2001, A Waitangi Tribunal Odyssey: the Tribunal’s response to the ‘presentism’ critique

The Presentism Debate
In 2001, Professor WH (Bill) Oliver published the most influential critique of the Waitangi Tribunal ever written in its 37-year history. His essay, ‘The Future Behind Us: the Waitangi Tribunal’s retrospective utopia’, soon achieved the status of academic orthodoxy. It appeared in a collection edited by Andrew Sharp and Paul McHugh, who summarised it in this way:

W.H. Oliver explores, and criticises, the “presentism” of the Waitangi Tribunal’s histories: their tendency to find the Crown guilty of not providing for Maori after 1840 what it would have been difficult or even impossible to conceive of at the time, and flatly impossible to deliver. He argues that the Tribunal’s political thought has a marked utopian element that it projects onto the past.

An integral component of presentism, in Oliver’s view, was ‘a “counterfactual” history of policies and institutions which should and

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1 Grant Phillipson was the Chief Historian at the Waitangi Tribunal Unit from 2007 until 2010 when he was appointed as a member of the Tribunal. Although this article discusses some of the Waitangi Tribunal’s reports and findings, the views expressed in “2001, A Waitangi Tribunal Odyssey: The Tribunal’s response to the ‘presentism’ critique” are his own and not those of the Waitangi Tribunal.

2 The Waitangi Tribunal is a permanent commission of inquiry established in 1975 to hear and report on Maori claims that they have been prejudiced by Crown actions or inaction in breach the principles of the Treaty of Waitangi, and to make recommendations for the removal of that prejudice. In 1985, the Tribunal was given jurisdiction to hear historical claims dating back to the signing of the Treaty in 1840. Its findings are not binding on the Crown.


4 Sharp and McHugh, Histories, Power and Loss, 5.
could have been put in place but were not’, resulting in the Tribunal’s ‘depiction of a better past that might have been’. 5

Oliver was not the first to argue that the Tribunal was presentist—indeed, he cited the earlier work of lawyers Richard Boast, Paul McHugh, and Andrew Sharp—but he was the first senior historian to do so. 6 According to Kerry Howe in 2003, Oliver brought out into the open what academic historians had been thinking privately about the ‘projection of today’s moralities on to unsuspecting peoples of the past’. 7

Oliver’s interpretation, however, might not have become the predominant academic view of Tribunal history had it not been followed in 2004 by Giselle Byrnes’ book The Waitangi Tribunal and New Zealand History. Byrnes repeated and expanded Oliver’s initial analysis, which had focused on two Tribunal reports from the mid-1990s (Taranaki and Muriwhenua Land), 8 applying it more generally across many of the Tribunal reports that had been produced by 2000. Byrnes’ critique was not exactly the same: her view of presentism, for example, was that Tribunal history is postcolonial ‘liberation history’, a ‘parallel world’ designed to liberate Maori in the present. 9 Byrnes’ book was followed in 2005 by Michael Belgrave’s Historical Frictions: Maori Claims and Reinvented Histories. Belgrave, too, suggested that the Tribunal’s analysis was sometimes presentist and counterfactual, but in a context where a long series of earlier inquiries into Maori claims had not satisfied Maori or achieved final settlements. 10 He thought it ‘difficult but not impossible’ for the Tribunal to take proper account of historical context. 11

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6 Ibid., 22-23.
11 Ibid., 16.
In 2006, the debate shifted to the *New Zealand Journal of History*, where Jim McAloon wrote a spirited defence of Tribunal reports as relatively orthodox empirical history. Oliver responded in 2007 that Tribunal history was ‘a curious mix’ of hundreds of pages of ‘straightforwardly empirical analysis’, or ‘telling it as it was’, and then a ‘wholly unempirical way of arriving at conclusions’. He rejected McAloon’s argument that the Tribunal could validly judge Crown decisions by comparing them to better alternatives proposed at the time—such alternatives were ‘political ideas lacking political weight’. Essentially, Oliver affirmed his central thesis that colonialism was unavoidably bad and no Treaty or counterfactual thinking could make it otherwise. In his view, this strengthened rather than weakened the Maori case for ‘reparative justice’. Belgrave’s response to McAloon suggested that the writing of Tribunal history had become more conventional anyway since the 1990s. Byrnes, on the other hand, maintained that the Tribunal’s emphasis on present-day prejudice from past breaches was still politically-motivated, but that all history is presentist to some degree. If historians should judge history, then it should be by the multiple standards of the past and, insofar as possible, not today’s. Tribunal reports continued to be seen—as Rachel Buchman summarised in 2007—as ‘presentist, counter-factual, a form of impoverished victim history’.

**Responses in the Waitangi Tribunal**

While no one could deny that some degree of presentism and subjectivity is inevitable for all historians, and that the Tribunal is a creature of statute with a political agenda set by its role in the settlement of claims, what this means for the kinds of history that the

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Tribunal must/should/can write has been hotly debated. This debate took place in academic publications and conferences. It was external to the Tribunal process, and—so it may have appeared—barely impacted upon it. What is opaque to an academic audience, perhaps, is the question of what happened inside the field of Treaty history as a result of Oliver’s groundbreaking 2001 critique and its elevation to academic orthodoxy. Did the Tribunal continue to write history as before, without reacting to the criticism that soon became widespread in the 2000s? What was the response of the Crown to a critique which suggested, essentially, that it was getting a raw deal in the Tribunal? What was the response of the claimants to the suggestion that the Tribunal’s history was present-driven, politically-motivated utopianism, and that their experience of colonisation could never have been better regardless of the Treaty? And did the many historians producing historical evidence for the Tribunal's inquiries change their approach to writing history, since, as Belgrave noted in 2006, their work largely escaped notice in academic critiques? In this essay, I intend to focus on those questions rather than the Oliver/Byrnes critique itself, since it has already been debated extensively in academic fora and since the Tribunal’s response is not as well known. In doing so, I will explore how and why counterfactual analysis was seen as the answer (as well as the problem).

Michael Belgrave suggested in 2006 that there had already been a sea change in the Waitangi Tribunal by then. In his view, the departure of Sir Edward Taihakurei Durie, Tribunal Chairperson in the 1990s, to the High Court, allowed the historians to take over, and ‘the Tribunal has moved on’: ‘the historical reasoning has been more prosaic and less subordinated to political opportunity’. That was how Belgrave saw the then recent Tribunal reports, Te Whanganui a Tara/Wellington (2003) Turanga/Gisborne (2004), Tauranga

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20 For my response at the time to the Oliver critique, see Grant Phillipson, ‘Talking and Writing History: Evidence to the Waitangi Tribunal’ in The Waitangi Tribunal: Te Roopu Whakamana i Te Tiriti o Waitangi, eds. Janine Hayward and Nicola Wheen (Wellington: Bridget Williams Books, 2004).
Raupatu (2004), Kaipara (2006), and Hauraki (2006), all of which he considered ‘more conventional history’.21

But the Tribunal still judged history by the principles of the Treaty of Waitangi and made conclusive findings as to whether those principles had been breached and Maori prejudiced thereby. So what, if anything, had changed?

The Crown quickly adopted aspects of Oliver’s critique. Craig Linkhorn, Crown counsel in the Turanga inquiry, cautioned the Tribunal in 2002:

There is a legitimate public interest in the integrity of the Tribunal’s inquiry process. There is also a public interest in the durability of historical explanation. There must be a solid foundation for the settlement of historical grievances. That foundation must be capable of withstanding the historical analysis to which the claims process will inevitably be subject. Ultimately, it will be the persuasive power of the Tribunal’s reasoning that will secure for participants [the claimants and the Crown] the confidence to use the Tribunal’s report as a basis for the future of their relationship.22

In effect, this was the “political agenda” that Linkhorn saw as underlying the Tribunal’s statutory role to hear claims. In Linkhorn’s submission to the Tribunal, all that was needed for it to fulfil this role was to take proper account of ‘historical context’. Quoting extensively from ‘The Future Behind Us’, he repeated Oliver’s suggestions that the Tribunal had elaborated an ‘alternative past which postulates a function for “the Crown” which could not conceivably have been discharged’, and that it measured Crown actions in the light of ‘timeless Treaty principles’ without consideration of historical context.23

But, in what was to become a frequent theme in Crown submissions, the answer was not seen to be less counterfactual history but more of the right kind of counterfactual analysis: Identification of what was

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21 Belgrave, ‘Looking Forward’, 245-246. In 1998, Chief Judge Durie was appointed a High Court justice. He remained the official Tribunal chairperson until January 2004 but all Tribunal business was conducted by Chief Judge JV (Joe) Williams as acting chairperson from 2000.
22 Craig Linkhorn, closing submissions on behalf of the Crown, June 2002 (Wai 814 Turanga Record of Inquiry, doc H14), 13.
23 Linkhorn, 9-10.
reasonably achievable in the period under review does not detract from the case for remedying imperfect observation of the promises of the Treaty’ [emphasis added].

In its report, published in 2004, the Turanga Tribunal did not engage explicitly with this part of Linkhorn’s submissions, nor with presentism or the Oliver critique. Chief Judge Williams (who presided) later stated his view of Oliver’s ‘powerful and elegant criticism’ at the 2005 Australia-New Zealand Law and History conference. His explanation for Oliver’s consternation was simply a gulf between law and history, returning to an explanation advanced earlier by McHugh and others. In examining facts, English common lawyers ask:

“what would the reasonable man on the Clapham Omnibus have done?” The counter-factual is thus established and citizens are required to conform to his standard. There may be contention about how fair or realistic the standard might be, but the counter-factual is the usual common law technique for standard setting.

The Tribunal’s counterfactual is ‘the promises in the Treaty’. The ‘problem ... is that the promises contained in the text are so powerfully made’, especially the guarantee of tino rangatiratanga (Maori autonomy). Whether realistic (then or now), those are the standards which the law requires the Tribunal to use. ‘The Treaty’, Williams observed, ‘is in some ways inherently utopian’.

A ‘utopian counterfactual’: the conundrum at the heart of Treaty history?
I want to pause here a moment to explore the idea that the Treaty posits a utopian counterfactual, which both Williams and Oliver argued (from quite different standpoints). I think one of the most

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24 Linkhorn, 10; see also R Ellis and A Irwin, closing submissions on behalf of the Crown, January 2002 (Wai 215 Tauranga Moana Record of Inquiry, doc O2), 8.
27 The Maori text of article 2 of the Treaty guaranteed hapu (tribes) the tino rangatiratanga (the full authority of their chiefs) over their lands, kainga (villages), peoples, and taonga (treasures, whether tangible or intangible), for so long as they chose to retain it.
important effects of the Oliver critique – and quite unintended – has been to cement this counterfactual at the very centre of Tribunal history. For me, this was epitomised in an impassioned plea from Peter Andrew, as counsel for the Crown, in 2005:

If the Treaty principles are to be a genuine constitutional guide to government rather than simply a means of condemning a past from the view of a more enlightened present, it must have been possible for the Crown to be Treaty compliant in the past—with its resources at hand, with the freedom of choosing between different policy options, and within the attitudes of the day.  

This is perhaps the most important faultline running through Treaty history today. In essence, Treaty history requires historians to accept as an intellectual starting point that colonisation could have been conducted more fairly than was actually the case. It is this proposition that Oliver was ultimately unable to accept, in his 2001 essay and his 2007 response to Jim McAloon.

We are not the first generation of New Zealanders to wrestle with this question. In 1871, the Chief Judge of the Native Land Court, FD Fenton, wrote to Native Minister Donald McLean:

don’t let us deceive ourselves; it is beyond the power of man to transfer the entire land of a country from one race to another without suffering to the weaker race. [Sir William] Martin thinks he can do this. He cannot—it is contrary to the truth of history and human nature. (emphasis in original)

Chief Justice Martin, whose opinions are often cited by the Tribunal, maintained that New Zealand could be colonised in a way that was fair to Maori and in their best interests; Chief Judge Fenton maintained that it could not. In this battle of the judges, present-day historians tend to fall on one side or the other of the Martin-Fenton divide.


30 Fenton to McLean, 6 August 1870, 15-16, as quoted in Fergus Sinclair, ‘Some Aspects of the History of the Native Land Court on the Chatham Islands’, November 1995 (Wai 64 Chathams Record of Inquiry, doc L1).
If we take Fenton’s view that injustice to the ‘weaker race’ was inevitable (which, indeed, it was, if the ‘entire land of a country’ was to be transferred out of Maori hands), and that colonisation could never have been better than it actually was, then the whole premise on which Treaty history is based might fall over. Historian Richard Hill warned in 2004 against ‘wishful thinking’ history, which imagines the colonial state as better than it realistically could have been, given ‘the coercive realities underpinning imperialism’.31 In his view, historians should ignore the ‘fine words uttered from time to time in policy statements and the like’ in favour of the cold reality of what actually happened, although reparations should still be made for broken promises.32 Alan Ward, on the other hand, saw some positives in the colonial state. The British contributed ‘an efficient infrastructure, including a bureaucracy with a tradition of integrity, a culture hostile to corrupt practices, and courts willing to uphold whatever rights the law allows’.33

This debate was not limited to New Zealand. In Pacific history, the status of imperialism as ‘an all-powerful system for evil-doing’ was being queried at the time.34 ‘Imperial actions could certainly be evil’, wrote Kerry Howe in 2003, ‘but the commonly heard condemnation of its supposedly purposeful, unrelenting, generalised depredations is not very scholarly’.35 Harvard historian Niall Ferguson, in his book Empire: how Britain made the modern world, also published in 2003, accepted that British imperialism could have been better than it was if it had lived up to its own ideals. The question of how far it did live up to its own ideals, he regarded as a valid field of study.36 Timothy Parsons, on the other hand, rejected Ferguson’s thesis (which he

32 Ibid., 24, 27.
34 Howe, ‘Two Worlds?’, 53.
35 Ibid. Howe was referring to studies such as Jane Samson, Imperial Benevolence: Making British Authority in the Pacific Islands (Honolulu: University of Hawaii Press, 1998).
considered part of an attempt to rehabilitate the kindly empires of Britain and France in defence of modern American policy). In Parsons’ view, we need only look at structural factors—what empires are and what they do—to realise that humanitarianism and other intellectual underpinnings are simply rationalisation at best, cynical hypocrisy at worst. ‘By their very nature’, he wrote, ‘empires can never be—and never were—humane, liberal, and tolerant’.

This is a conundrum at the heart of Treaty history, and one which was, in my view, the dominant conundrum in the 2000s, once presentism was confronted directly. If better behaviour was so unlikely from a State representing the enfranchised colonists as to be virtually impossible, then was the Treaty a fraud which could never have been kept? The Crown’s answer was that it must have been possible for governments to have been ‘Treaty compliant in the past’, within the parameters of their infrastructure and resources. This was because governments had choices between different policies and actions, some of them ‘less penal’ to Maori (but the choices had to be known, practicable, and compatible with ‘the attitudes of the day’).

In making this argument, the Crown adopted principles often used in counterfactual history, by such diverse expert practitioners as Geoffrey Hawthorn (1991) and Richard Ned Lebow (2010). Hawthorn, in his book Plausible Worlds, argued that historians need to consider whether possibilities were in fact possible (involving a number of factors, including capacity and resources). Before we, from our perspective today, decide that people in the past got it wrong, then it ought to have been possible, in the circumstances of the time, for them to have got it right. Lebow, in his study of international relations, Forbidden Fruit, argued that plausible

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37 Timothy H Parsons, The Rule of Empires: those who built them, those who endured them, and why they always fall (New York: Oxford University Press, 2010), 1-19. Parsons’ introductory and concluding chapters are devoted to applying his critique of imperialism to the policies of George W Bush and Operation Iraqi Freedom.

38 Ibid.

39 Ibid., 4.

40 Waitangi Tribunal, He Maunga Rongo, 178.


42 Ibid., 122.
alternatives needed to be part of the knowledge available to policy-makers at the time, and to have been feasible in terms of both their practicability and their acceptability to policy-makers’ constituencies. 43 Industrial relations historian Ralph Darlington preferred the term ‘alterfactual’ to ‘counterfactual’, to underline an approach that is limited to alternatives considered or plausibly available at the time.44

The most important aspect of the Crown’s argument for the purposes of this essay, however, was that it was inspired by Professor Oliver’s evidence in the Hauraki inquiry, back in 1997. It is to that inquiry we now turn.

The Hauraki Inquiry: Oliver’s proposed methodology

In his 1997 evidence for the claimants in the Hauraki inquiry, Oliver had argued that the ‘inevitability’ of colonisation does not prevent historians from identifying when the state might have acted differently than it actually did, or from assessing whether it could have acted better than it did. He suggested:

the responsibility of the state lies in the modes and the consequences of land acquisition; it is a responsibility which is not to be ignored because the colonisation and settlement of New Zealand, and of Hauraki, was in one way or another inevitable. It was a question of the way in which it was quite deliberately decided to act.45

Because Oliver’s 2001 criticism of the Tribunal’s legal and historical counterfactuals is often cited, but his own proposed counterfactual framework for Treaty history almost never, it is worth setting out his 1997 methodology in full, especially since it was supported by the Crown and became one of the conceptual underpinnings of the Tribunal’s Hauraki Report (published in 2006).

The historian’s task, Oliver argued, was to examine the part government played in land loss (factual), and ‘what part might it have been expected to have played’ (counterfactual). Colonisation was an

‘irresistible historical force’ well beyond the control of governments. But that did not ‘eliminate questions of responsibility’, especially ‘the closer one draws to specific episodes of colonisation’. ‘It is surely beyond dispute’, wrote Oliver, ‘that governments, whatever may have been the limits of their capacity to protect Maori[,]... should not have taken advantage of them and acted in an exploitative manner’, for example by using monopoly powers to force Maori to sell land at artificially low prices. Governments still had options within the overall context of colonisation. The questions for historians are:

“Should government have imposed the colonising policies it in fact adopted?” And, further, “Were less penal alternatives, still within the framework of colonisation, available to government?”

Consequential questions arose:

was it within the capacity of 19th century New Zealand governments to act more effectively in the interests of Maori? Second, had they done so would they have been acting in an improperly paternalistic manner by not leaving Maori to work out their own destinies?

Oliver did not shy away from a “what could or should have happened differently” analysis. In assessing the state’s poor performance in the delivery of health services to Maori in the Hauraki district, he argued that it would have been a small stretch from funding education (which was done) to funding health. It was not, therefore, inconceivable or ‘beyond the imagination’ of officials at the time. He also argued that health services could have been significantly improved at relatively little cost (and were therefore affordable within the resources available to the state at the time). In his view, there was actually a contraction rather than an expansion of services, which was entirely avoidable in the circumstances of the time.

Oliver’s overall (counterfactual) conclusion was:

It would not have been unreasonably paternalistic to have ensured that Maori, in Hauraki and elsewhere, retained enough land, secured reasonable profits from the land they chose to sell, and received the same assistance that many struggling settlers received. Had such policies obtained, at the least Maori would have been somewhat

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48 Ibid., 13.
better off and could have made modest progress towards recovery from the inevitable shocks of colonisation. Oliver’s methodology is broader than that proposed by historian Niall Ferguson, who—reacting against some of the less plausible hypotheticals that had drawn the ire of critics—suggested: ‘We should consider as plausible or probable only those alternatives which we can show on the basis of contemporary evidence that contemporaries actually considered’. Oliver, in contrast, argued that if the body of knowledge at the time was such that an idea was not ‘beyond the imagination’ of historical actors, then there need not have been a specific policy suggestion about it. Writing later, in 2001, Oliver still felt that the Crown could have acted better ‘in marginal ways, such as a more enlightened approach to, say, reserves, prices, leasing [instead of purchasing], and tribal titles’, but that the Tribunal’s counterfactuals were implausible.

The Hauraki Tribunal adopted Oliver’s methodology as its answer to presentism in 2006:

In one sense, the Treaty of Waitangi Act 1975 establishes the principles of the Treaty above the flux of history. However, the most authoritative interpretation of Treaty principles, that of the Court of Appeal in the Lands case (or the Maori Council case) of 1987, affirmed that one of the key principles was that Crown and Maori were obliged to deal with each other reasonably and with the utmost good faith. “Reasonableness”, we believe, must also be the test of the Crown’s actions historically. We must consider, then, what might reasonably have been done at the time of the events under consideration. Notwithstanding the perennial quality of Treaty principles, historical contexts cannot be ignored.

In navigating through these perilous 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 remedy or sought support for a measure they thought beneficial; or if (as Dr Belgrave suggests) the Crown’s own

49 Ibid., 13.
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. We [the Hauraki Tribunal] have seen much evidence of this type...52

In adopting this methodology, the Tribunal relied not just on Oliver but also on the 2002 evidence of Michael Belgrave, who argued that the Tribunal had a legal responsibility to apply Treaty principles but that it need not do so ahistorically. After all, ‘the protective responsibilities recognised in the preamble to the Treaty of Waitangi had echoes in policy relating to Maori throughout the nineteenth century’.53 Treaty historians, however, needed to ‘maintain some degree of a fiction that Crown agents...could have acted differently if consistently instructed to honour the principles of the Treaty of Waitangi’. Theirs was a ‘middle road’ that focussed on ‘the Crown’s own stated policies and on alternatives that would have been practically possible within the particular policy environment of the time’.54

In tandem with Oliver’s methodology, and the Crown’s endorsement of Belgrave’s argument, the Hauraki Tribunal clearly found this position a reasonable one for it to adopt.

**Dissenting opinions in the Tauranga and Kaipara inquiries**

In 2004, while the Hauraki Tribunal was still writing its report, historian Michael Bassett dissented from the majority opinion of his colleagues in the Tauranga *raupatu* (confiscation) inquiry. For the first time, presentist criticism of the Tribunal was made from within the Tribunal itself. Bassett’s concern was what he saw as *out-of-date* presentism: ‘Visiting the nineteenth century with 1960s and 1970s notions of the State’s all-encompassing social responsibilities...makes for bad history’.55 He echoed Oliver’s 2001 critique, arguing that the Tribunal was wrong if it expected ‘the erection of an all-powerful, regulatory, State apparatus that would govern every detail of Maori-

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54 Ibid., 18.
Pakeha interaction’ in the nineteenth century. He also objected to active protection in the guise of state paternalism and interference in the rights of individuals. Bassett emphasised, however, his agreement with the majority that broken government promises and failure to obtain free and proper consent to land transactions were Treaty breaches.

The Tribunal did not mention ‘presentism’ in its majority report, although it noted the need for itself and its ‘twenty-first century readers’ to understand historical context. Its Treaty standards were carefully constructed from a mix of Tribunal jurisprudence (previous Tribunal findings), the explicit terms of the Treaty, and the statements of prominent contemporaries (such as Colonial Secretary Cardwell’s and Sir William Martin’s condemnation of raupatu). It focused on broken government promises, failure to conduct land transactions with the free and willing consent of all owners, failure to carry out the then current law (and its protections) properly and with due process, and other matters inconsistent with nineteenth-century standards for honourable government behaviour. It carefully considered historical context and the options known to governments and debated at the time.

In 2006, shortly before the release of the Hauraki Report, Bassett again dissented from the majority opinion of his colleagues, this time in the Kaipara Report. But he did not accuse his Kaipara colleagues of presentism. When the Crown closed its Kaipara case in September 2001, it had referred briefly to presentism and the necessity to ground Tribunal findings in historical context. It argued that, if the Treaty principles were interpreted with a full appreciation of historical

56 Bassett, ‘Minority Opinion’ (Tauranga), 416.
57 Ibid., 413-417.
58 Waitangi Tribunal, Te Raupatu o Tauranga Moana, 365; see also 230, 302, 304, 363.
59 The Tribunal argued, for example, that active protection was no ‘modern invention’ but explicitly derived from Normanby’s 1839 instructions and from the preamble and articles of the Treaty: Te Raupatu o Tauranga Moana, 23.
61 See, for example, Waitangi Tribunal, Te Raupatu o Tauranga Moana, 120, 304, 402–403.
context and Maori agency, then the claimants had not been able to 
demonstrate any Treaty breaches in Kaipara.63 The Tribunal did not 
use the word ‘presentism’ in its report but asserted quite categorically 
that it could not impose its twenty-first century views ‘in judgement 
of the past’.64 It agreed with the Crown that it must take full account 
of historical context, and that the test was one of reasonableness: 
‘Was the Crown’s action or inaction toward Maori reasonable or 
unreasonable in the circumstances of the time? Was there significant 
Maori protest or other relevant evidence?’65 Bassett found this 
approach unexceptionable although he did not agree with some of the 
Tribunal’s findings.

**The presentism debate in the Central North Island inquiry, 2004-2008**

In the same year that Bassett had accused his Tauranga colleagues of 
presentism (2004), prominent Treaty historian Angela Ballara tackled 
presentism in her evidence for the Central North Island inquiry. She 
put forward a strong case for the historicity of the Treaty principles. 
Ballara, like many Treaty historians (including myself), did not accept 
that Treaty standards were necessarily or exclusively modern 
constructs. She observed:

> in the nineteenth century, the publicly acknowledged and 
> promulgated standards of official behaviour in land purchasing and 
> the conduct of Maori affairs, were much higher than is sometimes 
> acknowledged by historians. That is, many of these publicly 
> promulgated standards were in accord with the Treaty of Waitangi, 
> and with Lord Normanby’s instructions of 1839 to Lieutenant 
> Governor Hobson out of which the terms of the Treaty were 
> constructed. The problem was not that nineteenth-century standards 
> of official behaviour were not based on the Treaty, but that these 
> acknowledged Treaty-based standards were often knowingly 
> breached or ignored by Crown officials.66

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63 Virginia Hardy and David Soper, closing submissions on behalf of the Crown, 
September 2001 (Wai 674 Kaipara Record of Inquiry, doc Q16), 8-9, 129-30 & 
passim. In these submissions, the discussion of presentism is sourced to Paul 
McHugh rather than Oliver (see p 9).  
64 Waitangi Tribunal, Kaipara Report, 316.  
65 Ibid., 314.  
66 Angela Ballara, ‘Tribal Landscape Overview, c.1800-c.1900, in the ‘Taupo, 
Rotorua, Kaingaroa, and National Park Inquiry Districts’, September 2004 (Wai 
1200 doc A65), 640-641.
Ballara rejected the possibility that her work for the Tribunal was presentist and ‘was not “history”, but biased, one-sided accounts which wrongly apply the politically-correct standards of the twenty-first century to the actions of Crown officials in the nineteenth century’. Inevitably, as all commentators have noted, Treaty historians focus on the relationship between Māori and government, especially ‘Crown land dealing’, and cannot fully contextualise that relationship ‘with examination of the social and historical contexts within which members of the successive governments and Crown officials formed their opinions and developed their values’. But within those expressed opinions and values Ballara found sufficient to show that the Treaty standards were known but deliberately not followed. In part, they were known because of Māori agency: Māori had constantly protested to governments about proper and better ways of transacting with them for their land. ‘The point cannot be made too strongly’, she wrote, ‘that there was an alternative, potentially more positive, known set of options for Crown-Māori relations available had the policy makers chosen to go down those paths’. The same facts about Crown-Māori relations, Ballara suggested, had been uncovered by Keith Sinclair, Alan Ward, James Belich, Michael King, and many other historians over the last half century, and so could not be labelled ‘liberal re-interpretation according to presentist failings’. Ballara used these ‘facts’ to draw a counterfactual conclusion, on which the Tribunal was to put significant weight in its report:

the inevitable upheaval of colonisation and reasonable land alienation could have been managed relatively painlessly for Māori, and could have resulted in their increased prosperity, rather than excessive land-loss, impoverishment and cultural damage which occurred in the period 1865-1900. Had the Crown and its government put in place methods of land acquisition which respected Māori social organization, communal land tenure and tikanga [customary law], peaceful and uncontested Crown acquisition of sufficient lands to

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67 Ibid., 640.
68 Ibid., 640.
69 Ibid., 644.
70 Ibid., 645.
allow the colony to progress without damaging the interests of Maori could have been relatively easily accomplished.\textsuperscript{71}

This was Ballara’s answer to the conundrum at the centre of Treaty history in the 2000s.

It should not be assumed, however, that this kind of counterfactual analysis and contesting of presentism was limited to claimant historians. Donald Loveridge, a senior Crown historian, came to his own counterfactual conclusion about a later period of Crown land purchasing, which also carried great weight with the Tribunal.\textsuperscript{72} He argued that it was ‘difficult to avoid the conclusion that the country in general, and Maori in particular would have been much better off in the long run’ if, instead of purchasing Maori land at the turn of the century, the Crown had used its money to support agricultural education and state loans for Maori farming.\textsuperscript{73} Loveridge’s argument forestalled any objections based on the constraints of infrastructure or state resources: there was already a government infrastructure for cheap loans to settler farmers, as well as a sum of money that could have been better spent on Maori development. Nor was his idea only obvious in ‘hindsight’; there had been repeated calls for it at the time, ‘it just never went anywhere, unfortunately’.\textsuperscript{74}

Historian witnesses such as Ballara and Loveridge were well aware of the presentist critique and had taken it into account in their interpretations and their methodologies, whether they mentioned it explicitly (Ballara) or not (Loveridge). The Tribunal found agreement between Ballara (for the claimants) and Loveridge (for the Crown) that counterfactual analysis of alternatives available at the time, grounded in high official standards for how Maori should be treated by the State, was neither dependent on hindsight nor fundamentally presentist.\textsuperscript{75} But ideals of the time and realities of the time were

\textsuperscript{71} Ballara, ‘Tribal Landscape Overview’, 639; Waitangi Tribunal, He Maunga Rongo, 180.
\textsuperscript{72} Waitangi Tribunal, He Maunga Rongo, 893-894, 896, 913.
\textsuperscript{74} Donald Loveridge, evidence given in cross-examination, 1 June 2005 (quoted in Waitangi Tribunal, He Maunga Rongo, 894).
\textsuperscript{75} See also Waitangi Tribunal, He Maunga Rongo, 180-182.
different; in that there was no essential disagreement between Loveridge, Ballara, Oliver, Byrnes, Belgrave, or McAloon.

In closing its case in the central North Island inquiry in 2005, the Crown relied on Ballara’s evidence as authority for the proposition that the ‘use of the standards of the time does not prevent the Crown from being held to account for breaches’. Its lawyers engaged with issues of presentism and counterfactualism, explicitly repackaging Oliver’s 1997 Hauraki methodology as a set of criteria for how the Tribunal should judge historical claims. Crown counsel argued that alternative policies or actions must not have been ‘beyond the imagination’ of the historical actors of the day. Such alternatives also had to be visible and known to decision-makers. They ought to have been reasonably practicable in the circumstances of the time. And their consequences ought to have been reasonably foreseeable at the time. In other words, historians should rely on what contemporaries thought might be the results, rather than using historical sources to evaluate them from a later, wider perspective (which was labelled as ‘hindsight’). 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. The ‘less penal’ choice must also pass a counterfactual evaluation, because it was only a valid choice if its foreseeable results fitted within these constraints. Predictions or analyses at the time, not the judgement of historians, were the Crown’s preferred counterfactual. Honest mistakes, assimilationist philosophies, vigorous settlement policies, and transfer of a great deal of land from Maori to the Crown, were all part of the thinking of the day and could not be construed as Treaty breaches.

The Maori claimants’ response was that presentism was a red herring. They relied in part on Ballara to argue that ‘ministers and officials were well aware of the standards required of them, expressed them frequently and publicly, and can therefore be measured by them without any fear of “presentism”’. Their claims were not based on an

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76 Peter Andrew et al, closing submissions on behalf of the Crown, part 1, 14 October 2005 (Wai 1200 paper 3.3.111 part 1), 50.
77 Waitangi Tribunal, He Maunga Rongo, 169-171, 432-433; Andrew et al, part 1, 23-24, 48-51; Peter Andrew et al, closing submissions on behalf of the Crown, part 2, 14 October 2005 (Wai 1200 paper 3.3.111 part 2), 1-2, 7-8, 170-172.
78 Waitangi Tribunal, He Maunga Rongo, 171-172.
‘expectation of modern behaviour and ideas from historical actors, but on the failure of the Crown to do what was asked of it by Maori at the time to keep the Treaty’. In particular, the claimants ‘objected to any suggestion that settler norms or majority views excused the Crown from doing what Maori asked of it, on matters so central to them and to the Treaty as their lands, resources, culture, and autonomy’.79

In 2007, the Tribunal released its Central North Island report, *He Maunga Rongo*, in pre-publication form to assist the negotiation of the ‘Treelords deal’.80 This four-volume report was in many ways a comprehensive Tribunal response to presentism.81 The first three volumes, in particular, concentrated on an historical analysis that engaged with the methodological criteria proposed by the Crown and attempted to demonstrate conclusively in twelve hundred pages the historicity of the Treaty principles, the capacity of the Crown to have acted consistently with those principles in ways known to it and practicable at the time, and its failure to have done so in a variety of policy decisions, actions, and inaction. Each volume of the report started with a chapter describing and locating the Treaty principles in the standards of the time period under review.

The Central North Island Tribunal’s approach is epitomised, perhaps, by its re-evaluation of the principle of Maori autonomy, sourcing it not only in the *tino rangatiratanga* guaranteed in Article 2 of the Treaty but also in the rights of British subjects guaranteed in Article 3. Relying on A.H. McLintock’s *Crown Colony Government* from the 1950s,82 the Tribunal argued that New Zealand settlers’ successful aspiration for self-government by local representative institutions was indisputably a standard of the time.83 The Tribunal devoted hundreds of pages to the many attempts in the nineteenth century in which Maori sought, and occasionally won, legal powers for their own elected tribal committees. In writing its exhaustive history, the Tribunal had the benefit of very detailed historical

79 Ibid., 172.
80 The version of *He Maunga Rongo* referenced in this essay is the final, published version, which was released in 2008.
evidence on these points, which the Taranaki Tribunal had not possessed in the mid-1990s, beginning with Vincent O’Malley’s groundbreaking *Agents of Autonomy*, published in 1998.\(^{84}\)

But the Tribunal did not accept the Crown’s suggested methodology without amendment. As the claimants had noted, judging Crown actions only in light of settler norms and aspirations wrote Maori out of history. The Tribunal found that ‘settler worldviews, philosophies, and aspirations were only one set of competing constraints on what the Crown could reasonably have been expected to do’; it also ‘had to consider what its Maori citizens wanted and thought should be done’. History would be monocultural if it did not include the ‘Maori dimension of what was reasonable, which Governments should (and sometimes did) take into account’.\(^{85}\) Unless they were always prepared to govern by force (or by what Paul McHugh called lawfare, imposing authority through the courts), governments of the day had to take some account of Maori wishes.

Secondly, the Tribunal did not—as the Crown suggested it should—develop counterfactual scenarios to explain the possible consequences of Treaty-compliant options. Predictions made at the time were occasionally cited, as Crown counsel had advocated. C.L. Rees, parliamentarian and lawyer, predicted in 1884 that if tribal committees were accorded the legal powers they sought to manage their affairs and their lands, then Maori would become ‘large producers and taxpayers of no inconsiderable amount’, to the benefit of the colony.\(^{86}\) But the Treaty principle of ‘mutual benefit’, a very general concept that Maori and settlers were both supposed to benefit from settlement, was seen as the ultimate consequent for all Treaty-compliant antecedents. The Tribunal accepted that the Crown was not required to guarantee economic success for Maori. Instead, the Crown was required to provide a level playing field in its nineteenth- and early twentieth-century structuring of economic development (which governments tried hard to do for settlers),\(^{87}\) and not to actively


\(^{85}\) Waitangi Tribunal, *He Maunga Rongo*, 188.


\(^{87}\) By referring to nineteenth-century government structuring of economic development, I do not wish to be mistaken for projecting mid-twentieth-century
put barriers in the way of Maori success or foreclose on their opportunities. Readers would search this and other Tribunal reports in vain for detailed ‘what if’ extrapolations of the possible consequences of keeping the Treaty, either for Maori or for governments and settlers. In practice, the Tribunal does not attempt to create such long-range counterfactuals. The 2010 Wairarapa report has a rare example, projecting in some detail what might have happened if Maori had been allowed to continue leasing land to pastoralists.

The Te Tau Ihu reports: a similar approach

In 2007 and 2008, the Tribunal also released reports on the Te Tau Ihu (northern South Island) claims. What is important here is that these reports took a similar approach to Hauraki and He Maunga Rongo. In this inquiry, too, Ballara had argued that better standards for ‘dealing with Maori and their property’ were known to governors and officials, which ‘they could have chosen to follow, but did not’. In this instance, Ballara’s evidence predated Oliver’s 2001 essay and so made no mention of presentism. Later, however, in summarising her evidence for hearing, she tackled the ‘standards of 2002’ and the ‘proclaimed standards of 1840’ directly. Presentism was not formally an issue before this Tribunal and it was not mentioned explicitly in the Tribunal’s reports. Crown counsel did not use the term and did not refer to Oliver’s work. Counsel did, however, remind the

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88 Waitangi Tribunal, He Maunga Rongo, 920, 939-984.
89 Waitangi Tribunal, Hauraki Report, 1216.
91 Angela Ballara, ‘Customary Maori Land Tenure in Te Tau Ihu (Northern South Island), 1820-1860’, February 2001 (Wai 785 Te Tau Ihu Record of Inquiry, doc D1), 233; see also 162-174.
93 Michael Doogan and Simone Rasmussen, closing submissions on behalf of the Crown, February 2004 (Wai 785 doc T16).
Tribunal that ‘uncritical application of today’s understanding of the Treaty and its principles to past conduct...ought to be avoided’. But the Crown conceded that, ‘even making due allowance for the context of the times’, its governors and officials had ‘sidelined’ the Treaty and unfairly prioritised settler interests.

The Tribunal based its analysis on a careful, explicit, and detailed examination of the ‘standards appropriate at the time’. In this district—the Nelson and Marlborough region—the Crown purchased almost all Maori land early in the colonial process and very close to the signing of the Treaty, from 1844 to 1856. The Tribunal measured those purchases against the standards set in the Treaty, Colonial Office instructions to governors, the government’s standards for approving private purchases at the time, official policies, and early Crown purchase “best practice” (if I can be excused this modern expression). A ‘model’ purchase in 1852 was used as a benchmark. The Tribunal also made explicit allowance for the institutional infrastructure and resources available to governments of the day. Ultimately, the Tribunal found that the Crown’s purchases fell well short of what it could and should have done, by its own standards and within its capabilities at the time. Moreover, the Crown’s refusal to allow Maori sufficient reserves was criticised by Maori and its own officials at the time as well as by historians later—as counsel for the Crown conceded.

**Oliver replies to McAloon: ‘political ideas lacking political weight’?**

In 2007, the year that the Central North Island report was released in pre-publication form, Bill Oliver made a further contribution to the debate when he replied to McAloon’s 2006 criticism of ‘The Future

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94 Doogan and Rasmussen, closing submissions on behalf of the Crown, February 2004 (Wai 785 doc T16), 5.
95 Doogan and Rasmussen, closing submissions on behalf of the Crown, February 2004 (Wai 785 doc T16), 2.
Behind Us’. McAloon had suggested that Tribunal history—while politically inspired, much like women’s history, labour history, or environmental history—was largely conventional in its empiricism, and usually grounded in standards and alternatives elucidated at the time.99 Oliver agreed with McAloon that examples of ‘governments not doing what someone (itself on occasion) said they should have done were endemic in the nineteenth century and beyond’.100 Such ‘voices of dissent and protest’, however, whether Maori or Pakeha, were ‘consistently ineffectual’ because of the very nature of colonisation:

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\text{dissent and protest, while certainly admirable for their idealism, express values, actions and policies which 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’...}^{101}
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Oliver challenged the whole idea of blaming either ‘a body of officials’ or ‘wicked’ individuals for ‘wilfully disregarding the better options they knew, so it is held, to be both available and practicable’. Perhaps they ‘did know about them and rejected them’ but that was not surprising, since ‘dissenting views were, at that time, political ideas lacking political weight’.102

This represents a complete rejection of the historical approach that Oliver had proposed in 1997. He had still been prepared to allow for the possibility of ‘marginal’ improvements to Crown behaviour in 2001. Why did he change his mind? The short answer is probably that he felt too much was being made of ‘possibilities’ that were actually implausible. Michael Belgrave suggested in 2005: ‘Because the Crown must be redeemable, the process assumes that there was a way of avoiding not only the worst but even the minor consequences of nineteenth century imperialism’.103 Oliver, however, was no longer willing to posit even minor improvements, given the ‘brute fact’ of

100 Oliver, ‘A Reply to Jim McAloon’, 85.
101 Ibid., 85.
102 Ibid., 85.
colonialism, which was always going to drive governments along certain paths. He did not see, perhaps, the extent to which his view might divert historiography back to ‘fatal impacts’, where Maori could do nothing to avert or even mitigate the negative effects of colonialism.

In light of this, and given the Tribunal’s stated intention in 2006 to steer a course between the Scylla of presentism and the Charybdis of historical determinism, has Odysseus made it safely home or is he lost at sea?

Conclusions
Oliver’s 2001 critique, reinforced by Byrnes in 2004, engendered an important period of reconsideration of Treaty history. His arguments had a strong influence on how the Crown framed its case in the Tribunal process in the 2000s, but—as it turned out—more through his 1997 prescription for a tightly constrained counterfactual analysis. That is why my discussion has focused so much on Oliver’s Hauraki methodology, which had a powerful effect on the writing of history in the Tribunal but is less well known. Crown counsel were still proposing this methodology to the Tribunal in late 2006 (the Tauranga post-1886 inquiry) and 2007 (the Tongariro National Park inquiry).  

But the limited degree of counterfactualism proposed by Oliver in his Hauraki evidence sidestepped the fundamental dilemma of whether Treaty compliance was truly possible for the Crown in the nineteenth century. In my view, this is the faultline running through Tribunal history: if the Crown was not ‘redeemable’, as Belgrave put it, then the Treaty was a fraud and Treaty history lacks credibility. But Oliver moved to a view that was almost one of “fatal impact” and was certainly determinist, arguing in 2007 that all ‘dissenters’, whether Maori or settler, were powerless to improve colonialism in even minor ways, even if the dissenter was the government itself. He dismissed all nineteenth-century alternatives as ‘political ideas lacking political weight’, hence seldom if ever adopted. But that is actually a

104 HM Carrad, AK Irwin, and DJ Llaird, closing submissions on behalf of the Crown, December 2006 (Wai 215 Tauranga Record of Inquiry, doc U26), 6; MJ Doogan, DN Soper, A Martin, closing submissions on behalf of the Crown: introduction, June 2007 (Wai 1130 National Park Record of Inquiry, paper 3.3.45), 8-10.
vital field of historical inquiry and cannot simply be assumed. What is required is the kind of analysis carried out by Don Loveridge in 2000, when he painstakingly uncovered and assessed the policy options considered and rejected in the colony’s early native land laws.\footnote{Donald Loveridge, ‘Evidence of Donald Loveridge concerning the origins of the Native Land Acts and Native Land Court in New Zealand’, November 2000 (Wai 674 doc O7).} This kind of inquiry is as much factual as counterfactual, since the identification of alternatives is in many ways a standard analysis of causation. Explaining why something happened often involves explaining why something else did not; it is the ‘what if?’ analysis of the possible consequences of untried alternatives that is truly counterfactual.\footnote{Lebow, Forbidden Fruit, 35-37; Giselle Byrnes, ‘What if the Treaty of Waitangi had not been signed on 6 February 1840?’ in New Zealand As It Might Have Been, ed. Stephen Levine (Wellington: Victoria University Press, 2006), 36-39; Ferguson, Virtual History, 86-87.}

Historian witnesses were influential in the Tribunal’s response to the presentist critique, and were willing to mix this kind of (mostly) factual and counterfactual analysis in their evidence. Belgrave (2002) and Ballara (2004) struck a powerful chord with the Crown, the claimants, and the Tribunal. As we have seen, Ballara argued strongly for the historicity of the Treaty standards (Belgrave more faintly so). No one disputed Ballara’s evidence on that point. She also argued that better land purchasing alternatives were known to the Crown and could have been used without undue impediment to settlement but with fairer outcomes for Maori. Her analysis was exactly the kind that the Crown said it wanted, although it did not accept all her conclusions. Similarly, Belgrave argued that the historian’s role was to identify possible and practicable (fairer) policy alternatives so that the Tribunal could determine whether the Treaty had been breached. Then, in the \textit{Hauraki Report} (2006) and \textit{He Maunga Rongo} (2007), the Tribunal used evidence and arguments of this type to respond explicitly to the presentism critique. In doing so, the Maori claimants’ view was accepted that a presentist critique was no excuse for monocultural history: Maori norms, wishes, and aspirations were part of the ‘standards of the day’, unless Maori were to be written out of history.
Since the release of the final Te Tau Ihu report in 2008, there have been other historical reports: *Te Urewera* parts 1 (2009), 2 (2010), and 3 (2012); *Wairarapa ki Tararua* (2010), and *Tauranga post-raupatu* (2010). Broadly speaking, the Tribunal continues to rely on counterfactual alternatives where such were known and appeared practicable at the time, to determine whether the Treaty has been breached. Most recently, for example, the Tribunal examined the options available to the Crown when it established Te Urewera National Park in 1954, and concluded that a ‘forest park’ (with its different rules) might have better protected vital Maori interests.\(^{107}\)

The Tribunal thus steers its course between Scylla and Charybdis. Scholars will no doubt still point to statements that appear presentist, especially given the Tribunal’s tendency to quote earlier reports in describing and sourcing Treaty principles. The Central North Island approach of writing ‘Treaty standards’ chapters, grounding those standards in both Tribunal jurisprudence and relevant circumstances of the times, has not become general practice. Also, it must always be remembered, Tribunal history is not written solely by historians. Legal members, presiding judges, and other non-historian panel members have their say. The Treaty principles are sometimes applied in an ahistorical manner. But no Tribunal does so unaware—the presentism debate has become part of the intellectual framework of the Tribunal.\(^{108}\)

Just as Oliver observed in 2001, counterfactual analysis and the judging of history by Treaty principles is still a relatively small though vital element in the Tribunal’s historical reports (along with a great deal of ‘telling it as it was’). And the Tribunal continues to identify where Maori are prejudiced today by past actions of the Crown, as its statute requires it to do.

This leaves us with the question of the Tribunal’s “political agenda”. Byrnes suggested that the Tribunal’s presentist political agenda takes it beyond a mix of factual and counterfactual analysis to ‘construct an

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\(^{108}\) See, for example, Waitangi Tribunal, The Wairarapa ki Tararua Report, 322–323, 531–532, 826–827.
entire parallel world centred around the idea or theme of liberation’. 109

For me, the Tribunal’s agenda is as stated in its 2005 discussion paper (and as described by Linkhorn in 2002): to facilitate Treaty settlements and to provide authoritative scholarly underpinnings for them. 110 By the Crown’s repeated submission, a factual and a counterfactual analysis of historical events in their context is what is necessary for the Tribunal to carry out this responsibility.

I would like to end with a final thought about the wider value of counterfactual history in the Waitangi Tribunal. Philip Tetlock and Geoffrey Parker observed:

> Things could have gone far better (and perhaps worse) for every definable subgroup of humans on which we care to shine the counterfactual spotlight. By reminding us of paths not taken, counterfactual history can stroke a powerful array of what-if emotions ranging from regret to relief. What did “we” or “they” do right or wrong? What could we or they have done differently? What should be done now? Who owes what to whom? When we concentrate our explanatory efforts on the great impersonal forces that push history into one path or another, we short-circuit, for better or for worse, these morally, emotionally, and angst-laden debates. 111

New Zealand needs to have these debates if we are to put the past rather than the future behind us.

It remains moot whether the entire history depicted by the Tribunal is a ‘parallel world’ because it is based on the counterfactual proposition that the Treaty could have been kept. But if the Tribunal’s statutory role and agenda is understood, if ‘it must have been possible for the Crown to be Treaty compliant in the past’, 112 if the Treaty principles are not applied ahistorically, if the necessary counterfactual analysis is grounded in historical context, and if the

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109 Byrnes, The Waitangi Tribunal, 156.
112 Andrew et al, closing submissions on behalf of the Crown (quoted in Waitangi Tribunal, He Maunga Rongo, 178).
historical narrative is persuasive, then Tribunal history should withstand scrutiny as a durable foundation for durable settlements.

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