to an isolated part of the west coast of Northland, around the Waipoua Kauri Forest Park. The main grievance related to the Crown's failure to ensure that a block of land remained as a reserve, although there were other issues including the removal of bones and ornaments from burial caves earlier this century. The Tribunal came down with findings generally in favour of the claimants and came up with a recommended package of remedies including the return of a number of blocks of land. All this seemed uncontroversial enough. Then the politicians and the media discovered the sting in the tail: some of these blocks were privately owned by Pakeha farmers.

This has caused a considerable storm, at least by the muted standards of New Zealand politics. On 19 May a delegation from Federated Farmers, an organisation of some potency in New Zealand life, called on the Minister of Justice, Mr Graham, to make their feelings known.⁴² The Tribunal's report, however unwittingly,⁴³ raised the dreaded spectre of compulsory acquisition of land to give

41 Waitangi Tribunal *Te Roroa Report* (Wai-38) 1992.

42 "Government May Move Over Private Land Rulings" *The Herald* (Auckland) 20 May 1992 p 1.

43 Although much of the anxiety and controversy has revolved around the issue of *compulsory* taking of private land to remedy a Waitangi Tribunal claim, it is questionable whether the Tribunal in the *Te Roroa Report* was even suggesting compulsory acquisition. In respect of two of the blocks in issue the Tribunal simply quoted an

effect to rulings of the Waitangi Tribunal. Mr Graham had already said earlier that the government had no intention of buying the land by agreement and that compulsory acquisition was legally impossible, necessitating a change to the *Public Works Act* 1981.⁴⁴ But this was not enough for Federated Farmers. They wanted, firstly, the government to buy the farms at a 'fair price' since (they claimed) the Tribunal's recommendations had made the properties worthless; and secondly, that the law be changed to prevent the Tribunal recommending the return of privately owned land in future. Federated Farmers nevertheless took care to distance itself from some of the more belligerent responses of some right wing politicians. On 27 July the President of Federated Farmers, Owen Jennings, gave the Tribunal strong endorsement at the organisation's annual conference, saying that he regretted many people's attitudes toward rectifying land grievances and that the country "would make little progress if amends were not made for past wrongs".⁴⁵ (After all, the organisation has quite a few Maori members). But, he said, such amends should not include threats to privately owned land. Jennings' efforts to defuse what could have been quite an inflammatory situation were mirrored by conservative Maori leaders who went public emphasising that their claims were directed against the Crown. Dame Whina Cooper and Sir Graham Latimer stated that claims to the Tribunal should not affect private landowners. Sir Graham has said that the argument is with the Crown and that "we should not have to legislate for common sense".⁴⁶ What distinguished the whole affair was the rapidity with which those on both sides moved swiftly to defuse the issue, showing the strength of the conservative-moderate centre in Maori and Pakeha politics. In fact one of the members of the Tribunal which made the decision in the Te Roroa case was

earlier opinion of a Maori Land Court judge to the effect that "the two blocks are theirs and should be returned to them, no matter what cost to the Crown this may involve". In respect of two further blocks the Tribunal likewise "adopted" the views of the Land Court, and then in relation to all of these blocks stated that "we recommend that the Crown take all steps to acquire these lands". Perhaps oddly, there is no further discussion of the means of acquisition elsewhere in the report at all.

- 44 "Freehold Land Safe Graham Tells Farmers" *The Dominion* (Wellington) 23 May 1992. Mr Graham is here reported as stating that the law would have to be changed to allow taking of private land for the purpose of giving effect to Waitangi Tribunal recommendations, that the government had no intention of changing the law, and that claims involving freehold land posed a difficult problem. The Minister said: "If anyone has any bright ideas about what we should do, then sing out. I don't know what the answer is."
- 45 "Jennings Speaks out for Waitangi Tribunal" *The Dominion* (Wellington) 27 July 1992: "Mr Jennings said the tribunal was the most professional effort ever made to research the history of grievances. 'Sadly, there are still too many New Zealanders who oppose the putting right of past injustices... This is sad because we will never achieve maturity in our relationships and improve the lot of all our people while such unattended controversy remains.'"
- 46 "Scaremongering on Maori Land Claims Denounced" *The Herald* (Auckland) 26 May 1992. Both Maori leaders were making the point that Maori claimants had no intention of seeking private land as compensation - and thus that it was unnecessary to restrict the Tribunal's jurisdiction as Federated Farmers wanted. (The government has proceeded to restrict its jurisdiction all the same.)

actually a former President of Federated Farmers, John Kneebone, a dairy farmer from the South Waikato.

The Te Roroa affair did however lead some opponents of the Tribunal process to call not merely for a restriction on the Tribunal's powers but in fact for the complete abolition of the Tribunal altogether. Leading the charge was Mr Ross Meurant, National MP for Hobson (this includes the Te Roroa area), who boldly stated that the time had come for the government to simply 'scrap' the Tribunal.⁴⁷ He was backed by an editorial in the National Business Review. But Mr Meurant's rush of blood to the head was very quickly repudiated by the Ministers of Justice and Maori Affairs in the current (conservative) National Government. Ian Peters, Chairman of the Maori Affairs Parliamentary Select Committee, said that Meurant's views were shared only by a small minority of "rednecks" in caucus.⁴⁸

The government has nevertheless proceeded to introduce legislation which will prevent the Tribunal from making recommendations affecting land in private title.⁴⁹ Taking a political, rather than a legal, view of these events it is certainly arguable that the Tribunal was rather unwise to allow this issue to arise, as the only effect has been a rather serious statutory restriction on the Tribunal's powers. Another unlucky consequence has been that the controversy over the private land issue has totally obscured any public discussion of the serious grievances of the Te Roroa Maori claimants themselves.

B. FISHERIES

The *Te Roroa Report* was followed in rapid succession by the *Ngai Tahu Sea Fisheries Report* which was released in August 1992. The bulk of the Ngai Tahu claim was reported on in 1991 but the issue of sea fisheries was separated out for an inquiry and report in its own right, and a further - and very substantial - report was issued in 1992.⁵⁰ This was not originally envisaged by the claimants. Ngai

47 "Meurant Says Scrap Waitangi Tribunal" *The Herald* (Auckland) 27 May 1992 p 1. Meurant was however not saying that Maori grievances were ill-founded; rather that the government take control of the process of grievance resolution.

48 "Ministers Turn Down Call to Scrap Tribunal" *The Dominion* (Wellington) 28 May 1992 p 2: "Mr Graham said yesterday the idea of scrapping the tribunal was absurd. 'I am totally opposed to the idea. The tribunal performs a very valuable task and does it extremely well on the whole,' he said."

49 *Treaty of Waitangi Amendment Bill* 1993. In introducing the Bill the Minister of Maori Affairs, Mr Kidd, explained that the Bill "will prevent the Waitangi Tribunal from making recommendations that the Crown acquire the ownership of any privately owned land, or interest in land held by any person." The Minister commended the Tribunal, "a forum and a focal point for Maori to air their grievances". The four MPs for the Maori electorates opposed the Bill as unnecessary. In one interesting exchange the Hon KT Wetere, formerly Minister of Maori Affairs in the 1984-1990 Labour Government, agreed with the current Minister that the Tribunal "went over the top" in making recommendations about private land. See *New Zealand Parliamentary Debates Treaty of Waitangi Amendment Bill*, 23 Feb 1993, 13377, 13380.

50 *Ngai Tahu Sea Fisheries Report* (Wai-27) 1992.

Tahu drew no distinction between their maritime fishery and the other issues they were concerned with, but the separation was rendered inevitable due to the events surrounding the question of Maori fishing rights at a national level.⁵¹ In the report the Tribunal traversed thoroughly the issues of importance to the claimants, including the effects of marine pollution (one witness put the point eloquently: while Maori used the sea as a refrigerator the Pakeha used it as a sewer).⁵² It looked at the history of Ngai Tahu fishing practices and the evolution of fishing law and practice. Finally it reached these two conclusions. Ngai Tahu have:⁵³

- (a) an exclusive Treaty right to the sea fisheries surrounding the whole of their rohe [territory] to a distance of 12 miles or so there being no waiver or agreement by them to surrender such right;
- (b) a Treaty development right to a reasonable share of the sea fisheries off their rohe extending beyond the 12 miles out to and beyond the continental shelf into the deepwater fisheries within the 200 mile exclusive economic zone.

A key issue was the Crown's management of fisheries by a system of quota management, established in 1986, by which fishers were allocated tradeable quota calculated as a percentage of a total allowable catch fixed by the government. There had already been an interim settlement of the fisheries issue in 1989⁵⁴ by which 10 per cent of the quota was transferred to Maori interests under a complex structure set up by statutory amendments to the *Maori Fisheries Act* 1989. The Tribunal stated that while quota management was prima facie in breach of the *Treaty of Waitangi* (how could it be otherwise, since it involved the granting of property rights in the fishery, a resource to which the Maori title had never been extinguished), nevertheless quota management was generally a good way to manage the fishery.⁵⁵

The Tribunal recommended that the Crown and Ngai Tahu "enter into negotiations" for the "settlement" of the Ngai Tahu sea fisheries claim, in which the respective parties should "take into account" the findings outlined above.⁵⁶ Thus in the Tribunal's view the final outcome was dependent on a further process of negotiation. Some participants in the fishing industry reacted fairly belligerently to the report. The managing director of a large Nelson-based company, Mr Peter

51 These events are much too complex to trace in this article. For a full coverage see *ibid* pp 217-247; a considerably more stringent and critical account of events up to 1990 can be found in J Kelsey (1990) note 8 *supra* pp 107-39.

52 Note 50 *supra* p 16 - evidence of Craig Ellison.

53 *Ibid* p 306.

54 *Maori Fisheries Act* 1989.

55 *Muriwhenua Fishing Report* note 6 *supra* p 239; *Ngai Tahu Sea Fisheries Report* note 50 *supra* p 226.

56 *Ngai Tahu Sea Fisheries Report, ibid* p 308.

Talley, claimed - according to *The Press* in Christchurch - that the Tribunal was a "kangaroo court which was racially biased and which should be disbanded".⁵⁷ Recreational fishers went public expressing fears that they would lose fishing rights off the South Island coast. But again, as with *Te Roroa*, the middle ground went into action. The Fishing Industry Board dissociated itself from Talley's remarks, although it did say that the Tribunal's report was predictable and "unhelpful".⁵⁸ Mr Doug Kidd, the Minister of Fisheries and Maori Affairs said that he had a message for fishermen who called for an end to the Tribunal's work, to the effect that it was too late "to force this back into the box".⁵⁹ The Ngai Tahu Maori Trust Board chairman, Mr Tipene O'Regan, said that Ngai Tahu had no intention of stopping commercial or recreational fishing or depriving anyone of existing rights.⁶⁰ And the chairman of Sealord Products - the country's biggest commercial fishing company - carefully refrained from commenting adversely on the Tribunal's recommendations, stating that he expected "no impact on [the] company's current and future business".

Since then events have moved very fast. When Sealords was put up for sale by its parent company, the government agreed to finance the Maori share of a bid for the company by a consortium one half of which was made up of Maori interests. This was pursuant to an agreement negotiated between the Crown and Maori by which the Crown's financing of the bid was to represent a global settlement of all Maori sea fishing claims, in return for the statutory extinguishment of Maori civil proceedings against the Crown and the cancellation of statutory protections of Maori fishing rights.⁶¹ The consortium's bid was successful (18 November 1992) and the legislation setting the terms of the agreement into place was thereupon enacted the following month.⁶² This major settlement has proved painfully divisive

57 *The Press* (Christchurch) August 12 1992 p 41.

58 *Id.*

59 "Promise to Fish Industry" *The Press* (Christchurch) 12 August 1992 p 1. At the same time the Minister promised the fishing industry "constant dialogue" over the process of settlement of the claim.

60 See "Fishery Assurance Doubted" *The Press* (Christchurch) 12 August, 1992 p 41: "...The Ngai Tahu Maori Trust Board chairman, Mr Tipene O'Regan, said people outside the Ngai Tahu tribe would not be excluded by Maori claimants from fishing around the South Island. 'There are no prospects that either recreational or fishing interests will be deprived of existing rights,' he said." The chairman of the South Canterbury Marine Recreational Fishers' Association professed scepticism at this assurance, however.

61 For a critical account see PG McHugh "Sealords and Sharks: the Maori Fisheries Agreement 1992" [1992] *New Zealand Law Journal* 354. Clause 5.1 of the agreement stated that "Maori agree that this Settlement Deed, and the settlement it evidences, shall satisfy all claims, current and future, in respect of, and shall discharge and extinguish, all commercial fishing rights and interests of Maori whether in respect of sea, coastal or inland fisheries (including any commercial aspect of traditional fishing rights and interests), whether arising by statute, common law (including customary law and aboriginal title), the Treaty of Waitangi, or otherwise". A challenge to the deed failed in the Court of Appeal: see *Te Runanga o Wharekauri Rekohu Inc v Attorney-General and Others* (unreported, Court of Appeal, 3 November 1992).

62 *Treaty of Waitangi (Fisheries Claims) Settlement Act 1992* (this became law on 16 December 1992.)

within Maoridom in a number of ways, which further intervention by the Waitangi Tribunal, although helpful and constructive, has failed to resolve.⁶³

The foregoing narrative shows that the Tribunal is certainly not immune to criticism. Nevertheless the general respect accorded to the Tribunal and the reluctance to attack it head-on are very striking. No doubt there will be those who will claim that this to be explained by the fact that the Tribunal is not a significant threat or that it plays a mediating and legitimising role which is valuable to the state and those who control the economy. A more plausible explanation in my view, however, is the one already advanced: that the moderate centre is extremely strong in New Zealand politics. There seems to be little desire on either side of the racial divide to politicise such explosive issues as Maori claims involving private land or control of sea fisheries. This may in turn be taken to illustrate the growing political maturity of the country or perhaps, less flatteringly, a dislike of argument and controversy in what is still a small and close-knit society.

VI. CONCLUSIONS

The author has tried to convey in this paper an impression of the complexity of the current scene in New Zealand. It is not an easy state of affairs to generalise about, but it does seem to be the case that the Waitangi Tribunal is steadily becoming less central to the process of claim resolution. The example of fisheries discussed above is one where the Tribunal played an important, but not central, part in the process of grievance articulation and settlement (at least for the time being). One would expect that the Tribunal will continue to be a part of the New Zealand scene for a considerable time to come, but that it will gradually become progressively an ordinary and uncontroversial part of the justice system rather like the Maori Land Court, with which, perhaps, it may one day coalesce. By then the continuing process of Maori self-assertion and of grievance resolution will have taken new forms, perhaps a dialogue between sovereign equals rather than a process of litigation in courts and tribunals.

This article has also concentrated on the Tribunal process. It has been shown that the Tribunal's work is subject to a number of constraints, including financial constraints and the risk of a review action in the ordinary courts which has had certain consequences for Tribunal procedure. The Tribunal is essentially a hybrid between an administrative tribunal and a commission of inquiry, and its scope for departure from ordinary procedure is restricted. The invariable presence of lawyers as representatives for claimants and the Crown has also meant that the Tribunal's

63 Waitangi Tribunal, *The Fisheries Claim Settlement Report* (Wai-307) 1992.

procedure has diverged little from that of ordinary courts and tribunals. This may of course be inevitable and necessary. Running a Waitangi Tribunal case is not too different from running complex litigation in the ordinary courts, and often calls for the skills of an experienced barrister. If it is seriously envisaged in post-*Mabo* Australia that a Tribunal-type approach might have its benefits, a thorough understanding of the Waitangi Tribunal's strengths as well as its limitations, and of the New Zealand political and historical context within which it operates is essential. Perhaps a structure less dependent on lawyers and expert witnesses might be preferable in the Australian context. Lawyers and expert witnesses are, furthermore, expensive and have to be paid for somehow. One situation which seems essential to avoid is that of creating a grievance resolution system which is heavily dependent on lawyers for its smooth operation but which at the same time is deficient in providing adequate resources; or which involves funding systems which, for no very good reason, put some claimant groups in a privileged position at the expense of others. Finally, this article has sought to dispel the impression that the Waitangi Tribunal works by means of 'community hearings'. The Tribunal's procedure undoubtedly is innovative and creative in a number of respects, but these innovations operate within the context of ordinary statutory tribunal procedure.