

Opportunities and challenges: The Waitangi Tribunal in the next 10 years

He mihi nui tēnei ki a tātou te hunga i huihui mai nei i runga i te āhuetanga o tēnei wiki whakahirahira, arā te wiki o te reo Māori.

Where have we been?

Now that I am in my fifties, I have the dubious distinction of being able to look back over many years. If there's one thing you learn from getting older it's that nothing ever stays the same.

This is certainly true of the Waitangi Tribunal. What a very different creature it is today from what anybody could have imagined when the Treaty of Waitangi Act was passed in 1975! The Tribunal's focus was originally limited to contemporary breaches of the Treaty, of course, but even after the amendment in 1985 extended the jurisdiction back to 1840, it was envisaged that it would investigate claims one by one. The Tribunal is now registering its 2117th claim, so a process that heard each one of them separately would be a very long one indeed.

That has been one of the main triggers for change in the Waitangi Tribunal: how many more Māori have made claims than its architects ever expected. In response, the Tribunal has developed techniques over time aimed at streamlining its inquiries.

When I first appeared as counsel in Waitangi Tribunal hearings in the late 1980s, they concerned only one 'Wai' number. They were 'iwi' claims, like the Muriwhenua claim and the Ngāi Tahu claim.

Appreciation that the Tribunal would never get through its claims register if it continued to hear claims one by one led to a major innovation in the mid-1990s. The Tribunal commissioned district-wide historical research called Rangahaua Whānui, and from that time on began to hear all the claims in a district as part of district-wide inquiries.

Then, at the turn of the century, more changes were introduced that were intended to make the Tribunal's train run faster and more smoothly. This was called – imaginatively – 'The New Approach'. It implemented a shorter, sharper inquiry process, with more interlocutory activity beforehand to crystallise the issues.

Inquiries have proceeded faster since then. Nevertheless, it has become increasingly plain to me in recent years that inquiring into the Crown's actions and inactions in any district over a period of 170 years is never going to be what anyone would call speedy. At law, the Tribunal is a permanent commission of inquiry. Its process necessarily involves extensive research,

liaison with many claimants and their lawyers to finalise the claims and the claimant groups bringing them, a hearing programme that gives everyone their day in the Tribunal, and then conscientious reporting on all that has been learned. It also involves decision making by a bi-cultural group of between three and seven persons rather than by an individual sitting alone. This means better decisions, but the process of reaching them is inevitably more complex. Over the 10 years since I have been part of the leadership of the Tribunal, we have done much soul-searching about how to make it all go faster without forgoing the benefits of the inquiry process, and without falling foul of our empowering legislation. We have not stopped asking ourselves what more can be done, and indeed we have a think-tank session planned for this week that I hope will move us forward. But the truth of the matter is that the Tribunal process was not designed for haste.

But here we are in 2009, operating in an environment that puts more and more emphasis on speed. The government has announced a best-endeavours initiative to get the settlement of all historical claims to agreements in principle by 2014. Where does that leave the Tribunal? Commissions of inquiry have no alternative but to engage in process that is thorough and fair. Are we the trusty service vehicle that will be left stranded on the race track?

Lets look first at this: what is the Waitangi Tribunal in 2009?

The Waitangi Tribunal

- Is a permanent commission of inquiry
- Is independent of the Crown - a Chairperson and 20 Pākehā and Māori leaders and elders, with MLC judges
- Engages actively with claimant communities
- Investigates, listens, and affirms proven claims
- Provides a fully transparent, public and independent process where evidence is tested and authoritative reports produced
- Provides a public forum for claimants to present their issues to the Crown and Tribunal 'kanohi ki te kanohi', and to receive a response
- Makes authoritative findings, and recommends to the Crown how proven claims might be settled

Where are we going?

The challenges facing us in the next 3-5 years are probably more diverse now that at any other time in the Tribunal's history. For at least the last ten years, the Tribunal's work has been a fairly predictable amalgam of district inquiries and applications for urgent hearings. In most years, there have been one or two urgent hearings at least.

Four main types of Tribunal inquiry

- District - 80% + of Tribunal work programme & resources, focusing mainly on historical claims
- Urgent - contemporary issues & processes
- Remedies - claims previously reported on but not yet settled; rarely proceed to inquiry
- Conceptual - one main inquiry (Wai 262) now in report-writing. Sometimes urgent inquiries are kaupapa-driven - eg Te Reo Māori; Wānanga; Foreshore & Seabed

The district inquiries have been, if you like, the Tribunal's set piece. New Zealand was divided into districts, with a view to working methodically through the districts, and in the process hearing all the claims. So where are we up to?

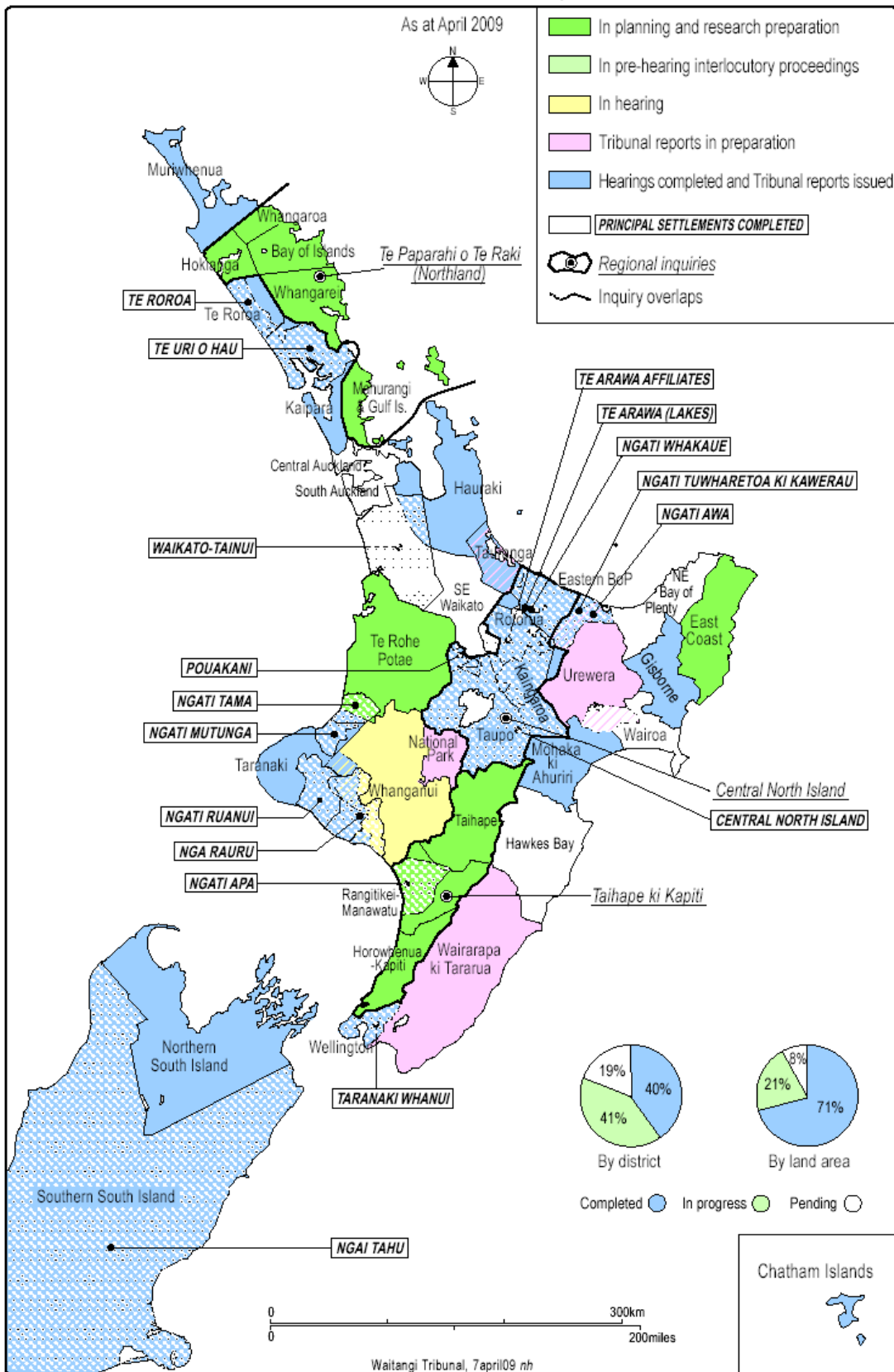
District inquiries – where have we got to?

- 15 of the Tribunal's 37 districts nationwide have reports; another 15 are in or preparing for inquiry
- In the remaining 7 districts major tribal groups have settled or are in the negotiation process
- Districts with Tribunal reports cover 71% of the national territory
- The Wairarapa ki Tararua, Tauranga, National Park and Urewera Tribunals will all report in 6-18 months, bringing the area reported on up to 78%

[Map follows]

Map of Waitangi Tribunal inquiries

Districts with Completed and Current Waitangi Tribunal Inquiries



Inquiry work in progress

- Reports in preparation for:
 - Tauranga Post-1886
 - Urewera
 - Wairarapa ki Tararua
 - National Park
 - Indigenous Flora and Fauna (Wai 262)
- Districts in hearing - Whanganui nearly completed, Te Paparahi o Te Raki starting October 2009
- Districts in preparation - 10 in all, grouped into 4-5 inquiries (Te Raki, Te Rohe Pōtae, East Coast, Taihape ki Kapiti)

The days have gone, however, when the Tribunal expects that it will continue to work its way through district inquiries one after the other. Probably the group of district inquiries now in preparation will be the last. The reasons for this are twofold:

- 1) there are not many districts left that have not been the subject of either Tribunal reports or settlements, or both; and
- 2) some claimants are choosing to enter into direct negotiation with the Government without going through the Tribunal process.

The period since 2008

Both recent governments have intuited in the country an appetite for getting the historical Treaty claim era behind us. The National Party fought the 2008 election on a platform of completing historical claims settlements by 2014, and now that they are the government, they have continued to support this objective, despite the obvious fiscal difficulties of achieving settlements in a period of economic recession.

The appointment of Dr Michael Cullen as Minister in Charge of Treaty Negotiations in 2007 really launched a new era in Treaty settlements, and that looks set to continue under the present Minister, Chris Finlayson.

The Tribunal inquired into many settlement negotiations in the period from about 2002-2007, and found them procedurally wanting in myriad ways. The Tribunal's critique culminated in the Tāmaki-Makau-Rau Claim Settlement and Te Arawa Settlement Process Reports in 2007. Since that time, and really commencing when Dr Cullen became Minister, the Office of Treaty Settlements' "Red Book" that articulated government policy for settling claims seems to have receded in importance, and the 'large, natural grouping' requirement that drove many policy choices no longer predominates. In short, the conduct of the Crown's settlement processes has moved closer to what Māori want, and the present government has been conducting hui to talk about the shape of things to come. Many Māori leaders are expecting to be

able to conclude settlements in the next few years, and some are happy to do that without the benefit of a Tribunal report.

Others continue to express a desire to go through the Tribunal process, however. Obviously, the Tribunal has an important role in meeting the needs of claimants who continue to want Tribunal process, but who are worried about what it might mean to be at the end of the settlement queue. There have been “first up, best dressed” issues with settlements in the past, and it is a real challenge for all of us in the sector to ensure that there is fairness as between claimants, whenever their settlements are concluded.

So what are the Tribunal’s goals in 2009?

The Tribunal’s goals

- Maintain a district inquiry process for those not entering immediately into negotiations
- Find ways to assist claimants and Crown to resolve differences and negotiate durable settlements as quickly as they want to
- Provide a forum for all claimants that facilitates truth and reconciliation

How will we go about achieving these goals?

First, we have to stick to our knitting. That means continuing to progress district inquiries.

District inquiries – completing the programme

- First priority - complete the outstanding Tribunal reports (next 6-18 months)
- Large research effort underway to get districts in preparation into hearing or negotiation (next 2-4 years)
- If any current inquiries go full term, their Tribunal reports are likely to be ready by 2014/15
- If the current pace and tenor of settlement negotiations is sustained, no new districts are likely to require a Tribunal inquiry

The days have gone when the Tribunal provided “one size fits all” process. From now on, and to a greater extent than ever before, it is likely that district inquiries will be very much tailored to the needs of the particular groups wanting to come before the Tribunal.

Adding value through innovation

- Most current and new inquiries will run in parallel with settlement negotiations - groups on intersecting tracks, some mandated to settle, others to go to the Tribunal
- Inquiry processes will be tailored to claimant/Crown aspirations - targeted research, selection of priority issues, interim and staged Tribunal reports
- New and modular processes that may help - early claimant oral and traditional evidence hearings; dealing with small claims; discrete remedies

The 1 September 2008 deadline

As well as ushering in a new era in negotiating Treaty settlements, 2008 also saw the 1 September 2008 deadline for submitting new historical claims to the Tribunal. What happened in response?

The pre-deadline avalanche

- A flood of claims - 1800+ new claims submitted in the 4 weeks up to the 1 September 2008 deadline (more than the 1500 registered since 1975)
- But more than half come from districts preparing for inquiry or in hearing, and fewer than 600 have as yet met the statutory requirements for registration
- 60%+ are individual or whānau claims, or unclear
- Few raise issues not already in registered claims
- Administrative challenges, but little issue expansion

We are currently addressing those administrative challenges, putting the myriad claims into places where they can be progressed. One important task now is to arrive at a clearer view of what work will remain once all the district inquiries are finished. That analytical work is now completed, and we are embarking on a workshop next week to devise next steps.

How do we address ALL historical claims?

- New claims in completed districts - what process will be deployed?
- Is further inquiry required when issues already reported on?
- Will a new small-claims process be called for?
- How many will be settled before inquiry needed?
- Can ADR techniques be usefully deployed?

Other work to be done?

As well as the work we can plan for, on the basis of claims already filed, the Tribunal will continue to respond to new claims as they arise. On the basis of work done to date, and looking forward to the shape of things to come, we can make some predictions:

Urgent inquiries contesting settlement process

- Often generated by contested representation and mandate - difficult questions of identity and leadership as well as the integrity of Crown process
- Many negotiations mean many overlapping interests
- Settlement and governance terms may also generate friction
- Tribunal sets a high threshold for granting urgency but has a vital role in keeping the process honest
- Much depends on sustaining fair process and good Crown/Māori relations without forcing the pace

Urgent inquiries challenging Crown policy and actions

- Tribunal inquiries started under urgency have addressed major policy issues - Waipareira Trust, Wānanga Establishment, Foreshore and Seabed
- Treaty-based challenges to current policies will continue to arise, and may sometimes merit urgency
- Local Crown actions may also demand quick action - eg public works takings, environmental impact
- The Tribunal does low-key work through conferences, round table discussions, mediation, facilitation

Inquiries concerning remedies

- Where the Tribunal has reported a claim as well-founded, claimants may return to seek remedies
- Applications usually from claimants feeling excluded by mandates for negotiation, or facing long delay
- Formal remedies proceedings are rare
- Statutory provisions - eg CNI settlement, Crown forest land, s.27B

Conceptual and contemporary inquiries

- Conceptual claims commonly raise generic issues concerning property rights, policy or practice
- Such inquiries can have significant influence on policy development and Treaty relationships
- Many important kaupapa (eg te reo Māori, radio spectrum, petroleum) have already been addressed
- Contemporary (post-1992) claims range from small and local to large and national - more may yet come
- A range of inquiry types and processes - thematic, small claims, mediation

What does the future hold?

Projecting forward then, we predict that the next 10 years will see the Tribunal engaged in these activities:

The next 10 years...

- Complete the hearing of historical claims - district/regional inquiries, residual claims process
- Switch the focus to contemporary and conceptual claims
- Add value to settlement negotiations but if necessary intervene to keep the process honest
- Provide a forum for claimants who do want to be heard
- Adapt and diversify inquiry processes, especially informal approaches - claimant oral/traditional evidential hearings, mediation, facilitated hui, round table consultations, small claims, discrete remedies, solution-focused research, 'hot tub' conferences of subject experts...

A final word though – and this takes me back to where I began. What we can confidently predict is change. The other thing we can confidently predict is that we cannot confidently predict **all** the changes that the next decade will bring. And of course we wouldn't have it any other way. As Benjamin Disraeli said, "Change is inevitable in a progressive country, change is constant."¹ Or, as Confucius said, focusing more on the personal experience, "They must often change who would be constant in happiness or wisdom."²

But let not the last word go to a Chinese or a Pom.

Ki roto i tō tātou reo tuturu, arā te reo Māori, tēnei:
"Ahakoa aha ka kōrure ngā whakaaro."

Koirā.

Nā reira, tēnā koutou, tēnā koutou, tēnā rā tātou katoa.

¹ Speech, 20 October 1867

² Goldsmith, *Citizen of the World*, No 123