NATALIE BECHER

FROM HAWKE TO REKOHU: AN ANALYSIS OF THE RECOMMENDATIONS OF THE WAITANGI TRIBUNAL

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I INTRODUCTION

Since the enactment of the Treaty of Waitangi Act 1975 (and in particular since its 1986 amendment) the Waitangi Tribunal has issued over seventy recommendatory reports. Over the twenty-six years since its inception, the Tribunal itself has seen changes in government, government priority and policy, its own membership, and to some extent changes in its methodology, as it has begun to deal with the hundreds of claims that have been registered.

In the last quarter century, the position of Treaty claims has shifted dramatically. One major factor has been the Crown's increasing willingness to enter into the process of grievance resolution, albeit with varying success. Underlying this process are the reports of the Tribunal, and the recommendations made therein. The reports lend legitimacy to claims in the eyes of the Crown, and their recommendations have come to provide a starting point and benchmark for negotiations.

The recommendations which the Waitangi Tribunal make relate to the practical application of the Treaty, where breaches of its principles have been proven.[1] It cannot make binding recommendations except in certain limited circumstances[2], and in most cases once its recommendations are made, its role is over: it is up to the Crown to put them into action, or to choose to ignore them.

The main relevant statute granting recommendatory powers is section 6(3) Treaty of Waitangi Act 1975, which states:

> "If the Tribunal finds that any claim submitted to it under this section is well-founded, it may if it thinks fit having regard to

[1] *Treaty of Waitangi Act* 1975, s5.

all the circumstances of the case, recommend to the Crown that action be taken to compensate for or remove the prejudice or to prevent other persons from being similarly affected in the future."[3]

The questions raised are, have "all the circumstances" to which the Waitangi Tribunal has regard when making recommendations changed since they were first considered in the initial reports? To what extent are the changing requirements of politics and policy reflected in the recommendations that are made? Do changes reflect recognition of what has worked and what has not, or do recommendations continue to be made on the same bases as they were from the beginning? Are they made on the basis of practicality in the sense of what will most benefit the claimants, or what will be best received and most likely to be employed by the Crown? These are the questions that this paper will attempt to address, through a comparison of the recommendations that the Waitangi Tribunal has made.

II METHODOLOGY

While the claims that have been made to the Tribunal are many and varied, former Chairperson of the Tribunal, Chief Judge Edward Durie, has noted that they can be divided into three broad categories.[4] The first is historical claims, based on past Crown action. The second is contemporary claims, which encompass those against current Crown policy or practice, and finally conceptual claims which deal with the ownership of natural resources. With the release of the *Pakakohi and Tangahoe* report[5], as well as the *Ngati Maniapoto Ngati Tama Cross-*

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[2] See *Treaty of Waitangi (State Enterprises) Act* 1988, *Crown Forest Assets Act* 1989, and *New Zealand Railways Corporation Restructuring Act 1990.*
[3] See also *Treaty of Waitangi Act* 1975, s6(4), and s8, especially ss8(D), 8(HE), 8(HJ).
[4] E T J Durie, "Background Paper" (1995) 25 VUWLR 97.
[5] Waitangi Tribunal *Pakakohi and Tangahoe Settlement Claims Report: Wai 152/758* (Legislation Direct, Wellington, 2000).

Claims report[6], there is arguably now a fourth category as well. As an increasing number of claimants choose to adopt the Crown's policy of direct negotiation, the Tribunal is being used in a new way. In these later reports, not only is the subject matter of the report different from those which have been issued before, however the questions the Tribunal are being asked to determine have changed.

In order to ascertain the existence and nature of changes in the recommendations of the Tribunal, a selection of early and later reports from each of the three main categories will be examined, and their recommendations compared.[7] These comparisons will be placed within the broader context of the types of recommendations the Tribunal makes; such as compensation, systemic and legislative change, and negotiation. A closer look will also be taken at the 'new' reports coming out of the Tribunal, and some observations made as to its changing role. It should be noted this is not intended to be a definitive statement of the position of the Tribunal 'then and now', but rather an indication of how the Tribunal's focus with regard to recommendations has changed. How is it that an organisation with no real means of enforcement, but with a recommendatory function, is able to continue to use that function effectively?

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[6] Waitangi Tribunal *Ngati Maniapoto/Ngati Tama Settlement Cross-claims Report: Wai788/800* (Legislation Direct, Wellington, 2001).

[7] The initial intention was to compare reports according to the type of recommendation made. However, the recommendations are intrinsically linked to the subject matter of the claims, and this proved an unhelpful method of classification. Using the categories suggested by Judge Durie allowed a broader scope for comparisons, without the need to separate the recommendations from the claims which generated them. Unpublished reports have been excluded, as they tend to be claims which were unfounded, or not followed through by claimants, or dealt with as part of other claims.

III HISTORICAL CLAIMS

As there are numerous historical claims, in this Part two representative reports have been chosen for comparison. These are *Orakei*[8] and *Rekohu*[9]. Orakei was chosen because it was the first of the big historical claims to be fully investigated and reported on after the 1986 amendment to the Treaty of Waitangi Act 1975, which allowed the Tribunal to hear claims dating back to 1840. It is in many ways a landmark claim, and is itself a departure from the approach to recommendations taken by the Tribunal in earlier reports. Significantly, it departs from the opinion of the Tribunal in the *Manukau* report, that the Tribunal was obliged to make practical recommendations, holding rather that recommendations could be made "for full and just compensation untempered by the convenience of the result".[10]

The *Rekohu* report is the most recent of all the reports, issued in June 2001. Like the *Orakei* report, it deals with historic grievances against Maori (and, in this case, Moriori), and makes wide-ranging recommendations. However, its recommendations differ from those of the *Orakei* claim in a number of important respects.

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[8] Waitangi Tribunal *Report of the Waitangi Tribunal on the Orakei Claim: Wai 9* (Department of Justice, Wellington, 1987).
[9] Waitangi Tribunal *Rekohu Report: Wai* 64 (Legislation Direct, Wellington, 2001).
[10] *Orakei Report,* above, 14.1.1, 185.

A Orakei and Rekohu: A Comparison

1 Approach to recommendations

The *Orakei* report deals with claims relating to Ngati Whatua, and their loss of land and economic base in what is now central Auckland. The Tribunal begins its discussion of remedies with the statement regarding 'full and just compensation' above. It points to the governing statute, and decides it has the power to make whatever recommendations are necessary to remedy the breach. Having made this bold statement of principle, however, the Tribunal takes a step backwards, pointing out that "effective settlement … will often depend upon the willingness of parties to seek effective compromise", although it is for the claimants and not the Tribunal to propose such a compromise.[11] It then lists the ways in which the claimants have already made compromises, such as foregoing claims to privately held land, and takes this as an indication of their reasonableness.[12] The Tribunal then rejects the return of public land, and compensation that reflects a quantification of the loss suffered (citing the impossibility of quantifying "what might have been" objectively), in favour of an approach centred on tribal restoration.[13] The choice is phrased in such a way as to make it seem the most practical option, despite the initial rhetoric to the effect that such an option was not mandatory.

The *Rekohu* report covers the claims of Moriori and members of Ngati Mutunga, regarding historical grievances over the Chatham Islands. The claim is unique in that there are two groups that are equally described as 'tangata whenua'.[14] An important difference between the two claims is that the Crown's breach regarding Moriori was partially indirect, a failure

[11] *Orakei Report*, above, 14.1.2, 185.
[12] *Orakei Report*, above, 14.1.2, 185.
[13] *Orakei Report*, above, 14.2, 186-7.
[14] Waitangi Tribunal *Rekohu Report: Wai* 64 (Legislation Direct, Wellington, 2001), 1.3.7, 11.

to prevent harm (enslavement by Ngati Mutunga) rather than an overt breach, which the Tribunal addresses by referring to the obligation of the Crown under the Treaty to protect Maori "from each other" as much as from the settlers and the Crown itself. The Crown was in a position to act and failed to do so[15] Both groups, in the eyes of the Tribunal, have legitimate rights to the islands and their resources, and it proceeds on this basis in its recommendations, where it deals first with the Moriori claim, then with that of Ngati Mutunga, and finally with issues that concern both groups.

The recommendatory portion of the *Rekohu* report begins with a very different discussion of principle to that of *Orakei*: that of self-representation and direct settlement with the Crown. "It seems right in principle that the Crown and Moriori should have the mana of settling matters between them. This principle seems now to be generally accepted" says the Tribunal.[16] Before any specific recommendations are made, the Tribunal recommends that the Crown and Moriori should negotiate a settlement between themselves, with leave to come back to the Tribunal should more specific recommendations be required.[17]

2 Form and substance of recommendations

Having stated its objective, the restoration of Ngati Whatua through "affirmation of the tribe's status, provision for homes, establishment of an economic base, and recognition of tribal authority [i.e., representation]",[18] the Tribunal in *Orakei* turns to specific recommendations, and they are specific indeed. Particular areas of land (right down to their site numbers)

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[15] *Rekohu Report,* above, 14.1, 285.
[16] *Rekohu Report,* above, 10.4, 177.
[17] *Rekohu Report,* above, 10.4, 177.
[18] Waitangi Tribunal *Report of the Waitangi Tribunal on the Orakei Claim: Wai 9* (Department of Justice, Wellington, 1987), 14.4, 192.

are to be returned to the Trust Board.[19] The church, marae and urupa are to be vested in the Trust Board, and exempt from rates.[20] The Crown is to pay $3,000,000 in cash, along with funding for an independent advisor and consultant for four years.[21] The powers and purposes of the Trust Board are to be extended to allow for such activities as development of land, tourism, sale of development rights and maintenance.[22] Legislation is to be enacted as necessary to ensure the recommendations can be carried out, and the Housing Corporation is to be directed to provide a preferential policy for Ngati Whatua when allocating State homes in the Orakei area.[23] In its specificity, the Tribunal's approach to recommendations is not unlike that of the *Manukau* report,[24] suggesting that the dramatic increase in jurisdiction had not yet been extended to recommendations. The Tribunal does emphasise the minimal nature of the recompense these measures provide compared to the huge loss by Ngati Whatua since the signing of the Treaty, and urges the Crown "should move in no unstinting manner to promote the re-establishment of the tribe it displaced"[25].

The tenor of the *Orakei* report is that the Crown has acted appallingly, and that the least it can do is to remedy the injustices it has caused forthwith, in the specific (albeit relatively limited) ways listed. While there is no argument that the Tribunal was fully justified in making the findings and recommendations it did, by the time of the *Rekohu* report, its approach had changed markedly.

Following the recommendation to negotiate, the *Rekohu* report then details the areas in which the Tribunal believes compensation is due, the

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[19] *Orakei Report*, above, 15.1; 15.4, 196-197.
[20] *Orakei Report*, above, 15.2, 196.
[21] *Orakei Report*, above, 15.5, 197.
[22] *Orakei Report*, above, 15.6, 197.
[23] *Orakei Report*, above, 15.7, 15.8, 197.
[24] Waitangi Tribunal *Report of the Waitangi Tribunal on the Manukau Claim: Wai 8* (GP Publications, Wellington, 1985)
[25] *Orakei Report*, above, 198.

changes to legislation, and return of land it deems necessary. In contrast to the *Orakei* report, there is no dollar value mentioned at all. Quantum is to be determined by negotiation.[26] There is one recommendation for the return of a particular block of land to two persons, on trust, for a concessionary payment.[27]

As with *Orakei*, the primary concern of the Tribunal is still one of restoration. Although the recommendations in *Rekohu* lack the specificity of those in the earlier report, they nevertheless give broad directions as to where the focus of compensation should be. For the Moriori, they recommend compensation should be directed to cultural re-establishment and the social, cultural and economic development of the people, as well as the establishment of a "significant Moriori land base" as a long-term goal[28]. Compensation paid to Ngati Mutunga should also be used "for general tribal purposes, in order to rebuild the tribe and the cultural base on the island, and in return for the land that the people, as a tribe, were denied"[29]. Again, it is recommended that the amount be determined through negotiations.

A notable absence from the recommendations is one for costs. In a number of other reports that anticipate resolution by direct negotiation, the Tribunal has recommended the Crown provide claimants with sufficient funds to enable them to engage professional assistance as required throughout the negotiations.[30] The Tribunal also often recommends the Crown pay the claimants' costs of bringing the claim.[31] The former

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[26] Waitangi Tribunal *Rekohu Report: Wai* 64 (Legislation Direct, Wellington, 2001), 14.1, 286.
[27] *Rekohu Report*, above, 14.2, 287; 11.
[28] *Rekohu Report*, above, 14.2, 286.
[29] *Rekohu Report*, above, 14.2, 287.
[30] Such recommendations were made in the following reports, for example: Waitangi Tribunal *Ngai Tahu: Wai 27*(Brooker and Friend, Wellington, 1991); *Mohaka River: Wai 117* (Brooker and Friend, Wellington, 1992); *Te Ika Whenua Rivers: Wai 212* (GP Publications, Wellington, 1998); and *Muriwhenua Fishing: Wai 22* (Department of Justice, Wellington, 1988).
[31] Costs were recommended in the reports in note 22 above, as well as in the following reports: Waitangi Tribunal *Waiheke: Wai 10* (Department of Justice, Wellington, 1989); *Report of the Waitangi Tribunal on*

recommendation in particular is intended to ensure that claimants can negotiate on a more equal footing, increasing the likelihood of a settlement which is both fair and lasting.

Although it is impossible, without further evidence, to know precisely why such a recommendation was not made, it is possible that one factor was the uncertainty as to whom would be the best recipients of such a fund. The issue of representation played a minimal part in the *Orakei* report, as there was an existing Maori Trust Board which, by the end of the hearing, had unanimous support from the tribe.[32] The Tribunal, in that report, acknowledged the issue could be relevant to the determination of remedies,[33] but in that case needed go no further. In contrast, the need to determine, or create, bodies which were truly representational of both Moriori and Ngati Mutunga respectively was acknowledged as a primary obstacle to the resolution of the grievances in the *Rekohu* report, but one which the Tribunal believed was best decided by the claimants themselves.[34] Representation both for claims before the Tribunal, and more especially for direct negotiation with the Crown remains a challenging issue, which has been recognised by the current Chairman of the Waitangi Tribunal, Chief Judge Joe Williams.[35]

3 Features unique to Rekohu

Claims Concerning the Allocation of Radio Frequencies: *Wai 26, 150* (Brooker and Friend, Wellington, 1990); *The Pouakani Report: Wai 33* (Brooker and Friend, Wellington, 1993); *Te Whanganui a Orotu Report: Wai 55* (Brookers Ltd, Wellington, 1995); *Taranaki Report – Kaupapa Tuatahi: Wai 143* (GP Publications, Wellington, 1996); *Te Whanau o Waipareira Report: Wai 414* (GP Publications, Wellington, 1998); *Turangi Township Remedies Report: Wai 84* (GP Publications, Wellington, 1998); and *Whanganui River Report: Wai 167* (GP Publications, Wellington, 1999).

[32] Waitangi Tribunal *Report of the Waitangi Tribunal on the Orakei Claim: Wai 9* (Department of Justice, Wellington, 1987), 2.2, 7.

[33] *Orakei Report*, above, 2.2, 7.

[34] Waitangi Tribunal *Rekohu Report: Wai* 64 (Legislation Direct, Wellington, 2001), 14.1, 286; 14.3, 288.

The *Rekohu* report illustrates a feature which is increasingly common in Tribunal reports; conflict between rival claimants. The report is not the first where the land or resource in question is subject to multiple claims. Since the *Rangahaua Whanui* project,[36] and the expressed intention of the Tribunal to speed up and streamline the reporting process, it is likely that the Tribunal will be required to make determinations between rival claimants more often than in the past, as regional claims are heard together.

The most radical recommendation in *Rekohu* has no counterpart in the *Orakei* report. The Tribunal recommend that a body be set up to investigate the introduction of a new land law for the Chatham Islands.[37] Amendment to legislation is suggested in a number of reports, but generally to the extent that Maori rights and interests are recognised within existing frameworks. What is advocated in *Rekohu* is no less than a complete overhaul of the existing tenure system. Given the history of political reluctance that accompanied the inclusion of Treaty clauses in existing legislation,[38] such a proposal belies any suggestion that the Tribunal makes its recommendations based on what is likely to be acceptable to the Crown. At the same time, given the Tribunal's awareness by this time that full economic compensation is not a remedy that the Crown will agree to in settlements,[39] such a recommendation might be seen as an example of the way in which the Tribunal has attempted to seek alternative means of redress.

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[35] Baragwanath, Justice D; Parata, H; Williams J, *Treaty of Waitangi Issues – the last decade and the next century* (Seminar, New Zealand Law Society, 1997), 46.
[36] A Ward, *National Overview: Tribunal Rangahaua Whanui Series* (GP Publications, Wellington, 1997).
[37] Waitangi Tribunal *Rekohu Report: Wai* 64 (Legislation Direct, Wellington, 2001), 14.3, 287.
[38] See for example the public debate surrounding inclusion of such a clause in the New Zealand Public Health and Disability Act 2000.
[39] This has been explicitly recognised in reports such as *The Taranaki Report – Kaupapa Tuatahi: Wai 143* (GP Publications, Wellington, 1996), 12.3.10, 314.

Another feature of the *Rekohu* report which does not appear in *Orakei* is the issue as to whether the Crown has any say in how settlement money is spent. That it is specifically dealt with here is evidence that the Tribunal is aware of some consequences of settlement in other cases[40], and applies this knowledge to its recommendations. It is also evidence of how far the claim settlement process has moved on since *Orakei* – i.e., actual settlements have been signed and paid.

B Conclusions on Historical Claims Recommendations

What observations can be made about the Tribunal's approach to recommendations on historical claims? The Tribunal has replaced specificity with broad guidelines in an effort to facilitate the policy of resolution-by-negotiation. Increasingly, issues are left to the claimants to resolve along with the Crown. Issues of representation, and who should receive remedies, are relevant, but these too are left to the claimants themselves, as the Tribunal takes pains to avoid being paternalistic, preferring to acknowledge the mana of the tribes to decide for themselves.

While the Tribunal faces new issues, however, its recommendations remain underpinned by the same primary objective – the economic, cultural and social restoration of Maori, to a position where they can participate fully as Treaty partners. Andrew Sharp is critical of such an approach by the Tribunal, in these and other claims, seeing its emphasis on prospection as a means of avoiding the huge sums which would be required of a strict reparationist approach.[41] While there is an element of truth to this, the alternate view is that, by bringing the Treaty into the

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[40] An example is the controversial situation that arose when the Crown withheld settlement money from Tainui while its runanga dealt with internal leadership issues.

[41] A Sharp, *Justice and the Maori: the philosophy and practice of Maori claims in New Zealand since the 1970s*, 2nd edition, (Oxford University Press, Auckland, 1997), Chapter 8, 141-155. Andrew Sharp is a Senior Lecturer in Political Studies at the University of Auckland.

present context through its emphasis on continued negotiations - a current contract - the Tribunal has preserved Treaty principles (such as partnership) more effectively than if it had simply recommended the award of huge sums of money or tracts of land in complete settlement.

IV CONTEMPORARY CLAIMS

A Categorisation

By Judge Durie's classification, contemporary claims are those which deal with current Crown actions. While nearly all of the claims could be said to have a contemporary element; in that the remedies granted would necessarily be coloured by contemporary conditions, there are relatively few which deal purely with current policies. Even among claims which can truly be described as purely contemporary, it is more difficult to make comparisons than it is with historical claims, because they deal with such a wide range of policies and issues, from representation to education, broadcasting to social policy.

The contemporary claims have been described as being essentially grounded in the need for social, cultural and economic survival.[42] While they are all quite issue-specific, there are certain similarities in the Tribunal's approach to recommendations within the reports. One issue which develops is the idea of a continuing relationship, and conflicting interpretations of kawanatanga and rangatiratanga. The most recent contemporary reports also show an increasing complexity. This Part will examine some of the characteristics of the recommendations in the

[42] K.S. Coates & P.G.McHugh; *Living Relationships: The Treaty of Waitangi in the New Millennium*, (Victoria University Press, Wellington, 1998), 260

contemporary reports, comparing both pre- and post-1986 recommendations, and those of the most recent reports.

B Focus of Recommendations

The recommendations in the majority of contemporary reports are focused almost entirely on the particular issue with which the claim is concerned. They are practical and to the point, and suggest solutions which are both immediate and specific. For example, in the *Wananga Capital* report[43], the issue was the funding of Maori tertiary education institutes, and the Tribunal recommended a one off amount be paid to cover three objectives – to compensate for money already spent on buildings and equipment, to enable the institutes to upgrade their facilities to a standard comparable to other tertiary institutions, and to cover the costs of the claim.[44]

Similarly in the *Maori Electoral Option* report of 1994,[45] where the issue was inadequate funding for education on the Maori Electoral Option with only two months before electoral rolls were to close, the Tribunal made three succinct recommendations: the Crown urgently increase funding to ensure it was enough to provide an adequate education campaign, that it consult with representatives of certain Maori organisations to settle on a suitable programme which included comprehensive multimedia coverage, and that the campaign be the responsibility of those Maori representatives in accordance with the principle of te tino rangatiratanga.[46]

This focus is also in evidence in the *Maori Development Corporation* report (MDC).[47] This concerned the sale by Government of its shares in

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[43] Waitangi Tribunal, *Wananga Capital Establishment Report: Wai 718* (GP Publications, Wellington, 1994).
[44] *Wananga Report*, above, 6.4, 55
[45] Waitangi Tribunal *Maori Electoral Option Report: Wai 413* (Brookers Ltd., Wellington, 1994).
[46] *Maori Electoral Option Report*, above, 5.3, 38
[47] Waitangi Tribunal *Maori Development Corporation Report: Wai 350* (Brookers Ltd., Wellington, 2000).

the corporation, which was a development bank with a pan-Maori focus. The concern was that such a sale would result in a bank that no longer assisted all Maori equally, but was dominated by particular tribes. The recommendations of the tribunal state succinctly the particular measures that it believes would enable the Crown to avoid breaching its Treaty obligations. It offers alternative solutions as to how the Crown might ensure the focus of the bank remained pan-tribal – through an existing trust, or by refraining from a sale of the shares until another suitable pan-Maori entity can be established. It notes that allowance should be made so that Maori authorities that wish to purchase shares can make payments over time, if necessary. Finally, it makes recommendations for the contingency that the Crown persists in the sale and the bank does become dominated by particular tribes – that the Crown negotiates a settlement with Maori for failure to meet the need for a pan-Maori development bank such as the MDC.[48]

The recommendations are brief and matter-of-fact. There is no condemnation, simply a statement of what the potential breach is, and how in the Tribunal's view it can be avoided, or if need be remedied. The focus is on the particulars of the case, the need for a development bank as part of the Crown's role as Treaty partner, and the need to ensure that its funds be available to all Maori on an equal basis. As long as these concerns are met, the Crown can sell its shares and have no more involvement.

The *Mokai School* claim, a more recent report, also deals with a particular one-off issue - the closure of a bilingual school in a small community.[49] Its recommendations too are specific, but more detailed than those of the MDC. Having recommended that the school must be reopened so that

[48] *Maori Development Corporation Report,* above, 53-54.
[49] Waitangi Tribunal *Mokai SchoolReport: Wai 789* (Legislation Direct, Wellington, 2000).

Treaty obligations are met, the report makes practical suggestions as to how the concerns of both claimants and the Ministry of Education might be addressed.

There is a noticeable difference in focus between *Mokai School* and the earlier reports. For example, where the *MDC* report listed particular measures that would enable the Crown to avoid a particular breach once and for all, but still end its direct involvement with the development bank, *Mokai School* requires a different kind of relationship. There is specific reference to on-going consultation, and the underlying premise that the Crown's obligations do not end with the simple re-opening of the school.[50]

As well as recommendations specific to the school, the Tribunal also makes a number of observations and recommendations on the wider systemic issues that underpin the case. Section 6(4) Treaty of Waitangi Act 1975 entitles the Tribunal to make recommendations either specifically, or in more general terms, and the Tribunal frequently does both, turning from remedies for the specific claim, to recommendations that address the broader underlying issues. In the above reports on contemporary claims, the Tribunal seems less inclined to make broader recommendations, and *Mokai School* is an exception to this trend.

C Kawanatanga and Rangatiratanga – Defining Relationships

Contemporary reports face unique difficulties, lacking as they do a comforting distance between breach and investigation. The Tribunal

[50] *Mokai School Report*, above, 4.8.2, 131.

acknowledges that the immediacy of the actions which they investigate affect the objectivity of both the parties and the Tribunal itself.[51]

Part of the difficulty is the politically sensitive nature of contemporary claims. The government has every right to govern, and part of that role is the implementation of policies that may (or may not) have been promised to the electorate. Conflict has arisen as to the interpretation of 'kawanatanga', or government, and of 'rangatiratanga', and how the two concepts interrelate in a practical sense.[52] The recommendations of the tribunal seem to rest on a very different conception to that of the Crown. This is the key issue with regard to contemporary claims. While they may be less controversial from a general public point of view (compared to the so-called conceptual claims, for example), their political sensitivity lies in their effect from a constitutional perspective. The government does not enjoy being told what to do, and some of the Tribunal recommendations, along with their interpretation of rangatiratanga, could place certain limits on parliamentary sovereignty. The challenge to the Tribunal in its recommendations on contemporary policy issues, is to make clear and firm statements as to the effect of policies from an independent Treaty perspective, while at the same time being aware of the risk of biting the hand of its creator. This is the advantage of being restricted to (for the most part) non-binding recommendations – as Judge Durie has pointed out, the Tribunal has the advantage over the Courts of being able to criticise the system, since the Government need not fear being forced to follow what it recommends.[53]

D Comparisons with pre-1986 Reports: Changing Issues?

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[51] *Maori Development Corporation Report,* above, 1-2.
[52] See for example *Mokai School Report*, above, 1.5.2, 1.5.3, 10.
[53] E T J Durie; 'The Waitangi Tribunal: Its Relationship with the Judicial System: [1986] NZLJ 235, 236.

The purpose of the claim resolution process has been described as one of survival for indigenous peoples.[54] This is particularly apposite for the post-1986 contemporary claims, which seek to ensure Maori education and representation, social welfare, and the preservation of the Maori language. The need for preservation, and an accompanying urgency in the face of inconsistent Crown policies are both characteristics of contemporary claims, which have led to an emphasis by some claimants on development of the Treaty principle of protection.

The *Te Reo* report[55] fits all of the above criteria, although it is an earlier report. In fact, it is possible to define all of the reports issued before 1986 as contemporary, since they were confined to current breaches by the Crown. Not only did the claims in the earliest reports have a more limited scope, the Tribunal's interpretation of its powers of recommendation limited them to what was 'practical' in all the circumstances.[56]

As subsequent reports such as *Orakei* have shown, the approach taken by the Tribunal even after 1986 in reality still involved recommendations based on practicality. However, what is considered 'practical', and 'possible', can be said to have changed since 1986. Reports issued today have the advantage of a different climate, in which 'principles of the Treaty' exist in law, and not just in principle, and in which the Crown has already reached settlements with some tribes. There is far more context on which to draw when making recommendations.

What is noticeable in the earlier reports is a trend to more and more detail in recommendations, and a Tribunal that became increasingly willing to

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[54] K.S. Coates & P.G.McHugh; *Living Relationships: The Treaty of Waitangi in the New Millennium*, (Victoria University Press, Wellington, 1998),260.
[55] Waitangi Tribunal *Finding of the Waitangi Tribunal Relating to Te Reo Maori: Wai 11* 2nd ed. (Department of Justice, Wellington, 1986).
[56] Waitangi Tribunal *Report of the Waitangi Tribunal on the Manukau Claim: Wai 8* (GP Publications, Wellington, 1985), 8.5.

go beyond the immediate issue to the broader surrounding problems. By the time the *Manukau* report was released, the Tribunal appeared frustrated by its limitations, and by the attitudes of decision makers who were disinclined to consider Maori interests, let alone include Maori in the decision making process (The requirements of the Resource Management Act 1991 were yet to come[57]). The Tribunal makes numerous detailed pleas in its recommendations for legislative amendment, funding, investigations and consultations – the same types of recommendations that reappear in many of its later reports, but in greater detail.[58] The recommendations are followed by a strongly worded statement on the need for recognition and remedy for the historical injustices which "prevented past wounds from healing", and the good faith of the Crown is called into question.

The Tribunal in its pre-1986 reports displayed an increasing level of detail in its recommendations, and urgency in its comments on Crown policy, until the Crown ultimately responded with the Treaty of Waitangi Amendment Act 1985. In contrast, post-1986 reports on Crown policy have been almost uniformly non-condemnatory, and largely limited to the immediate issues before them. However, with the comments in the *Mokai School* report, and the *Waipareira* report, there may be a new trend developing. These two reports are factually quite different, and the latter introduces a new and contentious issue with regard to representation for urban Maori. However, underpinning both is the issue of kawanatanga and rangatiratanga. The Tribunal is becoming increasingly explicit in its recommendations on this matter. In the *Waipareira* report it refers to the *New Zealand Maori Council* case,[59] and restates the need for a balance to be found through "consultation and negotiation between the parties,

[57] See sections 6(e), 7(a) and 8 Resource Management Act 1991.
[58] *Manukau Report, above,* 129-135.
[59] *New Zealand Maori Council v Attorney-General* [1994] 1 NZLR 513,517, Lord Woolf.

conducted in a spirit of partnership".[60] Arguably the Crown has already responded, and the new 'cross-claims' reports could be seen as evidence of this.[61] On the other hand, the *Wananga* report, which bears all the limited specificity of the pre-*Waipareira* contemporary claims, was released as recently as 1999. It may simply depend on the type of claim for which the Tribunal is making its recommendations, or even upon the members of the Tribunal for a particular report – or the particular arguments that are presented in support of a claim.

V CONCEPTUAL CLAIMS – RESOURCE SHARING

An examination of the recommendations in the 'conceptual' claims highlights three particular issues. The first is the evolution that has occurred in the application of Treaty principles since the Tribunal began. The second is the way in which the interests of the various parties have been balanced by the Tribunal, and the third, the way in which the Tribunal has employed the remedy of legislative and systemic change in its recommendations.

A Evolution of Principles

Four reports that demonstrate this evolution are the 'river claims': *Kaituna*[62], *Mohaka*[63], *Te Ika Whenua*[64] and *Whanganui*[65]. Each concerns a particular river, which is acknowledged as a taonga of the local tangata whenua. What changes over the course of the reports is the significance, in practical terms, of taonga, particularly in terms of the obligations that

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[60] Waitangi Tribunal *Te Whanau o Waipareira Report: Wai* 414 (GP Publications, Wellington, 1998), 234.
[61] See Part VI.
[62] Waitangi Tribunal *Report of the Waitangi Tribunal on the Kaituna River Claim: Wai 4,* 2nd ed (Department of Justice, Wellington, 1989).
[63] Waitangi Tribunal *The Mohaka River Report: Wai 119* (Brooker and Friend Ltd., Wellington, 1992).
[64] Waitangi Tribunal *Te Ika Whenua Rivers Report: Wai 212* (GP Publications, Wellington, 1998).

flow from that to the Crown in the form of the Tribunal's recommendations.

The *Kaituna River* claim is essentially about the claimants being unable to use fish from the river because the practice of discharging effluent is regarded as unclean. The Tribunal recommends that the proposed discharge of effluent into the river be stopped, and alternative means of disposal be investigated.[66] It recommends that, in the meantime, the subsidy granted to the local district council be altered to allow the effluent to be treated before it is discharged, to bring it up to standard, and that the Water and Soil Conservation Act 1967 and other related legislation be amended so that decision making bodies such as the Planning Tribunal are able to take Maori spiritual and cultural values into account when considering applications to water rights.[67] The Tribunal acknowledges that continuing to allow even treated effluent to be discharged into the river is a 'compromise', since it is the very mixing of the waters that is offensive to Maori. Despite its findings that the rights which the claimants seek to protect are taonga, and that the Treaty of Waitangi guarantees "the continued enjoyment and undisturbed possession" of taonga, it recommends what it sees to be the most 'practical' solution rather than one which in fact protects the rights.[68] Its emphasis is on practicality and compromise.

The *Mohaka River* report, although still about the treatment of taonga, is quite different to *Kaituna*. The Tribunal describes it as the first claim of its kind.[69] The claim is about ownership and control of the river itself. Rather than just access to fish, and an assurance that Maori values will be

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[65] Waitangi Tribunal *Whanganui River Report: Wai 167* (GP Publications, Wellington, 1999).
[66] Waitangi Tribunal *Report of the Waitangi Tribunal on the Kaituna River Claim: Wai 4,* 2nd ed (Department of Justice, Wellington, 1989), 33.
[67] *Kaituna River Report,* above, 10.3.1;10.2.3, 33.
[68] *Kaituna River Report,* above, 9.3.3, 33.
[69] Waitangi Tribunal *The Mohaka River Report: Wai 119* (Brooker and Friend Ltd., Wellington, 1992), 80.

considered with regard to its use, as was the case in *Kaituna*, here the claimants seek recognition of what they claim are existing, unextinguished rights of ownership over the actual river.[70]

Recommendations are made that the Crown should negotiate with Ngati Pahauwera in order to reach an agreement vesting the riverbed in Ngati Pahauwera, and making provision for a regime of management and control in which they are included.[71] Any water conservation order should be made as part of that agreement and not before, and any removal of gravel or stones from the river in future should require Ngati Pahauwera's consent.[72] The agreement should recognise the legitimate interests of both Ngati Pahauwera and other citizens.[73]

One explanation for the vast conceptual difference between claims is that *Mohaka River* was subsequent to the 1986 amendment of the Treaty of Waitangi Act. Although the Tribunal eventually began to refer to pre-1986 incidents as relevant to current situations,[74] such a view was not evident in *Kaituna*. The claim brought in *Mohaka* would have been beyond the scope of the Tribunal's powers before 1986, based as it was on rights dating back to before 1840. It is clear that the 1986 amendment had a dramatic effect on the claims that could be brought before it, not only because it allowed historic grievances to be aired and recognised, but also because of the conceptual shift that it enabled.

The Tribunal in the *Mohaka* report bases its recommendations on the principle of active protection, which the it sees as derived from the Treaty guarantee of te tino rangatiratanga over taonga, and including the right of

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[70] *The Mohaka River Report*, above, 1.1,1.
[71] *The Mohaka River Report*, above, 6.4, 79.
[72] *The Mohaka River Report*, above, 6.4,79.
[73] *The Mohaka River Report*, above, 6.4.79.
[74] See especially: Waitangi Tribunal *Report of the Waitangi Tribunal on the Manukau Claim: Wai 8* (GP Publications, Wellington, 1985).

development.[75] Applying the reasoning of the Judges in the *New Zealand Maori Council* case,[76] the Tribunal concludes that "it is a principle…that the Crown is obliged to protect Maori property interests to the fullest extent reasonably practicable"[77] – and property includes taonga.

In *Te Ika Whenua Rivers*, the Tribunal builds on this approach. This report, splintered from the main Te Ika Whenua claim like its sister report on energy assets,[78] also deals with an interference with the claimants' rights to exercise te tino rangatiratanga over their taonga by a variety of Crown actions.[79] The Tribunal finds that in exercising its kawanatanga, the Crown must "have regard to" the claimants' right of "tino rangatiratanga over their rivers and their position as a treaty partner and weigh these against the interests of other users and in the national interest".[80] Its recommendations reinforce the obligations of the Crown as Treaty partner to negotiate with Te Ika Whenua to establish a "regime of management and control of the rivers that recognises and takes into account" that Treaty guarantee, over the rivers and the native fisheries therein.[81]

Throughout both the findings and recommendations in *Te Ika Whenua Rivers*, the Tribunal recognises that there are other interests that must be taken into account, such as those of other river users, and (particularly with regard to the dams) the 'national interest'.[82] What is clear, however, is that since the *Kaituna* report, the Crown's obligations with regard to protecting taonga have greatly increased. The right to tino rangatiratanga

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[75] *The Mohaka River Report*, above, 6.1.
[76] *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641.
[77] *The Mohaka River Report*, above, 6.2.
[78] Waitangi Tribunal *Te Ika Whenua Energy Assets Report: Wai 212* (Brooker and Friend Ltd., Wellington, 1993).
[79] For a summary of the particulars of the claim, see Waitangi Tribunal *Te Ika Whenua Rivers Report: Wai 212* (GP Publications, Wellington, 1998), 1.1, 1-2.
[80] *Te Ika Whenua Rivers Report*, above, 11.5.1, 142.
[81] *Te Ika Whenua Rivers Report*, above, 11.7, 143-145.
[82] for example, *Te Ika Whenua Rivers Report*, above, 11.5.1, 142; 11.7, 143.

means that Te Ika Whenua are more than just one interest group – they have rights which *must* be respected, and that generate obligations on the Crown to consult, to include iwi in management, and should their rights be limited in any way, to ensure that this is a result of negotiations, with compensation for any loss.[83]

In contrast, the *Whanganui River* report takes a different tone. The recommendations themselves are similar to *Te Ika Whenua*, in terms of compensation and costs, and the need to involve Atihuanui in the management of the river. Where *Te Ika Whenua* consolidated the findings of its earlier reports on te tino rangatiratanga,[84] however, the Tribunal in *Whanganui* emphasise the 'uniqueness' of the claim. Rather than detailed recommendations, they make a number of 'proposals' for ways in which a settlement could be reached, largely focused on legislative change.[85] There is a conscious distinction between the right of ownership in the Whanganui River that Atihuanui have, and the "English legal conception of river ownership in terms of riverbeds".[86] Where the emphasis in *Mohaka River* and *Te Ika Whenua Rivers* was on establishing that iwi had rights over the river and that these should be taken seriously, in *Whanganui River* there is a development of what the substance of these rights might be, and the indication that this may well vary from case to case.

At the very heart of the conceptual claims is the difference between Pakeha/English and Maori conceptions of ownership. The Tribunal emphasise that Atihuanui do not wish to deny others the use of the river, but seek to ensure that the river is used in such a way as to preserve the

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[83] *Te Ika Whenua Rivers Report*, above, 11.7, 145.
[84] See *Te Ika Whenua Rivers Report*, above, 11.2, 134, for discussion on this principle in the *Mohaka River, Turangi Township,* and *Ngai Tahu* reports.
[85] Waitangi Tribunal *Whanganui River Report: Wai 167* (GP Publications, Wellington, 1999), 11.7, 342-4.
[86] *Whanganui River Report*, above, 11.7, 343.

"mana of the ancestral inheritors"[87]. There is a spiritual dimension to the Maori conception that does not exist in English property law, with its basis in 'rationality'. The river reports show an evolving awareness of that spiritual element of 'taonga' within the Tribunal. The inconsistency of existing legislation with such a conception illustrates the fact that the development of ideas by the Tribunal is not always mirrored in similar development by the Crown.

B Balance of Interests

The controversy that arises with conceptual claims is that they relate to *shared* resources, especially rivers. These are the claims over which the general (non-Maori) public is most likely to get upset, which may make the Government less happy to go along with the Tribunal's interpretations – how the "sharing" part of the partnership works in practice is a tricky and politically risky area in which to engage. The recent petition presented by Mike McVickers to Parliament opposing the transfer of "ownership" of the Rotorua lakes to iwi is a case in point. Although the petitioners appear themselves to have a fairly simplistic take on the issue, their actions are indicative of the level of public feeling which is often aroused when the 'ownership' of certain public property is at stake. While such reactions have no impact on whether or not there has been a breach of the Treaty, there is an argument that the interests of the wider community form part of the circumstances to which the Tribunal ought to have regard (under section 6(3) Treaty of Waitangi Act 1975) when making their recommendations.

[87] *Whanganui River Report*, above, 11.6, 342.

An example of such an approach can be found in the dissenting opinion of the *Whanganui* report (one of only three reports to contain a dissent).[88] John Kneebone's opinion is that nobody can own the water, and that Whanganui Maori need to recognise that along with the three strands of the river which represent their three ancestors, is now entwined a fourth strand, representing non-Maori New Zealanders who share an equally legitimate interest in the river.[89] While only a minority opinion, this view represents the end of the pendulum that was apparent in the *Kaituna* report – a view in which "all circumstances" to be considered must include the interests of the majority as well as of Maori. In contrast, the focus of the majority (as it was in *Te Ika Whenua* and *Mohaka River*) is on what partnership and the Treaty guarantees mean for Maori.

It is clear that the resolution of claims will at some point involve a balancing of interests, Maori and non-Maori. The Tribunal has been accused of taking a partisan approach, acting as "an advocate on its clients' behalf".[90] Where in earlier reports the Tribunal weighed up the public interest as one of the circumstances which affected its recommendations (as it did in *Kaituna*), to the extent that it might avoid making recommendations altogether,[91] reports such as the later river claims leave that balancing act to be done by the Crown. This raises issues as to the role of the Tribunal. Arguably the balancing of interests is one that should be left to the Crown, to be applied as part of its negotiations with Maori. The Tribunal's primary role is to determine breaches of the Treaty by the Crown, and its recommendations are aimed at healing those breaches. The dissent in *Whanganui River* highlights the modern reality that how those recommendations are applied affects more

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[88] *Whanganui River Report*, above. Another is Waitangi Tribunal *Radio Spectrum Management and Development Final Report: Wai 776* (GP Publications, Wellington, 1999).
[89] *Whanganui River Report*, above, 11.9, 345.
[90] A Sharp, *Justice and the Maori: the philosophy and practice of Maori claims in New Zealand since the 1970s*, 2nd edition, (Oxford University Press, Auckland, 1997), 147.

than just the parties to the Treaty, and illustrates how much the majority of the Tribunal has changed since its early reports.

C Legislative and Systemic Change

While *Whanganui River* might be seen as a gentler approach to the issue of tino rangatiratanga, the proposals that it makes for including Maori in the management of the river are a little more radical. The majority consider ways in which the existing statutory framework could be utilised, and conclude that there is no solution within the scheme of the Resource Management Act 1991 which would "do justice to the issues involved".[92] Its proposals included a major alteration of the scheme of the RMA, to include iwi in a 'meaningful decisionmaking role', rather than leave the scope of their involvement to the discretion of regional authorities.[93]

The Tribunal has waged a long-term reformatory campaign with regard to legislative amendment. It was first recommended in the *Kaituna River* report, to allow Water Boards and the Planning Tribunal to take account of Maori spiritual and cultural values.[94] Since then it has been recommended in nearly every report. Changes to legislation represent the most direct way in which the Government can meet its Treaty obligations. In most cases where the Tribunal has recommended legislative change, this has been in the form of amendments which either make Maori concerns and values relevant considerations, or include Maori in the decision-making process in one way or another. Generally the recommendations are intended to fit into existing legislative framework. The most notable exception to this is the aforementioned *Rekohu* report, which advocates a

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[91] For example, see Waitangi Tribunal *Report of the Waitangi Tribunal on the Mangonui Sewerage Claim: Wai 17* (Department of Justice, Wellington, 1988).
[92] Waitangi Tribunal *Whanganui River Report: Wai 167* (GP Publications, Wellington, 1999), 11.7, 342.
[93] *Whanganui River Report*, above, 11.7, 342-4.
[94] Waitangi Tribunal *Report of the Waitangi Tribunal on the Kaituna River Claim: Wai 4,* 2nd ed (Department of Justice, Wellington, 1989), 10.2.

whole new system of land tenure for the Chatham Islands.[95] This is a fairly radical recommendation, and it may be that it was unique to the circumstances of the claim. On the other hand, given Tribunal awareness of the financial constraints on compensation and other forms of remedy, it may be that the cost of implementing new legislation is seen as a preferable one, and an effective means to ensure that the principles of the Treaty are given effect to at all levels.

VI THE FOURTH CATEGORY

In the last two years, the Tribunal has issued two reports that do not really fit within the three categories above. Although at a stretch they could be said to be contemporary, in that they have arisen as a result of Crown policies, they have more direct and fundamental implications for the resolution process.

A Negotiation

Over the years, the Tribunal has urged direct negotiations between the claimants and Crown in order to resolve claims in a number of reports.[96] After all, they must engage with each other at some point. Whether this was Tribunal driven, or originated as Crown policy is uncertain, but it is now official Crown policy, part of the role of the Office of Treaty Settlements.[97] The policy is increasingly reflected in the format of recommendations. For example, the *Ngati Awa Raupatu* report contained no recommendatory section at all, but rather a list of proposals under the

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[95] See Part III.

[96] Specifically, *Te Ika Whenua Energy, Mohaka River, Pouakani, Te Arawa Geothermal, Whanganui River, Ngati Awa Raupatu, Whanganui a Orotu Remedies, Turangi Township, Final Radio Spectrum, Te Ika Whenua Rivers.*

[97] See *Healing the Balance, Building a Future*, publication of the Office of Treaty Settlements, Wellington, 1999, for a clear exposition of the Crown's direct negotiations policy.

heading of 'Claim Settlement', designed to suggest areas and issues that the parties might focus on during negotiations.[98]

In some cases, the recommendation to negotiate has been accompanied by leave to reapply for specific recommendations should the parties be unable to reach an agreement, although the Tribunal usually expresses its hope that this will not be required.[99] In very limited cases, the Tribunal has discouraged negotiation – in the *Muriwhenua Land* report[100], it adjourned to hear submissions on recommendations, as it was contemplating using its binding powers of recommendation, an action that it does not take lightly; and *Te Whanganui a Orotu*,[101] it again adjourned to hear submissions, but ultimately recommended negotiation in its subsequent *Remedies*[102] report anyway.

In the case of the *Ngai Tahu* claim,[103] the report was issued with the purpose of assisting negotiations already under way, which did indeed result in an historic settlement. Both parties specifically asked the Tribunal to refrain from making recommendations, which it largely did.[104] Reports such as *Ngai Tahu*, and *Muriwhenua Fishing*, can be distinguished by the fact that claims had already been put before the Tribunal, and investigations begun. In *Ngai Tahu* the result was a report based on the Tribunal's findings so far, and resulted in a three volume set (in addition to the *Ngai Tahu Fishing* report). The aim was to give the parties a base for negotiation, the difference to earlier reports being that

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[98] Waitangi Tribunal *Ngati Awa Raupatu Report: Wai 46* (Legislation Direct, Wellington, 1999).
[99] It has been required so far in: Waitangi Tribunal *Turangi Township Remedies Report: Wai 84* (GP Publications, Wellington, 1998), & Waitangi Tribunal *Te Whanganui a Orotu Remedies Report: Wai 55* (GP Publications, Wellington, 1998).
[100] Waitangi Tribunal *Muriwhenua Land Report: Wai45* (Brooker and Friend Ltd., Wellington, 1997).
[101] Waitangi Tribunal *Te Whanganui a Orotu: Wai 55* (Brookers Ltd., Wellington, 1995).
[102] *Te Whanganui a Orotu Remedies Report*, above.
[103] Waitangi Tribunal *Ngai Tahu Report: Wai 27* (Brooker and Friend Ltd., Wellington, 1991).
[104] The Tribunal did make some general recommendations, particularly with regard to representation of Maori on regional and national environmental committees – see *Ngai Tahu Report,* above, 25.1-3, 1061-5.

this time it had been asked for by the parties, not recommended by the Tribunal.

B The 'New' Reports

With the publication of the *Pakakohi Tangahoe Claims* and *Ngati Maniapoto/Ngati Tama Cross-Claims* reports, the Tribunal has arguably embarked on a new phase of reporting. The questions which it is being asked differ from those of earlier reports, although of legislative necessity they are phrased as requests for determination of whether certain Crown actions breach its Treaty obligations.

The *Ngati Maniapoto* report demonstrates a new purpose for the Tribunal. Its concern is not to resolve the claim, but to ensure that future claims and settlements are not prejudiced by the heads of agreement, or any settlement negotiated between the Crown and Ngati Tama.[105] The Tribunal is acting as a safety net, in a way, to ensure that the process of settlement negotiation is carried out in a manner entirely consistent with the Crown's Treaty obligations.

In a similar manner, the Tribunal in the earlier *Pakakohi* report are neither prepared to recommend an end to the settlement, nor to formally recommend a change in the Crown's approach to settlement.[106] Its focus instead is on protecting the integrity of both Pakakohi and Tangahoe in the context of the Ngati Ruanui settlement under negotiation.

It is clear that the Tribunal's recommendatory function is less relevant to this kind of claim. The Tribunal has responded to the positive moves by the Crown to address claims resolution in a meaningful way at last. In an

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[105] Waitangi Tribunal *Ngati Maniapoto/Ngati Tama Settlement Cross-claims Report: Wai788/800* (Legislation Direct, Wellington, 2001).

extension of its recommendations to negotiate, which are characterised by their general, non-specific nature, the Tribunal appears anxious not to stifle the process in any way. It should be noted that these kinds of reports have so far been limited to the context of historical claims. It will be interesting to see whether the direct negotiation approach is extended by the Crown to other types of claims, and if so, whether the Tribunal will respond as it has with these reports.

VII IN CONCLUSION

A Summary

On the whole, the Tribunal's recommendations have become noticeably less specific, more focused on negotiations, and offering more options. At the same time, there is often a greater breadth of scope, particularly as understanding of the principles of the Treaty deepens and changes. Basic assumptions underlying recommendations have changed, with the development of ideas of ongoing partnership, and what it means to be Treaty Partner. The 1986 amendment had a huge impact. The extended jurisdiction is part of the reason why the Tribunal was able to entertain arguments which led to development of the Treaty principles, and in turn affected the Tribunal's own recommendations.

The resolution of current issues is more contentious than historical claims, meaning that there is more likely to be disagreement between members of the Tribunal. It is notable, therefore, that only two reports so far contain dissent, and both of these are recent ones.

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[106] Waitangi Tribunal *Pakakohi and Tangahoe Settlement Claims Report: Wai 152/758* (Legislation Direct, Wellington, 2000).

It is true that the type of recommendation depends to some extent on the type of claim – compensation is relevant to historic grievances, for example, but less so to current, contemporary claims – although in some of those cases, recommendations for costs are still relevant. Costs are particularly useful in the context of recommendations to negotiate, and the Tribunal has demonstrated its concern that claimants are place in a position of relative strength from which to negotiate.

Over all, the Tribunal have achieved a remarkable level of consistency between reports, bearing in mind the changes which have resulted both from Crown and court actions and development of the Treaty principles, and changes in the Tribunal's own membership. The focus remains on social, cultural and economic restoration, and development of an on-going and constructive relationship between the Crown and Maori, in the spirit of partnership which the Treaty represents.

B The Changing Role of Recommendations

The changes in the Tribunal's recommendations give rise to questions as to the role of its recommendatory function. Is it of secondary importance to the Tribunal's determinative role ? Joe Williams has noted the importance of the reports for individual negotiation, as a source of Treaty law "used by policy developers and those seeking to affect policy development to inform that process"[107]. Although the reports are used as evidence in Courts, and acknowledged as important, it is their evidential value rather than the substance of their recommendations upon which weight has been placed.

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[107] Baragwanath, Justice D; Parata, H; Williams J, *Treaty of Waitangi Issues – the last decade and the next century* (Seminar, New Zealand Law Society, 1997), 31.

On the other hand, it could be said that the Tribunal plays a similar role to that of the Law Commission when it makes recommendations for law reform: the recommendations point to a way forward, which the Tribunal believe would best achieve the obligations and aims of the Treaty, but whether those recommendations are put into practice, or in what form, remains the domain of Parliament. The point which has been made by Judge Durie is that this is as it should be in a democracy.[108] On the one hand, it could be argued that effective protection of minorities, and especially of tangata whenua, requires something more binding. At the same time, the professed common aim of Tribunal and Government both is to achieve settlement in a way that, if not final, is at least lasting. To do so requires remedies that are acceptable not only to Maori, but also to the non-Maori majority of the population. To take away the role of Parliament by giving all Tribunal recommendations a binding force, would be as disastrous as ignoring the Tribunal's findings altogether. It is clear that a balance is required. The recommendations of the Tribunal, for the most part, focus purely on what is necessary to protect Maori, leaving this balancing exercise for the most part to the Crown.

A large part of the value of the Waitangi Tribunal lies in its contribution to the development of a "Treaty jurisprudence". Acknowledgment from the Court of Appeal of the importance of the Tribunal's findings has added to their legitimacy. Although at times the Tribunal's reports have contained radical departures from the orthodox thought of the time, many of their findings have gradually come to be seen as fact. However, the Tribunal itself has made clear that it is not in the business of solving grievances. To that end, its more general recommendations are arguably more useful to the current settlement process than their earlier, more specific reports. The relevance of the recommendations is that they provide a direction, and

[108] ETJ Durie, 'The Waitangi Tribunal: Its relationship with the judicial system' 1986 NZLJ 235, 237.

means, of transforming jurisprudence into practice. Whether they are ultimately followed or not, they provide a potential starting point, and a way in which the Treaty can be made to work in the real world.

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