The Claims Process of the Waitangi Tribunal:

Information for Claimants

by

Geoffrey Melvin

A Waitangi Tribunal Publication

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The cover illustration shows wananga funding Tribunal members Josephine Anderson (left) and Keita Walker discussing the claim with kaumatua adviser Bishop Manuhuia Bennett, Raukawa Marae, Otaki, October 1998

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Introduction

This booklet provides claimants and potential claimants with general information about making a claim to the Waitangi Tribunal. Its aim is to help claimants, as well as members of claimant groups, to be more informed and effective participants in the process. (A flowchart summarising the process is set out in appendix II.)

Where questions remain, claimants are encouraged to raise them with Tribunal staff at an early stage or to refer to the other sources of information listed on pages 9 to 11 and pages 38 and 40.

It should also be noted that the information in this booklet is presented as a guide only and that the Tribunal may adapt its procedures to meet the needs of particular circumstances.

Inquiries

Central North Island
East Coast
Indigenous flora and fauna
National Park
Northern South Island
Tauranga moana
Urewera
Wairarapa ki Tararua
Wairoa
Whanganui

The inquiries listed here were those that were in hearing or at the conferencing stage at the time of publication and are indicative of the workload of the Tribunal at any one time

Waitangi Tribunal

Chairperson
Deputy chairperson
Sixteen members
(Maori Land Court judges may also preside over Tribunal panels)

Servicing

Waitangi Tribunal Business Unit

Director
Manager
Accountant
Administration
Claims administration
Communications
Editorial
Library and Information Services
Registrarial
Report writing
Research
Te reo

The Waitangi Tribunal Business Unit has a staff of approximately 50

The Waitangi Tribunal and the Waitangi Tribunal Business Unit

The Waitangi Tribunal

A permanent commission of inquiry

The Waitangi Tribunal is a permanent commission of inquiry set up to investigate Maori claims relating to the Treaty of Waitangi. It comprises up to 16 members, who are appointed for their expertise in the matters that are likely to come before them. It also has a chairperson, who is either a judge or a retired judge of the High Court or the chief judge of the Maori Land Court, and a deputy chairperson, who is a judge of the Maori Land Court. Most of the members sit on the Tribunal on a part-time basis only. Approximately half are Maori, half Pakeha.

The Tribunal's administration

The Tribunal is serviced by the Waitangi Tribunal Business Unit, the staff of which are employees of the Department for Courts. These staff carry out many functions, ranging from providing the Tribunal with financial and administrative services to registering claims, conducting claims research, liaising with claimants, running Tribunal hearings, and providing report-writing and editorial assistance to Tribunal members.

While Tribunal staff are the most frequent point of contact that claimants have with the Tribunal, staff cannot bind the Tribunal itself. The Tribunal conveys its decisions directly at hearings or conferences, by issuing written directions or memoranda, or by communicating through staff.

Except when addressing the Tribunal in the course of a hearing, it is generally not appropriate for claimants to contact the Tribunal members directly. Anyone wishing to communicate with the Tribunal should do so via Tribunal staff, unless directed otherwise.

Correspondence relating to claims should be addressed to:

The Registrar
Waitangi Tribunal
PO Box 5022
Wellington

Where claimants are dealing with a particular staff member, they should mark the letter to the attention of that person.

Why was the Tribunal established?

There is a long history in New Zealand of Maori protest over instances where the Treaty of Waitangi was not observed. The Waitangi Tribunal was set up in 1975 at a time when protest about unresolved Treaty grievances was growing and, in some instances, taking place outside the law. By establishing the Tribunal, Parliament provided a legal process by which Treaty claims could be investigated.

The Tribunal inquiry process contributes to the resolution of Treaty claims and, in that way, to the reconciliation of outstanding issues between Maori and Pakeha.

Governing legislation

The Tribunal was established by an Act of Parliament, the Treaty of Waitangi Act 1975. While the Act is the main statute governing the Tribunal, there are other statutes that also regulate or affect how it works, including the Commissions of Inquiry Act 1908, the Treaty of Waitangi (State Enterprises) Act 1988, and various statutes that give effect to Treaty claims settlements.

Because it was established by an Act of Parliament, the Tribunal is often described as a 'creature of statute'. This means that it may do only the things that Parliament has authorised it by statute to do. The Tribunal must always be careful, therefore, to act within its authority, lest its actions be challenged in the High Court.

The Tribunal and the legal system

The Tribunal is part of New Zealand's judicial system. This comprises a range of bodies, including:

- the general courts (such as the District Court, the High Court, and the Court of Appeal);
- specialist courts (such as the Maori Land Court, the Family Court, and the Environment Court);
- various tribunals (such as the Disputes Tribunal and the Residential Tenancies Tribunal); and

The wananga funding Tribunal (above) and claimants and witnesses (right) at Raukawa Marae, Otaki, October 1998

- temporary commissions of inquiry, royal commissions of inquiry, and so forth, which are established to inquire into specific matters.

The Waitangi Tribunal is unusual in that it was established as a permanent commission of inquiry. It differs from a court in several important respects:

- Generally, the Tribunal has authority only to make recommendations. In most instances, its recommendations do not bind the Crown, the claimants, or any others participating in the inquiries.* In contrast, a court can make a ruling that binds the parties involved in its proceedings.

* In certain limited situations, the Tribunal does have binding powers: see page 7.

- The Tribunal's process is more inquisitorial and less adversarial than that followed by the courts. In particular, it can conduct its own research to try to find the truth of a matter. In general, a court must decide a matter solely on the evidence presented and the legal arguments made to it by the parties.
- The Tribunal's process is flexible – the Tribunal is not necessarily required to follow the rules of evidence that usually apply in the courts, and it may adapt its procedures as it thinks fit. For example, the Tribunal may follow 'te kawa o te marae'. In contrast, the procedure followed in the courts is much less flexible, and strict rules of evidence normally apply.
- The Tribunal does not have final authority to decide points of law. That power rests with the courts. However,

for the purposes of the Treaty of Waitangi Act 1975, the Tribunal has exclusive authority to determine the meaning and effect of the Treaty of Waitangi as it is embodied in both the Maori and the English texts.

- The Tribunal has a limited power to summons witnesses, require the production of documents, and maintain order at its hearings. It does not have a general power to make orders preventing something from happening or compelling something to happen, and it cannot make a party to Tribunal proceedings pay costs.

The rules of natural justice

All judicial and quasi-judicial bodies must follow the rules of natural justice, and the Waitangi Tribunal is no exception. Natural justice requires that the Tribunal's procedures be fair. It includes the rules that persons affected by a claim have a right to be heard and that decision-makers should be free of any bias that affects, or that might affect, their impartiality.

The Tribunal and the Crown

In constitutional terms, there are three 'arms of government': the executive, the judicial, and the parliamentary. Generally, the Crown is regarded as being the executive arm of government. It comprises Ministers of the Crown, Government

departments, and Crown entities, and has the sovereign – the Queen – at its head.*

The Waitangi Tribunal, like the courts, is part of the judicial arm of government, and it is independent of the Crown.

Parliament, which enacts the country's laws, is the third arm of government, and it is also independent of the Crown.

The Tribunal and the Claims Settlement Process

The Tribunal's recommendatory role

The Tribunal's function is to inquire into claims that Maori have submitted to it and to decide whether they are well founded. It then reports its findings to the claimants and the Government. Where it concludes that a claim is well founded, it may make recommendations to the Government on how the claim should be settled. The Government considers the Tribunal's findings and recommendations but is not generally bound to accept or to give effect to them. Whether the Government does so or not is a political decision for it to make.

Binding recommendations

In some limited instances, the Tribunal has the power to make 'binding recommendations'. These are recommendations that

* In this booklet, the terms 'the Crown' and 'the Government' are used interchangeably.

the Crown must follow and may be made only for the return of certain lands to Maori ownership. The lands in question are:

- Crown forest land that is subject to a Crown forestry licence; and
- 'memorialised lands'.*

Where the Tribunal makes a binding recommendation, it has interim status for the first 90 days. This period is intended to allow the Crown and the claimants to reach a negotiated settlement in place of, or incorporating aspects of, the Tribunal's recommendation. If a settlement is reached in the 90-day period, the Tribunal amends its recommendation to give effect to the terms of that settlement. If no settlement is reached, the interim binding recommendation takes full effect and must be implemented by the Crown.

Settlement negotiations

Despite the Tribunal's power to make binding recommendations, in most cases the settlement of claims arises out of negotiations that take place directly between the Government and the claimants.

Where the Tribunal has inquired into and reported on a claim, the report will, in general, form a platform for the

* Memorialised lands are lands owned, or formerly owned, by a State-owned enterprise or a tertiary institution, or former New Zealand Railways lands, that have a notation, or memorial, on their certificate of title advising that the Waitangi Tribunal may recommend that the land be returned to Maori ownership.

settlement negotiations. However, the Tribunal is not involved in those negotiations or in the implementation of a settlement.

In certain circumstances, the Government will agree to negotiate the settlement of a claim even though the Tribunal has not reported on it. However, if negotiations begin while Tribunal hearings are in progress or before hearings have started, it is likely that the Tribunal's inquiry process will be suspended while the negotiations proceed.

Mediation

The Tribunal may refer a claim to mediation. The mediator may be a Tribunal member, or any other suitable person. The mediator's duty is to use her or his best endeavours to bring about a settlement of the claim.

Other bodies involved in the claims process

The following organisations are also involved in the claims process. Although the Tribunal liaises with these organisations, it is independent of them.

The Crown Forestry Rental Trust

Despite its name, the Crown Forestry Rental Trust is not a Crown agency. It is an independent trust that was established in 1989, as a result of an agreement between the Crown and

Maori, to receive the rental proceeds from the licensing of Crown forest land. The trust uses the interest earned from the rentals to assist Maori to prepare, present, and negotiate claims to the Waitangi Tribunal. The trust is the largest funder of research for Tribunal claims.

For further information, contact:

The Secretary
Crown Forestry Rental Trust
PO Box 2219
Wellington
Tel 4 472 8500 Fax 4 472 8504

The Office of Treaty Settlements

The Office of Treaty Settlements is part of the Ministry of Justice and is the key Government agency involved in the settlement of claims. The office negotiates the settlement of historical Treaty claims on behalf of the Crown, and is responsible for the implementation of these settlements. It also runs the Government's protection mechanism for surplus Crown-owned land, which mechanism includes the 'land banking' of certain properties for possible use in Treaty settlements.

The office has published a booklet for claimants entitled *Healing the Past, Building a Future: A Guide to Treaty of Waitangi Claims and Direct Negotiations with the Crown*, and further information can be obtained from the office's website (www.ots.govt.nz) or by contacting:

The Director
Office of Treaty Settlements
PO Box 919
Wellington
Tel 4 494 9800 Fax 4 494 9801

The Crown Law Office

The Crown Law Office is a Government department that acts as the Government's principal legal adviser. Lawyers from the office represent the Crown at Tribunal hearings and provide legal advice to the Crown in the course of settlement negotiations.

The office maintains a website at www.crownlaw.govt.nz.

Te Puni Kokiri

Te Puni Kokiri, or the Ministry of Maori Development, is the Government's principal adviser on the Crown's relationship with iwi, hapu, and Maori, and on key Government policies as they affect Maori. Along with other Government departments and Ministries, Te Puni Kokiri provides advice to the Government on Treaty issues. In particular, the Ministry advises the Government on the mandating procedure for the settlement of Treaty claims.

Information about Te Puni Kokiri can be found at its web site (www.tpk.govt.nz) or can be obtained directly from its regional offices.

Making a Claim to the Tribunal

Who may make a claim?

Any Maori person may submit a claim to the Tribunal. (For this purpose, a 'Maori person' includes someone who is descended from a Maori.) A claim may be submitted on behalf of a group of Maori, including an organisation such as a runanga, but an organisation may not be a claimant on its own.

What may a claim be about?

The Tribunal may inquire only into certain matters. Section 6 of the Treaty of Waitangi Act 1975 sets out the grounds for making a claim.

First, a claim must relate to one or more of the following matters:

- an Act of Parliament, an ordinance, a regulation, or another statutory instrument;
- a practice or policy adopted or proposed by or on behalf of the Crown; or
- an action or omission of or on behalf of, or proposed by or on behalf of, the Crown.

Secondly, the claimants must establish how the law, practice, policy, action, or omission of the Crown:

- is or was inconsistent with the principles of the Treaty of Waitangi; and
- has prejudicially affected the claimants, or the group on whose behalf the claim is made.

Claims may relate to Treaty breaches dating back to 6 February 1840, when the Treaty was signed.

What may a claim not be about?

There are certain things that the Tribunal may not inquire into. For example, it may not inquire into disputes purely between Maori, because these are not matters that section 6 of the Treaty of Waitangi Act 1975 authorises the Tribunal to consider. Nor does section 6 allow the Tribunal to inquire into proposed legislation, unless it has been referred to the Tribunal by the House of Representatives (in the case of a Bill) or by a Minister of the Crown (in the case of a regulation or an Order in Council).

In addition, the Tribunal may not inquire into claims that relate to:

- commercial fishing or commercial fisheries;
- the Waikato raupatu;
- Ngai Tahu claims; and
- the Turangi township.

These are matters for which the Crown has negotiated settlements with particular claimants, and the Tribunal's authority to inquire into them has been removed by statute (see, for example, the Waikato Raupatu Claims Settlement Act 1995, which gives effect to the settlement of the Waikato raupatu claims, and the Ngai Tahu Claims Settlement Act 1998, which gives effect to the settlement of the Ngai Tahu claims). As other

claims are settled in the future, it can be expected that the settlements will provide that the Tribunal – and the courts – will no longer have the authority to inquire into those matters and that Parliament will pass legislation to give effect to those agreements.

Private land

Claims may relate to land that is privately owned, and the Tribunal may inquire into and report on such claims.* However, unless the private land is memorialised (see p8n), the Tribunal may not recommend:

- that the land be returned to Maori ownership; or
- that the Crown acquire it.

In such cases, the claimants may seek other compensation, such as the return of alternative Crown-owned land or monetary compensation.

Submitting a claim

To submit a claim, it should be sent to the registrar at the Tribunal. There is no fee for submitting a claim, and there are no forms that must be used. (A sample form of claim, which may be used as a guide, is set out in appendix 1.) It is not necessary for a claim to be researched before it is submitted; indeed, it

* For this purpose, Parliament has defined 'private land' broadly to include land owned by local authorities.

The Hauraki Tribunal visits the site of a former pa behind Wharekaho Marae, Whitianga, July 2000

is common for claims to be researched after they have been registered.

However, to be able to register a claim, the Tribunal must be able to see that it relates to matters that the Tribunal has the authority to inquire into. In other words, the claim must set out, at least in a general way, which laws (or other statutory instruments), practices, policies, actions, and omissions it relates to. The claim should also set out how these matters are inconsistent with the principles of the Treaty and how the claimants have been prejudicially affected.

When a claim is first submitted, it is not usually necessary to set out the compensation (or the remedies) sought, although those details may be provided. Sometimes, claimants initially

seek only a finding from the Tribunal that their claim is well founded and ask for permission to propose detailed remedies at a later date. However, where claimants want the Tribunal to exercise its power to make a binding recommendation (see p7), this should be set out in the claim.

Alternatives to submitting a claim

Before submitting a claim, intending claimants should consider whether it is necessary to do so and whether it is the most effective course of action for them.

First, there may be an existing claim that the Tribunal has already registered covering the same issues. Instead of submitting another claim, it may be possible to join with or support that existing claim. Even if that is not possible, the Tribunal will still hear people who have advised it that they have an interest in the matters raised by the claim and who wish to be heard. The Tribunal will hear such people whether or not they have submitted their own claim.

Secondly, there may be alternative ways of airing the concerns and satisfactorily resolving them. For example, it may be possible to raise the matters directly with the organisation or body involved and to reach a solution through negotiation or mediation. Sometimes, it is possible to lobby a local member of Parliament to seek a solution to an issue, or it may be faster and more effective to seek compensation through the courts.

Before submitting a claim, it should be remembered that:

- in most instances, the Tribunal may only make recommendations that do not bind the Crown;
- the Tribunal is not a court and it therefore cannot make orders to prevent something from happening or to compel something to happen;
- there are costs involved in pursuing a claim, including legal and research costs and the time spent on preparing for and attending hearings;
- the Tribunal may decide not to inquire into a claim if it believes that there is an alternative remedy available to the claimants that they could reasonably exercise; and
- the Tribunal's inquiry process can be relatively slow and may not produce immediate results. Depending on the size of an inquiry and the issues raised in it, it may take a number of years for the Tribunal to complete the inquiry and issue a report. It then takes some time for the Government to consider the Tribunal's report and decide what (if any) action it will take.

Amending a claim

It is common for claimants to amend or to add to their claim after it has been submitted to the Tribunal. Generally, this occurs after research has been completed so as to ensure that the claim includes all the issues that the research has covered, or it occurs after a lawyer has been appointed so that the claim can be clearly drafted in the most effective way. In any case, the

Tribunal will expect claimants to have their claim in a final form before it is scheduled for hearing. In some instances, the Tribunal may direct claimants to file an amended claim.

An amended claim replaces all previous statements of the claim, while an addition simply adds new issues to the current statement and is read in conjunction with it. An amendment or addition should be sent to the registrar, but there are no set forms that must be used and there is no filing fee to be paid.

Need for claims to be comprehensive

There are many types of claim. Sometimes, a claim arises out of a concern with a particular issue (such as a recently announced education policy), whereas another may relate to all the laws and all the actions and policies of the Crown that have affected the claimants. Inevitably, the type of claim that is submitted will vary from case to case, but, generally, claimants submitting a historical claim should try to ensure that their final statement of claim includes all their historical Treaty grievances. In other words, the claim should be comprehensive. This is important because, once a claimant group enters into a settlement of its historical grievances with the Crown, the Tribunal is usually barred from inquiring into any other historical claims of that group.*

* For this purpose, the Crown usually treats events that occurred before 21 September 1992 as historical. That date is associated with the settlement of Maori claims to commercial fishing rights.

Withdrawing a claim

Claimants may at any stage withdraw a claim by advising the registrar in writing that they wish to withdraw it. The Tribunal will issue a memorandum–direction noting that the claim has been withdrawn.

Where the intention is to withdraw only part of a claim, this should be done by filing an amended statement of claim or by advising the registrar in writing of the specific part that is to be withdrawn.

Claimant authority

Where a claim has more than one named claimant, the Tribunal's standard practice is to require the signatures of all the named claimants on any documents amending, adding to, or withdrawing the claim.

However, a lawyer who is representing claimants may file documents with the Tribunal on behalf of those clients. Where a lawyer represents claimants, the Tribunal assumes that the lawyer is acting with the authority of those claimants.

Engaging a lawyer

Claimants are not required to be represented by a lawyer at Tribunal hearings. However, lawyers are skilled in dealing with the technical legal issues that may arise in an inquiry, in ensuring that evidence is presented effectively, and in managing the

large amount of documentation that the claims process often generates. For these reasons, the Tribunal usually prefers both that claimants are legally represented and, where it is appropriate, that claimants arrange joint representation with other claimants.

When claimants appoint a lawyer to represent them, the Tribunal's practice is to treat the lawyer as the address for service for the claim (see p 26). That means that the Tribunal will send documentation relating to the claim to the claimants' lawyer, who is then responsible for informing her or his clients of the information received. Accordingly, it is important that claimants have a good relationship and open communication with their lawyer.

The appointment of a lawyer early in the claims process can be an advantage in that it often enables issues to be focused on and the research to be directed to the relevant issues.

Legal aid

Civil legal aid is available for Tribunal claims, and claimants should discuss their eligibility for it with their lawyer. The Tribunal's registrar can provide legal aid application forms, but the Tribunal does not process or decide the applications. Completed application forms should be sent to:

The Wellington Legal Aid Unit
PO Box 24 149
Wellington

The Tribunal's Registration Process

Registration

When a claim is submitted, Tribunal staff immediately send a letter acknowledging its receipt. If the claim cannot be registered, Tribunal staff will contact the claimants to explain why this is so.

If the claim can be registered, the Tribunal will issue a formal note, called a memorandum–direction, that directs the registrar to:

- register the claim by assigning it a 'Wai number'; and
- give notice of the claim to those people and agencies that will be, or are likely to be, affected by the claim.

It is important to read the memorandum–direction carefully because it may make other statements or directions relating to the claim. For example, the Tribunal may direct that the claim be heard at the same time as other claims or that the claimants provide particular information. If claimants are unsure as to the meaning of a memorandum–direction, they should contact the Tribunal.

The registration of a claim and the allocation of a Wai number to it does not mean that the Tribunal accepts that the claim is well founded or that the people who have submitted the claim are the appropriate representatives of the people on whose behalf the claim is made. These are matters that can be determined only by a Tribunal inquiry into the claim. Registration is simply an administrative step that must occur before a Tribunal inquiry can take place.

Notification

Natural justice requires that those who are affected by a claim be given an opportunity to make submissions on, or to present evidence relating to, the claim. The Tribunal therefore gives notice of a claim by sending a copy of it to those people and organisations. The Crown (which includes the Office of Treaty Settlements, the Crown Law Office, and other relevant Government departments) is always notified of a claim. The Tribunal also notifies:

- other claimants who have claims that relate (or might relate) to the same issues;
- Maori organisations who have (or might have) an interest in the claim; and
- any affected local authorities in whose area the claim is located.

To assist the Tribunal in giving notice of a claim, it is helpful if claimants state in their claim the people and organisations that they believe will be affected by it.

Later, when hearings are scheduled, the Tribunal will notify those parties on the notification list that hearings are about to take place. It will also give public notice of the claim and the hearings by publishing notices in relevant newspapers.

The record of inquiry

At the same time as the Tribunal registers a claim, it sets up a record of inquiry for the claim. This record holds all the

A Tribunal staff member checks the record of inquiry of a claim

important documents relating to the claim, including the statement of claim, any amendments or additions to the claim, memoranda relating to procedural issues, and the evidence that has been submitted. These documents may come from various sources, such as the immediate claimants, the Tribunal, the Crown, other claimants, and people who have established a right to be heard. The Tribunal may consider written evidence only if it has been filed with the Tribunal and entered on the record.

Where the Tribunal hears a number of claims in one inquiry, it creates a combined record of inquiry for them, usually under an 'independent' Wai number (ie, one that has not previously been assigned to a particular claim). At the same time, it maintains a separate record for each individual claim.

For ease of reference, every document entered on a record of inquiry is assigned a number or an alphanumeric identifier, and the Tribunal compiles an index to each record.

Access to the record

Documents entered on the record of inquiry are distributed to the Crown and to the others involved in the inquiry, including affected claimants. Generally, members of the public may also access a document once it is entered on the record. By operating openly and publicly in this way, the Tribunal gives effect to the requirement of natural justice that those who are affected by a claim must be given an opportunity to find out about it and respond to it. It also increases public support for the Tribunal's process. But because documents on the record will be made publicly available, claimants should be careful about the personal information (such as private addresses and telephone numbers) that they disclose in those documents.

General correspondence between claimants and the Tribunal is not entered on the record of inquiry but kept separately in confidential claim files.

Sensitive information

If claimants are concerned about others having access to sensitive written or oral evidence that is to be submitted to the

Tribunal, they should first discuss the matter with their legal representative (if they have one) or with Tribunal staff. It may be that it is not essential for the purposes of the claim for the evidence to be presented to the Tribunal. Or it may be that it can be presented in a way that meets both the claimants' concerns and the Tribunal's needs.

It is possible for claimants to apply to the Tribunal for a restriction to be placed on access to evidence containing sensitive information (such as whakapapa or details about wahi tapu). Such applications are not granted automatically; the Tribunal must be satisfied that there are good grounds for restricting access to the evidence.

The Tribunal and copyright

Under the copyright laws, the Tribunal is not restricted by copyright where it uses or copies material for the purposes of its proceedings. This means that it may legally copy all the documents entered on a record of inquiry and distribute them to the concerned parties. The purpose of this copyright exemption (which applies to all commissions of inquiry) is to allow the Tribunal to carry out effectively its duty to inquire into and report on claims.

For other purposes, however, the Tribunal must observe normal copyright restrictions.

Address for service

The Tribunal requires an address for service for each claim. This is the address to which the Tribunal and the parties to the claim will send documents relating to the claim or to the wider inquiry in which it is being heard. Usually, the address for service is the address of one of the claimants named in the claim, although another person may be appointed as the claimants' representative and that person's address nominated as the address for service. Where claimants engage a lawyer, the lawyer's offices will normally become the address for service.

Tribunal staff will provide the address for service for a claim to those who request it.

Claimants should always advise the Tribunal as soon as possible of any change in the address for service.

Preparing a Claim for Hearing

General information

Preparing a claim for hearing involves claimants in many tasks. The preparation is likely to include:

- liaising and communicating on a regular basis with other members of the claimant group to keep them informed of developments, and to involve them in decisions, relating to the claim;
- liaising and corresponding with Waitangi Tribunal staff, and with other bodies (such as the Crown Forestry Rental

Trust), about research matters, hearing timetables, and arrangements for hearings;

- engaging a lawyer to represent the claimants at Tribunal hearings and at conferences dealing with procedural issues, and maintaining ongoing communication with that lawyer;
- meeting with the professional historians or other experts who are preparing reports about the claim; and
- preparing traditional evidence, including a written mana whenua report, and traditional and contemporary oral evidence.

These tasks are often spread over a considerable period of time, but that is not always the case – the amount of time available for preparation depends on when the claim is submitted and when the Tribunal is to hear the hearing district in which the claim falls (see p 29). Experience shows that it can be as difficult for claimants to sustain the preparation of a claim over a long period as it can be to prepare a claim for hearing in a short period of time.

Getting a claim researched

The type and amount of research that is necessary depends on the particular claim and the issues raised in it. The research needed for a tribe's historical land claim, for example, is likely to be different from that which is needed for a claim about a present-day governmental education policy. In order that

research is directed to the appropriate issues, it is preferable that claimants talk to the Tribunal's research staff before starting their own research.

There are several ways by which claims can be researched:

- claimants may fund and carry out their own research;
- claimants may seek research funding from bodies such as local runanga or the Crown Forestry Rental Trust (contact the trust for information about its funding criteria: see page 10 for the address);
- the Tribunal may commission research for itself, using either a member of its own research staff or another professional researcher; or
- the Tribunal may authorise claimants to commission research on their own behalf at the Tribunal's expense (these reports usually cover traditional evidence).

For further information about research, refer to the Tribunal publication *Preparing Claimant Evidence for the Waitangi Tribunal* (see p38) or contact staff at the Tribunal or the Crown Forestry Rental Trust.

The Tribunal's Hearing Process

How are claims heard?

In general, the Tribunal groups claims into geographical areas called inquiry districts, and it will hear all the claims, both historical and contemporary, that relate to a district in one

inquiry. However, generic claims (being claims that do not relate to particular inquiry districts) or claims that have been granted urgency may be heard in separate inquiries.

In determining the boundaries of an inquiry district, the Tribunal will balance a number of factors, including:

- the commonalities between claims (such as the Crown's actions or the resources to which claims relate);
- the geographical size of the district;
- the number of claims to be heard within the district; and
- the associations that tribes have with an area.

Although the Tribunal will make the final decision on the extent of the inquiry districts, it will invite the Crown and any affected claimants to make submissions on the districts as they are proposed.

Order of hearing districts

The Tribunal maintains a forward programme that sets out a projected timetable of research and hearings for each inquiry district. The programme is based on a number of factors, including:

- the priority given to districts with a raupatu element to their claims;
- the research already underway via the Tribunal and the Crown Forestry Rental Trust;
- any overlaps with other districts already in hearing or being researched; and

- the strength of the claimants' desire to go through the Tribunal process, as opposed to entering into direct negotiation with the Crown.

Because there are many factors that can affect when a district will be ready for hearing, the order in which districts are to be heard may change. The forward programme is updated and published each year in the *Waitangi Tribunal Business Strategy*, which is available from the Tribunal.

The casebook method

Tribunal inquiries generally follow the casebook method. This involves planning – as far as is possible – the research required for an inquiry and completing that research before hearings start. The completed research is then bundled together into volumes (collectively known as a 'casebook') and distributed to counsel representing the main claims in the inquiry.

One of the aims of the casebook method is to shorten the hearing process by avoiding the need to undertake research once hearings have started. It also helps claimants to detail fully – that is, to particularise – their claims before hearings start, and it helps the Crown prepare its response to the claims.

Urgent inquiries

In certain circumstances, the Tribunal may decide to inquire urgently into a claim, or a part of a claim. In considering an

application for urgency, the Tribunal will look at a number of factors, including whether:

- the claimants can demonstrate that they are suffering, or are likely to suffer, significant and irreversible prejudice as a result of current or pending Crown actions or policies;
- the claim challenges an important current or pending Crown action or policy;
- an injunction has been issued by the courts on the basis that the claim for which urgency has been sought has been submitted to the Tribunal;
- there is an alternative remedy that, in the circumstances, it would be reasonable for the claimants to exercise (such as action in the general courts); and
- the claimants are ready to proceed urgently to a hearing.

The Tribunal considers applications for urgency very carefully and, before making a decision, will hear submissions from the claimants and from those affected by the application, including the Crown.

Appointing a Tribunal

From the available pool of Tribunal members, a panel of between three and seven members is constituted to inquire into a particular claim or grouping of claims. Each panel has a presiding officer, who must be a legally qualified member of the panel, the chairperson of the Tribunal, or a judge of the Maori Land Court. The presiding officer is responsible for issuing

directions relating to the inquiry and for guiding the Tribunal on procedural issues, which often include points of law.

Planning an inquiry

As the casebook for an inquiry district is finalised, Tribunal staff will liaise with claimants and their representatives about how the hearings will be run. The matters to be worked through include the order in which claimant groups are to be heard, where hearings are to be held, and the arrangements to be made for each hearing venue.

The presiding officer is also likely to hold conferences of parties at regular intervals throughout an inquiry to settle some of these planning matters. The Tribunal may also hold conferences to clarify the issues that it is to inquire into, to settle the evidence that parties intend to call, and to hear submissions from parties on procedural issues raising legal questions.

Hearing venues

The Tribunal tries to hear claimant groups at the venue of their choice and according to their protocols, where that is desired. Usually, claimant groups are heard on their marae. When the Tribunal hears the Crown and others who are entitled to be heard, it often moves to a neutral venue (such as a public hall or a conference centre) or, occasionally, it uses courthouse facilities. In all cases, however, the Tribunal must be satisfied that a

proposed venue is suitable for its needs and that it meets certain health and safety requirements. Accordingly, the Tribunal makes the ultimate decision as to where it sits.

Where a marae is the venue, there needs to be close communication between the Tribunal's staff and a marae representative on a range of matters, including the seating arrangements, the delivery of Tribunal equipment, the gaining of access to the wharenui to set up equipment, the catering arrangements, and so forth.

Hearings

The purpose of hearings is for claimants to present their evidence to the Tribunal in order to substantiate their claims. Other parties, including the Crown, present their own evidence. The parties' lawyers will also make submissions containing legal arguments based on Treaty principles. Hearings are normally open to the public.

Typically, claimant evidence is a mix of oral evidence from kaumatua and rangatahi and written evidence relating to the claimants' traditional history and to their grievances against the Crown. Where the evidence is written, it will normally have been submitted to the Tribunal in advance, according to a timetable set by the Tribunal. At hearings, witnesses usually present summaries of their reports. Evidence may be presented in te reo Maori, and all witnesses may be questioned by the Tribunal and by counsel for other parties. Sometimes, in the course of a

The radio spectrum Tribunal and Crown representatives hear evidence from a Native American lawyer in Washington DC by way of a video link, Wellington, May 1999. Photo courtesy the *Dominion*.

hearing, the Tribunal will visit sites of importance to the claimants (such as pa sites and wahi tapu) so as to gain a fuller appreciation of the claim or claims.

The length of an inquiry depends on a number of factors. In a large district inquiry, hearings may be spread over a couple of years, or sometimes longer. This timeframe arises from the amount of preparation required for each hearing and because most members do not work full-time for the Tribunal. In a smaller inquiry, no more than two or three hearings may take place over a much shorter period of time. Occasionally, where a single claim is being heard and the issues are limited, there may be no need for more than one sitting, and that may be completed in just a few days.

The general order of proceedings over the course of an inquiry is as follows:

- the claimants present their evidence and submissions;
- others with an interest in the inquiry present their evidence and submissions;
- the Crown presents its evidence and submissions; and
- the parties present their closing submissions.

After the hearings

After the Tribunal has heard all the evidence and submissions in an inquiry, it writes its report. The amount of time that this takes depends on a number of factors, including the size of the inquiry. In a district inquiry, the Tribunal will aim to be ready to release its report approximately nine to 12 months after the last hearing.

The Tribunal releases its report simultaneously to the claimants and to the Minister of Maori Affairs (and to any other Ministers who have an interest in it).

Reporting options

The Tribunal's task is to decide whether, on the balance of probabilities, a claim is well founded. If the Tribunal decides that a claim is well founded, it may recommend to the Crown how the claimants can be compensated, how the harm they are suffering can be removed, or how similar harm can be

Tribunal manager Dr the Honourable Ian Shearer presents the Tribunal's *Ngati Awa Raupatu Report* to Te Runanga o Ngati Awa chairman Joe Mason at Taiwhakaea Marae, Whakatane, October 1999. Photo courtesy Whare Akuhata.

prevented from happening in the future. In some cases, the Tribunal reports both its findings and its recommendations in one report. In other cases – particularly where the Tribunal has been asked to make binding recommendations (see p7) – it may report in two stages. In these latter cases, the Tribunal's first report is likely to contain only its findings and its conclusion on whether the claim is well founded. Where the Tribunal upholds the claim, the parties may at that stage enter into settlement negotiations and it may not be necessary for the Tribunal to make detailed recommendations. However, if such recommendations are required, the Tribunal will hold a 'remedies

hearing', where the parties will present further evidence and submissions on what they believe the Tribunal should recommend. The Tribunal will then issue a further report with its recommendations (if any).

Sometimes, the Tribunal will issue an interim report that deals with just part of a claim or a grouping of claims, or that presents preliminary findings based on some, but not all, of the evidence. However, an interim report may prove sufficient to enable the claimants and the Crown to enter into direct negotiation.

Claimant costs

Although no fee is charged to submit a claim to the Tribunal, being a claimant in the claims process may involve a sizeable amount of expense. Some, but not all, of these costs will be met by the Tribunal or by other organisations. Some costs claimants will have to meet. One of the biggest costs that claimants will face is to their time.

The Tribunal will cover the costs of:

- research that it commissions; and
- distributing documents on the record of inquiry (where this is done by the Tribunal's administration).

The Tribunal will contribute to the costs of:

- hiring marae or other hearing venues;
- hiring essential equipment needed for hearings (such as additional seating or tables and so forth);

- providing lunches for Tribunal members and staff attending hearings;
- site visits; and
- providing interpreters at hearings.

The Tribunal will not pay for:

- claimants' legal costs;
- claimant witnesses' costs;
- claimants' travel and accommodation costs;
- non-essential hearing costs (such as general hospitality and catering costs, other than those stated above); and
- costs involved in direct negotiations with the Crown.

Funding to meet some of the costs that the Tribunal does not cover may be available from other sources. For example:

- the Legal Services Agency may provide civil legal aid to meet legal costs (see p 20);
- the Crown Forestry Rental Trust may provide financial assistance to claimants (see p 9); and
- the Office of Treaty Settlements may agree to assist claimants with costs involved in negotiating settlements to claims (see p 10).

Further Information

Tribunal publications

Further information about the Waitangi Tribunal claims process is contained in the following Tribunal publications:

- *Guide to the Practice and Procedure of the Waitangi Tribunal*, a guide for claimants and lawyers;
- *Preparing Claimant Evidence for the Waitangi Tribunal*, a guide for claimants written by Tribunal historian Dr Grant Phillipson;
- *Te Manutukutuku*, the Tribunal's newsletter, which anyone interested in the Tribunal may ask to receive;
- *The Waitangi Tribunal Business Strategy*, an annual document that sets out the Tribunal's strategic direction for the next three to five years; and
- *The Waitangi Tribunal Business Unit Management Plan*, an annual document that describes how the strategies set out in the *Business Strategy* will be applied and what will be achieved during the financial year.

The above publications can be obtained from the Tribunal at no cost.

Legal Services Board videos

In 1999, the Legal Services Board produced a three-part video series, *Journeys: Ngai Tapuae*:

- video 1, *Ngai Tohu: Signatures*, presents key information about the Treaty through a fictional land claim;
- video 2, *Voices of the Treaty: Te Reo o te Tiriti Mai Ra Ano*, offers a range of individual views on recent New Zealand history, Treaty law, and the settlement process; and

- video 3, *Te Raukura: The North Taranaki Claim*, is a documentary exploring the complexity of a claim and the process involved in seeking a settlement.

The videos have been distributed widely to public libraries, citizens advice bureaux, community law centres, tertiary institutions, and secondary schools. They can also be bought from Whitcoulls stores.

A Reminder

Please let the Tribunal registrar know as soon as possible if:

- you appoint a lawyer to represent your claim;
- your or your lawyer's contact details change; or
- you intend to withdraw your claim.

If you need any further information or have any questions about the claims process, contact the Tribunal's staff.

Appendix 1: Sample Form of Claim

[*Insert your address*]

The Registrar
Waitangi Tribunal
PO Box 5022 (DX SP22525)
Wellington

[*Insert the date*]

1. I/We, [*Insert name(s), address(es), occupation(s), tribe(s)*],

2. For myself/ourselves and [*Give names of any group(s) on whose behalf the claim is made; for example:*

'For myself and the descendants of Tamatu of which I am one'; or

'For ourselves and Ngati Iti, of which we are members, and with the support of the Ngati Whanui Maori Trust Board on which Ngati Iti is represented'; or

'For ourselves and the several tribes shown opposite our names'],

3. Claim I am/I am likely to be / we are/we are likely to be prejudicially affected by [*Here describe your claim*].

Remember that, under section 6 of the Treaty of Waitangi Act 1975, the claim may be made only in terms of policies or practices or actions or omissions of the Crown, or in relation to

Acts of Parliament or other statutory instruments. The Tribunal cannot, however, inquire into proposed legislation unless it has been referred to the Tribunal by the appropriate authority.

And I/we claim that these matters are contrary to the principles of the Treaty of Waitangi.

4. I/We seek the following relief: [*Set out relief sought*].

Although there is no requirement that you state in advance of a hearing the compensation that you are seeking, you may set this out. Sometimes, claimants initially seek a finding that a claim is well founded and ask for permission to nominate the specific compensation at a later date. However, claimants seeking the return of memorialised land or Crown forest land under the Tribunal's binding powers should advise the Tribunal of that in the statement of claim.

If you set out the compensation that you are seeking, you should add at the end: 'and such other relief as the Tribunal considers appropriate'.

5. I/We wish the Tribunal to commission a researcher to report on the claim.

If you ask for research assistance, you will be required to provide a research proposal setting out the research topic, the types of sources that need to be researched and their locations,

an outline of the report's structure, the names and qualifications of the researcher(s) to be used, a timetable, and a budget.

6. I/We ask for permission to amend this claim, if necessary.

7. The Tribunal is advised that my/our legal representative is [*Give your lawyer's name (if you have a lawyer), their full postal address, and their fax and telephone numbers*].

Civil legal aid is available for Tribunal matters. Applications should be sent to the Wellington Legal Aid Unit, PO Box 24 149, Wellington. Application forms may be obtained from the unit or the Tribunal.

8. I/We wish the claim to be heard at [*Name venue*].

If you wish the claim to be heard at a particular place, such as a specific marae, state this here.

9. I/We believe the following persons and organisations should be notified of this claim: [*List names and addresses*].

Those affected could be other Maori, Government departments, corporations, local authorities, or private individuals. List all those who you think might be affected by the claim and provide their addresses where possible. Remember that it is important for the Tribunal to notify everyone who might be

affected. Failure to give adequate notice may invalidate the Tribunal's proceedings.

10. This claim amends/replaces my/our earlier claim of [*Give date of earlier claim*].

If this claim is in addition to an earlier claim, note the date that the earlier claim was made. Usually, the same people who submitted the original claim must submit any addition to it or an amended statement of claim. Omit this section if this is your first statement of claim.

11. I/We can be contacted care of: [*Give address for service*].

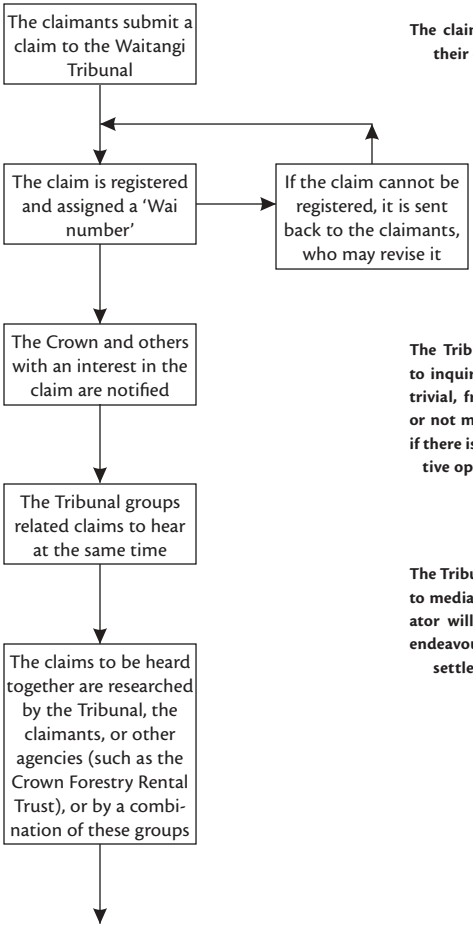
It is important that you include a residential address (in addition to any box number) and a telephone number at which Tribunal staff or parties to the claim can easily contact you. This may be the address of a person making the claim, but if you have a lawyer, their address will normally be the address for service.

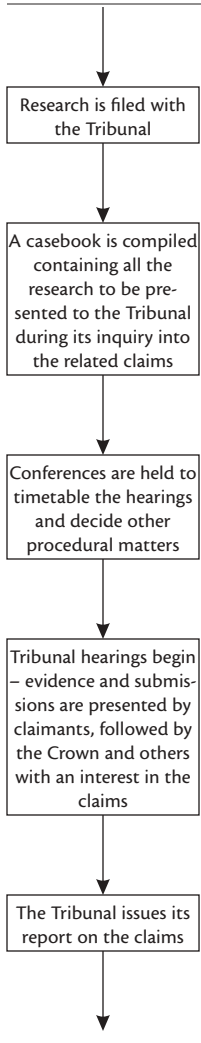
[*Insert the date*]

[*Print name(s) of claimant(s)*]

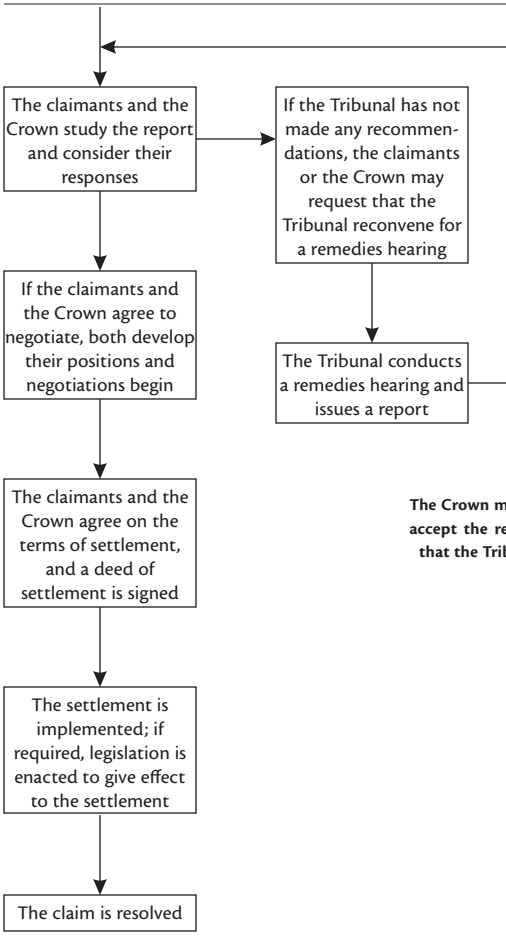
[*Sign here*]

Appendix 11: The Claims Process



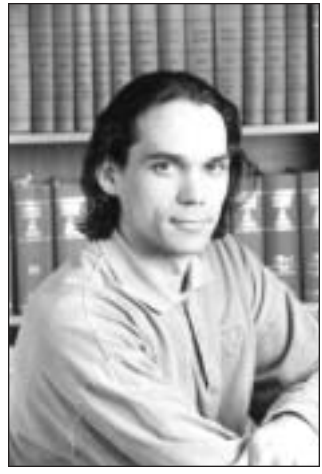


At any stage, the claimants may decide to negotiate with the Crown directly (for further information, refer to the handbook *Healing the Past, Building a Future: A Guide to Treaty of Waitangi Claims and Direct Negotiations with the Crown*, produced by the Office of Treaty Settlements)



The Crown may decide not to accept the recommendations that the Tribunal has made

Additional copies of this booklet can be obtained from
the Waitangi Tribunal and a PDF version is available at
the Tribunal's website, www.waitangi-tribunal.govt.nz



Geoffrey Melvin is a barrister and solicitor of the High Court of New Zealand and a former registrar of the Waitangi Tribunal. He maintains an involvement in Tribunal matters as a lawyer in private practice.