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Towards a Radical Reinterpretation of New Zealand History: The Role of the Waitangi Tribunal

Until recently, most commentators have relied on the English language text of the Treaty of Waitangi. According to this the Māori chiefs transferred their sovereignty to the Queen of England, were guaranteed the possession of their lands, forests, fisheries, and other properties, yielded a right of pre-emption to the Crown to purchase their land, and were granted royal protection and the rights and privileges of British subjects. New Zealanders have generally assumed that these provisions of the Treaty have been upheld. The Treaty has been seen as a fundamental instrument of a broader policy — of bringing Māori and their lands within the compass of British (and in due course colonial-made) law; a policy of assimilating the Māori, thereby making one people, according to Hobson's well-known dictum, 'he iwi tahi tatou'. That saga has formed a central theme of most Pākehā versions of New Zealand history.

But, we need to remember that the Treaty of Waitangi was written in two languages, English and Māori. With the exception of the English language text signed by 39 Māori at Manukau and at Waikato Heads — often subsequently regarded as the 'official' version — all of the copies signed by Māori were in their language. Māori people have usually regarded this as the real and binding version of the Treaty. Its meaning to them has been very different from the

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meaning Pākehā have taken from the English version. Some of the key concepts in the English text, like sovereignty, could not easily be rendered into Māori. The translators fell back on transliteration, with sovereignty rendered as 'kāwanatanga', or governorship. That concept was not unknown to Māori since it had been used in translations of the scriptures and in reference to the British governor of New South Wales. Under the Treaty, kāwanatanga was to be exercised by a new governor in New Zealand. According to the preamble, he was to protect the Māori and their property from Europeans now colonising the country. However, the power and autonomy of the chiefs — their 'rangatiratanga o o ratou wenua o ratou kainga me o ratou taonga' (their chieftainship over their lands, their homes and other treasures) — was expressly preserved in the second article of the Treaty. To the Māori chiefs who signed the Treaty, that rangatiratanga was far more than a guarantee of their possession of land and other properties; it was also a guarantee of their autonomy and authority, above all their mana, as chiefs; even, in some recent interpretations,[1] a guarantee of Māori sovereignty. Such Māori views of the Treaty have been frequently voiced at Māori gatherings since 1840, have sometimes found their way into the written record, and have been increasingly noticed by historians and lawyers over recent years.

The fact that there are two histories of the Treaty of Waitangi, stemming from the English and Māori texts, is a sure reminder that Hobson's hope that the Treaty would facilitate the formation of one people has not been realised. Because of the determined efforts of the Māori people to resist assimilation and preserve their identity, the Treaty has become the basis, rather, for the coexistence of two peoples within one nation.

The recent attention of historians and lawyers to the Māori text of the Treaty has provided an academic background to attempts by successive Governments to give better recognition to the promises of the Treaty. Ruth Ross's seminal essay, 'The Treaty of Waitangi: Texts and Interpretations', published in 1972,[2] was the first significant analysis of the two texts of the Treaty, and of the role of Henry Williams in devising a Māori text and persuading the Māori chiefs assembled at Waitangi to accept it. D. F. McKenzie has taken the process of textual analysis much further.[3] Claudia Orange's published doctoral thesis[4] also considerably elaborates the textual studies, while making the fullest examination yet of the signings of the Treaty, at Waitangi and elsewhere, and of its continuing significance for both races in subsequent New Zealand history. She has done more than any other historian to recover that submerged Māori history of the Treaty which has hitherto existed largely in oral tradition.

Such work of historians has been paralleled by that of lawyers. Until recently it was common for academic lawyers to reiterate court judgments on the Treaty, stemming from that of Chief Judge Prendergast in 1877 to the effect that it was a nullity. In 1934 H. F. von Haast summed up the prevailing view by arguing that the Treaty was not cognisable in international law and was only applicable in domestic law in so far as certain provisions had been adopted in local statutes.[5] Von Haast's views were generally accepted by lawyers — and by historians like James Rutherford[6] — until the late 1960s. Then a new generation of academic lawyers, including F. M. Auburn,[7] W. A. McKean,[8] P. G. McHugh[9] and D. V. Williams,[10] inspired by changing interpretations of international law and important decisions in the courts, especially in North America, began to chip away at the established doctrine. In consequence, the Treaty has been resuscitated: it has been deemed cognisable in the colonial law of the time, like similar treaties in other British territories. Like the historians, the lawyers have not been content to rely on the English language text. They have drawn attention to recent judgments in North American courts where assenting parties of treaties have been required to pay attention to the indigenous language texts, and the promises made by the British Crown when the treaties were negotiated. Accordingly, the way has been paved for radical new interpretations of the Treaty of Waitangi and its role in New Zealand history.

The Waitangi Tribunal, as constituted by The Treaty of Waitangi Act 1975 and its amendment of 1985, has been given a vital role in that reinterpretation. Both pieces of legislation, it should be noted, were passed by Labour Governments and sponsored by Māori Ministers of Māori Affairs: the first Act by Matiu Rata and the amendment by Koro Wetere. The preamble of the 1975 Act noted that the English and Māori texts of the Treaty differed from one another, and section 5 required the Tribunal to have regard to both texts. Moreover, for the purposes of the Act, the Tribunal was to have 'exclusive authority' to determine the meaning and effect of the Treaty as embodied in the two texts, and to decide issues raised by the differences between them. Section 6 of the Act allowed 'any Maori' to submit a claim to the Tribunal on the grounds that he [*sic*] was 'prejudicially affected' by any Act, regulations, or Order in Council, or any policy or practice of the Crown, currently in force or proposed, which were inconsistent with the principles of the Treaty. This section had some important limitations. No Pākehā could submit a claim. Although subsection 1 did allow Māori claims against any legislation, policy, or practice currently in force, subsection 6 specifically excluded from the Tribunal's jurisdiction 'anything done or omitted before the commencement of this Act'. Moreover, the Tribunal itself had no

power of remedy; if it considered a claim to be well founded it could merely recommend that the Crown compensate for or remove the prejudice. Section 7 allowed the Tribunal to refuse to investigate any claim that was deemed trivial, frivolous, or vexatious, or for which there was an adequate remedy elsewhere. Section 8 required the Tribunal to ascertain whether any draft legislation referred to it was contrary to the principles of the Treaty.

In interpreting the meaning, principles and effect of the Treaty, the Tribunal could hardly confine itself to the two texts. It had to examine the contemporary intellectual climate to assess what was in the minds of the men who made, negotiated and signed the Treaty. That in turn required an investigation of the historical traditions of both sides: on the British side some centuries of jurisprudence and colonial policy; on the Māori side orally recorded traditions of lore and custom. There was no way of avoiding such historical analysis, despite the limitation in the Act excluding actions or omissions of the Crown before 1975.

The Tribunal was to consist of three persons: the Chief Judge of the Māori Land Court, who was to be chairman, and two others appointed by the Governor-General, one on the recommendation of the Minister of Justice, the other (who was to be a Māori) on the recommendation of the Minister of Māori Affairs. The original appointees were Chief Judge Kenneth Gillanders Scott, L. H. Southwick, an Auckland QC, and as Māori representative, Sir Graham Latimer, chairman of the New Zealand Māori Council. Their first full hearing concerned the claim of Joseph Hawke and others of the Ngāti Whātua tribe of Orakei to fishing rights in the Waitemata Harbour.[11] Ironically, the tangata whenua of Tamaki Makaurau, whose tribal territory was now reduced to a tiny fragment of the metropolitan area of greater Auckland, were obliged to meet the Tribunal in the unfamiliar surroundings of the ballroom of Auckland's plush Intercontinental Hotel. Hawke lost the claim, though he subsequently lodged a new one that concentrated on the loss of land at Bastion Point. In 1980, on the retirement of Judge Scott, E.T. J. Durie was appointed Chief Judge of the Māori Land Court — the first Māori to hold that position — and became chairman of the Tribunal. In 1984 Paul Temm, another Auckland QC, replaced Southwick. Judge Durie transformed the Tribunal, both in procedure — henceforth it met on the marae of the claimants, and observed their kawa in its hearings — and in its philosophical approach to the issues.

It is not possible in a short essay to review all the findings of the Tribunal in the ten years of its existence under the 1975 Act. In any case several claims were either dismissed or withdrawn before the Tribunal completed its hearing, and need no further discussion. I shall examine four claims — Motunui, Kaituna,

Manukau, and Te Reo Māori — all of them presided over by Judge Durie. And I shall use the Tribunal's findings to illustrate its role in interpreting — and reinterpreting — the Treaty and its place in New Zealand history.

The Motunui claim was lodged by Aila Taylor on behalf of Te Atiawa of Taranaki, who held that they were or would be prejudicially affected by the discharge of sewage and industrial waste (coming mainly from the proposed Motunui Syngas plant) on to their traditional fishing grounds and reefs at Waitara. Such pollution was said to be inconsistent with the principles of the Treaty of Waitangi. The Tribunal reported its findings in March 1983, upholding the claimants' case.[12]

Before setting out its findings on the specifics of the Motunui claim, the Tribunal made some important statements on the interpretation of the Treaty, based largely on a memorandum submitted by the Department of Māori Affairs. On the question of a possible conflict between the two texts, the memorandum quoted Lord McNair's text, *The Law of Treaties*, to the effect that 'in the absence of a provision to the contrary neither text is superior to the other', but that it was permissible to interpret one text by reference to the other. However, the memorandum went on to argue that 'should any question arise of which text should prevail, the Māori text should be treated as the prime reference' since this was the text signed by most of the chiefs. The Tribunal made no comment. Nevertheless, it did decide that it was not obliged by statute, nor the precedents of international law, nor Māori tradition, to confine itself to a literal interpretation of the texts of the Treaty. It cited from the Māori Affairs memorandum a paper by I. M. Sinclair, who argued that if the language of treaties was ambiguous or obscure (which was certainly the case with the Treaty of Waitangi) recourse could be had to 'extraneous means of interpretation such as consideration of surrounding circumstances'. Furthermore, treaties were to be interpreted 'with reference to their declared or apparent objects and purposes'; and even 'the subsequent conduct and practice of the parties in relation to the treaty'.[13] Finally, the Māori Affairs memorandum cited decisions of the United States Supreme Court to the effect that treaties made with Indian tribes were to be construed 'in the sense which they would naturally be understood by the Indians'.[14]

All of this argument was relevant to the interpretation of the two texts of the Treaty of Waitangi. It was accepted by the Tribunal 'from the standpoint of European legal concepts', and as being consistent with a Māori approach to the Treaty, which 'would imply that its wairua or spirit is something more than a literal construction of the actual words used can provide. The spirit of the Treaty

transcends the sum total of its component written words and puts narrow or literal interpretations out of place.'[15]

The Treaty was not to be regarded as simply a tract for its time, a 'Maori Magna Carta'. 'It was not intended to merely fossilise a status quo, but to provide direction for future growth and development.' It was to be 'the foundation for a developing social contract'. That contract was not what Hobson had hoped, the formation of one people, but rather the coexistence of two peoples within a single nation. 'The Treaty was an acknowledgement of Maori existence, of their prior occupation of the land and of an intent that the Maori presence would remain and be respected. . . . It established the regime not for uni-culturalism, but for bi-culturalism.' The Tribunal concluded that the Treaty was 'capable of a measure of adaptation to meet new and changing circumstances provided there is a measure of consent and an adherence to its broad principles'.[16]

Although these findings of the Tribunal represent the collective view of its members, there is little doubt that the new chairman, Judge Durie, had a powerful influence in the formulation of that view. In two later lectures on the work of the Tribunal he made similar points. He told a Wellington District Law Society Seminar in September 1986 that 'we can read into the Treaty what we might modernly call the heads of agreement for a bi-cultural development in partnership'.[17] He went on to discuss the novel procedures — particularly respect for marae protocol — that the Tribunal had adopted, and added that the Tribunal had 'regard not only to civil law, but to Maori customary or ancestral law as well'.[18] Overseas this interplay of civil and customary law was common, and customary law held status within the legal systems, in contrast to New Zealand where there had been a steady determination of Governments to apply one law to Māori and Pākehā alike. Lecturing to a race relations class at Auckland University, Judge Durie said that 'as a constitutional document it [the Treaty] must be always speaking. To speak in our time it must be stripped of its old law clothing, and . . . its essential body exposed to view.'[19]

With such general comments in mind, it is useful to examine the Tribunal's interpretation of specific guarantees in the Treaty in relation to the Motunui claim. Like most of the other claims before the Tribunal, Motunui was more concerned with fishing rights than land; as Judge Durie put it later, 'the first Maori claims to the Tribunal came from the sea as though the land was no longer theirs'.[20]

Māori fisheries were specifically protected in the English but not the Māori text of the Treaty. The few Māori who signed the English text at Manukau and Waikato Heads should have been informed of the guarantee, but with the

official publication of this text in 1869 and on numerous subsequent occasions, Māori people generally became aware of it. They made many unsuccessful petitions to Parliament and appeals to the courts for the guarantee to be upheld. It is therefore not surprising that they also appealed to the Waitangi Tribunal, more especially as their traditional fishing resources were threatened by recent economic developments.

In looking at Te Atiawa's claim to the Waitara fishing grounds, the Tribunal accepted their view that these were indeed part of their tribal taonga, their tribal 'treasure troves'.[21] Moreover, the Tribunal argued that the Māori people had retained control over their fisheries by virtue of 'te tino rangatiratanga' in the second article of the Māori text of the Treaty. In the English version of this article 'rangatiratanga' had been interpreted as possession, but the Tribunal argued that 'te tino rangatiratanga' could be taken to mean 'the highest chieftainship' or, indeed, 'the sovereignity [*sic*] of their lands', and that the 'Maori text of the Treaty would have conveyed to the Maori people that . . . they were to be protected not only in the possession of their fishing grounds but in the mana to control them . . . in accordance with their own customs'.[22]

The Tribunal's interpretation of the guarantees in the second article of the Treaty had radical implications, since it struck at the very heart of the longstanding Pākehā doctrine that the transfer of sovereignty in Article 1 provided the foundation for one system of law, British law. Nevertheless, the Tribunal's final recommendations on the Motunui case were mild and conciliatory. It drew attention to the long title and preamble of the 1975 Act, which referred to its responsibility to make recommendations for the 'practical application of the Treaty'. Indeed the Tribunal concluded that it was 'not inconsistent with the spirit and intention of the Treaty . . . that the Crown and the Maori people affected should . . . agree to alter the incidence of the strict terms of the Treaty in order to seek acceptable practical solutions'.[23] In this respect Te Atiawa had agreed to seek a workable compromise. The immediate result was the suspension of the proposed effluent outfall off Motunui, but more than five years later a compromise solution that involved land-based treatment and a new outfall at Waitara had only just emerged. It was likely to take four years to complete.[24]

The Kaituna claim was lodged by Sir Charles Bennett and others of the Ngāti Pikiao tribe against the proposal of the Rotorua City Corporation to divert treated sewage from Lake Rotorua into the Kaituna river. Once again the Tribunal's findings included a lengthy discussion on the Treaty. Much of this was based on memoranda submitted by two academics: by Professor Hugh Kawharu, then Head of Māori Studies and Anthropology at Auckland

University, who discussed the Māori understanding of the meaning of the Treaty; and by P. G. McHugh, Fellow of Sidney Sussex College, Cambridge, who dealt with the legal aspects of the Treaty in relation to customary and colonial law.

Kawharu argued that, since the Māori had an oral culture, the chiefs at Waitangi had placed their faith in the spoken words of the missionary translator, Henry Williams, who was more successful than newcomers like Hobson could have been in persuading them to sign the Treaty. Although the British regarded the transfer of sovereignty as providing them with the authority to establish all the paraphernalia of a Crown Colony, the chiefs saw themselves as surrendering only a part of their rangatiratanga — that which had hitherto 'enabled them to make war, exact retribution, consume or enslave their vanquished enemies and generally exercise power over life and death. . . . [T]hey would [not] wittingly have divested themselves of all their spiritually sanctioned powers. . . . They would have believed they were retaining . . . their customary rights and duties as trustees for their tribal groups.'[25]

Drawing on McHugh's paper, the Tribunal noted that for more than a hundred years it had been assumed in the courts that the provisions of the Treaty had 'no place in New Zealand law', except where they had been incorporated in municipal law.[26] The Tribunal went on to summarise McHugh's attack on this doctrine. McHugh had argued that the 'Colonial policy of the British Crown included punctilious recognition of the rights of indigenous peoples wherever the British flag was raised'. He cited evidence for this from British policy in North America from the beginning of the seventeenth century, including a Crown right of pre-emption to purchase land. And he concluded that by 1840 it was 'a settled principle of colonial law that the land rights of aboriginal people were protected by the Crown', citing Lord Normanby's Instructions to Hobson to this effect. McHugh maintained that the rights guaranteed in the Treaty were respected by New Zealand courts until the Prendergast judgment of 1877, which argued that the Treaty 'could not transform the natives' right of occupation into one of legal character since, so far as it purported to cede the sovereignty of New Zealand, it was a "simple nullity" for no body politic existed capable of making such a cession of sovereignty'. McHugh argued that Prendergast's proposition was wrong since it was based on a concept of international law and not on established principles of colonial law. All subsequent judgments that applied the Prendergast argument were wrong for the same reason.[27]

The Tribunal concluded that there was 'much force in Mr McHugh's argument',[28] but it did not attempt to make a ruling, preferring to leave that

to the courts in the event of the matter being raised there. Since the Tribunal was not a court it could not issue judgments, but it could, and did, speak out boldly on matters within its statutory jurisdiction. The Tribunal did have such authority to make a finding on whether any act or omission of the Crown under any statute, regulation, or Order in Council that had remained in force since 1975 was inconsistent with the *principles* of the Treaty: 'any Act on the statute books that prejudicially affects a Maori may give rise to a claim no matter when it was passed by Parliament'.[29] It added that this 'wide power enables us to look beyond strict legalities so that we can in a proper case identify where the spirit of the Treaty is not being given due recognition'.[30] Likewise, the Tribunal's Act required that any future legislation or policy of the Crown 'must be measured against the principles of the Treaty'.[31] And the Tribunal concluded:

> This is a remarkable result. From being a 'simple nullity' the Treaty of Waitangi has become a document of importance approaching the status of a constitutional instrument so far as Maoris are concerned. . . . But it does expose the Crown to the risk of a claim that the statute in question is in conflict with the Treaty and . . . it would seem prudent for those responsible for legislation to recognise the danger inherent in drafting statutes or regulations without measuring such instruments against the principles in the Treaty.[32]

So far as the Kaituna claim was concerned, the Tribunal concluded that the proposed pipeline to discharge effluent into the Kaituna river was likely to prejudice the claimants' spiritual or cultural values and reduce the quality of their fisheries in the river. It also found that Ngāti Pikiao had retained uninterrupted ownership of the river since 1840, and with that the right to fish the river, its estuary and the adjacent sea, and to use the flora along its banks. These were taonga that were guaranteed to them by the Treaty. Finally, the Tribunal recommended that the Rotorua City Corporation investigate alternative land-based sites for disposing of the effluent that would avoid Lake Rotorua and the Kaituna. The corporation subsequently adopted a scheme to spray treated effluent on to the Whakarewarewa State Forest.

By contrast to Kaituna, the Manukau claim was large and complex; the most wide-ranging that the Tribunal had so far considered. It was lodged by Nganeko Minhinnick and Te Puaha ki Manuka, a section of the Waikato-Tainui tribal group, who claimed that their use and enjoyment of their land and traditional fishing groups had been or would be prejudiced by a variety of private and public works on or adjacent to the Manukau Harbour. A major concern was

the proposal by New Zealand Steel Ltd to take water from the Waikato river for a slurry pipeline and to discharge the effluent into the Manukau. Such works were said to be in contravention of the promise of the Treaty of Waitangi to full, exclusive, and undisturbed possession of Māori lands, homes and fisheries.

To provide a context for the events since 1975, which were within its jurisdiction, the Tribunal embarked on a lengthy history of the sufferings of the Tainui and Ngāti Whātua peoples of the Manukau, 'because consequences have followed that still have their effects today'.[33] The Tribunal examined what it called 'The Land Wars: Te Riri Pākehā or "the White Man's Anger"'; that is, the attacks on the homes and property of the Māori people of Manukau on the eve of the invasion of Waikato in 1863, and the subsequent confiscation of much of their land under the New Zealand Settlements Act 1863. This survey was based mainly on the Report of the 1927 Royal Commission on Confiscated Lands which in turn had relied largely on the contemporary observations of J. E. Gorst in his book *The Maori King* (1864). But the Tribunal also referred to the work of more recent historians and quoted at length from Keith Sinclair's *The Origins of the Maori Wars* (1957). The Tribunal concluded: 'all sources agree that the Tainui people of Waikato never rebelled but were attacked by British troops in direct violation of Article II of the Treaty of Waitangi'.[34] Altogether 58,877 hectares of land were confiscated, although small portions of this were subsequently returned, including some land around the marae at Ihumatao where the Tribunal held its sittings.

From the confiscations during the wars of the 1860s, the Tribunal went on to investigate 'Te Riri Ture, the Anger of the Law', whereby private purchasers and public authorities used a variety of legal means to acquire much of the Māori land that had remained after the confiscations. The loss of land had left an enduring mark on the Māori people of Manukau: 'For them it is as though the confiscations and dealings occurred yesterday.' But there could be no 'happier base' for the coexistence of the races 'that was once the hope implicit in the Treaty of Waitangi' unless 'we . . . lay bare the truth of history for he who does not know the past will never understand the present'.[35] Of course the Tribunal could not right the wrongs of the past — at least those prior to 1975 — so it fell back on an impassioned plea to Government to do so: 'We are frankly appalled by the events of the past and by the effect that they have had on the Manukau tribes. Unlike our jurisdiction, that of the Government is not constrained. . . . It may be practicable to provide a measure of relief at this stage. . . . [W]e would urge that steps be taken now, for they are long overdue.'[36] No such relief has been provided.

The Manukau claim was not confined to the land; the claim to the harbour and its food resources was equally important. As the Tribunal put it: 'The harbour was as much owned and apportioned to the care and use of different tribes as the land was. To the local tribes the Manukau was their garden of the sea. Accordingly, to them any loss of the use of the harbour is as much a loss as the loss of the land.'[37] With the harbour the Tribunal had an opportunity to take up and develop issues already investigated in the Motunui and Kaituna claims.

For a start the Tribunal dealt with what it called the 'comprehensive claim' — to ownership of the Manukau Harbour. The Tribunal acknowledged that under English common law the Crown owned harbours and foreshores, and that this had been consistently maintained in legislation and in court decisions in New Zealand, although in the case of the Manukau the tidal lands had been vested in the Auckland Harbour Board by the Manukau Harbour Control Act of 1911. On the other hand the Manukau tribes maintained that the harbour was theirs under customary law and that the Treaty promised them that Māori customary law would prevail: 'It is on the Treaty that they pin their hopes, the hope that the Treaty will be upheld as the supreme law.'[38] In the end the Tribunal did not support the claim of the Manukau tribes to ownership of the harbour; it merely suggested that they should have a share, as kaitiaki or guardians, in the control of it.

The Tribunal then proceeded to examine the vexed issue of fishing rights, noting that section 88(2) of the Fisheries Act 1983 specified that 'nothing in this Act shall affect any Maori fishing rights'. However, the question remained of whether there were any such rights, since the courts had persistently denied that the fishing rights guaranteed by the Treaty had any legal standing. Although legislation had allowed Māori fishing grounds to be set aside, this had not been done — except in the case of some oyster beds set aside on the Manukau at the turn of the twentieth century. Only one of these, known as the Needles Reserve, was still in existence, but the oysters there had died. As the Tribunal put it: 'For the Manukau people the law is as empty as the oyster shells on the Needles Reserves . . . .'[39] Although the Fisheries Act of 1983 allowed special reserves to be established, past experience of the Department of Agriculture and Fisheries suggested that Māori fishing grounds would not be reserved. The Tribunal admitted that the reservation of Māori fishing grounds had been destroyed by pollution, public works and reclamations.[40]

Yet the Tribunal was not content to confine its findings to traditional fishing and held that the Manukau tribes should have a share in commercial fishing in the harbour. It noted that some countries, more particularly Canada and the

United States, had gone much further than New Zealand in expanding customary rights 'not just to fish, but to husband and harvest fishing for domestic and commercial purposes'.[41] Yet the Ministry of Agriculture and Fisheries, though it had the power under the Fisheries Act of 1983 to confer 'special rights' on 'special communities', had not even considered granting such rights to the Manukau tribes; nor had the Department considered 'compensating Māori interests for the depletion of their fisheries',[42] though it had admitted that the harbour was seriously over-fished. The Department, the Tribunal concluded, 'has not discharged its responsibilities in respect of the Manukau harbour'.[43]

But, despite such criticism, the Tribunal's recommendation was mild and compromising. It would be 'unfortunate', the Tribunal maintained, 'if Maori fishing rights fell to be determined solely on a literal interpretation of the Treaty which guarantees as *exclusive* use of *all* Maori fisheries, for Maori fisheries are extensive and indeed, the whole of the Manukau could be described as a traditional Maori fishery'.[44] It was necessary to make compromises, to minimise the conflict between Māori, private and commercial fishing interests, and to begin a search for options available for the recognition and protection of Māori fishing grounds and securing compensation for Māori fishing losses. It was necessary to identify 'particularly important tribal fishing grounds'[45] and, in the meantime, to reserve the Whatapaka and Pukaki inlets as the claimants had requested. This was a far cry from concluding that the Manukau tribes should be given an exclusive right to the kai moana of the whole harbour.

So far as New Zealand Steel's slurry pipeline was concerned, the Tribunal concluded that there was not great danger to the environment or the fisheries in the transfer of water from the Waikato river to the Manukau. But it did not accept the claimants' view that the transfer was culturally offensive: that the 'mauri of the two water bodies is incompatible'. The Tribunal went on to observe that: 'In our multicultural society the values of minorities must sometimes give way to those of the predominant culture, but in New Zealand, the Treaty of Waitangi gives Maori values an equal place with British values, and a priority when the Maori interest in their taonga is adversely affected.'[46] Although the Tribunal recommended a change in the laws to admit Maori values, it accepted that New Zealand Steel had been granted a water right to discharge the water from the pipeline into the Manukau but hoped that it would be able to work out an acceptable compromise with the claimants.

In its general findings the Tribunal concluded that: 'In the Manukau the tribal enjoyment of the lands and fisheries has been and continues to be severely prejudiced by compulsory acquisitions, land development, industrial

developments, reclamations, waste discharges, zonings, commercial fishing and the denial of traditional harbour access.'[47] The failure of the Crown to provide a protection against these things was contrary to the principles of the Treaty of Waitangi. Admittedly, such omission had begun last century with the policies that led to war and confiscation of tribal territories, but it had continued into the twentieth century, even beyond 1975 with 'an omission to recognise or give appropriate priority to Maori interests in laws and policies and in planning'.[48]

The Tribunal wanted such omissions to be rectified in future legislation and policy. The Ministers concerned were asked to consider amending a great deal of legislation to ensure that Māori sensibilities, rights and interests were taken into account in planning and development relating to the Manukau and its environs. The Ministry of Agriculture and Fisheries was called on to carry out urgent and comprehensive research into Māori traditional fishing activity 'for the recognition, protection or compensation of Maori fishing interests'[49] and on the effects of commercial fishing in the Manukau and the lower Waikato river. The Tribunal called for the formulation of a Manukau Harbour Action Plan to take positive measures for the cleaning up of the harbour, and for the appointment of guardians representing Māori and environmental interests. Pending the formulation of the Action Plan, the Minister of Transport was asked to suspend further reclamations of the harbour — as it turned out, the only one of the Tribunal's recommendations that the Government set aside for further study late in 1986. But acceptance of the other recommendations did not mean action; three years later, most of them are still not implemented.[50]

In contrast with the complicated Manukau claim, the Te Reo Māori claim was singular and straightforward. It was lodged by Huirangi Waikerepuru on behalf of Nga Kaiwhakapumau i te Reo Inc. (the Wellington Board of Māori Language), which asked that Māori be recognised as an official language throughout New Zealand for all purposes. Despite this apparent simplicity, the claim was regarded by the Tribunal as potentially the 'most difficult' so far, in view of its political, social and financial ramifications.[51] The four weeks' sitting was the longest the Tribunal had held. But those who spoke did so with a rare degree of unanimity. 'They "came from the four winds" and they spoke with one voice.'[52]

The Tribunal concluded from the evidence and argument presented that 'by the Treaty the Crown did promise to recognise and protect the language and that promise has not been kept. The "guarantee" in the Treaty requires affirmative action to protect and sustain the language, not a passive obligation to tolerate its existence and certainly not a right to deny its use in any

place.'[53] These bold assertions were argued at greater length later in the report. Although the Māori language was not specifically listed in the Māori possessions guaranteed in the second article of the English text of the Treaty, it came under the heading of 'o ratou taonga katoa' in the Māori text, variously translated 'as all their valued customs and possessions', or 'all things highly prized'. In the Manukau finding, the Tribunal had decided that taonga in the context of the Treaty meant more than objects of tangible value and included intangibles. So in the Te Reo Māori finding, the Tribunal simply concluded that 'the language is an essential part of the culture and must be regarded as "a valued possession"'.[54] The version of the Treaty signed by most of the Māori chiefs was in their language and 'the right to use the Maori language would have been one of the rights expected to be covered by the Royal guarantee by those chiefs who signed the Treaty'.[55] It was unlikely that many of the chiefs would have signed had Hobson denied that the guarantee covered their language.

Having established these points of principle, the Tribunal went on to consider the teaching of Māori in the education system, praising recent developments such as the kohanga reo — the language nests for pre-school instruction in Māori — yet also lamenting the fact that too many Māori children were not reaching a sufficient level of attainment in their formal schooling. 'The promises of the Treaty of Waitangi of equality in education as in all other human rights are undeniable.[56] Judged by the system's own standards Maori children are not being successfully taught, and for this reason alone, quite apart from the duty to protect the Maori language, the education system is being operated in breach of the Treaty.'[57] Nevertheless, the Tribunal did not attempt to determine what was wrong with the system, and was content to call for an urgent inquiry into the way Māori language and culture were taught in the schools.

The other major area discussed was broadcasting, but, since a Royal Commission was currently investigating the broadcasting system, including the role of Māori language and culture, the Tribunal thought it inappropriate to make any specific recommendations. It was content with a broad generalisation: 'It is consistent with the principles of the Treaty that the language and matters of Maori interest should have a secure place in broadcasting.'[58]

Finally, on the large question of the official recognition of the Māori language, the Tribunal was equally restrained. There was no opposition to the proposition that the language should be officially recognised — not one of the Government departments consulted by the Tribunal had opposed the idea — but the Tribunal was not prepared to go very far in terms of practical measures. For instance, it turned down a demand that all public documents, notices and newspapers should be printed in both Māori and English, largely on the ground of expense. On the other hand the Tribunal did recommend that Māori ought to be allowed to use their language in the courts and in dealing with Government departments or local authorities. But once again the Tribunal was cautious in applying this proposal: it was unwilling to require fluency in Māori as a condition of appointment to all positions in the civil service, and merely suggested that this should be a requirement in some positions and a qualification to be encouraged in others. The Minister of Internal Affairs was asked to establish a statutory body to supervise and foster the use of the Māori language.

Thus, in the Te Reo Māori claim, as in the earlier ones, the Tribunal's findings were potentially radical, but its recommendations were mild and accommodating, and could be achieved without much pain or expense to the predominant Pākehā community. Whether this will always be so is a moot point, more especially under the new regime created by the Treaty of Waitangi Amendment Act 1985. That amendment enlarged the Tribunal to seven and gave it a built-in Māori majority by requiring at least four of the members to be Māori. The Tribunal was allowed to observe 'te kawa o te marae' as it thought appropriate for a particular case, provided that it did not deny any person the right to speak on grounds of sex — a provision that was clearly intended to overcome the custom which prevented women from speaking on some marae. But the biggest change of all was the extension of the Tribunal's jurisdiction back from 1975 to 6 February 1840, when the Treaty was signed by northern chiefs at Waitangi. The change had enormous potential since every act or omission of the Crown in some way related to the principles of the Treaty since 1840 came within the purview of the Tribunal. But despite this greatly enlarged jurisdiction, the Tribunal still could not do more than make recommendations. Since it was clear that there would be a great increase in the Tribunal's work, the amendment also provided for extra assistance. The Tribunal was allowed to sit with a quorum of three people (one of whom had to be a Māori), each of the members was to have a deputy, counsel could be appointed to assist the Tribunal and/or the claimants, and extra staff could be appointed to assist with administration and research. Finally, the errors in the Māori text of the Treaty printed as a schedule to the 1975 Act were corrected.

It is hardly surprising that the amendment encouraged a veritable flood of claims; within two years, more than 160 had been submitted. These represent merely the tip of the iceberg, since there is not a Māori community in the country that does not have grievances over the loss of land or other resources, tangible or intangible. Many grievances have already been the subject of inquiry

by official commissions, though the Māori claimants were often dissatisfied by the results, and are likely to try again before the reconstituted Tribunal. A notable case is the raupatu — the confiscation of Māori land carried out under the New Zealand Settlements Act 1863 during the New Zealand wars — which was the subject of a Royal Commission in 1927. Although that Commission's recommendations were eventually given effect by the Government, the Māori tribes involved have long been dissatisfied with the scope of the Commission's findings and the amount of compensation awarded. Some submitted claims to the Tribunal. Other old land grievances had already appeared in claims now before the Tribunal. In the Taipa claim, for instance, Crown purchases of the 1840s in the Mangonui district were called in question; so too the Crown's handling of the pre-1840 land claims, including the retention of the 'surplus land' not awarded to the European claimants, which was retained by the Crown and was the subject of a Royal Commission in 1948.

In the revived Orakei claim the Crown's role in the purchase of 283 hectares of prime waterfront land near the centre of Auckland city was examined by the Tribunal under its 1985 amendment. Since any act or omission of the Crown in relation to the block since 1840 could now be in breach of the principles of the Treaty, the Tribunal was obliged to prepare a detailed history of the Crown's acquisition of the block. The Tribunal made an exhaustive examination of the documentary record — reports of previous inquiries, departmental files, Native Land Court records, newspapers, historical dissertations and essays — and took written submissions from interested parties and members of the public. It also recorded the oral testimony of Ngāti Whātua kaumātua and kuia; this provided a traditional perspective on Ngāti Whātua history and vivid testimony of the more recent, harrowing events in the long-running Orakei saga. This material was compressed into a narrative history of the Crown's acquisition of the Orakei block which ran to more than 100 pages, over half of the final report issued in November 1987.[59]

The narrative provided a platform for an analysis of the scope of the Treaty and breaches of its principles. In the Tribunal's view the 'critical damage' was done by the Native Lands Acts of 1865 and 1867 and an 1869 Order of the Native Land Court

> vesting the whole of the land then in communal ownership in thirteen members only of the tribe as legal and beneficial owners, to the complete exclusion of the great majority. This necessarily destroyed the mana or authority of the tribe in and over their land. Subsequent breaches of the Treaty built upon and reinforced these . . . critically destructive violations . . . . Nor, in many cases, did the Crown comply either with its statutory or Treaty obligations to ensure that Ngati Whatua owners would not be rendered landless. That Ngati Whatua were powerless to prevent the consummation of the Crown's objective of obtaining the whole of their land was finally demonstrated by the Public Works Act taking of the 10 acre exchange block and the papakainga accompanied by the ejection of all those living on there and, shortly thereafter, by the physical destruction of . . . the marae, leaving only the Church and urupa intact.[60]

Since large areas of Māori land in other parts of the country were acquired in a similar manner, the Tribunal's findings in the Orakei claim were likely to have considerable influence when it considered other claims.

Nevertheless, in keeping with the attitude of the old Tribunal, the recommendations of the new Tribunal in the Orakei claim were restrained and achievable.[61] The Tribunal accepted the fact that the bulk of the land acquired by the Crown had already passed into private ownership; some of it was occupied by high-value houses, the remainder by State houses, many of which had also passed into private ownership. However, the Tribunal did recommend that Ngāti Whātua people be given preference in the allocation of remaining State houses in the block. Most of the land still in Crown ownership was in public reserves and used for active or passive recreation. These included the 15-hectare Okahu Park sports grounds and the 38.5-hectare Bastion Point headland which the Tribunal recommended should be transferred to a Ngāti Whātua of Orakei Reserves Board, composed of equal numbers of Ngāti Whātua and City Council representatives. But they were to remain as public reserves. The Ngāti Whātua Trust Board was to retain the former State houses of Kitemoana Street, to gain ownership of a 1.79-hectare block which the Housing Corporation had proposed to sell for private housing, several other small sites, and regain control of the marae, church and urupā. Finally, the Tribunal recommended that a $200,000 debt be cancelled and that Ngāti Whātua of Orakei be awarded a general payment of $3,000,000, as a tribal endowment for housing and other purposes.

In this last recommendation the Tribunal had shied away from attempting to quantify Ngāti Whātua's loss in terms of the capital value of the land within the Orakei block, a sum which would have run into many millions of dollars. Instead, the Tribunal tried to calculate the minimum sum that would be needed to provide an economic base — or at least adequate housing — for those members of the tribe who wished to return to Orakei. Since the bulk of the land to be returned to Ngāti Whātua was to remain in public reserves, there was little

left over for other tribal economic activities. In relation to the true market value of the land, the $3,000,000 payment was cheap. It was accepted with some relief by Treasury[62] and Government, along with nearly all of the Tribunal's other recommendations. The settlement, with its emphasis on the cheaper alternative of a tribal endowment, set a precedent for the settlement of other land claims.

The other major claim reported on by the new Tribunal — the Muriwhenua fishing claim — could not be so easily resolved, though the Tribunal's report[63] was no less significant than that on Orakei. Part of a broader claim that included land and spiritual concerns, the Muriwhenua claim was lodged by the Hon. Matiu Rata, the Te Hapua 42 Incorporation, and the five northern tribes: Ngāti Kurī, Te Aupōuri, Te Rārawa, Ngāi Takoto and Ngāti Kahu. But the hearing of those other claims was set aside to enable the Tribunal to report on the fishing claim. During the first hearing at Te Hapua in December 1986 it was disclosed that the Ministry of Agriculture and Fisheries was about to issue further fish quota which the claimants held contravened their rights under the Fisheries Act and the Treaty of Waitangi. The Tribunal's plea for the quota to be withheld was not accepted by the Minister. The Tribunal's hearings continued but in September 1987, when the Ministry was preparing to issue yet more quota, the chairman of the Tribunal issued a statement that the issue of quota 'would be contrary to the principles of the Treaty'[64] and called on the Crown to negotiate with the Muriwhenua claimants before taking further action. At the same time counsel for the claimants began an action in the High Court where Mr Justice Greig issued an injunction restraining the issue of further quota in the Muriwhenua district. In November a separate action in the Court resulted in a further injunction over the issue of fish quota for the remainder of the country. The Government then set up a Joint Committee, with four of its own nominees and four representatives of the New Zealand Māori Council, to try to negotiate a settlement on the allocation of fishing quota. While those negotiations proceeded the Tribunal came under considerable pressure to complete its hearings and report on the Muriwhenua fishing claim. The findings of the Tribunal on the extent of Muriwhenua fisheries, the nature of the Treaty guarantee on Māori fishing rights, and possible breaches of these by the Crown were likely to be of crucial importance in the Joint Committee's negotiations. Meanwhile, the Tribunal had been proceeding with its hearings of the claim: it held sittings at Ahipara in March, Kaitaia and Auckland in April, and at Wellington in September 1987 and in March and April 1988. The report was issued in June.

Although it referred only to the fishing claim, the report was no mean document; indeed at 371 pages it was considerably longer than the Orakei

Report. And, although Māori fishing rights had been an important component of earlier Tribunal inquiries, the Muriwhenua Fishing Report was by far the most comprehensive examination of traditional Māori fisheries and their progressive diminution since 1840 that had yet been published. At its hearings in the North the kaumātua provided the Tribunal with a wealth of oral evidence on the nature of fishing practices, their fishing grounds and the species caught. This was taken into account alongside the extensive documentary evidence assembled by the Tribunal's consultant, Dr George Habib, from the journals of early European navigators, the accounts of ethnographers, and the findings of archaeologists.

From this material the Tribunal concluded that the Muriwhenua tribes had made 'full and extensive fishing use' all round the year of their fresh water and coastal fisheries (out to about 3 miles), 'intensive and regular but mainly seasonal' use of the balance of the continental shelf (to about 12 miles), and occasional use of selected fishing grounds beyond (even, in one case, a fishing ground 48 miles off shore).[65] The fishing technology was in some respects superior to that being used by Europeans at the time. For instance, James Cook discovered in 1769 that Māori nets were considerably larger than the ones he had on board the *Endeavour*; such nets were still being used a century later. Moreover, the Tribunal found (and during the hearing counsel for the Crown conceded the point) that traditional Māori fishing had a 'commercial' component in that coastal tribes habitually traded fish for other products with inland tribes. That 'commerce' expanded with the arrival of Europeans, so that by the 1840s Māori were the main suppliers of fresh fish to the burgeoning markets in the new settlements. Although the tribes of the Far North gained little of this new commerce, they continued to fish commercially, if on an intermittent basis, as they did for domestic consumption. Nevertheless, as the Tribunal's report went on to demonstrate, Māori were progressively eliminated from the commercial fishery from the later nineteenth century. Although fisheries legislation provided some protection for Māori fishing rights, it was assumed that these were confined to the gathering of fish or shellfish for domestic consumption and that it was unnecessary to provide specific protection or assistance for Māori in the commercial fishing industry. The Tribunal found that the failure of Government to provide for such protection or development was contrary to the Crown's obligations under the Treaty. In its interpretation of the Treaty, the Tribunal concluded that the guarantee to Māori of 'the full exclusive and undisturbed possession of their . . . fisheries' (in Article 2 of the English text) meant precisely what it said. The 'only difficulty with the words', the Tribunal added, 'is

the inconvenience they present. The meaning is altogether too clear. "Exclusive" means "exclusive" . . . .'[66] It added that there was nothing inconsistent in the Māori text (which did not specify fisheries, although these were by implication included in taonga, or valued possessions). Moreover, the Māori text guaranteed Māori the rangatiratanga (not merely possession but chiefly control) over their taonga. They were guaranteed possession and control over their fisheries so long as it was their wish to retain them. Unlike the situation over land, there was no specific provision for alienation of fisheries — and nowhere in the historical record was there any evidence that Māori, in Muriwhenua or elsewhere, had alienated their fisheries or willingly surrendered their control over them. On the contrary, there was a massive array of evidence, much of it documented by the Tribunal, of Māori protest, by petitions and otherwise, of their loss of fisheries since 1840.

This loss has been most pronounced in the last few years, although some Māori, including a number of Muriwhenua fishermen, had participated as individuals or in joint ventures in the commercial fishery over the years, most notably in the years of unrestricted licensing between 1963 and 1983. But that lack of restriction, especially with the opening up of export markets, encouraged gross overfishing of the inshore fisheries. By 1980 the Ministry of Agriculture and Fisheries recognised the need to reduce the total allowable catch. In 1983 a moratorium was placed over the issue of new licences and those not in use were cancelled. When new licences were issued, in the form of individual transferable quotas (ITQs), these were based on a pro rata reduction of a fisherman's average catch over the previous three years. As a result many small or part-time fishermen, if they got quota at all, received so little that it was uneconomic, and they sold out to the larger holders. The Ministry had clearly embarked on a policy of removing small fishermen from the industry; in 1964–65 nearly 300 were eliminated in Northland alone and these included at least 29 Māori fishermen, nearly all of those involved in commercial fishing in the Muriwhenua area.[67] Moreover, the Ministry persisted with this policy in the face of the Fairgray Report of September 1988 which warned of the grave economic and social consequences of the policy for Northland communities. Unless there was a major reversal of the policy, the Tribunal concluded, 'the traditional association of the Muriwhenua people with their ancestral seas will be non-existent, and their communities will be in disrepair'.[68]

It was evident that the Muriwhenua Fishing Report had important implications for the rest of the country. What had been said of Māori fishing in Muriwhenua clearly applied, to a greater or lesser extent, to the fisheries of

other tribes, not least the Ngāi Tahu of the South Island whose claim, which included rights to fisheries right around the island, was also being heard by the Tribunal. Clearly the Muriwhenua Fishing Report added considerable substance to the claims of the New Zealand Māori Council negotiators on the Joint Committee. Indeed much more could be claimed than the Government could readily concede, and it is not surprising that negotiations became acrimonious and inconclusive.

What of the future? Since the Waitangi Tribunal was a creation of the legislature, it always had an uncertain future, one that was subject to the whims of the politicians and ultimately the electorate. Legislation then before the House to increase the membership of the Tribunal would hopefully improve its chances of reducing the backlog of claims. But one thing was certain: so long as the Tribunal retained its retrospective jurisdiction to 1840, it would continue to recover a hitherto largely submerged Māori history of the loss of resources and mana, supposedly protected by the Treaty. The Tribunal's findings are not always going to be palatable to many New Zealanders, but it would be perilous to ignore them.