

TREATY RESEARCH SERIES
TREATY OF WAITANGI RESEARCH UNIT

Historical ‘Facts’ and the Waikato Raupatu Claims Settlement Act 1995.

In December 1995 Professor Bill Oliver decided to treat the historical accounts embodied in the pioneering Waikato Raupatu Claims Settlement Act as a topic for review in a journal whose title is self-explanatory – *New Zealand Books* (vol. 5, no. 5: issue 21). His ‘brief note’ (which occupied a large-format page) interrogated the ‘three page preamble to the bill’ (by which he presumably meant ‘the Act’), although he saw it as ‘a small and...non-substantive part of the measure’ and indeed wondered ‘who insisted upon’ the preamble’s inclusion in the legislation – the short answer to which was no-one, for the results of the negotiations between Crown and claimants were consensual.

The reviewer seemed to know little about negotiations processes, in fact. He wrongly speculated, for example, that the history embedded in the settlement was based on a single report by Ann Parsonson that was mostly ‘excellent’ but ‘less than excellent’ on the issue of returned land. He also believed there to be two other commissioned reports that would have provided clarity on land, but ‘[t]here is no indication that...these were ever completed’. Or if they had been finished, he claimed, they had not, for some reason he does not specify, been ‘made generally available’, including to Dr Parsonson.¹ On the basis of such suppositions, Oliver felt that the historical account in the preamble to the Act provided ‘a rather surprising version of some crucial events’ – one that was ‘risky’, perhaps ‘misleading’, even ‘deceptive’.

The *New Zealand Books* index summed up his message by giving his piece the title ‘Legislating (bad) history’. The title given on p. 15 focussed upon Oliver’s belief that the ‘facts’ in the preamble were wrong: ‘Getting facts on your side’. He had corresponded with the Crown Law Office on the issues he was concerned about, and this had left him ‘wondering what [their reply] could possibly mean’. He did not, it seems, contact the Office of Treaty Settlements (OTS), which reported to the Minister in Charge of Treaty of Waitangi Negotiations and took the lead role for the Crown in all Treaty negotiations. And nor, it seems, did he consult the Waikato-Tainui negotiators for their views.

¹ Oliver believed that land returned to ‘returned rebels’ was ‘probably outside Dr Parsonson’s original brief, and that ‘she may have had to scramble to cover the ground left vacant by the reports never completed (or, if completed, not made generally available).’

‘Why’, he asked, ‘did those responsible for the settlement not take the trouble to get the history right?’ He speculated that there were political pressures for a fast settlement, and assumed that ‘careful history’ was, *ipso facto*, a casualty of this. He concluded that ‘[i]t seems fair to assume that the Waikato negotiators wanted [this wrong] version of history’ embedded in the Act, and charitably supposed that historians on both sides had given advice that was not taken up.

He based his assessment that the history was wrong on research he had conducted after ‘stumb[ling] upon’ a report in ‘the widely accessible *Appendices to the Journals of the House of Representatives (AJHR)*’. He had followed that up by reading another report in the *AJHR*. These two documents revealed, he believed, ‘the fragility of some of the assertions’ in the preamble. Had the two apparently unfinished reports commissioned within the Treaty negotiations processes been finished, ‘the truth of this matter could be revealed [sic]’. This indicates, presumably, that he felt that his reading of two *AJHR* reports did not get him as far as ‘the truth’ per se, but near enough to conclude that the preambular version was not the truth.

Professor Oliver may have been hinting that had Waikato-Tainui gone through the hearings processes of the Waitangi Tribunal – on which he had written a Tribunal-commissioned book – a better history might have emerged in the preamble (not that he thought there should have been a preamble). But the nub of his case seems to be more specific: that his notification to the drafters of the final, enacted version of the historical account, based on his interpretation of two *AJHR* reports, had gone unheeded. As a result, Parliament had passed an allegedly incorrect statement that land returned after confiscation had ‘generally not’ gone to the ‘rebels’. He based his conclusion that this was wrong on figures in the two reports in the 1871 and 1873 *AJHRs*. These recorded that ‘as much as 10%’ of the returned land went to ‘natives (otherwise)’ as opposed to ‘natives (loyal)’; and that with 473 grants having gone to ‘chiefs or heads of families’ holding land in trust for ‘Returned Rebels’.

Apart from noting Professor Oliver’s assumptions (including that ‘otherwise’ necessarily meant ‘rebel’, as opposed to – say – neutral or indeterminate), the Crown Law Office may well have pondered on his conclusion that even if the majority of returned lands had gone to non-rebels, this invalidated the Act’s statement that the returned land was ‘generally not’ transferred to rebels. In fact, even Oliver did ‘not know if further research would confirm’ that 10% of the confiscated land had gone to ‘returned rebels’. But, he continued, ‘nor do those responsible for drafting the bill know that it was not; they do not have the right or pretend that they do know the answer’.

In assessing this statement, a reminder of what the Act stated might be helpful. The preamble noted that some confiscated land had been transferred to iwi members, but ‘generally not to those who had fought for the Kingiitanga [sic]’. Crown Law’s response to Oliver had suggested that he contextualise the ‘fairly flexible’ phrase ‘generally not’

within the preamble as a whole. On the face of it, this seems reasonable given his own tentative analysis of the figures he had found in the two reports he had come across. It might be noted that he not only produced no other evidence, but also agreed that his own percentages might be wrong even though the thrust of the review was to contest the words ‘generally not’ in the legislation. (It might also be noted that he seemingly assumed that the Crown and iwi negotiators had not come across the reports in the *AJHR*, although that source is one of the first ports of call in historical research on such issues.)

Given that his own analyses did not necessarily support this main argument of the review, Professor Oliver argued that the Crown’s and Waikato-Tainui’s figures might be wrong as well (not that he knew what they were based on, given that he was not privy to the negotiations, which were held *in camera*). On this basis he criticised not only the many public servants, Crown-based historians and politicians involved in the negotiations, but also the Waikato-Tainui leaders, negotiators and historians. With regard to the claimants, in fact, not only had they supposedly got their history wrong, but ‘saddening[ly]’ they were arguing against their own interests by ‘maximising the number of Waikato people who could be charged with failure to support the kingitanga cause.’

Of course Waikato had (and have) their own views on how best to maximise their own interests. Here I will merely note, from the perspective of having been in charge of the historical negotiations for the Crown’s team at the time, that the officials and politicians engaged in the negotiations did not attempt to advise, let alone pressure, Waikato-Tainui on how they should exercise their rangatiratanga. Both teams negotiated in good faith to seek historical recitals that the two parties could agree upon, and they found them within a generally positive negotiating environment.

Professor Oliver’s other critical comments were made almost made in passing and, apart from one about the Crown ‘initiat[ing] hostilities’ in 1863 (which he did not dispute, but wanted more context for), they would also appear to fall into the category of questioning the iwi’s interpretation of its own best interests. In 1995 Oliver clearly sought, through this review and in some other public stances he took around that time, to promote a public discussion about the role of history in the Treaty settlements processes. This was of course an entirely worthy quest.

In the event, no such public debate occurred, at least not in any structured form (although the issue has surfaced from time to time, including through contributions by two of the editors of this Treaty Research Series: see for example, the 2007 article by Richard Hill and Brigitte Bönisch-Brednich, ‘Politicizing the Past: Indigenous Scholarship and Crown–Maori Reparations Processes in New Zealand’, *Social and Legal Studies*, 16:2). Certainly, Oliver’s own views did not receive any feedback in *New Zealand Books*, not even from the Crown – whose historians, advisers and

negotiators had been found so wanting, along with their Waikato-colleagues, in the review.

At the time, some of the OTS historians providing advice to the Ministers felt that this lack of response to Professor Oliver's call was unfortunate –that a debate on the 'facts of history' in Treaty settlements should be welcomed. In fact, they had quickly prepared, as the basis for discussion with management, a draft response to Oliver's allegations of bad history. Management approval was needed if the draft were to be taken any further and the issues brought into the public arena. In the event, that was not forthcoming.

A copy of the draft that OTS historians presented for management consideration has recently surfaced amongst the research collection held at the Treaty of Waitangi Research Unit. Had management decided that a response to Oliver was appropriate, the final text would undoubtedly have been more polished. But this original draft remains of some interest. It indicates how historical advisers saw the issues in 1995, at a time when the pioneering negotiations which led to the first major Treaty settlement were fresh in their minds. It reads (with a handful of editorial alterations to address typing errors, and in an adapted layout):

We write in reference to the note by Professor WH Oliver on the Waikato Raupatu Claims Settlement Act, published in your December 1995 issue.

While accepting the justice of the Waikato raupatu settlement, Professor Oliver seems to be straining at gnats with regard to the historical Preamble to the Act.

He questions the need for any historical preamble without apparently being aware that for many Maori claimants the admission of Crown breaches of the Treaty may well be the most important part of a Treaty claim settlement. The Preamble and the Apology were, for many Waikato, the most important parts of the Act, setting out formally the Crown's Treaty breaches and the process through which Waikato had to go to gain recognition and compensation.

Waikato requested that the Preamble be included and the Crown saw no reason to deny this request. Indeed, the Crown saw positive virtues in it. The Crown had never before so formally admitted to such actions being in breach of the Treaty and causing undue suffering to Maori. The Preamble was important, too, for its educative value for the great majority of people, who, lacking Professor Oliver's extensive knowledge of New Zealand history, remain substantially unaware of the exact nature of the Waikato raupatu grievances; or of the 'sufficient historical consensus' to which, we believe, a simple reference would have been adequate.

Three main points in which the Preamble is allegedly deficient historically were identified by Professor Oliver.

The first was in reference to the nature of the Kingitanga and the depiction of it as being accorded ‘ultimate authority over the land [of those chiefs who formally pledged allegiance to Potatau] and ultimate responsibility for the well-being of the people’. Provided it does not contravene established historical scholarship, which this statement does not, Waikato’s own understanding of their own internal relationships as expressed here cannot be rejected by the Crown. Crown historians, in short, accommodate Maori oral tradition into their overarching interpretations of the past. Indeed, many Treaty claims stem from alleged attempts of varying kinds by the Crown to tell Maori their own business. It might also be noted that ‘ultimate’ does not mean ‘absolute’ or ‘all-encompassing’ and even Professor Oliver admits the King was given some right of veto over land alienation.

The second is the use of the phrase ‘initiated hostilities’ instead of a detailed recitation of the events leading up to the invasion. The Crown does not consider that there is such a thing as an uncontested list of ‘facts’ in this or many other Treaty matters. In any case, the Preamble is already twenty-four clauses and nearly five pages long, and adding still more detail would be moving even further away from the short, sharp reference to the historical consensus apparently desired by Professor Oliver.

As far as the Crown historians’ interpretations are concerned, the ‘fact’ remains that nothing actually done by Waikato (as opposed to rumours generated and/or promulgated by Grey) created a formal war; the Crown did indeed ‘initiate hostilities’. The crucial point – that the Crown’s actions in invading the Waikato were unjust and unwarranted, even in the ‘pretty disturbed’ context of 1862-63 – is established by the present wording.

The third alleged inadequacy to which Professor Oliver takes exception refers to the use of the words ‘generally not to those who had fought for the Kingitanga’ in the account of the return of some confiscated land to Maori. ‘Generally not’ is not an ‘evasive’ phrase as characterised by Professor Oliver, nor, by any standard use of the English language, does it mean that those to whom it was applied were ‘too few in number to matter’, the interpretation upon which Professor Oliver founds his complaints.

Rather, it accurately, and with appropriate honesty, captures the situation that (a) it is not known presently exactly to whom every piece of Waikato land was returned, (b) the Compensation Court was instructed not to return land to ‘rebels’, (c) Turton, the Crown agent, made some deals that did accommodate some ‘rebels’, (d) at most, even on the figures Professor Oliver cites (and they are highly unreliable, as only a small proportion of land promised in them was actually granted in practice), 40% land returned went to rebels.

The phrase means precisely what it says, that generally the land returned did not go to adherents of the Kingitanga (thus depriving the vast majority of Waikato of their ancestral lands). Presumably, Professor Oliver would not have wanted the whole settlement delayed for a minimum of months while

the exact percentage was ascertained through detailed examination of the history of every Crown grant in the Waikato.

While perhaps intellectually satisfying, such an examination would have had no practical effect on the settlement, given that this was based on the invasion, the initial confiscation, the complete loss to Waikato of at least 75% of their lands, and the return of lands having been made in Crown grants that destroyed the customary tribal tenurial structures. The Crown advisers took a general look at the state of the art on the history of Crown-Waikato relations (they had rather more material available to them than the one finished report Professor Oliver seems to think the settlement was based on – a report that arrived only late in the day anyway²).

Professor Oliver also attempts to score some other gratuitous points against those working within the settlement process. As just explained, trouble was indeed taken to get the history right, at least in such general terms as was possible within such a brief summary. There is not, contrary to his assertion, unlimited funding available for claim-related historical research; would that there were.

Although, in a substantial advance on his earlier review of the Crown Settlement Proposals³, Professor Oliver now recognises that officials merely give advice which politicians may reject or alter as they please, he does not seem to recognise that settlements are reached by negotiation. The wording of the Preamble doubtless does not reflect either side's ideal, nor attain historical perfection, but it does represent the best that could be reached in a compromise without undermining the integrity of either position.

The Crown is attempting, within a ten-year timeframe, to meet Maori desire for settlement of all major verifiable historical grievances resulting from breaches of the Treaty of Waitangi. Some academic commentators might think it an easy task. In reality, the negotiations are difficult and protracted for Ministers, claimants and officials (including historical advisers) alike. In the Crown's eyes, the fact that Waikato's historical raupatu grievances have been resolved – a historic result acceptable to both the Crown and Waikato Maori – is the important thing.

This draft letter is self-explanatory, and I will conclude this revisiting of a small incident almost two decades ago by noting what I believe to be some conclusions that can be drawn from it. Firstly, scholars engaging in historical debate about the role of history in Treaty of Waitangi settlements should best acquaint themselves with the processes by which the agreed wordings are reached, although a long time needs to pass before documents from the actual deliberations will be released.

² This is a reference to the report by Ann Parsonson mentioned in Professor Oliver's review as being on 'the general shape of government policy and its implementation' with regard to the Waikato raupatu.

³ This refers to Oliver's "Pandora's envelope: it's all about power", a review of *Crown Proposals for the Settlement of Treaty of Waitangi Claims* in *New Zealand Books*, vol. 5, no. 1: issue 17, March 1995.

The processes included, in this case and all others I know of, examining many more than a handful of reports; the primary and secondary materials consulted are invariably comprehensive (among other things, the negotiators in the Waikato settlement had access to the vast *Raupatu Document Bank* compiled at the Waitangi Tribunal with the support of the predecessor to the Office of Treaty Settlements, The Treaty of Waitangi Policy Unit/TOWPU). The ‘facts of history’ do need debating, but they are elusive and require very serious research if they are to be sensibly addressed.

Secondly, and far more importantly, scrutinisers of the historical agreements between Crown and Maori should surely bear in mind the purpose of the settlement processes in the first place: reparations for Crown breaches of its promises in the Treaty of Waitangi and, more broadly, socio-political reconciliation between Crown and Maori.

With regard to the first major Treaty settlement, that which Professor Oliver addressed in his review of its historical accounts, the Crown had made a tentative first offer to the iwi in 1990 after scoping negotiations carried out by TOWPU. This was valued at some \$17-20m. Five years later, a Treaty settlement package valued at \$170m was agreed to and has since been built upon, with tribal holdings are now worth more than \$1b – the size of the original fiscal envelope, announced in 1994, in which all claims nationwide were to be fitted.

In 1995, the Crown made a pioneering apology to the Waikato iwi for invasion, blood spilt and land confiscated, and for the very first time the British (in Queen Elizabeth II’s capacity as head of state of New Zealand) apologised to an indigenous people. The first three clauses of the apology, as entered into the legislation, read:

1. The Crown acknowledges that its representatives and advisers acted unjustly and in breach of the Treaty of Waitangi in its dealings with the Kiingitanga and Waikato in sending its forces across the Mangataawhiri in July 1863 and in unfairly labelling Waikato as rebels.
2. The Crown expresses its profound regret and apologises unreservedly for the loss of lives because of the hostilities arising from its invasion, and at the devastation of property and social life which resulted.
3. The Crown acknowledges that the subsequent confiscations of land and resources under the New Zealand Settlements Act 1863 of the New Zealand Parliament were wrongful, have caused Waikato to the present time to suffer feelings in relation to their lost lands akin to those of orphans, and have had a crippling impact on the welfare, economy and development of Waikato.

The settlement was an effort to address, after some thirteen decades, such impacts on the Waikato people. That is an overarching (and surely uncontested) 'fact of history'.

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October 2014.