TE MANUTUKUTUKU

Te Roopu Whakamana i te Tiriti o Waitangi Panui

Waitangi Tribunal Division Department of Justice Newsletter

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WAITANGI TRIBUNAL

1993: END OF YEAR STATEMENT

The Tribunal chairperson has released the following overview of the Tribunal's operations as an end of year statement.

Accountability: Roles of Ministry of Maori Development & Department of Justice

- The Treaty of Waitangi Act 1975 under which the Tribunal operates, is administered through the Minister of Maori Affairs.
- By law the Tribunal must report its findings on any claim to the Minister of Maori Affairs and "such other Ministers ... as have an interest in the claim" (s6(5)).
- The Minister of Maori Affairs is to report annually to Parliament "on the progress being made in the implementation of recommendations made to the Crown by the Tribunal" (s8I). Te Puni Kokiri assists the Minister in that matter. A report was completed for 1993.
- The chairperson of the Tribunal is the Chief Judge of the Maori Land Court (s4 (2)). The chairperson may appoint any judge of the Maori Land Court to preside in his stead on any inquiry (cl 5(1) second schedule). The judges are all appointed through the Minister of Maori Affairs.
- Tribunal Members are also appointed on the recommendation of the Minister of Maori Affairs (s4 (2)).
- However, the Department of Justice is to furnish "such secretarial, recording and other services as may be necessary" (s4(5). The Tribunal's staff members are officers of the Department of Justice and the Tribunal's budget is provided through Vote Justice.

Membership

In addition to the chairperson, the Act provides for a maximum of 16 additional members. Presently there are 15. The Tribunal has asked that the vacancy be not filled until the new workload of the Judges under the Ture Whenua Maori Act has been assessed. It will affect the type of person needed for the vacancy if the Maori Land Court judges are less frequently available.

Members may be appointed for any term not exceeding three years, and may be reappointed for a further term. A rotational retirement scheme applies.

Members whose terms have expired continue in office to complete claims in hearing that involve them (cl 1 Second Schedule). Three former members are continuing to hear claims under that provision.

The Tribunal has one full-time member. Most other members have other commitments but several would work full-time if the Tribunal's finances permitted.

Appointments

Members are appointed on the recommendation of the Minister of Maori Affairs after consultation with the Minister of Justice (s4(2)). In considering the suitability of persons for appointment it is required that the Minister of Maori Affairs shall have regard to:

- the partnership between the two parties to the Treaty; and
- the candidate's personal attributes and knowledge and experience in the different matters likely to arise (s4(2A)).

This affirms the role of the Tribunal as an expert body with specialist knowledge.

These additional criteria appear also to be important:

- the maintenance of a Maori-Pakeha balance (presently there are seven Maori, eight Pakeha);
- the maintenance of gender representation (presently there are seven women, eight men); and
- inter-disciplinary representation (presently, there are Maori kaumatua, Pakeha kaumatua, lawyers, historians and graduates in Maori studies).

More than one is needed in each discipline as different Tribunals are constituted from the membership for any one inquiry. The inquiries demand much effort and since most members work on a part-time basis, many cannot attend to more than two claims per annum. There is a need for more members to work full-time but this cannot be done under the existing budget.

Claims

The claims may be arranged in three categories:

- historical (past Government actions);
- contemporary (current Government actions); and
- conceptual ('ownership' of natural resources).

Historical claims may be divided to:

- major claims (large tribal losses); and
- 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 therefore involve as many as 30 claims. This practice has reduced the workload, has increased efficiency, and has placed specific claims in an appropriate context. The claims are generally presented tribally.

Historical claims cover many areas of which the main ones appear to be these:

- the confirmation of pre-Treaty purchases;
- Crown (and some private) purchases to 1865 under Crown-Maori negotiations;
- Crown and private purchases under the Native Land Court system;
- confiscations and expropriations (including Public Works);
- title arrangements and land development under the Native Land Court system; and
- tribal autonomy.

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

Historical and resource claims are dealt with separately. Regrettably, contemporary claims are rarely considered now as a result of this other workload.

From the categorisation of claims as above it is considered:

- The Tribunal's claims register (of 396 claims at 30 November) 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 has been considered that the historical claims could involve 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. In these cases 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. Many urgent requests have concerned the alienation of state assets. In recent months urgency has been granted for:

- Maori Development Corporation (Crown share transfer)
- Otamarakau (sandmining)
- Whanganui River (Water Conservation Order application, Regional plan proposals, new bylaws etc)
- Ikawhenua (power asset disposals)
- Turangi (Public Works disposals)
- South Auckland (DOC land alienation)
- Te Maunga Railway lands (Public Works disposals).

Several other requests for urgency await determination. Many have been declined.

The Tribunal does not grant urgency to accommodate illegal occupations and will not intervene on matters that are or could be the subject of court proceedings.

Inquiries

From the total membership separate Tribunals (of not less than 3 nor more than 7) are constituted for different inquiries. These may be chaired by a Maori Land Court judge or a Tribunal member of at least seven years legal standing (cl 5(1)(2) second schedule). The Tribunal could conduct many more inquiries if finances permitted.

The Tribunal may, in terms of section 5A:

- commission any person, whether or not a member of the Tribunal's staff, to undertake any particular research; and
- authorise claimants to commission research (from out of the Tribunal's budget).

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 that is required.

In 1988 and subsequently, the Tribunal was empowered to make 'binding recommendations' in respect of State Enterprise assets, including those onsold to private interests, and certain Crown forests. This has affected the process requiring a higher evidential standard, loss quantification and more legal argument, where substantial 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 have been 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.

Research and Claim Management

The Tribunal's experience is that research and good claim management provides the key to the more efficient despatch of the long outstanding business. This involves considerable archival investigation. The following points are noted under this heading:

- The funding of claimants to conduct their own research has produced some work of uneven quality which has generated extra auditing costs. On the other hand the engagement of professionals, while more cost efficient, has left claimants rightly complaining of the capture of their claims by academics. The Tribunal has found it best therefore to marry professional researchers with claimant research committees.
- With hearing costs at some $20,000 per week, the Tribunal has found it necessary to reduce the number of its hearings and 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 has found it best to require that the research be compiled before hearing, that procedural and research issues be settled at preceding judicial conferences and that the hearing of the people's evidence be severed, in hearings, from academic submissions and legal argument.
- The Tribunal has a budgetary allocation of $400,000 per annum for the funding of claimant research. This is considered a very small fund considering the number of claims and the tasks the claimants must perform.
- There is no statutory provision for the funding of tribal claim managers. The role of tribal claim managers is seriously underrated in the Tribunals' view especially for those claims involving large numbers of people and inter-related hapu. Claims have proceeded best and with less cost where there is a well-funded claim committee under good management.
- The inquiry into historic claims involves considerable historical interpretation. It is therefore important that the Tribunal has the benefit of competent competing arguments. The Tribunal considers it is much assisted in that respect by Crown Law Office. The maintenance of a strong research unit within the Crown Law Office is seen as essential.
- Official information has been mainly accessed by researchers and in the Tribunal's view it should continue to be; but information on the historical devolution and alienation of Maori land is best accessed through the Maori Land Information Office which operates within the Maori Land Court. This office was constituted as a result of the New Zealand Maori Council's settlement with the Crown in 1987 and was for the purpose of providing claimants with ready access to official information. Presently, information is available from the office to claimants at the claimants' request. It would assist if the Maori Land Information Office was also to provide information direct to the Tribunal on the Tribunal's request in order to ensure the availability of that data and in its original form, to the Tribunal and to all interested parties and persons.
- The Tribunal research staff itself has completed research on a number of single issue claims that will be heard as ancillary to major claims.
- The Tribunal has found that there is very little research that has been unnecessarily duplicated or that was not essential for the inquiry.
- There is a close relationship between research and the Tribunal's programme of operations and the maintenance of the Tribunal's own research staff is also seen as important.
- In researching, co-ordinating research and in claim management, certain protocols are observed within the Tribunal:

- that staff must develop good working relations with claimant groups but must also protect the Tribunal's independence;
- that the Tribunal must consider the research required but cannot interfere on the formulation of research opinion.

Contrary to some views, the bare facts cannot be severed from interpretation, and accordingly an expert and professional staff is necessary.

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 Rangahau Whanui research project. The project is well advanced and should be completed in about two and a half years. It serves:

- to give equal weighting to all historic claims;
- to ensure that issues germane to several claims are dealt with generically to avoid research duplication; and
- to enable a national overview of the claims position to be obtained.

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 generally 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 then elect to negotiate a settlement. The second step is activated only if negotiations are not preferred or if negotiations fail. The parties will then be heard on remedies and the Tribunal will report its recommendations.

This process is seen to facilitate negotiations where negotiations are preferred. Hopefully, it will also promote lasting settlements by ensuring that the parties have the benefit of comprehensive report covering all aspects before settlements are considered.

Claims Resolution and Tribal Rangatiratanga

Research to date suggests there is not one tribal group without a valid claim of one sort or another. This was apparent to the Tribunal as early as 1987 and led the Tribunal to conjecture whether the most practical course was to concentrate on positive programmes for the restoration of the economic base of the tribes according to appropriate tribal groupings. There is nothing in subsequent research to cause the Tribunal to resile from that opinion.

Representation Issues

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

- customary representation (which hapu or iwi have customary interests in any particular area?);
- level of representation (what matters should be settled at a hapu, iwi or national level?);
- 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:

- 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
- 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.

The Tribunal has considered:

- The legislation thus distinguishes between customary and modern representation.
- 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.
- 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.
- Questions of modern representation are not generally referred to the Maori Land Court except for a specific purpose and on evidence that the interested parties are unable to resolve the issue. 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.
- It would be more helpful if customary issues were referred to the Maori Land Court in the first instance and to the Maori Appellate Court only on appeal. The Tribunal also considers that, as with references under section 30, the court should sit with additional members with expertise in Maori custom when hearing customary issues. This requires statutory change.
- The question of customary representation is a most vexed issue that is spawned by the claims resolution process itself. It may not need to be a vexed issue were it clear to claimants that all groups with proven claims are entitled to some compensation, and that compensation need not depend upon a nice definition of boundaries. That approach would appear to focus the issue on where it may really be, on the level of representation. Issues concerning the level of representation may sometimes be resolved by assuring adequate protection for and recognition of sub-groups in the settlement structure.
- The Tribunal has also considered that the question of customary representation would also be alleviated by positive policies for the staged restoration of tribal endowments within economically sustainable limits. Tribal re-establishment with settlements on account would relieve many tensions in the historical claims process.

Servicing

The Tribunal is serviced by the Waitangi Tribunal Division of the Department of Justice. The current permanent strength of the Division is 20 organised under a Director/Registrar with an administrative and claims management unit of 14, and a research unit of seven. In addition there are a number of researchers on specific research commissions. For the large tasks to be performed, the Tribunal considers its administrative and research units are extraordinarily efficient.

There are difficulties however in the structural arrangements:

- The allocation of resources to outputs restricts the Tribunal's authority to settle its own process and priorities.
- The State Sector Act prevents the Tribunal from having any proper input to the recruitment of appropriate research staff. Their selection and interpretation of historical information is crucial to the outcome. It may not be well known that the Tribunal does not appoint its own research staff.

As claims lie only against the Crown, it is important to the Tribunal that the Tribunal should not only be independent, but should be seen to be independent and without administrative control of its process. Some review of the Tribunal's structure may be appropriate.

Resources

The major impediment to the Tribunal's progress is the limitation on its resources. The Tribunal's budget for 1993/1994 is $2.5 million. The Tribunal has considered:

- The level of funding is such that it is questionable whether

Maori have proper access to legal process for their many and long outstanding grievances.

- The Tribunal budget meets more than the costs of hearings, including members fees, travel and accommodation. The budget meets also the cost of Tribunal generated research, the funding of claimant research and the supply of public information.
- Many urgent claims that should have been heard, have not been heard.
- The major impact on the Tribunal has been:
  - a lack of research in important areas;
  - a lack of assistance in report writing;
  - insufficient full-time members;
  - a large voluntary and "free time" contribution by members, in the form of extensive reading, personal research and report writing;
  - a lack of conferences whereby Tribunal members, currently dispersed to separate Tribunals, can meet to discuss common issues; and
  - an inability to deal with many urgent claims.

Issues Concerning the Tribunal's Operation

The Tribunal is aware of the following additional issues concerning its operations:

- should Tribunal reports be tabled in the House?
- should the Tribunal account annually to Parliament on its process and progress?
- should Tribunal members be appointed in consultation with Maori?
- should the Tribunal be able to decline to hear tribal claims that have been brought without an appropriate tribal mandate? Presently "any Maori" may file a claim.

Those are matters of policy that require statutory modification if they are to be implemented. The most common complaint has been however that the Tribunal is not sufficiently resourced to hear claims expeditiously and that research funding for claimants is also insufficient.

Some concerns have been voiced about inconsistencies in the Tribunal's reports. There is a related problem that issues determined on one case may affect others where different arguments would be presented. This difficulty would be partly alleviated if the Tribunal had sufficient finance to meet as a group more often. At present Tribunal members are able to meet together for only two days, once per annum.

There have been several complaints that claimants are unable to obtain legal aid. That matter however is now outside the Tribunal's jurisdiction.

Public Information

It is not a function of the Tribunal to provide information about the Treaty and the work of the Tribunal but it is an important role and there is a large public demand for information of this nature. A good public information service is provided by the Department of Justice through the Waitangi Tribunal Division from out of the Tribunal budget. This includes a series of resource kits to schools and bi-monthly newsletter.

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.

In 1994 the Tribunal is likely to report on:

Taranaki Raupatu claim
Muriwhenua Land claim
Ngai Tahu Ancillary claims
Orotu (Napier Inner Harbour)
Chathams
Turangi Public Works
Wellington Tenths
Otamarakau mining
Tainui Forests
Te Arawa Geothermal
Ikawhenua Power Generation, and
Te Maunga Public Works.

The inquiry in these claims is well progressed by either or both research and hearings.

The disposal of claims as at 30 November 1993 is as follows:

Claims reported	44
No further inquiry	26
Deferred	7
In mediation	3
In negotiation	13
Under Tribunal research	48
Under claimant research	90
In hearing/proceedings	72
Research completed awaiting hearing	15
Referred to Maori Appellate Court	1
Referred to Maori Land Court investigation	2
No action	75
TOTAL	396

The Tribunal and staff extends
to all readers a merry Christmas
and a peaceful new year.

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