

## THE NEW APPROACH: BENEFITS AND PITFALLS

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### Introduction

I have been asked to provide a presentation which discusses developments since the "New Approach" has been implemented in relation to traditional historical inquiries, the ways in which lawyers need to adapt to the New Approach and a lawyer's perspective on the different approaches.

I have had the benefit of receiving the presentation of Deputy Chief Judge Caren Fox prior to the development of this paper and as such I won't repeat what Deputy Chief Judge Fox has outlined in her seminar paper. Further, as other presenters in this seminar will be addressing the issue of Urgent Inquiries, I will only focus on the developments in approaches to the historical inquiry process and innovations followed by various Tribunals since the introduction of the New Approach.

### Inquiry Procedures

I have been counsel before the Waitangi Tribunal in several inquiries since approximately 1997 and therefore have experience of the pre-2000 District Inquiry method, the post-2000 method, the modular New Approach and the two-stage approach that is currently employed by the Waitangi Tribunal.

The Waitangi Tribunal is a unique forum which inquires into and investigates breaches of the Treaty of Waitangi and its principles. Māori claimants who meet the statutory criteria are entitled to have their claim investigated and that usually means having evidence presented and a right to be heard. Those of us who practice predominantly in the Waitangi Tribunal arena will be well aware that s 6 of the Treaty of Waitangi Act provides that any Māori who claims that he or she, or any group of Māori of which he or she is a member, is or was likely to be prejudicially affected by an action of the Crown, can make a claim. Further, the Waitangi Tribunal has an obligation to inquire into every claim submitted to it pursuant to s 6(1) by any Māori or group of Māori who claim to have been prejudicially affected. This empowering provision in favour of Māori to make a claim is unequivocal.

In certain circumstances claims then may give rise to serious justiciable rights and powers exercisable by the Tribunal including land or forest resumption and compensation payment. One of the Tribunal's functions under s 5 is to determine the meaning and effect of the Treaty under s 8 of the Treaty of Waitangi Act. The Tribunal can make resumption orders to resume memorialized lands and Crown forest licensed lands to claimant groups. Such orders are binding upon the Crown. Thus, our obligation as lawyers is to advocate properly and fully the evidential and legal issues pleaded against the Crown and prove those issues on the balance of probabilities.

In the main, however, the jurisdiction and legal obligations of the Waitangi Tribunal are to investigate and to make findings as to whether the claim is well founded and then to make recommendations to remove the prejudice. The Tribunal therefore makes factual findings and recommendations if need be.

### Developments since the New Approach

Deputy Chief Judge Fox has helpfully outlined in her seminar paper the procedural approach adopted and the various obligations and methods by which the Tribunal as a Commission of Inquiry operates. Deputy Chief Judge Fox has also provided a copy of the Waitangi Tribunal Review Paper<sup>9</sup> circulated to parties in the Porirua ki Manawatu Inquiry and Te Paparahi o te Raki Inquiry which was designed to inform parties about processes that have previously been adopted in Waitangi Tribunal Inquiries and provide an overview of Inquiries since the "New Approach" was developed.

Since development of the New Approach I have had the opportunity to be involved in several inquiries where the New Approach has been implemented. Particular inquiries include the Central North Island Inquiry, Urewera District Inquiry, National Park District Inquiry, Whanganui District Inquiry, Te Rohe Potae District Inquiry and Te Paparahi o te Raki Inquiry. I have also had the opportunity to be involved in the inquiries that have implemented variations on the New Approach and those are the Whanganui Inquiry, Te Rohe Potae Inquiry and Te Paparahi o te Raki preliminary hearings.

To date, and without any disrespect to any of the Tribunal panels that I have appeared before, I consider the most effective Tribunal process has been that conducted in Te Urewera Inquiry. The process followed in Te Urewera Inquiry was as follows:

- Hearing weeks were divided into the sub-regions referred to by the Tribunal.
- Each hearing week was held in a different location within that sub-region.
- Each hearing week was allocated a generic issue derived from the Statement of Issues.
- During that hearing week, all the technical evidence on that issue was heard. This was supported by particular claimant evidence relating to that issue. It was the claimants' choice whether they presented on that issue during that week.
- After the generic issue was heard, the Tribunal then heard all evidence from the claimants within the area that the hearing was held.
- The next hearing week was then held in a different area, with a different generic issue, followed by specific evidence of claimants (both tangata whenua and any additional technical evidence) relating to that issue and then all evidence of the claimants in that area.
- Hearings concluded with all the Crown's evidence being presented in a final hearing week(s).

This process is beneficial as it:

- Focuses the parties on particular issues and avoids duplication of generic evidence.

<sup>9</sup> Discussion paper on Inquiry Process: Porirua ki Manawatu District Inquiry, Wai 2200 # 6.2.3.

- Allows claimants to present evidence on specific issues which are of particular concern to them, if they wish.
- Allows claimants to present all their evidence in a single week thereby reducing the burden of travel and time to attend other hearings.
- Avoids confusion with the Crown's view of the evidence at the time it is presented.

Variations on this approach are being followed in current inquiries that are underway. For example in Te Paparahi o te Raki rather than each hearing week being allocated a generic theme all generic matters are to be heard together and first in a series of hearing weeks. Following the generic hearing weeks, the Tribunal will then conduct further hearings to hear the tangata whenua evidence to be presented by the claimants.

### Rationale for the New Approach in the Inquiry Procedures

The rationale for the New Approach adopted by the Waitangi Tribunal in the historical inquiry process is founded on a number of factors. Those factors have been identified in Deputy Chief Judge Fox's seminar paper. However, it would appear that one of the key focus points for the development of the New Approach is squarely founded on a Crown desire that inquiries are focused on significant outputs and outcomes such as a purpose-written report for the just and timely settlement of grievances. In other words, settlement negotiations.

I note that Her Honour Judge Carrie Wainwright in her paper produced for the New Zealand Law Society Waitangi Tribunal Conference in 2005 outlined that:

"While it is not the role of the Tribunal to involve itself in the substance of settlements between Māori and the Crown, it can and does, inquire into the process. The Tribunal's work in this area has seen it striving to support and encourage parties keen to settle with the Crown, at the same time endeavouring to ensure that the rights of tribal members who say that they have been excluded or otherwise unfairly treated, or who have become disaffected, or who do not wish to participate, are protected".<sup>10</sup>

The issue that I have with this view is that the Tribunal in striving to support those who are keen to settle with the Crown has, on occasion, not provided the excluded, disaffected, unfairly treated or those who did not wish to participate, the opportunity to come back to the Tribunal, the appropriate protection. It is only now, with the benefit of *Haronga*<sup>11</sup> that the Tribunal is now following its jurisdictional obligations and indeed will be involving itself in the substance of settlements.

Increasingly there have been calls from claimants, in particular those seeking a mandate to represent claimants in negotiations with the Crown, for the Tribunal to truncate or streamline its processes so that historical research produced and any findings and recommendations that the Tribunal may make will assist in the negotiation process.

For example, in the Central North Island Inquiry where a two-stage hearing approach was taken, the first stage focused on generic issues that were deemed to have affected whanau, hapu and iwi across the entire CNI region. Hearings were held and completed and reports issued based on the generic themes that were pleaded. At the same time, negotiations for

<sup>10</sup> NZLS Conference, Waitangi Tribunal 2005, 17-18 November 2005, p 8.

<sup>11</sup> *Haronga v Waitangi Tribunal and Ors* SC 54/2010 [2011] NZSC 53.

the settlement of the CNI forest were being conducted and have now (for nine iwi) been concluded. However, the negotiations of the comprehensive claims of all the iwi (excluding the forest) have not been concluded in the Central North Island. Whilst some have settled, such as Ngati Manawa and Ngati Whare whose negotiations were largely assisted by the research conducted in Te Urewera inquiry, it does not appear that the reports issued by the CNI Tribunal in the first stage of the hearing process will assist in the completion of negotiations of the comprehensive claims of the other iwi. It may well mean that the second stage of the hearing process may be necessary. This will be time consuming and costly and not the fault of either counsel or the Tribunal, I hasten to add. The short point is that the objective of providing Tribunal reports solely to assist in negotiations may be unwise.

There are a number of factors for this. Perhaps most importantly is the fact that the Crown appears to have an abject disregard for the findings of the Waitangi Tribunal. This is no more evident than to those of us who are in negotiations with the Crown and who have the benefit of Waitangi Tribunal reports. The approach taken to date by the Crown has been dismissive of the findings, dismissive of the evidence in support of those findings, and as such dismissive of the recommendations made by the Waitangi Tribunal to provide redress for the claims that have been found to be well founded. Therefore while the objective was to provide research and/or findings that may assist in the development and progression of negotiations with the Crown, often, and in reality, that is not the case. The Crown's preferred *modus operandi* in negotiations is to follow its policy framework which has nothing to do with the findings of the Waitangi Tribunal. More often than not Crown officials involved in the negotiation of Treaty claims are not involved in the Tribunal Inquiry process (although you will nowadays see Crown representatives from the Office of Treaty Settlements in attendance at hearings), as the evidence and findings do not fall within the Crown policy framework, therefore despite what is found, they are often ignored.

In my view what needs to be kept in mind is that the Waitangi Tribunal occupies an important and integral space in New Zealand's juridical framework. Its aims are to investigate and remove prejudice where the Crown has Treaty duties to perform. Many claimants do not have any intention to negotiate a settlement with the Crown for its breaches of the Treaty and therefore we as counsel must ensure that the Tribunal does not adopt or accept a policy which focuses the hearing process on negotiations, whereby the ultimate outcome of the claims against the Crown are incomplete. This could operate as a restraint on a claimant having his or her claim investigated by the Tribunal due to what has been developed as a policy of the Crown. Therefore settlement should not come at any price and certainly not at the cost of addressing claims fully and appropriately.

### Discrete Remedies Applications

In the Whanganui District Inquiry (Wai 903), the presiding officer Judge Carrie Wainwright proposed a process to progress the delivery of discrete small scale remedies to particular whanau or small hapu groups in advance of the negotiations and settlement of the claim generally. This was to be conducted in parallel with the historical inquiry that was under way at the time. The specific redress would typically be cultural redress rather than commercial redress and the criteria for these cases was as follows:

- a small scale, discrete claim affecting only a particular, identifiable group;
- involving the return of land or assets owned by the Crown;

- already well researched and understood; and
- not too complicated.

As the paper highlights, a number of applications have been made for the discrete remedy process, and the majority of those applications have not met the relevant criteria.<sup>12</sup> The paper also points out that two applications are still the subject of discussion between claimants and the Crown. One of those applications is in fact from our firm, and the only one that has been successful is that filed by Te Poho o Matapihi Trust (Wai 999) in October 2007, who put forward a specific case seeking the return of the Putiki Rifle Range which had been taken under the Public Works Act 1904. Following a series of without prejudice chambers conferences between the Presiding Officer, the Crown and claimant counsel, the Crown agreed to gift the land back to Te Poho o Matapihi Trust provided that all tangata whenua who had an interest in the Putiki Rifle Range approved the Trust receiving the range lands. This finally occurred in May 2009 at a ceremonial hand over at Putiki Marae. Therefore, the process from beginning to end took approximately one year and seven months.

In contrast is the application our firm made in regard to the former Taringamotu school site for and on behalf of a hapu, Ngati Urunumia, again within the Whanganui Inquiry District. That application was made on 13 May 2009 (Wai 903 # 3.2.556). The application has languished unresolved as the Crown's position has been to fob the matter off, merely advising the Tribunal periodically that it is awaiting instructions from Cabinet. Therefore, over what has so far been 2 and a half year period the claimants and the Tribunal have been left yet again to the whim of the Crown as to whether or not in its wisdom it considers this process to be applicable with regard to the remedies sought. The fault for this application remaining unresolved cannot lie either at the Tribunal or the claimant's feet but lies squarely at the feet of the Crown. I am uncertain as to the position of the other outstanding application which is presently in discussions between the claimants and the Crown.

### Nga Korero Tuku Iho o Te Rohe Potae – Wai 898

A further development in the New Approach in the Waitangi Tribunal inquiry process has been implemented in the Te Rohe Potae Inquiry District where the presiding officer, Judge David Ambler, proposed that oral and traditional evidence be presented prior to the interlocutory phase.<sup>13</sup> Judge Ambler proposed that oral traditional korero be presented at a series of hui in advance of the completion of the interlocutory process and the commencement of hearings. These hui were designed to compliment the standard new approach inquiry model by allowing the presentation of oral traditions in a more dynamic way which is sympathetic to the tikanga of those traditions.<sup>14</sup>

The hui were to focus on the presentation of traditions as they apply to tribal identity and history and specific thematic issues that arose from the claims filed. It was intended that the korero would reflect debate that occurs amongst speakers on marae during important hui and was deliberately intended to limit the role of counsel to allow the korero to flow as would normally be the case at such hui without being required to respond to specific

<sup>12</sup> Discussion paper on Inquiry Process: Porirua ki Manawatu District Inquiry, Wai 2200 #6.2.3, p 13.

<sup>13</sup> Ibid, p 10.

<sup>14</sup> Ibid, pg 10

questioning by counsel. The theme of limiting the role of counsel has received some air play in various inquiries to which I intend to respond to in this paper as well. Initially there was to be no written evidence or documentation. However during the course of these hui, parties indicated that written briefs and documents in support of their korero were required and indeed helpful and those hui were amended in order to incorporate this event. However this had the outcome of the evidence being presented in a much more structured and conventional way and fluid discussion as initially envisaged rarely occurred.

This process appeared to have the benefit of hearing from kaumatua and kuia who hold a wealth of knowledge but who might no longer be living or well by the end of a lengthy historical inquiry. The process gave the hau kainga and experts in oral korero a voice and a forum. Those matters are clearly beneficial from a claimant perspective. The issues however are how will this korero be reflected in the Tribunal Report and how will the Crown engage with that particular korero? Additionally, the observations of what occurred during this process indicate that there was scarce Crown involvement or engagement with the evidence that was being presented and therefore I am uncertain at this stage as to the final benefits of this particular process.

### Our Role as Counsel

What should be the focus for us as claimant counsel?

The New Zealand Law Society Lawyers and Conveyances Act ("the Act") (Lawyers: Conduct and Client Care) Rules 2008 set out in the preface that:

Whatever legal services your lawyer is providing, he or she must –

- act competently, in a timely way, and in accordance with instructions received and arrangements made;
- protect and promote your interests and act for you free from compromising influences or loyalties;
- discuss with you your objectives and how they should best be achieved;
- provide you with information about the work to be done, who will do it and the way the services will be provided;
- charge you a fee that is fair and reasonable and let you know how and when you will be billed;
- give you clear information and advice;
- protect your privacy and ensure appropriate confidentiality;
- treat you fairly, respectfully, and without discrimination;
- keep you informed about the work being done and advise you when it is completed;
- let you know how to make a complaint and deal with any complaint promptly and fairly.

The obligations lawyers owe to clients are described in the *Rules of conduct and client care for lawyers* (the **rules**). Those obligations are subject to other overriding duties, including duties to the courts and to the justice system.

These rules are based on the fundamental obligations of lawyers set out in s 4 of the Act, namely –

- to uphold the rule of law and to facilitate the administration of justice in New Zealand;
- to be independent and provide and regulate the services to clients;
- to act in accordance with all fiduciary duties and duties of care owed by lawyers to their clients;
- to protect, subject to overriding duties as officers of the High Court and to duties under any enactment, the interests of clients.

The rules are not an exhaustive statement of the conduct expected of lawyers. They set the minimum standards that lawyers must observe and are a reference point for discipline.<sup>15</sup> Therefore having regard to the rules, regulations, and the provisions and practice notes relating to matters involved in Treaty of Waitangi claims, counsel must advise their clients on their position and the rules and then take instructions from that perspective. Further, the evidence that is produced in the Waitangi Tribunal must be relevant and contextual. The objective, of course, is to require the Tribunal to adhere to its obligations under s 6(2) to complete its inquiry into every claim.

Increasingly there have been murmurs of discontent regarding the extent to which counsel dominate the process within the Waitangi Tribunal. For example, in *Te Paparahi o Te Raki*, on several occasions lawyers have been "back benched" so that the claimants themselves have the ability to direct the Tribunal as opposed to being directed through counsel. In my view, this position is misconceived. Whilst I have no objection to claimants wanting to have more input into the claim process, frankly we as lawyers are there to help guide them in that process. It is what we do on a daily basis. It is what we are paid to do and it is the experience that we carry as counsel within the treaty forum. Therefore, the call that there is less lawyer engagement in the process in my view is ill-advised.

In light of the *Haronga* decision,<sup>16</sup> our role as counsel is even more fundamentally important in that we must achieve a position that our clients have available to them every possible avenue of success and remedy should a negotiation either fail or not commence. As the Supreme Court in *Haronga* found:

"While the Tribunal is not obliged to recommend a remedy for all claims it has decided are well founded, it is required to determine whether it should do so. Its recommendations may either be in general terms or indicate specific actions which, in the opinion of the Tribunal, the Tribunal should take. Each of these steps is part of the inquiry which it is the Tribunal's duty to undertake. The obligation to inquire into each claim is not discharged by a determination that the claim or treaty breach is well founded."<sup>17</sup>

Then at paragraphs 84, 86 and 87 of *Haronga* the Court held:

"In that respect an inquiry into a claim is not complete until the Tribunal has determined whether the claim is well founded and, if so, whether it should recommend a remedy. Where the Tribunal has decided a claim is well founded and the remedy sought is return of Crown Forest land, the inquiry must address whether

<sup>15</sup> Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, pp 2-3.

<sup>16</sup> *Haronga v Waitangi Tribunal and Ors* SC 54/2010 [2011] NZSC 53.

<sup>17</sup> *Ibid* para 80.

the land is to be returned to Māori ownership, any terms and conditions of return, and, if applicable to which Māori or group of Māori the land is to be returned.<sup>18</sup>

While the prospect of a settlement between various claimants and the Crown remained open there may well have continued to be sufficient reasons for the adjournment to continue.<sup>19</sup>

But the exercise of the section 7(1) power for scheduling reasons or to permit negotiated settlement does not end the inquiry. It does not remove the Tribunal's obligation to complete an inquiry by adjudicating on whether it should make remedial recommendations for claims that it has decided are well founded. If settlements do not eventuate or if irremedial prejudice to the claimants will result from deferral for scheduling purposes, the Tribunal must reconvene its adjourned inquiry to adjudicate on whether a recommendation should be made.<sup>20</sup>

Our focus as claimant counsel must surely be to place our client in a position where we obtain findings or recommendations that our clients' claims are well founded and to persuade the Tribunal to use all its procedural powers to provide that objective as only then is there a viable fall back option for our clients in the event that negotiations either fail or do not proceed. Secondly, our objective as counsel must be to assist our clients and their claims in negotiations or, failing that, ensure that the Tribunal uses its limited powers to provide a remedy and remove the prejudice. In doing this I consider that we will then be satisfying our obligations to protect and promote our clients' interests.

However, as counsel we also have a duty to assist the Tribunal in ensuring the process is run efficiently. This includes presenting evidence that is focused on the issue, theme or pleading within a Statement of Claim or developed in Statements of Issue and not repetitive (eg numerous briefs or memoranda that effectively speak about the same thing). We also need to present submissions that are supported by the evidence brought by the tangata whenua claimants or professional historians or established through cross-examination and not theories developed by the lawyers themselves without evidential support. Nor should we advocate as though we are the client.

I note that Deputy Chief Judge Fox has highlighted that a lawyer's ability to appear before the Tribunal is with "the leave of the Tribunal". I don't consider that there is any misconception from the treaty bar that it is only with the leave of the Tribunal that we appear. However, when we appear it is for the benefit of our clients with a view to assisting the Tribunal in developing and progressing a process which is ultimately for the benefit of our client claimants. That must be respected and supported.

What do we as counsel need in the Waitangi Tribunal process to assist us in the role of advocating our clients' position? New or old approach? The short answer is that we need better and more focused research coupled with the opportunity to advocate properly our clients' claims.

The research which is presently being commissioned in current Tribunal Inquiries may well be as a result of the focus in the New Approach which looks at high level generic issues that encompass all claimants within a Waitangi Tribunal Inquiry. What this type of generic research misses is the detail that is required in order to develop appropriate statements of claim for the particular claimants within an inquiry. What is often produced, and I place no particular fault in either the hands of the Waitangi Tribunal or Crown Forestry Rental Trust, are reports that provide an overview of what has occurred

<sup>18</sup> Ibid, para 84.

<sup>19</sup> Ibid para 86.

<sup>20</sup> Ibid para 87.

within an inquiry district, block narratives that outline in a global sense what has occurred in respect of the entire inquiry district and various other matters. However, the detail is lacking.

One example of this are the details that used to be provided in block reports that highlighted what occurred in a particular block such as when Native Land Court hearings were conducted, who appeared in those hearings and on behalf of whom, who those that appeared whakapapa to, who did they assert had interests within those particular blocks, what was the evidence led in support and against the evidence presented to the Native Land Court, and what was the outcome and lists of names to whom the final awards of title were made.

This level and type of detail can only be identified when there is a thorough analysis of, for example, the Native Land Court minutes. This job has fallen to counsel in particularising statements of claim as the detail required in order to establish the particulars for the generic breaches in statements of claim can only be found in those Native Land Court Minute Book minutes. This is a glaringly obvious gap in the current process and is not assisted by the present operational policy for legal aid for proceedings before the Waitangi Tribunal regarding the funding of claimant lawyers to progress claims on behalf of their clients.<sup>21</sup> The policy currently restrains claimant lawyers from working through the level of detail in for example, Native Land Court minutes in order to particularise statements of claim as we will not be funded for work that the Legal Service Agency considers to be "original historical research."<sup>22</sup> The prejudice is suffered by our clients who will not have particularised statements of claim, who run the risk of not having their claims aggregated or consolidated within a particular Tribunal Inquiry District unless they have that detail. The necessary level of detail required to draft fully particularized statements of claim is not currently provided in the generic overview reports which are now in vogue and therefore the claims are at risk of not being researched and heard defeating the purpose of the Treaty of Waitangi Act 1975.

## The Crown

It is perhaps not for me to outline what the Crown should do in these Tribunal inquiries as the list is exhaustive. However, it would be a massive progression if the Crown were to accept some of the jurisprudence that has been developed in several Waitangi Tribunal reports that the Crown appear to want to contest in each inquiry. A glaring example of this is the jurisprudence in relation to the Native Land Court, where succeeding Tribunal reports (for example, Hauraki Tribunal, Gisborne Tribunal) have found categorically that various aspects of the operation, effect, implementation, procedure and impact of the Native Land Court were in breach of the Treaty and its principles. The Crown has had ample opportunity within those and succeeding Waitangi Tribunal inquiries to contest the issues related to the Native Land Court which have all been rebutted and yet there continues to be resistance by the Crown in acknowledging the jurisprudence that has been developed.

This was no more evident than in a recent judicial conference held in Te Rohe Potae Inquiry where the Presiding Officer suggested that the Crown might like to accept the existing jurisprudence related to the Native Land Court and therefore negate the need for

<sup>21</sup> Operational Policy for Legal Aid for Proceedings before the Waitangi Tribunal, p 12 at para 5.4.

<sup>22</sup> Ibid.

exhaustive pleadings to be developed in claimant Statements of Claim and for the matter to be extensively argued in the process of the inquiry hearings. Once again this met with resistance from Crown counsel who indicated that the Crown should be given the opportunity to contest the matters and the jurisprudence that has been developed. That continued resistance means that we as claimant counsel must appropriately and adequately plead those matters which is time consuming, costly for another department of the Crown, namely Legal Aid (as well as on the Tribunal's resources), which could all be better focused on other issues and is unnecessary given the weight of jurisprudence on the Native Land Court.

It is not limited of course to the Native Land Court. Issues surrounding Crown purchasing have been widely canvassed and jurisprudence developed on the Crown purchasing policy, practice and regime and other matters. The point of course is that, if the Crown wishes to reinvent the wheel in every Waitangi Tribunal District Inquiry, then of course we as counsel are obliged to perform our role on behalf of our clients in order to establish and prove their case.

What results is that concessions from the Crown are miserly and largely ineffectual nor do they assist in truncating the Waitangi Tribunal hearing process whatsoever.

### **The Waitangi Tribunal Process: Other Benefits**

What cannot be forgotten in the Waitangi Tribunal process is that it is the only opportunity for claimants to air their grievances: it is the only place where the claims of the people can be heard. The process should not be truncated merely to assist the Crown or those claimants who wish to enter into settlement negotiations. The process must have a cathartic and reconciliation benefit as well as providing the claimants with the opportunity to be heard, providing the opportunity for the claimants to release the hurt and *mamae* that their *tipuna* have experienced and that they now carry in relation to the breaches of the Treaty by the Crown.

In addition, the Waitangi Tribunal process does have a substantial benefit in that research that can be provided to the claimants, if done properly and comprehensively, can go a long way to relieving the pain that the claimants have endured. Indeed the research has a wider benefit for the *hapu*, *whanau* and *iwi* in that often it can confirm and validate what the claimants have known for many years. Ultimately the research that is provided can also provide an additional and at times stronger basis for negotiations with the Crown if negotiations proceed. That cannot be ignored. Furthermore the research also lays a platform for improving the understanding in the wider community of this country's history.

Ultimately though, this process must provide the claimants with the opportunity to obtain some remedy, some redress in order to remove what has clearly been established in many inquiry districts, the prejudice that has been occasioned by the actions and inactions of the Crown. The Tribunal must be encouraged and, after *Haronga*, directed to exercise its jurisdiction to provide the remedies that it can.

Of course, the Crown may or may not accept the Tribunal's recommendations and, as has been my experience, often the Crown is ignorant of or dismissive of the findings of the Waitangi Tribunal. If the research and reports do lead to negotiations and ultimately settlement with the Crown, then the process in itself has been successful in that regard. I

have already pointed out that it has the additional benefit that if negotiations are unsuccessful or do not eventuate then the report and findings must have some "teeth" so that they can be exercised.

Finally, our role as counsel must be to critique, test and cross examine the technical and historical evidence, the Crown evidence and that *tangata whenua* evidence which negatively impacts upon the claims of our client. It is in that process that the Tribunal must exercise its control over counsel in ensuring that the cross-examination and critique is appropriate – both from a legal and *tikanga* perspective. The balance must be to give counsel the opportunity to perform their role as counsel for the claimant.

Further, that the Tribunal process must be assisted by counsel in terms of the evidence which is drafted by counsel on behalf of claimants, the memoranda and submissions which are provided to support the evidence which has been put before the Waitangi Tribunal panel, and advocate as strongly as possible the claimant position and not the lawyer's position.