Background Paper

Chief Judge Durie*

I THE TRIBUNAL AND THE TREATY

The Treaty of Waitangi Act 1975 constitutes the Waitangi Tribunal comprised of the Chief Judge of the Maori Land Court as chairperson and up to 16 additional members appointed by the Crown for terms not exceeding three years.

The Tribunal's main function is to inquire into and make recommendations to the Crown upon claims submitted to it by Maori. The claims that may be submitted are, in short, that Maori are prejudicially affected by legislation, policies, acts or omissions of the Crown inconsistent with the principles of the Treaty of Waitangi. If the Tribunal finds any claim is well founded, it may recommend to the Crown that action be taken to compensate for or remove the prejudice. A recommendation may be in general terms or may indicate the specific action which, in the opinion of the Tribunal, the Crown should take. The Tribunal is not restricted to assessing the loss and ordering recovery. An equivalence may be impracticable. Nor is the Tribunal confined to recommending monetary compensation or the recovery of Crown land. It may propose broad policies for long term restoration. In some cases, especially with regard to State enterprise assets and certain Crown forests, the Tribunal may make 'binding recommendations' (but has not yet done so). This resulted from out of court settlements in 1987 and 1989.

The Treaty of Waitangi was an agreement between the Crown and Maori for the colonisation of the country and was a prelude to the proclamation of sovereignty. It sought to provide for settlement while assuring benefits for Maori and the maintenance of their interests. In terms, the Maori or English treaty texts promised protection, the continuance of rangatiratanga, the retention of those things Maori treasured (including their land unless they wished to sell it) and equality before the law. However in applying the treaty, regard is had to both the terms and the treaty's general purpose. In the context of its historical and political significance, it has been held that it is the spirit of the treaty that most counts. Evidence of the surrounding circumstances, statements of the time, expectations expressed and subsequent conduct have been called in aid.

---

* Chief Judge of the Maori Land Court and Chairman of the Waitangi Tribunal.

II CLAIMS

The claims may be arranged in three categories:

(a) historical (past Crown actions);

(b) contemporary (current Crown actions); and

(c) conceptual ('ownership' of natural resources).

Jurisdiction to handle historical claims was given in 1985. The historic claims may be divided into:

(a) major claims (large tribal losses); and

(b) specific claims (particular losses).

The Tribunal groups historical claims by districts for combined hearings and attaches the specific claims as ancillary to the main inquiries. One inquiry and report may involve as many as 30 claims. This has reduced the workload and has placed specific claims in a larger context. Most claims are presented tribally.

Historical claims cover these broad areas:

(a) the confirmation of pre-treaty purchases;

(b) Crown (and some private) purchases to 1865 under Crown-tribe negotiations;

(c) Crown and private purchases under the Native Land Court system;

(d) confiscations and expropriations (including Public Works);

(e) title arrangements and land development under the Native Land Court system; and

(f) tribal autonomy.

One tribal claim may encompass all or many of these areas.

Contemporary claims include resource management policies, the impact of development works, Maori language, land administration, Maori participation in economic development, judicial systems, administrative structures, Maori land law, the alienation of state assets by the Crown, education, immigration, the status accorded Maori women, intellectual property rights, cultural maintenance, fishing, hunting, foraging and a range of laws and regulations.

Conceptual or 'resource claims' usually contend for a Maori interest in the use and development of rivers, lakes, foreshores, minerals and geothermal resources, or in the outputs from the development of those resources.

From the above categorisation of claims it is considered:

> the Tribunal's claims register, of approximately 450 claims, is not an indicator of the workload. The register includes a mixture of major and small claims, most can be grouped for concurrent inquiry and some claims are duplicated. It is estimated that the historical claims could be reduced to some 30 inquiries.

With adequate resources it would be feasible to report on all historical claims before the year 2000.

In addition the Tribunal has many requests for urgent inquiries. Claimants and the Crown may be heard on whether urgency should be granted. The Tribunal endeavours to hear cases where the action complained of may have some irreversible consequence. It does not grant urgency to accommodate illegal occupations and will not intervene on matters that are or could be the subject of court proceedings.

Other claims are heard as and when the Tribunal considers the research is complete and the claim is ready to proceed to hearing.

III THE NATURE OF HISTORICAL CLAIMS

The categories of historical claims were considered earlier.

With regard to 'sales' it is usually contended that the Maori and western understanding of transactions were so different that mutuality was unlikely. More particularly it is claimed that Maori transactions were based on alliances for future mutual advantage, not for immediate benefits and not in contemplation of permanent dispossession. As to purchase policies it is argued that the Crown, if ignorant of the nature of Maori transactions, should at least have ensured that the areas acquired were less and the reserves to Maori greater.

Native Land Court tenurial reform appears to have affected all tribes. It is argued that the reforms led to the extinguishment of group interests, tribal polity and tribal economies and that the lands should have been held for the tribe or kept under tribal control.

Confiscations, expropriations (for townships, scenic reserves, public works, rates, survey costs, taxes and duties) and more recent land reform and relocation schemes, are challenged on their merits.

The extent of the historical claims may be guessed at by reference to the outcome. Maori were admitted by the state to have owned all parts of the country, but Maori landcomprises today 5% of the national total, much on poorer land and some 7% unworkable. The tribes, as such, are restricted beneficiaries for almost no land is now owned tribally. The spread of Maori land is not even and there is little or no Maori land in some tribal areas. Most Maori have shifted to towns and score below par in statistical counts for health, housing, employment, law observance and education. They

are limited participants in business yet once were major market suppliers and were engaged in commercial fishing, shipping, milling and banking.

IV INQUIRIES

The Tribunal structure and process is bent to the historical, cultural and legal mix of issues. It is inquisitorial. United State's Claims Court experience suggests the adversary system is slower, more costly, not exhaustive of native issues and disempowering of the people aggrieved.

The Tribunal is bicultural and inter-disciplinary. There has been criticism from Canada that the courts are insufficiently representative to handle native perspectives and that the legal discipline is overly restrictive of historical and anthropological opinion.

Tribunal members are appointed through the Minister of Maori Affairs for their experience and knowledge of the matters to be considered. Equal numbers of Maori to Pakeha staff the Tribunal constituted for any claim and Tribunal members are qualified in tikanga Maori, law, historical geography, anthropology, history, agriculture, business or industry. There are seven women and nine men. Of the traditional kaumatua members two are women and two men.

Good research is pivotal to the expeditious despatch of the Tribunal's business. Ideally it is completed prior to hearing. The Tribunal may

(a) Commission any person, whether or not a member of the Tribunal staff, to undertake any particular research; and

(b) authorise (and fund) claimants to commission research.

Research reports are made available to the parties. The parties are generally the claimants, the Crown, other Maori and private interests who may intervene. The Tribunal staff has large tasks in undertaking research, co-ordinating the research of others and maintaining claim management. The Tribunal has the additional task of considering the research required. Conferences are held to define issues before final argument.

Maori are heard on their home marae or tribal meeting places, or at several marae when different tribal groups are involved. They are heard in accordance with traditional kawa which has a formality of its own.

The addition of the power to make 'binding recommendations' in some cases has affected the process requiring a higher evidential standard, loss quantification and more legal argument when substantial Crown assets are in jeopardy.

The Tribunal may refer matters to mediation but experience suggests this should be done only when the facts are largely settled and the issues delineated. Six claims have been referred to mediation. There have been settlements in two cases. Mediation of the major historic claims has now been subsumed by negotiations.

The funding of claimants to conduct their own research has produced some work of substandard quality which has generated extra auditing costs. Controls are imposed on claimant research expenditure. On the other hand the engagement of professionals, while more cost efficient, has had claimants complaining of the capture of their claim by academics. The Tribunal has found it best to marry professional researchers with claimant research committees.

The budgetary allocation of $400,000 for claimant research however has proved to be too limited for the tasks the claimants must perform. There is also no provision for the funding of tribal claim managers although their role in the efficient despatch of claims is important.

For budgetary reasons the Tribunal has reduced the number of hearings to target funds to research. This has led to claimant dissatisfaction and to a process that is seen as less "people-empowering". To alleviate this the Tribunal requires that all research be compiled before hearing, that procedural and research issues are settled at preceding conferences and that the hearing of the people's evidence is severed, in hearing, from academic submissions and legal argument.

The inquiry into historical claims involves considerable interpretation. It is important that the Tribunal has a benefit of competent competing arguments. It is much assisted in that respect by Crown Law Office.

In researching, co-ordinating research and claim management certain protocols are observed within the Tribunal and by its staff:

(a) that staff must develop good working relations with claimant groups but must also protect the Tribunal's independence;

(b) that the Tribunal must consider the research required but cannot interfere on the formulation of research opinion.

V CLAIM PRIORITIES

The Tribunal has adopted the principle that claims will be heard where the pre-requisite research has been completed to a proper standard.

The Tribunal nonetheless influences the order in which claims are heard through its allocation of research funding. The Tribunal is aware that the seriatim hearing of claims has created inequities, advantaging those whose claims are first heard and reported. Accordingly the Tribunal is endeavouring to advance all historic claims contemporaneously by arranging broad historical surveys according to districts. This is known as the "Rangahaua Whanui Research Project". The project is well advanced and should be completed in about 2 years.

It serves:

(a) to give equal weighting to all historic claims;

(b) to ensure that issues germane to several claims are dealt with generically to avoid research duplication;

(c) to enable a national overview of the claims position to be obtained; and

(d) to inform the Tribunal when making recommendations on any particular case.

VI RELATIONSHIP TO NEGOTIATIONS

The Tribunal sees the maintenance of an effective negotiations policy as crucial to claims resolution, but, while encouraging parties to negotiate, the Tribunal cannot decline to inquire into a claim for policy reasons.

Inquiries on historical claims proceed through two stages. The first is an inquiry on the facts and results in a full report on the claim. If the claim is held to be well-founded the parties may elect to negotiate a settlement. The second step is activated only if negotiations fail or are not preferred. The parties will then be heard on remedies and the Tribunal will report its recommendations.

This process encourages negotiations. It also promotes lasting settlements by ensuring that the parties have the benefit of a comprehensive report covering all aspects before settlements are effected.

VII REPRESENTATION

A major impediment to the resolution of claims is the issue of representation. It has three aspects, related yet severable:

(a) Customary representation (which hapu or Iwi have customary interests in any particular area?);

(b) Level of representation (what matters should be settled at a hapu, Iwi or a national level?);

(c) Modern representation (what bodies or associations should represent any Maori grouping?).

The issue has been brought to the fore by the repeal of the Runanga Iwi Act 1990 but the Tribunal is currently assisted by two statutory mechanisms:

(a) section 6A of the Treaty of Waitangi Act 1975 which enables the Tribunal to state a case to the Maori Appellate Court on (inter alia) the question of customary representation; and

(b) section 30 of the Ture Whenua Maori Act 1993 which enables the Chief Judge of the Maori Land Court (or the Chief Executive of the Ministry of Maori Development) to refer to the Maori Land Court a question of modern representation.

It may be noted:

(a) The legislation distinguishes between customary and modern representation;

(b) The use of either section is discretionary. Representation issues may sort themselves out in the course of hearings, or the Tribunal may be able to reach a conclusion and to make recommendations without recourse to the Maori Land Court or the Maori Appellate Court.

(c) Representation issues affect negotiations as much as Tribunal inquiries. Tribunal and legal processes have the benefit of affording an open hearing to all interested groups.

(d) Questions of modern representation are not generally referred to the Maori Land Court except for a specific purpose and on evidence that interested parties are unable to resolve the issues. Questions of modern representation are also not referred to the Maori Land Court where the primary purpose would appear to concern the allocation of fisheries quota. That is a matter to be determined by the Treaty of Waitangi Fisheries Commission.

VIII RESOURCING

An impediment to the Tribunal's progress has been the lack of adequate resourcing. The Tribunal's budget for 1994/1995 was $3,408,000. This compares unfavourably with the funding allocated to other agencies that advise the Crown on Treaty related issues and has restricted the Tribunal in research, the number of hearings and in report writing. There has been one full-time member, a large voluntary contribution from members and an inability for members to meet as often as required. It is also questionable that Maori have had proper access to process for the hearing of their grievances.

The Minister of Justice has announced an intention to increase funding in this area.

IX PROGRESS IN REPORTING

As at July 1993 the Tribunal had completed 42 reports, seven historical and 35 on contemporary issues including five on fishing, four on asset transfers and five on resource use. Recommendations were made in 23 cases. The Tribunal reported the withdrawal of a claim or that a solution had been found in a further 14 cases, and in five cases, recommendations were declined as the claims were not well-founded. Some extensive inquiries did not result in reports as a result of settlements or claimant requests for adjournment.

The inquiry into a number of other claims is well progressed by either or both research and hearings.

The disposal of claims as at 31 January 1995 was as follows:

Claims reported	45
Claims in report writing	8
No further inquiry	39
Withdrawn	6
Deferred	13
In mediation	2
In negotiation	9
Under Tribunal research	19
Under claimant research	74
Research proposals needed	127
In hearing/proceedings	54
Research completed awaiting hearing	23
Referred to Maori Appellate Court-	
Referred to Maori Land Court investigation-	
No action	32
TOTAL	451

The Act requires that the Minister report annually to Parliament on progress in the implementation of recommendations. He has reported that of the 116 recommendations in 16 reports as at November 1992, 45 had been fully implemented, 13 had been partly or wholly embodied in legislation, 27 were partly implemented but under further consideration, and eight had been rejected. In only the Radio Frequencies report had all the recommendations been rejected but in that case the Crown proposed an alternative arrangement, probably more beneficial to Maori, that was approved by the High Court.

A value judgment is required of the Crown's performance since some recommendations are in general terms and several years may need to elapse before a recommendation can be implemented.

On the negotiations side it was reported, again as at November 1993, that six agreements had been reached though minor issues remained unresolved on three of them. Of those six, one followed Tribunal hearings (the Railways claim) and two followed Tribunal mediations (Waitomo and Hauai).

Some of the settlements resulting from the recommendations, negotiations and court actions have been well publicised. The State-owned Enterprise and Crown Forest settlements concerned process, enabling the transfer of assets or rights while protecting restitution to Maori in cases subsequently established. They did not transfer assets to Maori, but allowed for that opportunity in proven cases.

The Radio Frequencies and Broadcasting claims led to substantial provisions for Maori after Tribunal and High Court proceedings. The fishing reports and High Court

action resulted in a national settlement of all fishing claims, sometimes described as the world's largest fishing settlement for indigenous people. The Rangiteaorere and Orakei claims, and the Waitomo claim mediation, gave rise to land and cash transfers. The Railways claim saw the establishment of the Crown-Maori Congress Joint Working Party to transfer certain railway properties to tribes on account of their claims where research established a prima facie case. Several properties passed over but that group has now been abandoned.

X THE COURTS

The courts have been involved in Treaty matters in various ways:

(a) where reference to the Treaty or to Maori values has been made in a relevant statute;

(b) where the Treaty has been held relevant to the interpretation or application of a statutory provision or the exercise of an administrative discretion; and

(c) where the Treaty is declaratory of rights enforceable at common law.

The courts have had a major role in guiding claim settlements through injunctive relief to restrain the transfer of state assets. This has generally been on the basis of some empowering statutory provision and upon principles of legitimate expectation.

XI CLAIMS RESOLUTION

There appear to be at least five major issues confronting the formulation of a claims resolution policy. They relate to:

(a) entitlement (which groups should be dealt with?);

(b) representation (who represents those groups?);

(c) comparative equities (how should compensation be apportioned between those groups?);

(d) Maori input (should, or how should Maori have input to the policy?); and

(e) limitation (what, if any, limitations should be imposed by way of time restrictions or settlement fund ceilings on account of political and economic imperatives?).

The question of limitation is not covered in this paper. The other matters are touched upon on the sections that follow.

XII OVERVIEW

Some national scoping of the nature, size and extent of claims would appear to be a condition precedent to the finalisation of policy. The Rangahaua Whanui Research Project may be useful in that respect although it was initiated for the other purposes described earlier. It appears historical and contemporary circumstances vary between districts and that the extent and nature of these variations need to be known. Preliminary research also suggests however that there is not one district without a reasonable claim to be heard. Native Land Court tenurial reform alone appears to have impacted in every area, and possibly, or even likely, with deleterious consequences for tribal economies.

XIII VARIABLES

Any policy on historic claims resolution may need to countenance a number of variables and resolve the weight to be given to them. Broadly, some tribes point to 'notorious' Crown actions like confiscations, others to the incremental effect of land purchase policies, reserves policies, land court tenurial reform and the like over an extended period, but for each the eventual outcome may have been much the same.

Some variables for the adjustment of compensation may be argued to include:

(a) the severity of the action complained of;

(b) the extent to which the action constituted a treaty breach;

(c) the impact of the action on the economy and survival of the group;

(d) the cumulative effect of various Crown actions over time; and

(e) the eventual outcome as reflected in the current social and economic circumstances of the group.

XIV BASIS FOR COMPENSATION

There is an issue of whether compensation should be adjusted according to an assessment of loss by such variables as those described or whether a broad approach should apply with the objective of restoring the economic base of appropriately large tribal groupings in accordance with certain assumed, original intentions.

It has been proposed that Crown and Maori envisaged the alienation of land for European settlement with Maori benefitting from development opportunities arising from their retention of a fair share. It is argued that a fair share should have been protected to them. Passages from Lord Normanby's instructions and evidence of subsequent Maori responses give some support to this view.

The approach to be taken involves an important question of policy. Is it to be based upon compensation or restoration? If the latter, then is a delivery of assets all that is necessary?

XV REPRESENTATION

Representation issues in addition to those discussed earlier:

(a) the extent to which the numerous Maori groups should be aggregated for settlement purposes or dealt with severally;

(b) the extent to which groups to be settled with should be structured to accommodate internal sub-groups;

(c) the extent to which that structure should protect individual and sub-group interests through the definition of objectives and through provisions for accountability.

XVI CUSTOMARY REPRESENTATION

Two vexed issues concern the identification of customary groups to be recognised for the purposes of settlements, and the determination of groups with an interest in any Crown lands available for settlement purposes. Customary group formation and dispersal appears to have been fluctuating and dynamic, and this issue may need to be determined by alternative criteria. Relevant factors include:

(a) the identification of groups according to appropriate scales of economy;

(b) commitment to the equitable restoration of those groups without undue reference to assumed tribal boundaries;

(c) adequate protection for and recognition of sub-groups in the settlement structure; and

(d) recognition that the extent of recovery should not depend upon the accident of current Crown asset locations.

XVII TAURA HERE

Presumably, the purpose of a claims resolution policy is not merely to pay off debts, but to ensure some lasting and durable benefit for the greater number of Maori who bear the consequences of historic action. It appears many of the ultimate beneficiaries are now resident outside tribal areas and are serviced by or have developed allegiances to taura here, or urban pan-tribal collectives. There are issues of whether and how these are to be accommodated, or how interests are to be adjusted between traditional and modern combinations.

XVIII STAGED OR FINAL SETTLEMENTS

Policies for the staged restoration of tribal endowments within economically sustainable limits have often been mooted. Policy in that category has been partly or

occasionally implemented in some ad hoc settlements and in the shortlived Crown-Congress Joint Working Party structure that saw the disposal of railway assets in districts conditional upon the transfer of part to Maori on account of claims.

The approach has some advantages:

(a) the provision of interim relief for disaffected groups;

(b) the change of group focus from grievance to asset development on the transfer of assets;

(c) the facilitation of future settlements on evidence of group recovery through good administration of the asset; and

(d) some relief for tribal leaders in facing their constituencies.

It may be useful to consider as well the land buy-back programmes instituted under the Land Council in New South Wales and funded from an allocation of land tax revenues.

XVIX NATIONAL SETTLEMENTS

It has been mooted that a national settlement is feasible with the transfer of assets to a Commission to generate land buy-back programmes from income and to review allocations from the fund on the basis of continuing Tribunal inquiries into comparable losses.

XX INPUT

Many of the issues bear largely upon the nature of early and current Maori societal structures and upon Maori preferences in formulating their own economic, social and cultural development. There is an issue of whether and if so how, Crown and Maori representatives should research and settle a claims resolution policy between them.