Historians' context and lawyers' presentism

DEBATING HISTORIOGRAPHY OR AGREEING TO DIFFER

'Is it possible that the antonym of "forgetting" is not "remembering," but *justice*?'[1]

New Zealand history goes to court and into negotiations

THE PRIMARY FOCUS of this paper is on the contributions of historians to legal proceedings in New Zealand, especially in relation to Treaty of Waitangi jurisprudence. A suggestion from the aphorism quoted above is that what historians 'remember' from the records of the past may be highly relevant to seeking justice for indigenous communities affected by the colonial past. Much of that past had been conveniently 'forgotten' prior to the work of the Waitangi Tribunal on historical claims of Māori that began after 1985. In exploring these issues, I also consider 'advocacy' or 'juridical' history and the role of history and historians in Waitangi Tribunal hearings and Office of Treaty Settlements (OTS) negotiations. The essay also explores the ways and means that lawyers debate about time, law and history in the common law, and how the past is interpreted by legal reasoning to suit presentist purposes. I suggest that understanding common law reasoning from a number of Commonwealth jurisdictions is of importance to the work of historians in New Zealand legal contexts. Lawyers (or at least some of them) do understand the importance of the difference between diachronic and synchronic analyses.

Michael Belgrave has noted that, in assessing the impact of colonial policies on Māori and in proposing practical redress for grievances, the Waitangi Tribunal 'has become just one more in a succession of commissions of inquiry that have considered these events since soon after the colony was established'. He remarked: 'It would come as a surprise to most New Zealanders to learn that, for almost every case examined before the Waitangi Tribunal since 1985, there have been previous court proceedings, or commissions of inquiry (including royal commissions), recommendations, negotiations and even an extensive record of settlement or partial settlement.'[2] However, most of those earlier proceedings were conducted in a legalistic manner with restricted terms of reference. Lawyers featured prominently but historians played little or no role in writing commission reports or informing the substance of the recommendations made. The same cannot be said for

hearings of historical claims in the Waitangi Tribunal since 1985, nor for negotiations between the Crown and Māori conducted under frameworks laid down by OTS since 1995.

The Treaty of Waitangi Act 1975 established the Waitangi Tribunal to inquire into claims arising after 1975 brought by Māori persons or groups, and to make recommendations to ministers of the Crown. Māori were empowered to file claims alleging that they were likely to be prejudicially affected by laws, policies, practices, acts and omissions of the Crown inconsistent with the principles of the Treaty of Waitangi. They could ask for recommendations that, in a practical way, would ameliorate the prejudice and offer redress to the claimants. The Treaty of Waitangi Amendment Act 1985, introduced by the fourth Labour government in fulfilment of an election promise for the 1984 general election, added a power to inquire and report on historical injustice claims. The Tribunal's inquiries could now look at the whole period of colonial history from the date of the first signing of the Treaty of Waitangi on 6 February 1840.

By a further legislative amendment in 2006, 'historical Treaty claim' was defined as all claims covered by the Tribunal's jurisdiction before 21 September 1992.[3] As defined by Parliament, 'history' came to an end (unbeknownst to the general public at the time) on the day when Cabinet agreed to ratify the 'Sealords' deed for the settlement of Māori commercial fisheries claims. Cabinet that day also instructed officials to formulate a new policy for the comprehensive settlement of all historical Treaty claims. The policy proposals they developed were not presented to the public until late 1994.[4] These 'fiscal cap' proposals were resoundingly rejected by a pan-tribal hui at Hirangi marae chaired by Sir Hepi Te Heuheu and then by 13 regional consultation hui convened by the government in 1995.[5] Nevertheless after time abroad for reflection, the minister, Douglas Graham, persuaded the Prime Minister, Jim Bolger, and his colleagues to carry on with the historical Treaty claims settlement policy that had been proposed.[6]

In 1995 the OTS replaced the Treaty of Waitangi Policy Unit (established in 1988) within the Department of Justice. The Office's first successful negotiations under the new policies resulted in the Waikato Raupatu Claims Settlement Act 1995. That Act, incidentally, received the royal assent from Queen Elizabeth II in person when visiting New Zealand at the time. Her signing – 'Elizabeth R' – was a unique departure from the constitutional procedures for the royal assent to Acts in New Zealand, the United Kingdom and all other Commonwealth constitutional monarchies. It was a striking affirmation of a strong sense of whakapapa and personal connection between the descendants of those who founded the the Kīngitanga / King Movement

and the descendant of Queen Victoria in whose name the Treaty of Waitangi was presented to Māori. That unique aspect apart, the government's Treaty settlement policy was further developed and published by OTS in the 'Green Book' (1999).[7] After some vigorous debate within the Labour-led government elected in 1999, the government made just a few cosmetic changes to Graham's policies and OTS issued the 'Red Book' in 2002.[8]

Despite the extremely poor reception the government's policy had received in 1995, as at 18 June 2014, the OTS website recorded that 54 historical claims had been fully settled in line with that policy; Deeds of Settlement had been concluded and ratified by a further ten groups of claimants who were now awaiting settlement legislation to be passed by Parliament for the Deeds to become unconditional; four more Deeds were awaiting ratification by the claimant community; 15 more groups were engaged in detailed negotiations, with an Agreement in Principle or equivalent already in place; and negotiations towards an Agreement in Principle were proceeding with another six claimant groups.[9]

With the notable exception of Ngāpuhi-Nui-Tonu in Northland, the largest iwi by population, successive governments have completed or nearly completed claims negotiations with respect to almost the entire land area of Aotearoa New Zealand.[10] All of these negotiations include a focus on an historical account of Crown–Māori relationships, and of Crown acts or omissions that are agreed to have been in breach of the principles of the Treaty of Waitangi. Each historical account is a platform for a redress package containing a Crown apology, cultural redress mechanisms and commercial redress arrangements. Thus, there is now a large body of written history that has been incorporated into Acts of Parliament. An example of a very detailed historical account may be found in the Deed of Settlement for Ngāti Whātua Ōrākei.[11]

Historians may well wish to ponder the proper historiographical parameters for assessing an historical account that is produced by negotiators in an essentially political process and then passed into law by parliamentary processes. What is to be made of such 'history'? What validity can be ascribed to a text purporting to lay down an authorized version of history on the basis of a recently devised legal test – 'breaches of the principles of the Treaty of Waitangi'? That criterion for assessment of the past was not, and could not have been, known to the persons playing a role in the history of New Zealand from 1840 to 1975, when the phrase first appeared in the Treaty of Waitangi Act. The implications of the 'principles of the Treaty' for the writing of history were little understood in 1975, and of course those engaged in more recent history did not know what the government would include in the Treaty settlement policy developed between 1992 and 1995 until it was implemented from 1995 onwards.

Tribunal research

In the case of most, though not all, Treaty settlement negotiations between Māori and OTS, there has been a prior inquiry by the Waitangi Tribunal into claims made by Māori alleging prejudice caused by acts or omissions of the Crown. Though Māori are a people for whom orally transmitted traditions and stories are of the utmost importance, in 1985 no living Māori could provide direct personal testimony of the history of dispossession in the nineteenth century, which is the primary focus of most of the legislated Treaty histories. On the other hand, unlike the situation in Canada and Australia, indigenous contact with colonizers and then the colonial state began after Māori had begun to use a written form of their own language and had produced a substantial body of historic written texts which might be mobilized as evidence. In the colonial period Māori organizations published numerous Māori-language newspapers. Educated Māori wrote many letters and petitions, both in English and in Māori, to state officials. The imperial and colonial governments and settlers also amassed a large documentary record of their activities and their opinions. From 1985 onwards, therefore, when historical claims began to be scrutinized at hearings of the Waitangi Tribunal, historians began to play an important role in Tribunal inquiries. That scrutiny, it soon became clear, was not of the sort practised by academic historians teaching in the universities.

Crucially, for the purposes of this paper, history generated for Tribunal inquiries involved viewing nineteenth-century history through the prism of recently crafted jurisprudence on 'the principles of the Treaty of Waitangi'. These principles were not important in New Zealand statute law and common law until the 1987 State-Owned Enterprise Lands case. It was then that the Court of Appeal enunciated a number of the principles governing Crown–Māori relationships – in particular, the principles of 'good faith' and 'partnership'.[12]

Given the huge reliance on reports written by historians in the work of the Waitangi Tribunal in the years since the Lands case, it is worth noting the marginality of the historical evidence put to the Court of Appeal in that litigation. The court received affidavits from Dame Whina Cooper, Sir James Henare and Sir Henare Ngata and one judgment cited Peter Adam's *Fatal Necessity.*[13] There were brief summaries of three 'illustrative cases' – namely the Ngāi Tahu 'tenths' claim in Ōtākou block; Ngāti Tama land in Taranaki that had been the subject of the Sim Commission in the 1920s; and a Ngāti Whātua claim to land at Woodhill taken under the Public Works Act. In the judgments, however, it was the proper interpretation and application of the words in section 9 of the State-Owned Enterprises Act 1986 that fell for

decision. As to the historical material presented, the President, Sir Robin Cooke, observed: 'we thought it right to admit all this material. We have endeavoured to read and assimilate as much as might give any real help in deciding the case. It would be impracticable to refer specifically in our judgments to many of the sources of information or opinion that have been consulted. For clarity, I think, it is essential to confine the discussion to direct dealing with the fundamental points falling for decision.'[14]

The importance of the Lands Case, though, was that as historians were beginning their researches into historical claims lodged with the Waitangi Tribunal, so lawyers and judges were also just beginning to invent and then refine their understandings of what the phrase 'inconsistent with the principles of the Treaty' might or should mean.[15] What soon became clear to historians engaged in Tribunal hearings, though, was that evidence had to be produced that was sufficient to meet *a legal test* if claimants were to succeed in persuading the Waitangi Tribunal to make findings and recommendations favourable to them. Lawyers and Claim Managers, and Crown counsel too, perused with care reports prepared by historians before they were lodged with the Tribunal's registry and entered into the Record of Documents. To what extent did each report advance, or detract from, the overall record of Crown–Māori relationships that claimant lawyers and Crown counsel would wish to identify as important for the impact of their closing submissions to each Tribunal inquiry? Not all commissioned reports were filed, even though substantial sums had been expended in preparing them. Even filed reports were studiously ignored in legal submissions if lawyers felt that their contents would not advance the claimants' interests.

Slowly at first, in the 1980s historians began to engage in the task of compiling detailed research reports to tender as evidence in the Tribunal's historical claims inquiries. In the 1990s their research activities started to be sustained by substantial flows of funds for the assistance of claimants from the Crown Forestry Rental Trust (CFRT) established under the Crown Forest Assets Act 1989. Massive reports were produced, supplemented by even more massive document banks of archival and other primary source materials, as the growing coffers of the CFRT enlarged the funds available for research commissions. Soon there was a 'Treaty industry' of professionals engaged in producing reports that fairly may be characterized as 'advocacy history'. An unfortunate aspect of the development of this 'Treaty industry' in the 1990s was the rise in inter-iwi and intra-iwi contestation. This led to many rows of contesting lawyers taking up far too much time and space in Tribunal hearings. Comprehensive district-wide inquiries became the Tribunal's normal mode of operation and so those who felt they were being unfairly treated in the historical

reports by historians commissioned by the leading claimants often sought experts to vindicate their competing claims. Numbers of historians, not all with the skills of those commissioned by the Crown and leading claimant groups, were pressed into service to advance the interests of rival claimants. This often diverted attention from the primacy of the Tribunal's jurisdiction to consider Māori claims directed specifically at the Crown.

Perhaps the implied slur of describing reports lodged with the Tribunal as 'advocacy history' was not quite so evident in the late 1980s when the first historical claims hearings began. In the Ngāi Tahu hearings historians employed by the Crown and those commissioned by the Tribunal did not, it seems, always feel impelled to conform to adversarial stances, even in the face of sharp cross-examination by legal counsel. Appendix 6 of *The Ngai Tahu Report*, the Record of Documents, sets out all the historical reports filed in that inquiry by historians, many of whom went on to contribute enormously over many years to later inquiries of the Tribunal. In addition to the quantity of evidence presented by Harry Evison,[16] amongst the more significant pieces of historical research filed by counsel for the claimants were reports by Ann Parsonson and James McAloon. Crown counsel submitted reports by Donald Loveridge, David Alexander, Tony Walzl and David Armstrong. Alan Ward was commissioned by the Tribunal itself to file independent historical reports on major points of contention in the Ngāi Tahu hearings and Michael Belgrave filed evidence for the Registrar of the Tribunal.[17]

All four of the Crown historians mentioned above later wrote many reports for Māori claimants under the auspices of the CFRT or consultancy firms that emerged after CFRT restructurings. Loveridge did so for a time but later returned to the Crown's team of historical experts. Ward made a huge contribution to the Tribunal's work, such as his *National Overview* of the Rangahaua Whānui series of reports[18] and also his report-writing assistance for *The Hauraki Report*. Belgrave ceased to be a Tribunal officer when he entered academia but later wrote significant research reports for Māori claimants.

By the 1990s, whether reports were commissioned and produced by the historians named above or written by the many more historians who joined the fray later, the general tenor of each report depended upon who the client was. Like expert witnesses in other legal proceedings, historians became mindful not of who might have been their client in previous hearings, but of who had commissioned them to write this report in this inquiry. Whether commissioned for claimants, for cross-claimants or for the Crown, historical reports could in almost all cases be categorized as 'advocacy history'. If commissioned by claimants, they were written so as to maximize the extent

of prejudice suffered by the particular claimant community for whom (or on whose behalf) they were working. If written for the Crown, they might admit the most egregious Crown breaches of principles of the Treaty but they would tend to minimize the blame to be attached to Crown actions and to offer historical context reasons for Crown omissions. The Tribunal seldom exercised its power to commission research that was independent of both claimants and the Crown.

That advocacy history predominated in the reports submitted by all parties to the Waitangi Tribunal is easily explained, at least to the satisfaction of legal scholars. The Tribunal is a permanent commission of inquiry whose members are appointed by ministers of the Executive branch of government. In its ordinary inquiries it does not possess adjudicatory powers of decision-making. Rather, it has an inquisitorial jurisdiction to inquire into those matters, and only those matters, that fall within the statutory powers granted to it by Parliament. The power to make recommendations to ministers of the Crown arises only if Māori claimants can show that they and their ancestors have suffered 'prejudice' arising from laws and Crown acts or omissions.[19] Problems suffered by a claimant indigenous community as a result of the actions of missionaries or traders, the spread of disease, the impact of intertribal warfare, ecological imbalances, and so on, are relevant to Tribunal inquiries only if evidence is produced to show that the laws and policies of the government were in some way responsible for the deleterious consequences suffered by claimants. Thus of the major impacts on post-contact Māori societies identified by Keith Sorrenson under the alliterative labels of 'Commerce, Christianity and Colonisation', it is the governmental aspects of the last-mentioned only that can be the primary focus of inquiries.[20] Conversely, or even perversely, any laws or policies of the government that could be said to have positively enhanced the well-being of a Māori community were not strictly speaking matters that were within the competence of the Tribunal to inquire and report. Unsurprisingly, therefore, historical research reports produced by claimants for the Tribunal focus always on the negative aspects of colonial history.

The historical record certainly contains more than enough examples of prejudice suffered by Māori to keep plenty of historians busy. Still, an unwelcome consequence of the narrow focus of the Tribunal's powers of inquiry is that Māori tend always to be portrayed as victims of colonial history. It is but a short step from that point for Māori to appear simply as passive victims of an unstoppable process of colonization. Whilst those engaged in advocacy history for claimants would surely protest the implication, it is not difficult to look over much of the historical research work prepared

for the Waitangi Tribunal and to observe that the conclusions reached are not all that dissimilar to the now discredited theory of the 'fatal impact' of European contact with indigenous peoples. Māori are rendered objects rather than subjects of their own history. They suffered dreadful 'prejudice' as the inevitable 'progress' of European civilization, insofar as it was controlled or facilitated by the Crown, proceeded apace.

History wars

It may well be that there has been a consensus in New Zealand, or at least a consensus amongst the political elite, that the Treaty settlement policies of recent years should be progressed by the history-informed negotiations that have taken place since 1995. It is valuable, though, to reflect on the more sharply contested Australian context, where the contributions of historians to legal judgments on indigenous rights have been highly controversial.

Judgments of final appellate courts in common law jurisdictions tend to dwell on the interpretation of statutes and the authoritativeness (or otherwise) of case law precedents. On occasion, and more frequently in recent years than used to be the norm, judges cite and discuss the writings of legal academics. Seldom indeed are the writings of academic historians relied on by judges as pertinent either to the ascertainment of facts or to the development of legal doctrines. It was somewhat surprising, therefore, when a book written by a History and Politics professor then at James Cook University in Townsville was cited and relied on by judges of the High Court of Australia in *Mabo v Queensland (No 2)* (1992). Henry Reynolds was the professor and one of his books – *The Law of the Land* – was cited by four of the judges.[21] Reynolds's writings featured again in a second leading case on native title – *Wik Peoples v Queensland* (1996).[22]

The court's decisions on the continuing existence, nature and extent of native title in Australia had an immediate and dramatic impact on Australian law and politics. In the Native Title Act 1993 and the Native Title Amendment Act 1998 the Commonwealth legislature attempted to accommodate the High Court's determinations and established a National Native Title Tribunal. These statutes also sought to achieve minimal or no disruption to the interests of non-indigenous Australians (especially mining companies and pastoral graziers in the outback) who held less than freehold property rights in areas where, by dint of the High Court decisions, native title had not been fully extinguished. Meanwhile, in academia, politically oriented think tanks, commentariat outlets and the wider news media, vitriolic debates erupted that came to be dubbed 'the history wars'.[23] The provocative titles of some of the contributions to these 'wars' are evidence of the intensity of the debates

within their pages: *Why Weren't We Told: A Personal Search for the Truth about our History* clashed with *The Fabrication of Aboriginal History*, which was directly attacked in *Whitewash* and then followed by *Telling the TRUTH about Aboriginal History*.[24] The Australian 'history wars' invite comparison with the sharp 'culture wars' in the United States of America and the abrasive 'Historikerstreit' ('historians' quarrel') in Germany in the late 1980s.[25]

'New Zealand contextualist historiography' in the Australian debates

In a 2007 paper on the natural law theories of Wolff, Vattel and Pufendorf as understood in Australia in the nineteenth century, University of Queensland political philosopher Ian Hunter drew heavily on what he called 'New Zealand contextualist historiography' in a strong criticism of Henry Reynolds's writings.[26] Hunter viewed the 'founding text' for the New Zealand school's understanding of historiography to be the work of J.G.A. Pocock – though Pocock's academic career has been pursued primarily in the northern hemisphere and the cited work was on the English 'ancient constitution' in the seventeenth century.[27] Hunter named Paul McHugh as a major contributor in 'identifying a strong linkage between the redemptive historiography of the moral nation and the revisionist historical sense of the culture of the common law'.[28] He also noted 'important contributions' from Andrew Sharp, Mark Hickford and Damen Ward.[29] Another historian of New Zealand origins whom Hunter relied on for his critique of national myth-making was Bain Attwood.[30] For Hunter it is the 'double timelessness of rights – formed at the nexus of time out of mind and a mind out of time – that the contextual historians have identified as a thread running through the national historiography of indigenous rights binding historiography to a common law presentism and a "juridical" relation to the colonial past. … It thus provides a strong contrast to Reynolds' social history of the law, where centre stage is occupied by the nation as the morally flawed defender of timeless rights against the state.'[31]

Of the historians with New Zealand links mentioned by Hunter, it is Attwood who played the most significant role in the Australian 'history wars'. The dust still unsettled after Keith Windschuttle's publication of *The Fabrication of Aboriginal History* in 2002,[32] Attwood wrote in 2004 that Reynolds's use of the terra nullius concept in Australian law 'can be regarded as a lie' by an academic historian. 'Terra nullius' was not a term in use in the late eighteenth century.[33] The reference to 'a lie' appeared in a theoretical discussion on the difference between academic history and history as myth. Attwood's comment later received a measured response from Reynolds

himself.[34] Nevertheless it proved to be an incendiary device that reignited 'history wars' over Reynolds's approach to history as relied on in the High Court's Mabo native title determination. 'New conservative' commentators, always on the lookout to attack Reynolds for his 'black armband' view of Australian history, pounced on Attwood's phrase.[35] For his part, though, Attwood then went on to write a deeply damning critique of the historiography of those new conservatives who had applauded his phrase – especially Keith Windschuttle.[36]

Yet Reynolds's works of juridical history continue to be a focus of adverse critical attention. As McHugh – a sometime proponent of juridical history himself – acutely observed, Reynolds has been targeted for his allegedly ahistorical writings because 'he was unable to invoke the professional mantle of the common-lawyer'. McHugh continued: 'Somehow there was a difference between the advocate as historian, which was more permissible, than the historian as advocate. The moralising inherent in the aboriginal title argument was less detectable – or, rather, more impregnable – dressed in the format of legal argumentation. However, in Henry Reynolds' work there was no such professional insulation.'[37] Be that as it may, Attwood has succinctly highlighted the difficulty that many academic historians have with juridical history: 'Arguably, its primary interest, unlike that of academic history, is to pass judgment on the past rather than to understand it. Moreover, its approach to the past tends to be presentist rather than historicist, if only because its principal tasks are oriented to the present and future more than to the past; and it tends to wear away the complexities and ambiguities of the past.'[38] Concluding his discussion about the poles of argument on juridical history, Hunter wrote: 'This conception of history, as the path charted by a morally self-perfecting nation, arose during the 1970s when an anti-state social history reactivated a metaphysical natural law doctrine and attached itself to the "presentist" self-understanding of common law revisionism. The rival contextualist historiography of political thought and public law constitutionalism views the state not as an agent responsible to and for the moral history of the nation, but as one whose normatively ungoverned actions – including colonisation – give rise to history as their uncontrollable consequence.'[39]

Aotearoa New Zealand's more muted history wars

Though lacking the personalized invective and sharpness of the Australian quarrels, there were significant debates in Aotearoa New Zealand over historiography and reliance on 'juridical history' in Waitangi Tribunal reports. In 2001 *Histories, Power and Loss* was published. W.H. Oliver,

picking up on earlier seminal writings by the political philosopher (and editor of that volume) Andrew Sharp,[40] expressed serious doubts about the nature and quality of the historical enterprise engaged in by the Waitangi Tribunal. Oliver and Lyndsay Head (both of whom had themselves given evidence to the Tribunal) castigated the general approach in research reports written by historians and were particularly disturbed by the published reports of the Waitangi Tribunal itself. Advocacy history and juridical history by historians led, it was said, to redemptive history and even millenarian history in the Tribunal's reports .[41] The earlier legal history scholarship of Paul McHugh (the other editor) had informed many findings in favour of Māori aboriginal title rights by courts and the Tribunal in the 1980s and 1990s. Now, however, he had begun to express doubts about the historicity of his earlier writings. He later described this as a 'Pocockian turn' from ahistorical legal writing to contextualist law and history.[42]

In a 2002 book review, Kerry Howe slated Waitangi Tribunal-related research:

> Paul Monin, who cut many of his historical teeth working for Hauraki Treaty claimants, has courageously stepped outside this paradigm and emphasises the complexities and subtleties of the contact process – 'where interaction outweighed confrontation, where ground was shared as well as contested by European and Māori, and where both races made strategic decisions on how best to advance their respective interests.' He offers the concept of 'dual agency' whereby Māori and European shared initiatives, and responsibilities.
>
> He looks at what happened to people and situations on the ground, so to speak, rather than narrating a predetermined morality tale. … Monin's careful research and thoughtful analysis makes a significant contribution not only to our understanding of a region, but to the historiography of culture contact in New Zealand. In particular, it is one of the first studies to move beyond the simplistic moralising that has dominated Tribunal related research over the past twenty or so years. [43]

In 2004 Giselle Byrnes's *The Waitangi Tribunal and New Zealand History* described the Tribunal's attempts to write history as a 'noble, but ultimately flawed experiment'.[44] The next year came a rather more nuanced and in-depth commentary from Michael Belgrave on the 'reinvented histories' traversed in Tribunal proceedings. In his view, 'some nineteenth century Europeans were able both to grasp key elements of Maori custom and to appreciate the extent to which Maori rights were being disregarded in the interests of settlement. As a result, a nineteenth century test of the Crown's actions under the treaty already existed. If it failed to protect Maori interests because to do so was politically impossible, that is no excuse.'[45]

Then, in 2006–2007, Volumes 40 and 42 of the *New Zealand Journal of History* devoted considerable space to a variety of perspectives on Tribunal-

related historiography. Jim McAloon suggested that the positions taken by the Tribunal were not, as Oliver had suggested, a purely presentist rewriting of history. Often the Tribunal relied on criticisms made of Crown actions at the time and noted alternatives suggested to Crown officers and officials that might have been more Treaty-compliant than the course of action actually adopted by the government of the day.[46] McAloon's paper drew responses from Byrnes, Belgrave and Oliver.[47] Oliver was especially sharp in his disagreements with McAloon and with any counterfactual arguments whilst insisting that this was not 'justifying or excusing the colonizing past': '[D]issent and protest … never prevail when a country is being colonized. This brute fact is the rock upon which the "might have beens" founder, including the anachronistic picture painted by the Tribunal of early colonial "possibilities".'[48]

All quiet now on the history wars front line ?

In a number of recent papers Grant Phillipson, long-time Chief Historian in the Waitangi Tribunal and now a member of the Tribunal, has reflected on the early millennium debates about presentism and the use of counterfactual options or possibilities in Tribunal narratives.[49] He notes that 'the Crown has adopted a fairly consistent position in Waitangi Tribunal inquiries over the past decade', which he summarized in these words: 'Crown counsel argued that alternative policies of action must not have been "beyond the imagination" of the historical actors of the day. … The Tribunal, it was argued, should not find a Treaty breach unless the Crown had had a choice, knew it had a choice, and *could have made* a choice that was less penal to Maori but would still have achieved its legitimate settlement objectives.'[50] In Phillipson's view the Tribunal itself has now moved to a position where its reports broadly agree with that position. He quotes from the 2006 *Hauraki Report*:

> In navigating through these turbulent methodological straits one light in particular has helped us to steer between the Scylla of 'presentism' and the Charybdis of 'historical inevitability', namely, whether an idea or concept had been voiced at the time, and was 'in the public arena', to use a modern expression. If Maori, in particular, had spoken or written to Crown officials or politicians about their concerns, asked for a remedy or sought support for a measure they thought beneficial; or if (as Dr Belgrave suggests) the Crown's own stated policy proposals included certain options, we think it entirely reasonable that such concerns and options be used as a measure of subsequent Crown action or inaction.[51]

Other options

It seems then that there are indeed options other than taking one side or the opposite in a polarizing debate on historiography between contextualists and presentists. For a start, there are academic historians (including participants in the

presentism debates) who acknowledge that the work of understanding the past is not wholly disconnected from the concerns of the present. Byrnes, as editor of *The New Oxford History of New Zealand*, published in 2009, emphasized the 'New' in the title. *The Oxford History of New Zealand*, published in 1981 and edited by Oliver, was criticized by Byrnes for its overly strong focus on nation-building history. New Zealand history needed to be reframed, according to her. The previous generation of historians paid too little attention to plurality and difference within the nation, and 'nationalism' is deeply problematic as the context for writing history. Rather, attention needed to be given to 'tribal, regional, class, gender, rural and urban distinctions and perspectives'. Why was this so? The answer Byrnes offered is unequivocally presentist: 'Hence, the structure of this volume reflects the main arguments of the book: that our understandings of New Zealand history are far more complex and more fragmented than the "colony-to-nation" narrative admits. The writing of history is, after all, more concerned with the present than the past – where present imperatives and preoccupations constantly interrupt, distort and inform our readings of past historical decisions, actions and events.'[52]

This is not just a 'new' perspective of historians. Attwood, in the work cited earlier, noted E.H. Carr's recognition that 'we can view the past, and achieve our understanding of the past only through the eyes of the present'.[53] Carr, famous as an historian of the rise of the Soviet Union, was born in 1892 and his *What is History?* was published in 1961. Postmodern and postcolonial theorizing may have influenced Byrnes and some of her contributors, but that cannot be an explanation for Carr's acceptance of an element of presentism in historiography.

So there are respectable academic arguments for a presentist perspective on history. Moreover, on the other hand, it should not be assumed that the presentist brush (pejoratively understood) taints all evidence submitted to the Waitangi Tribunal and the Office of Treaty Settlements. Judith Binney has argued that though oral history of claimant elders is presented in testimonial form, it is 'closely tested by the archival research that, for the most part, is not "presentist" in its approach'. Commentators, she complains, tend to focus only on the Tribunal's reports, 'the purpose – and obligation – of which is "reparatory" and "restorative", once it has assessed the evidence'. Yet the evidential basis for those reports is based on public hearings with a much more textured context, she asserts, than critics would admit, or even know about.[54]

A large part of the problem for historians of all persuasions is that the less well informed are often looking to historians to confirm political positions that they have adopted without reference to any historical evidence. Damen Ward has highlighted this difficulty. In a paper that carefully criticizes aspects

of Reynolds's writings in a scholarly manner, Ward writes: 'In presenting my analysis to various audiences, I have been struck by the tendency – in some cases, almost an eagerness – to hastily conclude that my conclusions fatally undermine the reasoning of the High Court of Australia in *Mabo* and *Wik*. Such an interpretation is mistaken. It presumes, just as Reynolds appears to do, that the various parts of imperial policy can be easily treated as a homogenous single entity. It fails to distinguish between normative legal and descriptive historical claims. Most importantly, it risks oversimplifying the relationship between historical analysis and legal analysis.'[55]

In any case, contextualist history is not simply 'descriptive' history. Monin, praised by Howe for distancing himself from the 'simplistic moralizing' of Tribunal-related research, recognized this in his contribution to the *New Oxford History*: 'Peripheral to the claimant undertaking is the investigation of wider historical context to establish further contributing factors, as this stands to reduce Crown liability.' He acknowledged that Tribunal processes require claimants to demonstrate prejudice caused by the failure of successive governments to live up to the promises and ideals of the Treaty of Waitangi. He then commented: 'Historical context features more in Crown evidence with the aim of exonerating governments or mitigating their responsibility for Māori losses.'[56] In agreeing with both of Monin's propositions, I would add that contextualist history from Crown historians is no more 'neutral' or 'objective' in Tribunal proceedings than is juridical history from claimant historians. *Both* types of history are used for presentist purposes in the Tribunal forum. Whether or not the Crown's actions do indeed deserve exoneration is then for the Tribunal to consider. Although juridical history is not the only way to write history, surely it is entirely valid methodology when written for a particular sort of audience. This must be so especially in the particular contemporary context of the Tribunal. Each Waitangi Tribunal report is officially dispatched to ministers of the Crown, who assuredly do expect a permanent commission of inquiry to abide by the statutory brief given to it by an Act of Parliament.

Lawyers do worry about time and context

To conclude this paper I advance some arguments concerning lawyers' understandings of law, time and history. I think it important that readers of this journal grapple with the ways that some lawyers do indeed worry about time and context. This discussion of legal reasoning, the declaratory theory of common law and some recent case law on indigenous rights is intended to illuminate aspects of the historiographical issues considered above. As historians will be well aware, in linguistics a synchronic analysis is

one which views linguistic phenomena only at one point in time, usually the present, and usually without reference to their historical context. This may be distinguished from a diachronic analysis, which regards a phenomenon such as the language of the law in terms of developments through time.

Janet McLean has written of the issues that arise for lawyers in understanding how law develops over time: 'Because the common law always looks backward and forward at the same time and legal concepts speak of the present, future, and the past, it often takes a very long time for the law to respond to major political change. The ideological timeframe in which law operates sometimes tracks prevailing political thought but often has its own distinct pace and rhythms; something that I have called "law time".'[57] McLean mentions one piece of legal history research that should warm the cockles of the hearts of those who hold to the importance of historical context in understanding the development of the law. *Donoghue v Stevenson* (1932) is a very famous law case throughout the common law world as an example of the power of judges to remould law. It concerned loss allegedly suffered by a litigant owing to the presence of a decomposed snail in a bottle of ginger beer. In the course of allowing that Scottish and English law permitted a manufacturer to be held liable for such a loss, Lord Atkin asked 'Who then in law is my neighbour?' and laid down the 'neighbour principle' so as to include manufacturers.[58] McLean observed: 'Though readers at the time and since have thought that Lord Atkin was appealing to moral and, especially, religious sentiment, this question also had a good legal provenance.'[59] Many have assumed that Lord Atkin's principle was based on the biblical injunction 'Thou shalt love thy neighbour as thyself' .[60] The research of Michael Lobban, an English legal historian cited by McLean, indicates however that the primary source for Lord Atkin's question and his 1932 answer as to the law's definition of a neighbour is to be found in the writings of the nineteenth-century English legal historian Frederick Pollock. Pollock's primary inspiration was sourced not from biblical texts but from general moral principles found in the Justinian Digest of Roman law, and most particularly in Pollock's reading of Ulpian's statement 'Thou shalt not do hurt to thy neighbour'.[61] This is an instance of the historical context of a legal principle being accurately identified using a diachronic analysis of the history of law.

Of course there are also lawyers and legal scholars who remain wedded to a synchronic point of view in analyzing legal doctrines. In New Zealand law on the doctrine of aboriginal title and its enforceability in ordinary courts, Jock Brookfield sharply criticized those who did not accept his views about the 'correct' legal reasoning on aboriginal title as laid down in the Court of Appeal's controversial foreshore and seabed decision in 2003.[62] Common

law lawyers often write about the law solely from the point of view of law as it is *now* understood. They gloss over the fact that the law is neither static nor unchanging, and understate the role of judges in incrementally changing the law.

This leads some historians to express impatience with the presentism of legal reasoning, and even to ridicule it. A good New Zealand example of the former is Oliver's critique of juridical history in the Waitangi Tribunal's reports discussed above. An example of ridicule is American historian J.P. Reid's comment that the 'way lawyers think about history is an eccentricity foisted on them by their professional training' which 'may amuse historians who stumble over lawyering anachronisms' even though it is not a matter of controversy among lawyers. He goes on to claim that:

> Even today, a lawyer trained in the common law methodology thinks that a judge who rules on a question in litigation is stating the law as it has always been. If the judge reverses a previous decision and states a new rule in its place, lawyers are aware that the law has changed, but the new rule is thought of by lawyers less as being new than as having always been *potentially* the law on that particular matter. What to a historian is now the 'old' rule, to the lawyer is the 'erroneous' rule. A long line of precedents that has been overruled is not, to the lawyer, the former law it would be to the historian, but incorrect law, discarded law, or not law at all.[63]

It might be noted, in partial response to Reid, that neither lawyers nor historians are a homogenous group. Historians' work, as I have suggested above, is sometimes avowedly present-minded. Also, the contextualist historiographical approach is not immune to criticism.

One critic, Blair Worden, commenting on the historical-mindedness approach of the 'Cambridge' historians such as John Pocock and Quentin Skinner, accepts that historians do need to reconstruct the assumptions and vocabularies of the past. He agrees with a commitment by historians to studying values we no longer endorse and considering questions we no longer ask. Yet Skinner too has suggested that by recovering 'lost' ideas from the past, historians can supply practical alternatives to current political values. At that point, Worden asks: 'Are not the historical particularities of past ideas impediments to their present usefulness? If we wish to use those ideas, do we need to strip them (if that is possible) of their historical encumbrances and revise or adapt them to meet our own circumstances? And if so, were not those unhistorically-minded critics who believed that past texts should be "appropriated and put to work", so as to answer "general questions of society and politics at the present time", in a position at least as strong as that of their successors?'[64] Lawyers, like historians, do not have a shared understanding of presentism, and will offer a variety of answers to Worden's questions. Reid is quite wrong to assume that all lawyers insist

on presentist perspectives, and fail to question the retrospective element involved in judicial development of the common law. These are matters of significant controversy in legal circles. Legal theorists, and judges too, worry about the ahistorical nature of the declaratory theory of the common law.

The declaratory theory of the common law lives?

An excellent opportunity for debate on the role of judges as lawmakers arose in 1999 when the Judicial Committee of the House of Lords, then the final appellate court in the United Kingdom, decided a case called *Kleinwort Benson v Lincoln City Council*.[65] In that case it was decided by a 3–2 majority, overruling a number of prior cases, that remedies found in the 'law of restitution' for the recovery of payments mistakenly made were available to persons who had made payments under a mistake of law. Previously it had been authoritatively determined that restitutionary recovery was limited to instances of payments made under a mistake of fact. It was accepted by the majority of the judges that this development of the law would have a retrospective effect in relation not only to the parties to the litigation but also to anyone else in a similar situation whose case had arisen before the new decision. Lord Browne-Wilkinson in dissent attacked the declaratory theory of the common law:

> The theoretical position has been that judges do not make or change law: they discover and declare the law which is throughout the same. According to this theory, when an earlier decision is overruled the law is not changed; its true nature is disclosed, having existed in that form all along. This theoretical position is, as Lord Reid said in the article "The Judge as Law Maker" (1972–1973) 12 J.S.P.T.L. (N.S.) 22, a fairy tale in which no one any longer believes. The whole of the common law is judge made and only by judicial change is the common law kept relevant in a changing world. But whilst the underlying myth has been rejected, its progeny – the retrospective effect of a change made by judicial decision – remains.[66]

Lord Goff's leading judgment for the majority, however, explicitly adopted a reinterpreted version of the declaratory theory of judicial decisions:

> Occasionally, a judicial development of the law will be of a more radical nature, constituting a departure, even a major departure, from what has previously been considered to be established principle, and leading to a realignment of subsidiary principles within that branch of the law. … It is into this category that the present case falls; but it must nevertheless be seen as a development of the law, and treated as such. … The historical theory of judicial decision … was indeed a fiction … [but] when the judges state what the law is, their decisions do, in the sense I have described, have a retrospective effect. I must confess that I cannot imagine how a common law system, or indeed any legal system, can operate otherwise if the law is be applied equally to all and yet be capable of organic change.[67]

Why did Lord Goff adopt this approach? I think that Richard Tur has identified the crux of the matter: 'That there is a Rubicon hereabouts to cross is jurisprudentially controversial in that theorists and practitioners remain divided as to whether the judicial role is ever legitimately creative (or legislative) rather than exclusively declaratory (or adjudicative).'[68]

Lord Goff and scholars like Brookfield are concerned to minimize the perception that non-elected judges, immune to dismissal from office, can act as legislators. Lord Goff's modern version of the declaratory theory of the common law allows for the common law to develop but rejects the accusation that judges have 'legislated' when they overrule previous decisions. As Tur writes, some may wish rule-of-law and separation-of-powers stories to be embedded in the law so that 'it is always improper even for a court of last resort to act legislatively'. Others, however, he suggests, 'may wish to bring different moral or political commitments to the law which would permit (and perhaps celebrate) strongly legislative judicial departures from long-standing legal standards or "ancient heresies" if justice is best served thereby, on the basis perhaps that the judicial duty of fidelity to "law" is to law and justice rather than to law alone'.[69]

The irony of the *Kleinwort Benson* case is that the majority judges overruled prior cases and did propound a significant change in the law of restitution, yet they disclaimed acting legislatively. The minority judges thought all forms of the declaratory theory to be fairy tales and argued that only by open judicial change is the common law kept relevant in a changing world – yet they conservatively refused to adjudicate legislatively. I would place myself on the side of the Rubicon that celebrates creative development of the common law in fidelity to law and justice. This is a preference for the reasoning on time and law as expressed by the minority judges, but nevertheless I would prefer the reformist outcome reached by the majority!

A recent Canadian case on 'law time'

A 2013 Supreme Court of Canada decision is a recent instance of the tensions when history and 'law time' intersect or collide in relation to indigenous peoples' rights. The case concerned a failure by the Canadian federal government to make proper provision in allocations of land 'for the benefit of the families of the half-breed residents' under the Manitoba Act 1870, section 31, at the time that the territory of Manitoba was first constituted a province in British North America. In a development of Canadian case law, the Supreme Court (by a 6–2 majority) extended the coverage of 'the honour of the Crown' as a constitutional concept

applicable to Manitoba Métis today. The court's judgment was founded on this premise:

> The ultimate purpose of the honour of the Crown is the reconciliation of pre-existing Aboriginal societies with the assertion of Crown sovereignty.

The judges in the majority then found:

> … that when the issue is the implementation of a constitutional obligation to an Aboriginal people, the honour of the Crown requires that the Crown: (1) takes a broad purposive approach to the interpretation of the promise; and (2) acts diligently to fulfill it.

What was the source of this constitutional obligation?

> In the constitutional context, this Court has recognized that the honour of the Crown demands that s. 35(1) [of the Constitution Act 1982] be interpreted in a generous manner, consistent with its intended purpose. [70]

The obligation thus derived from the Constitution Act enacted in 1982 was then applied by the court to the circumstances of the Manitoba Act passed in 1870:

> The s. 31 obligation [of the Manitoba Act 1870] made to the Métis is part of our Constitution and engages the honour of the Crown. The honour of the Crown required the Crown to interpret s. 31 in a purposive manner and to diligently pursue fulfillment of the purposes of the obligation. This was not done. The Métis were promised implementation of the s. 31 land grants in 'the most effectual and equitable manner'. Instead, the implementation was ineffectual and inequitable. This was not a matter of occasional negligence, but of repeated mistakes and inaction that persisted for more than a decade. A government sincerely intent on fulfilling the duty that its honour demanded could and should have done better.

In commenting on this judgment, Paul McHugh (who had provided expert evidence for the Crown in that case) bemoaned the Supreme Court's reliance on an ahistorical doctrine derived from constitutional provisions enacted as recently as 1982.[71] Post-1982 constitutional principles were being applied to settings very far removed historically from the present and regardless of the fact that the relevant actors in the nineteenth century could have had no possible conception of any such legal doctrine. From a Pocockian point of view, suggested McHugh, it is not good historical method for judges to find that 'honour of the Crown' doctrine enabled an adjudicated conclusion that the government in the 1870s 'could and should have done better'.

The questions that might then be asked include whether it is right for historians and other readers of this journal to expect courts to adopt 'good

historical method'. Is it right to characterize as unconstitutional and dishonourable conduct that was perfectly lawful (even if unfair) at the time? Is it ever sensible for judges to declare what governments in a bygone era could or should have done?

I am not convinced that debates between scholars (or litigants, or political observers) will narrow the gap between juridical history and contextualist history. One might consider, for example, whether McHugh's own juridical history research, submitted by Māori claimants to the Waitangi Tribunal in the Kaituna River, Ngāi Tahu and Muriwhenua inquiries in the 1980s, is any more or less *valid* than his more contextualist Pocockian evidence, commissioned by Crown counsel and submitted to the Waitangi Tribunal's Foreshore and Seabed inquiry in 2003 and Te Paparahi o Te Raki (Northland) inquiry in 2012. In my view both modes of retelling the past have validity. What is important is that historians (and judges) should identify carefully and clearly exactly how they have undertaken their work and what methodology they have employed. It is not important that evidence submitted by an historian to a court or commission of inquiry must conform to the Pocock/Skinner 'Cambridge' approach to history, or to postcolonial theory, or to any other template or paradigm in favour at one time or another.

Personally, I hope that 'history wars' over settler–indigenous relationships in Australia and New Zealand – whether of the vitriolic Australian variety, or the more muted New Zealand variety – have not eliminated the desirability that historians of different persuasions should listen to, and sometimes learn from, research perspectives that do not entirely please them. The Treaty industry has produced an immense volume of material on historical events from almost all corners of Aotearoa New Zealand. The Treaty settlement processes have bequeathed us some legislated versions of how Crown–Māori relationships and history might be understood. I would hope and expect that academic historians of all stripes will access and ponder on the significance of these historical records in the coming years.

A final thought from Pocock on histories from his native land is pertinent: 'But the peoples concerned – it is a simplification to say there are two of them – have known and shaped each other for two centuries, and the antagonisms and incomprehensions between them do not altogether preclude that situation in which "they know what I think of them and I know what they think of me" and the relations are implicit as well as explicit. They may be imagined pursuing this state of things by recounting histories in one another's hearing.'[72] The recounting of people's histories, and of peoples' histories, so that others may hear the diverse stories from our pasts has been an enormously worthwhile element of Waitangi Tribunal hearings since

1985. If the Tribunal's reports necessarily must be juridical history, academic historians would still do well to pay attention to those reports and to the many excellent commissioned reports filed with the Tribunal. If legislated historical accounts need to be supplemented by perspectives not considered important by OTS and mandated Māori claimant groups, then well and good. Historians removed from the fray could and should provide a broader context for the times the various peoples of this land have lived through. The views of the more strident 'warriors' in the history wars, though, should be rejected. The large body of New Zealand juridical history compiled for the Waitangi Tribunal and OTS should not be dismissed as unworthy of the name 'history'.

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NOTES

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13 *New Zealand Maori Council v Attorney-General*, p.674 (Justice Richardson).

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