

KO NGAA TAKE TURE MAORI

Waitangi Tribunal History: Interpretations and Counter-facts

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I INTRODUCTION

The Waitangi Tribunal and its processes have prompted complex conversation surrounding the overlaps and conflicts between law and history. In many ways, the Tribunal's reports can be viewed as historical narratives. First, all of the significant challenges faced by historians are found in the Tribunal's work, including issues of objectivity, subjectivity, perspective, bias, advocacy, and presentism.¹ Secondly, the Tribunal has contributed a significant quantity of research to the store of New Zealand history writing: as historian Michael Belgrave notes, without the Tribunal, "there may have been almost no Maori history or race relations history written over the last fifteen years".² Thirdly, the reports are being taught as 'history' — for instance, in the teaching of Land Law at the University of Auckland, the plight of Ngati Whatua Maori is portrayed in almost the exact substance and sequence seen in the *Orakei Report* summary.³

But are Waitangi Tribunal reports really 'history'? Can they be judged by historical standards? And what would these standards be in any case? This article sets out to offer some tentative answers to these questions, while posing further questions about the interrelationship between law and history. It traverses the works of major critics of the Tribunal's reports, including Giselle Byrnes, Michael Belgrave, and W.H. Oliver, comparing and contrasting their interpretations. The core claim of the analysis that follows is that many of their criticisms are in various ways undue or obsolete, based as they are on misunderstandings of the statutory jurisdiction of the Tribunal, outdated assumptions about Tribunal practices, and unfair accusations about the legitimacy of the history the Tribunal is producing.

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1 Bymes, "By Which Standards? History and the Waitangi Tribunal: A Reply" (2006) 40 NZJH 214, 225 ["A Reply"].

2 Belgrave, "The Tribunal and the Past: Taking a Roundabout Path to a New History" in Belgrave, Kawharu, and Williams (eds), *Waitangi Revisited: Perspectives on the Treaty of Waitangi* (2004) 45 ["*Waitangi Revisited*"].

3 Waitangi Tribunal, *Report of the Waitangi Tribunal on the Orakei Claim — Wai 9* (Revised ed, 1991) ["*Orakei Report*"].

The analysis begins with some clarification about the term ‘Tribunal’, which appears throughout the article. Following this, the Tribunal is defended in Part III against accusations that there are inherent theoretical tensions in its work. Issues canvassed include the relationship between law and history as disciplines; the Tribunal’s use of discretion; the interaction between legal precedent and history; the dangers of presentism; the politicization of history; the use of counter-factual history; and postcolonialism. It is noted that the critics of the Tribunal either ignore important aspects of the Tribunal’s responsibilities in making these criticisms, or neglect the fact that mainstream history-writing shares the shortcomings that are supposedly present in the Tribunal reports. Part IV examines the Tribunal in action in more detail, investigating the extent to which the theoretical tensions emerge in the 1987 *Orakei Report*⁴ and the 2006 *Kaipara Report*.⁵ Emphasis is placed on the fact that the Tribunal has become more self-reflexive and historiographically literate over time. Attention then turns to the issue of legislated history, and it is suggested that commentators, in quibbling with methodological challenges in the Tribunal reports, have overlooked the real site of conflict between law and history: namely, the stage of legislation, where selective interpretations of history become embedded into the legal landscape.

II THE PRESENCE OF NOT ONE, BUT MANY, TRIBUNALS

Some preliminary remarks are needed on this article’s frequent references to ‘the Tribunal’ to avoid confusion and misinterpretation. The use of the term in this seemingly off-handed way might imply that ‘the Tribunal’ comprises an unchanging body of people. Such an inference should not be made. As Belgrave notes, most approaches to Tribunal history have drawn on selected examples and quotations, which are often taken out of context, and have ignored the vastly different authorship of the Tribunals.⁶ He is right to point out that references to ‘the Tribunal’ tend to ascribe Tribunal history with a coherence that it does not and cannot have, while simultaneously damning it for its contradictions.⁷ Whilst this article makes reference to the dynamic commission as a singular entity, it proceeds cautiously with regard to generalizations. By comparing the mainstream historiography (predominantly focussing on the reports of the 1990s), and examining closely a 1987 and a 2006 report, this article acknowledges and describes a process of change, rather than suggesting consistency or castigating for inconsistency. This approach is a necessary first step in properly understanding the Tribunal’s work in context.

4 Ibid.

5 Waitangi Tribunal, *The Kaipara Report – Wai 674* (2006) [“*Kaipara Report*”].

6 Belgrave, “Looking Forward: Historians and the Waitangi Tribunal” (2006) 40 NZJH 230, 237 [“Looking Forward”].

7 Ibid.

III NEGOTIATING THE TENSIONS BETWEEN LAW AND HISTORY IN THE WAITANGI TRIBUNAL NARRATIVES

Commentators have made much of the way in which Waitangi Tribunal narratives fuse law and history. This Part aims to delineate the charges levelled at the Tribunal as they have been articulated by various historians and academics, and to dissect each charge.

Law and History: In Constant Tension as Disciplines?

New Zealand historians writing about Waitangi Tribunal history have taken different views on the relationship between law and history. Byrnes is a key proponent of the fundamental differences between the two disciplines. She argues that historians now recognize the tension between facts and interpretation:⁸

The fundamental tension between law and history is ... that [law] sees truth in absolute and unequivocal terms, believing that it can be deduced and achieved through reason, argument, and cross-examination. On the other hand, recent shifts in historical thinking have moved away from the belief in ‘the truth’ to a belief in multiple truths, from absolutes to subjectively conditioned truths.

This is the tenuous context in which the Tribunal is placed. Byrnes argues that “[t]he chief difference between law and history is that the law is not interested in explaining human behaviour, but in judging it”, while “[h]istory ... is primarily concerned with explanation rather than judgment.”⁹

This is one of the clearest statements of the internal conflict faced by historians engaged in the Tribunal process. On the one hand, historians seek to provide possible explanations for past behaviour; yet on the other, they must provide *the* explanation to ensure a practical outcome in the form of identifying prejudice and formulating recommendations for redress. Byrnes notes that while most historians do not discuss it overtly, “the writing of history necessarily involves engaging with absolutes and so the making of moral judgments is unavoidable”.¹⁰ Here, Byrnes acknowledges that any explanation of human behaviour involves assessment, and the inevitable importation of the historian’s personal moral ideology. Given the subjectivity of historical narrative, the discipline does not appear equipped to engage in the practical judgement required by the Tribunal’s legal obligations.

Alan Ward sees history quite differently. He argues that “[m]yths

⁸ Byrnes, *The Waitangi Tribunal and New Zealand History* (2004) 82, 87 [“Waitangi Tribunal History”].

⁹ *Ibid* 99.

¹⁰ Byrnes, *A Reply*, *supra* note 1, 222.

abound” in the history of New Zealand.¹¹ He goes on to suggest that “[b]ad history, like bad currency, drives out the good”; arguing that “[t]he critical historian is needed more than ever.”¹² Ward suggests that “[i]f the research has indeed been exhaustive, and the wider contexts in which the evidence was created are known and understood, we get closer to concepts of truth.”¹³ He appears to suggest that the critical historian is capable of distinguishing the truth from the myth. Under this assumption, the disciplines of law and history could inform each other as effective tools of judgement. It seems that law and history need not be incompatible.

Both views have merit. However, given that the historian is only as effective as the evidence he or she is presented with, and that a lack of balanced evidence is a common feature of historical inquiry, Ward’s confidence in ‘truth’, or ‘near-truth’, seems both illusory and dangerous. Law and history are in a certain amount of tension in their differing approaches to truth, and such a tension creates challenges for bodies like the Waitangi Tribunal, which attempt to fuse the disciplines. Whether these challenges are as fatal as Byrnes suggests is the subject of the analysis below.

The Tribunal’s Exercise of Discretion

It is because the Tribunal is engaging in a new discipline at the margins of law and history that it has considerable discretion in its writing of history and application of legal principles. Yet it is precisely this discretion that has come under attack in the leading criticisms of the Tribunal’s activity.

A key criticism propounded by Oliver is that both courts and the Tribunal have engaged in “judicial activism”.¹⁴ He argues that this has been effected by the discretionary enlargement of the terms of the Treaty “into broad statements of the criteria which they consider to be applicable”.¹⁵ Oliver suggests that a strict construction of the Treaty would lead one to ask only whether land was “knowingly sold”, as opposed to the broad approach: that “the principle from the Treaty as a whole is whether ... any sale was fair”.¹⁶ He then notes that “the Tribunal assumes, quite without argument, that the correct way to proceed is by broad construction”.¹⁷

What Oliver does not emphasize is the fact that the Tribunal was given full legislative discretion to identify Treaty principles, by which it would judge claims. The principles were largely defined by the Tribunal prior to the extension of its jurisdiction in 1985, and further by the Court of

11 Ward, “Historical Method and Waitangi Tribunal Claims” in Fairburn and Oliver (eds), *The Certainty of Doubt: Tributes to Peter Munz* (1996) 152.

12 *Ibid.*

13 *Ibid.* 155.

14 Oliver, “The Future Behind Us” in Sharp and McHugh (eds), *Histories, Powers and Loss* (2001) 12.

15 *Ibid.*

16 *Ibid.*

17 *Ibid.*

Appeal in the state-owned enterprises cases of the late 1980s.¹⁸ By arguing that the Tribunal is engaging in “judicial activism”, Oliver is mistaking his criticism of the law for criticism of the Tribunal’s exercise of discretion.

Belgrave argues that, in its role as a Commission of Inquiry, the Tribunal is “testing ‘truth’ by *judicially* determined notions of fairness and by the reputation of expert witnesses, rather than by standards of peer review, conference presentation and publication”.¹⁹ He notes that the adversarial nature of the Tribunal’s enquiry causes the debates to become polarized, meaning that there can often be little opportunity to explore the issues in a comprehensive and rounded fashion, or to find a middle ground.²⁰ The legal procedural framework also has an effect on the history produced; historians’ evidence is often mediated through lawyers’ submissions and tested by cross-examination.²¹

While the Tribunal’s procedural biases are unavoidable, its approach to historical legalities is perhaps less black and white than Belgrave implies. The early approach that the Tribunal took toward historical legalities is indicated in the *Orakei Report*:²²

It is necessary to have regard to the sense in which the provision of the Treaty would be understood by the Maori signatories. It is also necessary that regard should be had to all relevant surrounding circumstances.... A generous interpretation avoiding ‘the austerity of tabulated legalism’ is clearly called for.

This is an attempt to place the Treaty in its historical context. The Tribunal’s approach, at least in the *Orakei Report*, appears to avoid the charge levelled by Belgrave. It has used the very discretion critiqued by various historians to steer clear of the dangers of “tabulated legalism”.

Historian Jim McAloon paints a more forgiving picture of the Tribunal’s exercise of discretion. He acknowledges the contrast generally drawn between lawyers’ search for certainty and historians’ emphasis on context, yet argues that historians are no more cautious than the Tribunal has proved itself to be.²³ McAloon points out that the Tribunal recognizes its own limitations. He quotes the *Taranaki Report*:²⁴

[T]hough questions of law require another standard of evidential proof, now hampered by lapse of time, we think it probable, on the historical record ... that the confiscation of north Taranaki was unlawful.

18 Belgrave, *Looking Forward*, supra note 6, 235. See eg *New Zealand Maori Council v Attorney-General*, infra note 26.

19 *Ibid* 232 (emphasis added).

20 *Ibid* 234.

21 *Ibid* 232.

22 Byrnes, *Waitangi Tribunal History*, supra note 8, 9.

23 McAloon, “By Which Standards? History and the Waitangi Tribunal” (2006) 40 NZJH 194, 202.

24 Waitangi Tribunal, *The Taranaki Report: Kaupapa Tuatahi – Wai 143* (1996) 102, cited in McAloon, supra note 23, 202.

There is an acknowledgement in the report that the Tribunal's finding represents *a*, rather than *the*, historical narrative.

Whilst certainly not flawless in its exercise of discretion, the Tribunal has been careful and aware of the limitations of bridging the disciplinary divide between law and history. Any criticism of the Tribunal's approach must take into account not only the statutory obligations imposed on the Tribunal, but also the fact that the Tribunal is constantly aware of the challenges that it faces — and often acknowledges these directly in its reports.

Binding Precedent and Complex Histories

The concept of precedent highlights a serious tension between law and history. History invites new understandings, while law frowns upon them. Belgrave refers to the Tribunal as “an historian”, and argues that past tribunals, courts, and inquiries have created precedents and historical narratives, which impose themselves on it.²⁵ The Tribunal in the *Orakei Report* explicitly states that it was guided by the Court of Appeal decision in *New Zealand Maori Council v Attorney-General*²⁶ when laying down guidelines for assessing claims:²⁷

We would emphasise that we are not attempting to lay down a set of definitive or exclusive criteria by which future claims should be assessed; they are intended to be guidelines and a base for our consideration of the present claims. No doubt they will be amplified, developed and refined in the light of subsequent claims which come before us.

The Tribunal, however, does overtly state in the *Orakei Report* that its ideology differs from an earlier report. After some discussion over the language used in its guiding statute, the Tribunal indicated that it no longer considered that it was obliged to make “practical” recommendations.²⁸ Tribunal precedent is a flexible concept, and does not bind the body as legal precedents would bind a court. This is of fundamental importance to the legitimacy of Tribunal history.

Presentism in Tribunal History

The debate over presentism in Tribunal history is fierce. Presentism arises “when history is written to meet the needs of the present rather than for its own sake”, and historians have argued vehemently over whether Tribunal history falls afoul of this tendency.²⁹

25 Belgrave, *Historical Frictions: Maori Claims and Reinvented Histories* (2005) 3 [“*Historical Frictions*”].

26 [1987] 1 NZLR 641.

27 Waitangi Tribunal, *Orakei Report*, supra note 3, 179.

28 Ibid 262.

29 Byrnes, *A Reply*, supra note 1, 216.

Oliver articulates the presentist critique of Tribunal reports in his 2001 article, “The Future Behind Us”. He argues that the presentism seen in the Tribunal’s reports is shaped by contemporary political agendas.³⁰ Byrnes, similarly, recognizes this flaw, but is more forgiving in acknowledging that the fact that the Tribunal “*must* operate with both a present *and* a future focus” is a direct result of the Tribunal’s statutory jurisdiction.³¹

McAloon, on the other hand, disputes the presentist criticism altogether. He argues that because the Tribunal is making findings based upon sources and material available at the time in question, it is primarily emphasizing perspectives evident in the nineteenth century, but marginalized at the time.³² An example of the Tribunal drawing heavily on pro-Maori perspectives is found in the *Kaipara Report*, which references Joel Polack at length.³³ The report notes that “[f]ew farms in civilized countries could be planted with greater attention to neatness”, pointing out that “potatoes and kumeras were planted in rows of small hills, laid out with strict regularity”.³⁴ These comments emphasize Maori agency and help present a view of Maori as a civilized community worthy of civilized treatment. An even clearer illustration is in the Tribunal’s reporting of Ernst Dieffenbach’s statement, suggesting that “if justly treated by their new government”, Wairoa Maori would prove “a valuable and wealthy part of the population of the colony”.³⁵ A further example is Lord Normanby’s instructions to Governor Hobson, stating that Maori “must not be permitted to enter into any contracts in which they might be the ignorant and unintentional authors of injuries to themselves”.³⁶ By referring to these liberal historical opinions, the Tribunal is able to criticize Crown actions without having to make any moral assertion that might be construed as presentist.

Belgrave refers to McAloon’s interpretation as applying a “high standard of fiduciary responsibility”.³⁷ He argues that just because there were European echoes of Maori complaint does not make them impartial, and that the proponents’ potential agendas must be further analyzed.³⁸

So is the Tribunal casting judgement according to marginalized historical perspectives, contemporary morals, or its own (unrepresentative) ideology of what was acceptable?

Oliver might be interpreted as adopting either of these last two possibilities. He contends that the principles so established are applied to

30 Oliver, *supra* note 14, 9.

31 Byrnes, *Waitangi Tribunal History*, *supra* note 8, 2 (emphasis added).

32 McAloon, *supra* note 23, 195.

33 See eg Waitangi Tribunal, *Kaipara Report*, *supra* note 5, 20–22.

34 *Ibid* 22.

35 Dieffenbach, *Travels in New Zealand: With Contributions to the Geography, Geology, Botany, and Natural History of that Country* (1974) vol 1, 263, cited in Waitangi Tribunal, *Kaipara Report*, *supra* note 5, 30.

36 Normanby to Hobson (BPP, 14 August 1839) vol 3, 87, cited in Waitangi Tribunal, *Kaipara Report*, *supra* note 5, 55.

37 Belgrave, *Looking Forward*, *supra* note 6, 235.

38 *Ibid* 236.

the Crown regardless of the contemporaneous values and norms, using the *Muriwhenua Report*³⁹ as an example:⁴⁰

Although at one point in the Muriwhenua report it is agreed that, ‘as Crown counsel contended’, government ‘policies and practices should be seen in the light of the standards of the day’, it is more forcibly asserted that ‘they must also be assessed by the principles and the standards for settlement established in the Treaty of Waitangi’. It is laid down that ‘a lower test cannot be sanctioned simply because it later became the norm’ and moreover that ‘the canons of justice and protection apply to all ages’.... History, the passage seems to imply, is concerned with ‘seeing’ and the law with ‘assessing’; the former approach is given a ‘lower’ standing.

But what if history can only ever be about ‘perceiving’ events through a certain lens, rather than ‘seeing’? What if history is *necessarily* about ‘assessing’, given the in-built biases in all history writing?

To take a further step back, perhaps the wrong question is being asked altogether: perhaps the relevant issue is not whether in practice the Waitangi Tribunal is writing presentist history, but whether presentism is escapable at all. It is not implausible to say that a large majority of historians have an objective in their writing. Whether it is to assert European agency in creating the ‘Third World’, or simply to bolster a weaker argument, the evidence we use is determined by our agenda. As Byrnes herself asks, “is not every history conditioned in some way?”⁴¹

The corollary of this is that ‘assessing’ is not a trait unheard of in historical scholarship. As Robert Berkhofer observes, “[e]vidence is not fact until given meaning in accordance with some framework or perspective.”⁴²

McAloon has further problematized the fundamental issue of presentism cleverly in his recent article. He points out that “[t]o say that historical situations should be judged by the standards of the time begs the question: which standards?”⁴³ While it is important that we do not project today’s standards onto the past, McAloon argues that this “should not be a euphemism for simply perpetuating the dominant discourses of the past”.⁴⁴ In other words, claims that Tribunal history is presentist should not be an excuse to fall back on discredited historical thinking. Byrnes responds to this by asserting that it is now indisputable that there were shared attitudes in the past, and that such can be extracted from the historical evidence.⁴⁵ She argues that the Tribunal engages with two “layers” of standards: “those

39 Waitangi Tribunal, *Muriwhenua Land Report – Wai 45* (1997) [“*Muriwhenua Report*”].

40 Oliver, *supra* note 14, 12, quoting Waitangi Tribunal, *Muriwhenua Report*, *supra* note 39, 385.

41 Byrnes, *Waitangi Tribunal History*, *supra* note 8, 19.

42 Berkhofer, *Beyond the Great Story: History as Text and Discourse* (1995) 53.

43 McAloon, *supra* note 23, 209.

44 *Ibid.*

45 Byrnes, *A Reply*, *supra* note 1, 220.

denoting broad inter-cultural differences of interpretation and understanding, such as between Maori and the Crown, and those signifying intra-cultural variation".⁴⁶ While Byrnes makes a valid point, she implicitly upholds the view that within cultures, the dominant discourse is the standard of judgement. This offers little engagement with the problematic nature of the perpetuation of dominant discourses, and reminds critics of another reason why the critique of presentism needs to be properly interrogated if it is to hold any weight.

Politicization of History

Part of this presentism is the impact of contemporary politics, now history in itself. Byrnes suggests that Tribunal history has, to its detriment, changed over time:⁴⁷

[Reports have become] increasingly politicised, moving from a reparatory discourse, born of rights and based on the concept of the Treaty as a contract, to one that fractures ideas of national unity and advances a vision of Aotearoa New Zealand where separate autonomous political entities exert their own sovereignty yet still partake in the sovereignty of the 'nation' as a whole.

While this may have been the direction in which reports were heading at the time her book was published, it is now evident that Byrnes' findings are frozen in time. A Tribunal report subsequently released evidences a much more conservative narrative than the sovereignty-based discussion Byrnes suggests. The 2006 *Kaipara Report* is, for the most part, confined to limited discussion of the competing claims. It lacks both the profuse statements of Maori suffering in the 1987 *Orakei Report*, and the strong statements of rangatiratanga in the 1997 *Muriwhenua Report*.

What this reveals is that each report is a product of its own time and circumstance. Presentism may be inevitable, but recognition of presentism or politicization should not lead to sweeping conclusions about the nature of the Tribunal reports. The conservatism in the *Kaipara Report* does not show that Tribunal history has become depoliticized, but is perhaps suggestive of the relatively open acceptance of the need for genuine reparation, indicative of the recent political climate. The situation becomes ever more complex with the realization that each report has itself become a part of history.

An honest explanation of the interplay between historical narratives and political context is offered by David Williams:⁴⁸

46 Ibid.

47 Byrnes, *Waitangi Tribunal History*, supra note 8, 5.

48 Williams, "The Treaty of Waitangi: A 'Bridle' on Parliamentary Sovereignty?" (2007) 22 NZULR 598, 609.

Myths are explanations that depend for their ‘truthfulness’ not on historical facts but on the perceived needs of social and political development in the here and now. Whether historians like it or not, myths of national origins do inform legal and political discourse of the present day.

The Tribunal, it seems, cannot escape politicization when it inherently informs, and even challenges, our national identity.

It is possible that this politicization is a trait of Tribunal history that is worthy of praise. It could be argued that Tribunal history has encouraged positive political change. The highly critical Oliver concedes, for instance, that “if [the Tribunal] had adhered to a more academic way of doing history, its political effectiveness would have been severely curtailed”.⁴⁹ In a recent interview, leading historian James Belich claimed that “history’s not about guilt”.⁵⁰ But the inter-cultural history of a young nation will inevitably invite guilt, and the Tribunal’s role certainly invites this type of reflection. Far from being counter-productive to New Zealand’s national cohesion, the Tribunal effectively constitutes a peripheral forum through which our collective conscience may find relief. Belgrave offers one explanation of how the Tribunal achieves this:⁵¹

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.

Perhaps, then, the Tribunal should be perceived as a political tool of national healing. Whatever the case may be, it is clear that the politicization of history is inescapable; historians should spend more time acknowledging the effects of this politicization rather than vainly attempting to assert that politicization should not occur at all.

Counter-factual History

Perhaps the most damaging claim made by critics of the Tribunal is that the Tribunal practises ‘counter-factual history’. Belgrave argues that the Tribunal’s need to show that claimants were “prejudicially affected” by the Crown’s actions constitutes a “counter-factual process”.⁵² This process involves attempting to compare the claimant’s current circumstances (at the date of the hearing) with the outcome that may have occurred had the

49 Oliver, *supra* note 14, 21.

50 Paul Holmes, Interview with James Belich, “Paul Holmes Interviews Professor James Belich” (TVNZ Q+A Programme, Auckland, 12 July 2009).

51 Belgrave, *Looking Forward*, *supra* note 6, 234.

52 Belgrave, *Historical Frictions*, *supra* note 25, 15.

Treaty's principles not been breached.⁵³ It has been said that the Tribunal is caught in a "contentious argument of cause and effect".⁵⁴

This is one criticism that does seem to encapsulate the way the Tribunal operates. An example of such "counter-factual" reasoning is evident in the *Orakei Report*. Under the heading "Approaches to Reparation", in an assessment of Paora Tuhaere's agency in organizing an economic subdivision venture, the Tribunal writes:⁵⁵

Had Tuhaere's plans been allowed to work, without dismemberment of the capital asset, there is every prospect Ngati Whatua would be today a compact tribe, well provided for with homes, industries, community amenities and a continuing revenue for tribal programmes.

In a more general statement, there is usage of 'but for' reasoning:⁵⁶

[B]ut for the various breaches of the Treaty by the Crown, Ngati Whatua would likely have maintained a handsome endowment....

The statutory requirement of legal 'judgment' seems to hinder Tribunal reports' legitimacy as history, moving well beyond 'explanation'. Belgrave's criticism is not a new one; other scholars identify the counter-factual fallacy. Oliver couches his interpretation of counter-factual history in the pithy term "retrospective utopia".⁵⁷

In this alternative past, European settlement in (rather than of) New Zealand is depicted as dependent upon Maori consent and should and could have led to a regime characterized by partnership, power-sharing and economic well-being for Maori as well as Pakeha.

In such a past, he notes, "[o]ught implies can."⁵⁸ He goes further, to mirror it with the 'better Britain' concept,⁵⁹ equally supposing "an imperial outcome without the vices of imperialism".⁶⁰

Oliver's concern seems to be with the necessary assessment of the prejudicial effect of colonialism and settlement. This is inescapable, however, as identifying past prejudice necessarily creates the possibility of a different past but for that prejudice. Is it truly 'un-historical' to re-examine the "vices" of colonialism? Is Oliver making a judgement of his

53 Ibid.

54 Belgrave, *Looking Forward*, supra note 6, 236.

55 Waitangi Tribunal, *Orakei Report*, supra note 3, 263.

56 Ibid 264.

57 Oliver, supra note 14, 10.

58 Ibid 11.

59 "Better Britain prophesied that New Zealand would grow much less and permanently remain Britain's junior partner, though a politically autonomous one whose citizens, man for man, were an improvement on the metropolis." Belich, *Paradise Reforged* (2001) 21 (emphasis in original).

60 Oliver, supra note 14, 27.

own by suggesting that the Crown should or could not have acted without “vice”?

Postcolonial Histories and the Waitangi Tribunal

Oliver’s outrage at the Tribunal’s use of counter-factual history in fact highlights the Tribunal’s value in raising issues of postcolonialism. Postcolonialism “seeks to undermine the structure, ideologies and institutions that gave colonisation its meaning”.⁶¹

Byrnes argues that the Tribunal effectively takes a postcolonial stance. She claims that a common motivation for claims to postcolonial status is the desire by both the colonized, and descendants of the colonizers, to “restore cultural and political integrity ... on their own terms”.⁶² Such a stance arises, she suggests, through their active role in restitution and settlement, their focus on ascertaining present and future solutions for problems rooted in the past, their emphasis on “Maori agency”, and their role in the process of restitution for historical injustices.⁶³ Byrnes believes that the myth of “the best race relations in the world” has been unsettled, and that the Tribunal “reminds us that colonization continues in many forms and guises”.⁶⁴

Oliver, however, is less forgiving of such a stance. He argues that the Tribunal’s failure to suggest specific political policies, and the associated failure to test the practicality of such, leaves Tribunal findings in a “distinctly vulnerable condition”.⁶⁵ But, problematically for Oliver, he goes further to adopt the counter-factual practice he so despises:⁶⁶

Under such conditions land would have been available for settlement only if and as autonomous Maori authorities provided it; colonisation would have been controlled by the indigenous people exercising authority through their traditional structures within distinct territorial realms. It can hardly be supposed that a large and increasing settler population and an expanding capitalist economy would have tolerated such controls.

This is a clever example of disguised fatalism; a tendency that is equivalent to the retrospective utopia of which Oliver is so dismissive. He argues that ensuring “that sufficient land was left in Maori hands, that Maori understood what was meant by the sale of lands ... that its own actions were subject to independent audit, and that Maori custom ... [was] preserved” was too high a standard for the Crown, given that the programme was

61 Byrnes, *Waitangi Tribunal History*, supra note 8, 5.

62 Ibid.

63 Ibid 6–7.

64 Byrnes, *A Reply*, supra note 1, 226.

65 Oliver, supra note 14, 16.

66 Ibid.

not compatible with colonization.⁶⁷ Oliver concludes that the Tribunal's "historical reconstruction must be considered defective in failing to consider practicalities before turning what is certainly a matter for regret into a culpable omission".⁶⁸ Again, he exhibits fatalism, simplifying New Zealand's colonial history as regrettable, yet inevitable. In stating that matters of regret during colonialism must be balanced with consideration of "practicalities", Oliver in fact implicitly *adopts* the structure, ideologies, and institutions that gave colonization its meaning.

Antony Anghie buttresses Byrnes's conclusions and accentuates just how important such postcolonial history writing is. Anghie points out that the conventional history of international law fails to engage adequately with why 'Third World' societies continue to be the most disadvantaged and marginalized.⁶⁹ Similarly, conventional histories of New Zealand promote unfortunate myths of "the best race relations in the world", and take the focus off the historical roots of current marginalization. Anghie's concept of the "reconstructive project" undertaken by a number of scholars is another way of understanding the competing myths of history:⁷⁰

As against conventional histories, then, what may be required is the telling of alternative histories — histories of resistance to colonial power, history from the vantage point of the peoples who were subjected to international law and which are sensitive to the tendencies within such conventional histories to assimilate the specific, unique histories of non-European peoples within the broader concepts and controlling structures of such conventional histories.

Reflecting on Europe and the roots of African underdevelopment, Walter Rodney reinforces the value of this postcolonial history:⁷¹

Hypothetical questions such as 'what might have happened if...?' sometimes lead to absurd speculations. But it is entirely legitimate and very necessary to ask 'what might have happened in Barotseland (southern Zambia) if there were not generalised slave-trading across the whole belt of central Africa which lay immediately north of Barotseland?'

In this spirit, Belgrave notes that the principles of the Treaty "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".⁷² He argues that many of these

67 Ibid 17.

68 Ibid 20.

69 Anghie, *Imperialism, Sovereignty, and the Making of International Law* (2005) 8.

70 Ibid.

71 Rodney, *How Europe Underdeveloped Africa* (1972) 110.

72 Belgrave, *Historical Frictions*, supra note 25, 218.

histories, searching for recognition of indigenous rights, are counter-narratives, vilifying colonial heroes and celebrating the resistance of rebels.⁷³ Such postcolonial narratives are the flipside of the myths of the mid-century, and are empowering in redressing not just historical injustices but also the historiographical injustices perpetrated through the deliberate marginalization of indigenous peoples in the history books.

For all its criticisms, it is evident that counter-factual history may be an effective tool with which to destabilize Eurocentric myths and promote postcolonial ones — if not to find ‘truth’, then at least to balance the perspective.

IV THE TRIBUNAL IN ACTION: INCREASING AWARENESS OF THEORETICAL TENSIONS OVER TIME?

It is useful at this point to assess two case studies of the Tribunal in action, in the form of the *Orakei* and *Kaipara* reports. Consideration of these reports allows a more in-depth examination of some of the theoretical tensions between law and history traversed in the foregoing discussion. It also highlights that the nature of these tensions has changed over time, and ensures that the Tribunal is not viewed as a unified, monolithic body, but rather as a body that has produced heterogeneous work.

The Orakei Report

The *Orakei Report*⁷⁴ is interesting as an early example of ‘history’ created by the Tribunal. It was written and published in 1987 under the chair of Eddie Durie, who has expressed frustration at the limitations of traditional historical research.⁷⁵ Belgrave suggests that restoring identity to tribal units was the rationale of this report.⁷⁶ He further notes that reports penned predominantly by Durie are typified by the “insights into historical events that were sensitive to Maori understandings of relationships between individuals and the environment, which made it at times innovative and interesting history”.⁷⁷ In its introduction, the *Orakei Report* argues that dissenters of the rights of Ngati Whatua had “assumed the rights of western development and have blamed the results on the inevitability of fate rather than admit to greed”.⁷⁸ The report asserts that the “story of Orakei is not a record of cultural misunderstanding”, but is rather a record of “breaches of

73 Ibid 34.

74 Waitangi Tribunal, *Orakei Report*, supra note 3.

75 Belgrave, *Historical Frictions*, supra note 25, 37.

76 Ibid 84.

77 Ibid 125.

78 Waitangi Tribunal, *Orakei Report*, supra note 3, 1.

a Treaty composed by the Europeans themselves”.⁷⁹ The emotive language in this anti-colonial history was arguably necessary, given the political and social atmosphere it aimed to capture.

Oliver is more sceptical of Durie and the report. He refers to Durie as an “influential ‘authority’”,⁸⁰ and notes the “intellectual suppleness” that characterized the Tribunal’s treatment of both history and law under Durie.⁸¹ Certainly the *Orakei Report* is limited in its historical method, given the extremely limited presence of referencing. However, the different approaches of Belgrave and Oliver are most convincingly revealed in their treatment of Durie. Compare Belgrave’s “innovative and interesting” Durie, with Oliver’s one-sided Durie. Oliver argues that Durie “made clear his belief that the Tribunal should help to rewrite New Zealand history ‘from a Maori point of view’”.⁸²

Such a viewpoint could be expected to show a preoccupation with deprivation and a concern with redress, not only in material ways by the award of compensation, but also through an eloquent story of indigenous loss told to underpin the campaign for a better indigenous future.

Whatever slant one chooses to put on Durie’s ideology, he was clearly fundamental in challenging the conventional histories of the 1980s.

Even if interesting and innovative history is commendable in the more recent political climate, historical criticisms go beyond the use of provocative statements. While Belgrave asserts that the emphasis on history within the Tribunal was limited in the early years, it is obvious that historians were key figures in the process. Although they did not actually sit on the Tribunal, historians were often quoted as authority in the *Orakei Report*. A key example of this is the reliance placed on A.W. Reed’s account of, inter alia, the contact between Ngati Whatua and the white men who wished to purchase Orakei, and the “uncompromising” resistance of the Maori with regard to the land.⁸³ As the report notes, the account was described in a book by Dr John Logan Campbell, the leader of the group wishing to purchase.⁸⁴ Historical method would certainly place reliance on the primary document over the interpretations of an historian. Added to this, Reed was an historian of the 1950s; an era the history of which has been the focus of much reinterpretation in recent years.

Of significant interest is the way Maori oral tradition is employed and discussed within the report. The report raises the inevitable question

79 Ibid.

80 Oliver, *supra* note 14, 10.

81 Ibid 9.

82 Ibid 10.

83 Reed, cited in Waitangi Tribunal, *Orakei Report*, *supra* note 3, 22.

84 Ibid.

of the bicultural focus of the Tribunal: is the mythology of the indigenous culture in fact 'history'?⁸⁵

Certainly it is not true the Maori came together in a fleet of canoes, about 1350, to wipe out the Moriori and carve out separate territories.... According to tradition, Toi came in the dawn of time, one section of his people called Ngati Awa occupying the northern peninsula, another called Ngaoho, after Toi's son Ohomairangi, an area from South Auckland to Tauranga, merging, around Tamaki with other early arrivals to form Waiohau.

This, of course, is an important claim in terms of asserting a wider Maori right to Orakei. Does a statement beginning with "[a]ccording to tradition" constitute evidence? Does it constitute 'history'? The Tribunal offers no answers, and in this early report at least, is perhaps a little ignorant of the implicit positions it upholds by referring to mythology and adopting a postcolonial outlook.

The Kaipara Report

The *Kaipara Report*,⁸⁶ released after the publication of Byrnes' book,⁸⁷ received praise in Byrnes' later article for employing a cautious approach and balancing Crown culpability with Maori agency.⁸⁸ Many of the criticisms and generalizations of 'the Tribunal' are blunted in this recent generation of reports. The Tribunal sets out its role, noting that its function is not to write "tribal histories":⁸⁹

We have carefully considered the evidence presented to us, which has assisted us in understanding tribal relations before 1840 in Kaipara. Our task, however, is limited to an inquiry into alleged Treaty breaches by the Crown, and for this task it is necessary only to establish which Maori groups had rights in our inquiry district which could have been prejudiced by acts or omissions of the crown after 1840.

The prevalence of footnoting and the engagement with historiographical issues is tribute to the increasing role of historians and report writers trained as historians.

The *Kaipara Report* provides not just the chosen narrative of history, but discusses contentions from either side. Each claim or historical event is outlined in the same general manner: it begins with some context, followed by claimants' submissions, then Crown submissions, Tribunal comment,

⁸⁵ Ibid 15.

⁸⁶ Waitangi Tribunal, *Kaipara Report*, supra note 5.

⁸⁷ Byrnes, *Waitangi Tribunal History*, supra note 8.

⁸⁸ Byrnes, *A Reply*, supra note 1, 219.

⁸⁹ Waitangi Tribunal, *Kaipara Report*, supra note 5, 13.

and concludes with findings and recommendations. This format highlights interesting contentions by the various parties and provides the reader with a greater understanding of the issues. Representing the Crown, historian Donald Loveridge described Lord Normanby's instructions in his evidence, which was summarized by the Tribunal:⁹⁰

[C]olonisation in New Zealand was to be funded largely by the substantial difference between the amount the Crown paid to purchase land from Maori and the amount it received when it sold that land to settlers. The provision of infrastructure made possible by this revenue was supposed to benefit Maori as much as Pakeha.

This submission clearly engages with the issue of presentism and attempts to refute anti-colonial sentiment. Even more interesting is a section headed "Interpretations of the historical evidence".⁹¹ It is noted that Crown counsel, in their concluding submissions, referred to "the complexity of the task of reconstructing history and of judging values and actions of the past".⁹² Such statements may be an overt reference to, and reflection of, the criticisms already discussed. What is evident in the *Kaipara Report* is that there is less emphasis on providing an historical narrative, and much more on analyzing historiographical issues.

The report highlights the debate over the competing standards against which the Crown's actions and omissions are measured. The Crown contends that "intervention [in land sales] would have been problematic; it would have been resented and opposed by Maori and could have been a breach of their article 3 rights as British citizens".⁹³ The Tribunal's findings are telling:⁹⁴

From our twenty-first century viewpoint, we now know that it was unlikely that people who had lived in a traditional, communal, subsistence economy would, by some process of osmosis, shift their customs and attitudes and immediately embrace an individualised, modern, industrial economy. However, we cannot simply impose our contemporary views in judgment of the past. There is ample evidence that most Pakeha officials and settlers genuinely believed that Maori would benefit from the influence of British culture that was being opened up for them through colonisation.

Fundamental concessions regarding the actions of the Crown indicate that this Tribunal membership of 2006 was acting under a more conciliatory ideology.

90 Ibid 57.

91 Ibid 313.

92 Ibid 314.

93 Ibid 316.

94 Ibid.

The Tribunal takes a legalistic approach toward the evidence presented. The overt sympathy for the plight of Maori (seen in the *Orakei Report*) is replaced with a focus on proof and practicality. The Tribunal suggests that one test relevant to its findings is that of reasonableness: “[w]as the Crown’s action or inaction toward Maori reasonable or unreasonable in the circumstances of the time?”⁹⁵ The incomplete nature of the available evidence makes drawing comparisons difficult:⁹⁶

[I]n the socio-economic evidence from the 1840s on, we were not given any comparison with the rest of New Zealand, Maori or non-Maori, or even with comparable services available for Pakeha settlers in Kaipara in the nineteenth and twentieth centuries. Nor was there any hint of the broader outside influences, such as economic recession or urbanisation, which the Crown could not control. As a result, we were faced with a massive amount of evidence about Ngati Whatua and their land since 1840 but little comparative data by which we might assess the Crown’s role. Our reading of other local histories..., for instance, indicates that, in the early years of Pakeha colonisation, the Pakeha settlers were often as poor as their Maori neighbours and that all their children had equal access to public school education.

Such practical treatment of the provided evidence, and the reluctance to engage in speculative analysis, epitomizes the conservatism of the 2006 Tribunal membership. But it also indicates that the Tribunal has taken on board theoretical criticisms, and shows a commitment to altering its approach to account for certain methodological tensions. This willingness to respond to the academic commentary can only be an encouraging development.

V LEGISLATING HISTORY: AN UNDER-ANALYZED AREA

There has been little historiographical engagement with the Tribunal’s ultimate legislative impact. Settlement Acts place historical findings and apologies into the words of the legislation. Yet it is not necessarily the exact findings of the Tribunal that are imported into the legal sphere. As Belgrave contends, “[w]hen 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 the ... parameters of legislation.”⁹⁷ Interesting questions are raised: how do historical statements that are written into parliamentary legislation fit with

95 Ibid 314.

96 Ibid 314–315.

97 Belgrave, *Looking Forward*, supra note 6, 232.

the doctrine of parliamentary supremacy? Are legislated historical facts more legitimate or reliable? These questions remain largely unanswered by commentators like Belgrave and Byrnes. Michael Bassett has noted that “[l]egislating history will always be a murky business.”⁹⁸ But there must be more measured analysis of just why it is such a “murky business”, and how this murkiness might be mitigated.

The circumstances surrounding the Te Uri o Hau Claims Settlement Act 2002 offer a glimpse of the problems involved with legislating history. Te Uri o Hau began negotiations with the government in 2002, long before the release of the *Kaipara Report*, and before the release of the *Kaipara Interim Report*.⁹⁹ The Te Uri o Hau Claims Settlement Act 2002 has proved controversial. The Act became relevant to the findings of the final report (in 2006), as within it the Crown apologized for historical actions that had equally prejudiced tribes which remained before the Tribunal, and admitted to prejudice that was not sufficiently ‘proven’.

Bassett, purportedly admitted to the Tribunal for his “conservative” influence,¹⁰⁰ and a key figure in the writing of Dr Don Brash’s famous (or infamous) Orewa speeches,¹⁰¹ obtained his own chapter, labelled “Minority Opinion”.¹⁰² He supports the majority of the findings, but disagrees especially with the finding on the Te Kopuru lands. According to Bassett, the Settlement Act prejudiced the findings in the *Kaipara Report*. He argues that the actions of the Crown bordered on irresponsible by proceeding to settle with Te Uri o Hau and passing the Act “containing many acknowledgements that were based on no more than untested assertions”.¹⁰³ He writes that “[c]areful readers of this report will notice that its findings against the Crown are less extravagantly worded than the Crown’s own findings against itself in the 2002 Act”;¹⁰⁴ and that “[w]hile the Crown failed Maori in several respects, many Maori failed their own descendants with actions they took during the nineteenth century.”¹⁰⁵

Essentially, Bassett argues that the Crown recklessly acknowledged more culpability than was necessary due to the content of the earlier legislation. Aspects of Bassett’s conclusions highlight his approach.¹⁰⁶

While this report is commendably less censorious of the actions of the Crown than the Te Uri o Hau Claims Settlement Act 2002, it contains assertions in chapter 11 that go beyond what I believe to be a reasonable reading of the history of Kaipara Maori. The Crown

98 Waitangi Tribunal, *Kaipara Report*, supra note 5, 361.

99 Waitangi Tribunal, *The Kaipara Interim Report – Wai 674* (2006).

100 Belgrave, *Historical Frictions*, supra note 25, 15.

101 Hager, *The Hollow Men* (2006) 87, 139.

102 Waitangi Tribunal, *Kaipara Report*, supra note 5, 359; see also Belgrave, *Historical Frictions*, supra note 25, 15.

103 Waitangi Tribunal, *Kaipara Report*, supra note 5, 361.

104 *Ibid.*

105 *Ibid.* 359.

106 *Ibid.* 362.

did warn Kaipara Maori about the undesirability of treating their lands like an inexhaustible bank account.

He is even cynical about the course of events: “[f]or some reason, neither the claimants nor this report fastened sufficiently on the key role played by chiefs in the alienation of Maori land.”¹⁰⁷ Bassett clearly adopts the Crown argument, and Oliver’s criticism, when he acknowledges the tension between protecting Maori from land sales and allowing Maori economic autonomy. He also engages with counter-factual history when he suggests that the warnings that the Crown should have given may not have stopped the determined chiefs from selling land anyway.

It is noteworthy that the Tribunal majority does provide some critical reflection on the Settlement Act. Section 8(c) of the Te Uri o Hau Claims Settlement Act 2002 states:

The Crown acknowledges that the process used to determine the reparation for the plunder of a store, which led Te Uri o Hau chiefs and others to cede land at Te Kopuru as punishment for the plunder, was prejudicial to Te Uri o Hau. The Crown acknowledges that its actions may have caused Te Uri o Hau to alienate lands that they wished to retain and that this was a breach of Te Tiriti o Waitangi/the Treaty of Waitangi and its principles.

The Tribunal appears to support the assertion, but notes that the use of the term “plunder” in the Act is not a good translation of *muru* as it might imply something unlawful, although the practice was lawful within Maori society.¹⁰⁸ In fact, the language represents the fact that the Crown did not concede that the plunder was a *muru*. Regardless, in its engagement with historiography, the Government has been found to have imported inappropriate language.

Does this call for an amendment of the Te Uri o Hau Claims Settlement Act 2002? It is unclear. What is clear is that there needs to be more scrutiny of the prospect of embedding definitive interpretations of history into legislation. In addition to legislators being wary of this prospect, historians and commentators must be more willing to assess the impact of legislated history on history writing and contemporary understanding.

107 Ibid.

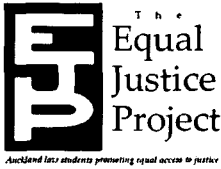
108 Waitangi Tribunal, *Kaipara Report*, supra note 5, 98.

VI CONCLUSION

When ‘full and final settlement’ is agreed upon and history is legislated, does historical analysis become frozen in time, leaving us with undisputed historical ‘fact’? Do settlements that skip the Tribunal process lack historical or legal legitimacy when compared to other settlements? And do the practical imperatives of the ‘real world’ outweigh the criticisms of theory-consumed academics?

The intent of this article was not to provide all of the answers, but to pose questions in the relevant context and invite educated reflection. It is arguable that the assertions and conclusions of the foremost Tribunal historians are of less practical significance than their theoretical criticisms might lead us to believe. Historical concepts such as ‘presentism’ and ‘counter-factual’ interpretation are used to deny the objectivity of Tribunal history, but these criticisms rest on the false premise that objectivity can be attained in the first place. This premise is especially false in the adversarial environment of the Tribunal. Further, in some cases, presentism and counter-factual history may be positive developments, and should not be uniformly frowned upon.

On the whole, historians and commentators have often misdirected their criticisms of the Tribunal, and held the Tribunal’s writing to an empty and unattainable standard. All that we should expect is for the Tribunal to be overtly aware of its historical impact. The legal–historical analysis of the recent *Kaipara Report* reflects a more explicit engagement with such issues on the part of the Tribunal, and is a promising development. Of course, there will always be challenges for the Tribunal, with the challenge of legislated history requiring particular attention. Nonetheless, with greater self-reflexivity, the Tribunal will be able to move away from the niggling tensions between law and history, towards a more nuanced understanding of the events of the past and the needs of the present.



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