IN THE WAITANGI TRIBUNAL Wai 2542

CONCERNING the Treaty of Waitangi Act 1975

AND an application for an urgent hearing by Jordan Haines-Winiata on behalf of himself, Ngāti Hinemanu me Ngāti Paki and the Ngāti Hinemanu and Ngāti Paki Heritage Trust

---

DECISION ON APPLICATION FOR AN URGENT HEARING

17 August 2016

Solicitors:
S Eccles (Crown), Crown Law, Level 3 Justice Centre, 19 Aitken Street, Wellington 6011
Sam.Eccles@crownlaw.govt.nz
A Sykes (Ngāti Hinemanu me Ngāti Paki, Wai 2542), 1460A Hinemoa Street, Rotorua
PO Box 734, Rotorua 3040 asykes@annettesykes.com
B Vertongen (He Toa Takitini), PO Box 14548, Kilbirine, Wellington 6241 baden@vertongen.co.nz
L Watson (Mōkai Patea, Wai 1705), 342 Gloucester Street, Taradale, PO Box 1035, Napier 4112
leo@leowatson.co.nz

Contents

Introduction

1. The Ngāti Hinemanu me Ngāti Paki Heritage Trust (NHNP) seeks an urgent inquiry into the Crown's overlapping claims process in relation to the Kaweka and Gwavas Crown Forest Licensed Lands (the Kaweka and Gwavas CFLs) offered to He Toa Takitini (HTT) under the Heretaunga Tamatea Deed of Settlement (the Deed). This claim has been registered as Wai 2542.

2. The Chairperson of the Tribunal subsequently delegated to this panel the task of determining whether to grant or decline the Wai 2542 urgency application.[1]

Background

3. On 25 August 2010, Ngāti Kahungunu ki Heretaunga Tamatea (also known as Heretaunga Tamatea) mandated HTT to negotiate with the Crown the settlement of their historical claims. The Crown conditionally recognised the mandate of HTT on 15 October 2010. Following further mandating hui for members of Heretaunga Tamatea living outside the tribal rohe, the Crown unconditionally recognised the mandate of HTT on 4 February 2011. On 11 June 2011 the Crown and HTT signed an Agreement in Principle. Following that, after a process of further negotiation, on 9 July 2015 the Deed was initialled by the Crown and Heretaunga Tamatea.

4. Then on 8 September 2015 this application for an urgent hearing regarding the Crown's proposed settlement with Heretaunga Tamatea was filed.[2]

5. The Deed was eventually signed on 29 September 2015.

Wai 2542 Claim

6. The Wai 2542 statement of claim was filed by Jordan Haines-Winiata on behalf of himself, and he says, on behalf of Ngāti Hinemanu me Ngāti Paki and NHNP.[3] The applicant submits that the Deed will remove the Crown's ability to deal with the NHNP claims to the Kaweka and Gwavas CFLs as they form part of the redress being offered to HTT.

7. The applicant claims that the Crown is settling the Kaweka and Gwavas CFLs in their entirety through a company that will be formed under the Deed. The company will control the assets to the Kaweka and Gwavas CFLs and it will be incorporated following the execution of the Deed and another settlement agreement reached with neighbouring iwi, the Mana Ahuriri Deed of Settlement. Both deeds record that 66.66% of the shares in the company will be held by the Heretaunga Tamatea Post Settlement Governance Entity (the PSGE) and 33.34% by Mana Ahuriri. The Crown's interests in the forests will be extinguished when both settlements are implemented.

8. NHNP assert customary interests in the forest lands. The applicant therefore submits that the Crown is acting in breach of the principles of the Treaty of Waitangi by denying NHNP access to an appropriate settlement of their

---

1 Per cl 8(2), Second Schedule to the Treaty of Waitangi Act 1975
2 Wai 2542, #3.1.1
3 Wai 2542, #1.1.1

historical claims because part of the redress that NHNP seek will have been transferred to Heretaunga Tamatea and Mana Ahuriri.

9. The applicant seeks a range of recommendations, including that:

   (a) NHNP claims are excluded from the Deed; and

   (b) The Kaweka and Gwavas CFLs remain unsettled until NHNP are ready to proceed to settlement, or that some appropriate mechanism is implemented to protect the rights of NHNP.

Issues

10. The issue for determination is, has the claimant satisfied the Tribunal's urgency criteria that an immediate hearing should be granted?

Procedural History

Wai 2542 urgency application

11. On 18 September 2015 the applicant filed a statement of claim and an application for an urgent hearing.[4] Affidavits in support from Jordan Haines-Winiata and Lewis Winiata were also filed.[5] The applicant sought Tribunal directions that the Crown and interested parties respond to the urgency application by 23 September 2015. The applicant also requested a teleconference be held on 24 September 2015 to determine the urgency application.[6]

12. On 22 September 2015 the Deputy Chairperson issued directions concerning the proposed timetable.[7] He considered it unreasonable as it did not allow enough time for the Crown and any interested parties to fully consider and respond to the urgency application. The Deputy Chairperson directed the Crown and counsel to confer to identify other parties who might be interested. The Registrar was directed to convene a teleconference on 24 September 2015 to discuss the progress of the application.

13. At the teleconference on 24 September 2015, the Deputy Chairperson directed the Crown and applicants to file further information concerning the inclusion of Wai 1835 in the Deed. The Crown and interested parties were also directed to respond to the urgency application by 8 October 2015. The applicant was directed to file submissions and evidence in reply by 13 October 2015. Following the teleconference, on 25 September 2015, further information was filed by the Crown and the applicant.[8]

14. As foreshadowed, on 28 September 2015 the Chairperson appointed Judge Harvey as Presiding Officer and Dr Ballara and Professor Temara as the panel that would inquire into the Wai 2542 claim. He also directed the panel to determine the urgency application as a step preliminary to the substantive hearing the claim.[9]

---

4 Wai 2542, #1.1.1 & #3.1.1
5 Wai 2180, #A1 & #A2
6 Wai 2542, #3.1.3
7 Wai 2542, #2.5.1
8 Wai 2542, #3.1.4, & #3.1.5

15. On 6 October 2015 claimants for Wai 1705 sought leave to appear as interested parties.[10] Counsel for Wai 1705 also sought leave to file submissions and evidence in response to the urgency application by 9 October 2015.[11] On 8 October 2015 the Tribunal received submissions and evidence in response from the Crown and HTT.[12] The Wai 1705 claimants filed the affidavit of Utiku Potaka on 9 October 2015.[13] On 13 October 2015 the applicant sought an extension to file further affidavits in reply to the Crown's and interested parties' submissions and evidence by 15 October 2015.[14] Following that, on 15 and 22 October 2015 the applicant filed submissions and evidence in reply to the submissions of the Crown and interested parties.[15]

16. There the matter lay until a judicial conference was convened to hear submissions on the urgency application on 10 December 2015.[16] The application was then adjourned to allow parties to discuss the possible discrepancy in the boundary areas depicted in a Memorandum of Understanding (MOU) between HTT and NHNP. The parties were directed to file an update by 18 December 2015.

17. On 18 December 2015 memoranda were filed setting out the progress of discussions.[17] In its submission, counsel for the Crown sought leave to file a further update for the Office of Treaty Settlements (OTS) as soon as practicable after 27 January 2016.

18. A further direction was issued on 12 February 2016 seeking an update from counsel as to progress.[18] On 19 February 2016 Crown counsel responded by confirming that the Crown considered there was no need to delay the introduction of settlement legislation.[19] The Crown confirmed that work was continuing on a number of other matters relating to the settlement and a draft Bill would not be considered by the relevant Cabinet committee until April 2016 at the earliest. The applicants also filed an update submitting that the issues and concerns raised by the applicant had not been addressed. The applicant therefore requested that the urgency application be revived.[20]

19. On 1 April 2016 we convened a chambers conference and raised the possibility of mediation. Following the conference, all parties confirmed that they were willing to explore the possibility of mediation during the month of April 2016. On 8 April 2016 we directed the Wai 2542 claim to mediation with Tā Hirini Mead and Ron Crosby appointed to mediate and to report back to the Tribunal by 27 April 2016.[21]

---

9 Wai 2542, #2.5.2
10 Wai 2542, #3.1.6
11 Wai 2542, #3.1.7
12 Wai 2542, #3.1.8, #3.1.9, #A3 & #A4
13 Wai 2542, #3.1.10 & #A5
14 Wai 2542, #3.1.11
15 Wai 2542, #3.1.13, #A6 & #A7
16 Wai 2542, #2.5.3
17 Wai 2542, #3.1.15, #3.1.16 & #3.1.17
18 Wai 2542, #2.5.4
19 Wai 2542, #3.1.18
20 Wai 2542, #3.1.19
21 Per cl 9A, Second Schedule, Treaty of Waitangi Act 1975; Wai 2542, #2.5.6

20. On 26 April 2016 and again on 9 May 2016 extensions for the mediators to report on the outcome were granted.[22] On 16 June 2016 the mediators reported that the claim had not been fully settled.[23] The parties had however, reached an agreement on the removal of Wai 1835 from the list of settled claims in the Deed. The parties however were unable to reach an agreement on any other issues.

21. Following mediation on 17 June 2016 the Presiding Officer directed the parties to file an update on the status of the urgency application by 24 June 2016.[24] Memoranda were then filed by Crown counsel, HTT and the applicant outlining their respective positions.[25] The Tribunal also received a memorandum from Wai 1705 claimants as to their position on the application.[26]

Taihape: Rangitīkei ki Rangipō District Inquiry (Wai 2180)

22. It would appear that the issue concerning the settlement of the Kaweka and Gwavas CFLs was first raised by NHNP as early as 2010 when the NHNP claims were originally included in the HTT Deed of Mandate.[27]

23. Then in 2014 counsel for NHNP suggested that the Tribunal could explore expedited hearings for water and/or the Crown Forest asset plan regarding the Kaweka and Gwavas CFLs.[28] Counsel submitted that:

> The Panel as a priority should examine the claims to the Crown Forests within the inquiry district. This is because, as the Tribunal is aware, the claimants have entered into a memorandum of understanding with the mandated group for Ngāti Kahungunu. An important aspect of this MOU is that when Ngāti Kahungunu come to negotiate their claims to the Crown Forests within the Taihape Inquiry District they have reserved a place for input into those negotiations for my clients. If the Tribunal were able to inquire into the Crown Forest claims at an early stage and make findings that my clients have well founded claims to certain Crown Forest Land then that will greatly assist the negotiation process and ensure that the Crown Forests that remain for settlement are not the dregs that other entitled groups do not want.

24. Counsel submitted that there would be no commercial redress available in the Kaweka CFL for those of NHNP who have extant claims to the Kaweka block which remain to be heard by the Taihape Tribunal.

25. Counsel for Mōkai Pātea and NHNP both expressed a general concern at the judicial conference about the potential prejudicial effect of the Crown reaching a negotiated settlement with neighbouring iwi and hapū over the Kaweka and Gwavas CFLs prior to the completion of the Taihape district inquiry.[29] At that time, the Crown clarified that it was in negotiations with Mana Ahuriri Incorporated and HTT regarding the Kaweka CFL.[30] The Crown also notified

---

22 Wai 2542, #2.5.7, & #2.5.8
23 Wai 2542, #2.8.1
24 Wai 2542, #2.5.9.
25 Wai 2542, #3.1.21, #3.1.22 & #3.1.23
26 Wai 2542, #3.1.24
27 Wai 2180, #3.1.120 & #3.1.134
28 Wai 2180, #3.1.197
29 Wai 2180, #4.1.1

the Tribunal that it intended to undertake an overlapping claims process with respect to this area before any redress was finalised.

26. On 19 December 2014 the Taihape Tribunal declined the request for expedited hearings on the basis that there was not yet sufficient evidence on the Taihape Record of Inquiry to warrant that approach.[31]

27. This issue was raised again at the sixth judicial conference on 5 May 2015.[32] Counsel for NHNP suggested that Tribunal directed mediation would enable NHNP to negotiate outstanding issues in their claim prior to the finalisation of the Deeds of Settlement between HTT, Mana Ahuriri and the Crown.

28. The Tribunal declined the request for mediation or facilitated discussions because NHNP and HTT had already held discussions without success and the Crown was unwilling to participate in mediation or facilitated discussions at that time. In addition, the dispute resolution provisions contained in the MOU did not appear to have been fully exhausted at that time.[33] NHNP were reminded that they retained the option of bringing an urgent application at any time.

Submissions of the Applicant

29. The applicant submits that the Crown has caused significant and irreversible prejudice to NHNP by finalising the Deed with HTT that includes some of the NHNP historical claims even though HTT does not hold the mandate to settle those claims.

30. The applicant alleges that the Crown has wrongfully included Wai 1835 in the Deed. This has occurred despite the Crown initially guaranteeing to exclude Wai 1835 from the Deed. The applicant submits that the inclusion is irrational when other claims of NHNP have been excluded. The applicant notes that HTT have taken the position that the inclusion of Wai 1835 was at the Crown's request. Therefore, the applicant argues that the Crown's insistence on the inclusion of Wai 1835 is contrary to principles of active protection and good faith which underpin the Treaty relationship.

31. The applicant is also concerned at the uncertainty over the extent to which they and their claims will be captured within the broader claimant definition in the Deed.

32. The applicant submits that the Crown has wrongfully relied on its own research to dismiss the claims made by NHNP that they have distinct interests in the Kaweka and Gwavas CFLs by virtue of their own whakapapa.[34] As a result, the Crown has not reserved any provision for allocation of interests to those of Ngāti Hinemanu who derive their interests from the ancestor Punakiao. The Crown has made no provision at all for the interests of Ngāti Paki. This, the applicant submits, is contrary to the principles of natural justice and the provisions of the Crown Forest Assets Act 1989.

33. The applicant further contends that the Crown has acted without proper consultation in its overlapping claims process and failed to recognise tino

---

30 Wai 2542, #3.1.207
31 Wai 2180, #2.5.36
32 Wai 2542, #4.1.2
33 Wai 2542, #2.5.41
34 Wai 2542, #A1(a) Appendix AA & #A6

rangatiratanga in negotiating its agreements. On this point the applicant submits that there has been a clear lack of engagement and participation by the Crown in its overlapping claims process. The applicant alleges that the process the Crown has followed is markedly different from the approach it has taken in other settlements. The approach taken here was developed without the knowledge or consent of NHNP and has essentially been a "tick the box process rather than any effort to understand [their] overlapping claims and to deal with them in a treaty compliant and fair way".[35]

34. The applicant also argues that NHNP's overlapping interests were meant to be dealt with by a process set out in the MOU signed between NHNP and HTT. Those processes have been thwarted by the unwillingness of the Crown and HTT to come to an agreement over the extent of NHNP's interests in the Kaweka and Gwavas CFLs and disagreement as to how the MOU should be interpreted.

35. The applicant contends that the correct meaning of clause 4.1 of the MOU extends the hard boundary line jurisdiction of the Taihape inquiry. This means that the boundary includes the claims arising from the originating block and therefore requires NHNP's claims into the Kaweka block itself to be considered. The applicant further submits that this view is reinforced by clause 6.3 of the MOU where HTT recognises that NHNP have legitimate interests in the defined area set out in Schedule 2 to the MOU.

36. The applicant submits that this interpretation of the MOU is consistent with the boundary described by the Chairperson in his directions on inquiry boundaries and process for the Taihape Inquiry in 2010.[36] The applicant argues that the Chairperson described the Taihape boundaries as extending at the Northeast end of the Kaweka land block into the Kaweka CFL, adjoining the lakes in the Kaweka blocks. This reflects the customary interests in the land asserted by NHNP. The applicant confirms that the map at Schedule 2 has never changed in several redrafts of the MOU since 2010.

37. Regarding the inconsistencies in the MOU, the applicant acknowledges that the Crown is not a party to the MOU and should have engaged with NHNP to seek agreement on its meaning in keeping with the express obligation of the MOU.

38. The applicant submits that, despite best efforts by the applicant, the Crown has been intransigent in its view that NHNP are not entitled to any specific redress in relation to the Kaweka and Gwavas CFLs, other than what they may receive as beneficiaries under the Deed. The applicant argues that the Crown is 'fiercely determined' to settle the Kaweka and Gwavas CFLs in a comprehensive settlement with Heretaunga Tamatea and Mana Ahuriri. According to the applicant, the Crown has asserted that a range of alternative financial, commercial and cultural redress is potentially available to NHNP including an agreed settlement quantum and the opportunity to purchase various Crown properties in the NHNP area of interest. The applicant submits that the Crown does not seem to see itself bound by the Crown Forest Asset Act 1989 and by authorities including *Haronga v Waitangi Tribunal* and *Attorney-General v Mair*, to address the failure to ensure there is sufficient

---

35 Wai 2542, #A1

36 Wai 2542, #3.1.16(a)

redress to meet the claims of NHNP that have not yet been inquired into or resolved.[37]

39. The applicant relies on the decision of the Supreme Court in *Haronga* and submits that the claim does not just concern the inability of the applicant to have NHNP's claim adjudicated but also the failure to have land restored. The applicant argues that any ability to inquire into a claim without the ability to provide specific redress, namely interests in land and compensation arising from CFRT and other provisions provided for in the Crown Forest Asset Act 1989 renders that inquiry nugatory.

40. In the applicant's submission *Haronga* provides a useful lens through which the Tribunal's urgency criteria should be viewed. The applicant submits that, with limited exceptions, the Tribunal is obliged to inquire into every claim. This involves determining whether the claim concerning the Crown action or omission is inconsistent with the Treaty of Waitangi and is well-founded, and if so whether the Tribunal should recommend that action be taken to compensate for or to remove the prejudice. To ensure that this duty is carried out, the applicant submits that the Tribunal needs to take care that it does not defer the hearing of a claim to defeat it and preclude it from being the subject of an inquiry.

41. The applicant submits that there are no alternative remedies available to NHNP and that an urgent Tribunal inquiry is their last recourse. Despite requests for kanohi-ki-te-kanohi meetings, the applicant claims that the Crown has refused to engage with NHNP. The applicant submits that there is no other forum that can hear the allegations against the Crown. Although NHNP do not wish to frustrate the passage of settlement negotiations for other tribes, they are compelled to take action to preserve what they claim is an entitlement to at least a portion of the Kaweka and Gwavas CFLs, or some equivalent.

42. The applicant submits there has been no delay in bringing proceedings. The urgency application was filed soon after the failed attempt to negotiate an outcome for the mutual benefit of NHNP and HTT. The applicant submits there was a clear lack of engagement and participation by the Crown in those negotiations.

43. The applicant rebuts the allegations relating to representation claiming that NHNP holds the mandate from Ngāti Hinemanu, Ngāti Paki, and Ngāti Hinemanu ki Heretaunga from the marae at Omahu at Hastings and the marae at Winiata at Taihape to pursue their claims.[38] The applicant also disputes the claims regarding whakapapa. As discussed above, it is asserted that Ngāti Hinemanu derives their customary interests in the Kaweka and Gwavas CFLs from Punakiao. In addition, the applicant says that the urgency application does not concern mana whenua or customary interests, nor does it concern any large natural grouping to be recognised in the Mōkai Pātea region. The applicant reasserts that the urgency application concerns the Crown's overlapping claims settlement process regarding the Kaweka and Gwavas CFLs.

---

37 *Haronga v Waitangi Tribunal & Others* [2011] NZSC 53; *Attorney-General v Mair* [2009] NZCA 625

38 Wai 2542, #A7 at [42]

Submissions of the Crown

44. The Crown opposes the application and says that the applicants have not demonstrated that they will suffer significant and irreversible prejudice. The Crown also says that there are alternative remedies available to NHNP.

45. Crown counsel submits that the Deed only partially settles the claim of NHNP so far as it relates to their customary interests in Heretaunga Tamatea. The Deed expressly excludes all claims of Ngāti Hinemanu relating to interests derived from the ancestor Punakiao. The applicant's historical claims derived through Punakiao will therefore remain extant and unaffected. The Crown also says that the claims of Ngāti Paki will not be affected.

46. Counsel also says that NHNP has consistently informed the Crown that Ngāti Hinemanu interests in Heretaunga Tamatea, including their interests in the Kaweka and Gwavas CFLs, derive from Taraia Ruawhare, while their interests at inland Pātea stem from the ancestor Punakiao. The Crown submits that NHNP have not provided any evidence of Ngāti Paki having distinct customary interests in Heretaunga Tamatea.

47. In any case, Crown counsel submits that Ngāti Hinemanu and Ngāti Paki are highly integrated. There is no meaningful way of distinguishing the interests of Ngāti Paki from those of Ngāti Hinemanu in the Kaweka and Gwavas CFLs. The Crown alleges that their high degree of integration means that most if not all of Ngāti Paki will benefit from the settlement by virtue of their Hinemanu ancestry to the extent that claims are settled in Heretaunga Tamatea.

48. The Wai 1835 remains, at present, listed in the Deed as a claim to be settled. However, the Crown recognises the importance of the Wai 1835 to the applicant. Crown counsel confirms that as was agreed during mediation, the Crown will seek agreement with HTT to remove the specific reference to Wai 1835 from the historical claims listed in the Deed. The Crown submits that despite the removal of specific reference to Wai 1835, that claim will remain partially settled to the extent it is a Heretaunga Tamatea claim.

49. Crown counsel submits that it has engaged in a robust process of consultation and has taken reasonable steps to inform itself of NHNP's interests. The Crown asserts that it has engaged with NHNP and all other groups with interests in the Heretaunga Tamatea region for some time in relation to the HTT negotiations, including prior to HTT achieving a mandate, following the signing of the agreement in principle and before the signing of the Deed. The Crown says that HTT also met with a number of other groups prior to the high-level agreement with the Crown and that this has been considered.

50. The Crown accepts that while there were various attempts to have face-to-face meetings with the applicant prior to the signing of the Deed, those meetings did not occur. However, the Crown notes that there have been face-to-face meetings between OTS and counsel for the applicant. There have also been numerous letters, emails and phone calls between OTS and the applicant.

51. Crown counsel further submits that since the signing of the Deed, a hui was held at the Winiata Marae. Key issues of the applicant were discussed further during the mediation process directed by the Tribunal. The Crown has had additional opportunities to hear and understand the applicant's concerns and explain the reason for its decisions. The Crown submits that it has listened and has given the applicant's proposal serious consideration.

52. The Crown submits that it has acted in good faith to ensure that its settlement with Heretaunga Tamatea does not prejudicially affect the historical claims of NHNP. The Crown says that its settlement decisions have been based on historical research and information provided by NHNP. Two independent reports were also commissioned to investigate customary interests in the Kaweka and Gwavas CFLs. The Crown says that the research did not reveal individuals identifying as Ngāti Paki, or claiming through key Ngāti Paki ancestors - Te Ao Pakiaka or Te Rangiwhakamatuku - asserting customary interests in any of the land blocks covering the Kaweka and Gwavas CFLs.

53. Crown counsel also submits that it has relied on the MOU signed between NHNP and HTT in its overlapping claims process. Counsel contends that it has been guided by the MOU and has attempted to reflect the intention of the MOU at all times. Counsel further argues that the MOU is clear that HTT will represent Ngāti Hinemanu's interests in the Heretaunga-Tamatea region in settlement negotiations. The Crown says that the Kaweka and Gwavas CFLs fall within the Heretaunga Tamatea Area of Interest and outside the common area of interest as defined in the MOU. Counsel also submits that the Crown has consulted with NHNP in relation to its interpretation.

54. The Crown says that it is satisfied that that the settlement with HTT will not impair its ability to settle the claims of NHNP. The Crown has considered the nature of the specific claims of NHNP and is satisfied that, should the Tribunal determine those claims to be well-founded, sufficient redress will remain for when NHNP come to settle the remainder of their claims. Rewi Henderson has discussed a number of settlements that have proceeded without Crown forests, such as those in the Taranaki region, to demonstrate how a fair settlement can still be achieved.[39]

55. The Crown acknowledges that the applicant has recently filed evidence in the Taihape district inquiry concerning Ngāti Hinemanu and Ngāti Paki's customary interests in the Kaweka and Gwavas CFLs. Crown counsel submits that the Tribunal is not prevented from hearing such evidence in the Taihape district inquiry. Counsel also says that the applicant has sought confidentiality orders in relation to a 2015 report entitled 'The Ngāti Hinemanu me Ngāti Paki Oral and Traditional Historical Report'. The applicant has not provided the Crown with this research, but seeks to rely on it. Relying on the Tribunal's priority report on *Maui's Dolphin*, counsel submits that it is incumbent on the applicants to inform the Crown on how they will be affected in order for the Crown to make informed decisions.[40]

56. Crown counsel submits that *Haronga* is irrelevant as NHNP's historical claims will not be fully settled and thus, the Wai 2180 Tribunal will still be able to inquire into NHNP's extant claims.[41] There will be no removal of the Tribunal's jurisdiction to make findings and recommendations in respect of those claims.

57. It is said that once the transfer of the Kaweka and Gwavas CFLs is registered, the applicants will no longer be eligible for Crown Rental Forest Trust (CFRT) funding. However, Crown counsel notes that CFRT funding will be available to NHNP for at least another year and so no significant prejudice arises. OTS is also working with NHNP in relation to an application for funding for legal advice, research, travel and other costs.

---

39 Wai 2542, #A3

40 Wai 2542, #3.1.21

41 *Haronga v Waitangi Tribunal & Others,* above n 37.

58. The Crown considers that the applicant has alternative remedies available. NHNP's claims will still be able to be settled and as submitted above, the Crown will retain the capacity to provide sufficient redress when NHNP come to settle their historical claims. Moreover, the Crown considers that it does not have an obligation to preserve an interest in the Kaweka and Gwavas CFLs. In addition, the Tribunal will have jurisdiction post-enactment of the settlement to inquire into the historical claims of Ngāti Paki and Ngāti Hinemanu insofar as they relate to the interests derived from Punakiao.

59. Crown counsel also argues that the applicant has delayed in bringing these proceedings to the Tribunal and that this should weigh against the granting of urgency. The Crown notes that the applicant knew of the matters which form the basis of the claim since at least September 2014, but elected to file the claim days before the planned signing of the Deed.

60. The delay by the applicant will result in delaying the introduction of the settlement legislation which will significantly disadvantage members of the claimant community who wish for the settlement to proceed, and who have been in settlement discussions with the Crown for a number of years.

Submissions of He Toa Takitini

61. HTT opposes the urgency application on the basis that there is no significant and irreversible prejudice to NHNP and that instead an urgent inquiry will cause significant prejudice to the Heretaunga Tamatea claimant community.

62. HTT submits that the Deed does not, nor has it ever, extinguished NHNP's historical claims. HTT says that the impact of the settlement is the same regardless of whether or not the particular Wai number is referenced. Despite the agreement in mediation to remove reference to Wai 1835, counsel submits the Wai 1835 claim will still be settled under the Deed to the extent that it is a Heretaunga Tamatea claim. Ngāti Hinemanu's claims deriving from Punakiao remain specifically excluded from the settlement.

63. To this extent, HTT submits that NHNP have preserved their right to continue and progress, and eventually settle, all their claims. NHNP will be able to pursue their claims in the course of the Taihape district inquiry, including submitting evidence to the Tribunal that may relate to areas outside the Taihape district inquiry boundaries. NHNP continue to participate actively in the Taihape district inquiry with no objection from any party.

64. HTT also submits that the Deed is not the primary barrier to NHNP being able to progress any settlement of historical claims they may have which relate specifically to the Kaweka and Gwavas CFLs. That 'barrier' is the result of the Tribunal's district inquiry boundaries and the lack of participation by NHNP in earlier inquiries such as Wai 201, the Mohaka ki Ahuriri district inquiry.

65. HTT submits that the offer of exclusive redress is not in itself significant prejudice and is consistent with the MOU. HTT relies on the MOU. HTT submits that the view of the MOU put forward by NHNP does not demonstrate significant and irreversible prejudice to NHNP.

66. It is further submitted by HTT that the offer of the Kaweka and Gwavas CFLs to Heretaunga Tamatea will not cause significant and irreversible prejudice because the structure of HTT's settlement enables NHNP to benefit from the Kaweka and Gwavas CFLs redress while also allowing them to progress their own settlement. That is, the claimant definition allows individual members of

NHNP to register with the Heretaunga Tamatea PSGE. HTT considers that this helps to avoid 'drawing lines' between the groups and enables access to redress including the Kaweka and Gwavas CFLs.

67. HTT submits that other CFLS may be sought as redress in direct negotiations with the Crown in any future Large Natural Grouping which includes NHNP. HTT says that the offer of exclusive redress in a settlement to one claimant group is not in itself significant prejudice to others.

68. It is also submitted by HTT that the applicant has alternative remedies. HTT has expressed a willingness to explore a future relationship with NHNP which may address their concerns. This includes the possibility of re-establishing connections in the context of hapū development, and also commercial arrangements in respect of the Kaweka and Gwavas CFLs. HTT alleges that while the applicant has rejected or chosen not to explore them, those pathways are still present.

69. HTT contends that granting an urgent inquiry will cause significant prejudice to the Heretaunga Tamatea claimant group. HTT submits that there would be a financial impact on Heretaunga Tamatea if the urgency application was granted. This would arise from loss of any accrued interest, loss of opportunity and the costs of having to re-negotiate key elements of Heretaunga Tamatea's settlement.

70. HTT also argues that the prejudice of granting an urgent inquiry may extend to the Mana Ahuriri settlement. There is no ability to reserve a portion of the Heretaunga Tamatea settlement without also redrafting the Mana Ahuriri settlement. This is because even if the HTT settlement was delayed the Mana Ahuriri settlement would fully allocate the Kaweka and Gwavas CFLs and give Heretaunga Tamatea a beneficial interest in them. Therefore, HTT notes, the provisions in the Mana Ahuriri settlement, including the entire company structure would need to be re-negotiated and redrafted. HTT submits as a result, the implications of delay will cause prejudice equally to Mana Ahuriri and HTT.

Submissions of the Wai 1705 claimants

71. On 6 October 2015 Isaac Hunter, Utiku Potaka, Maria Taiuru, Hari Benevides, Ms Moira Raukawa-Haskell, Te Rangianganoa Hawira, Kelly Thompson, Barbara Ball and Richard Steedman, claimants for Wai 1705 (Mōkai Pātea), sought leave to appear as interested parties to these proceedings. The claimants submit they represent the following groups:

    (a) Te Rūnanga o Ngāti Hauiti;

    (b) Te Rūnanga o Ngāti Whitikaupeka;

    (c) Te Rūnanga o Ngāti Tamakopiri;

    (d) Te Rūnanga o Ngai Te Ohuake; and

    (e) the Mōkai Pātea Waitangi Claims Trust.

72. Mr Potaka states in his affidavit that Mōkai Pātea support their Ngāti Kahungunu whanaunga to negotiate historical claims to the lands to the East of the Ngaruroro River and the summit of the Ruahine Ranges in the manner

that they choose. Mr Potaka provides an account of Mōkai Pātea's whakapapa and the connection between Ngāti Kahungunu and Mōkai Pātea:[42]

> 10. Ngāti Hinemanu, Ngāti Honomokai and Ngāti Mahuika are hapū that take their name from their respective eponymous ancestors. They are a sister and two brothers (respectively) who share the same father and mother.
>
> 10.1 The father of Hinemanu, Honomokai and Mahuika was Taraia Ruawhare who was of Ngāti Kahungunu. All of the mana whenua interests of these hapū which are to the east of the Ngaruroro River and the summit of the Ruahine Ranges are derived from their father, Taraia Ruawhare, and form part of the larger Ngāti Kahungunu rohe. This includes the areas in which lie the Kaweka and Gwavas Crown Licenced Forests.
>
> 10.2 The mother of Hinemanu, Honomokai and Mahuika was Punakiao who was of Ngāi Te Ohuake. All of the mana whenua interests of these hapū which are to the West of the Ngaruroro River and the summit of the Ruahine Ranges are derived from their mother, Punakiao, and form part of the larger Ngāi Te Ohuake and Mōkai Pātea rohe.

73. Mr Potaka details his understanding of Ngāti Paki mana whenua:

> 15. In terms of Ngāti Paki, the eponymous tupuna of Ngāti Paki is Te Rangi te Pakia.
>
> 16. Te Rangi te Pakia originated from Heretaunga and married Taungapuna of Ngāi Te Ohuake.
>
> 17. From this marriage came the hapū now known as Ngāti Paki.
>
> 18. The hapū estate of Ngāti Paki is wholly contained within the manawhenua rohe of Ngāi Te Ohuake of Mōkai Pātea, west of the Ngaruroro River and the summit of the Ruahine Ranges.
>
> 19. The claims of the Mōkai Pātea Waitangi Claims Trust encompass the claims of those members of Ngāti Hinemanu and Ngāti Paki within the Mōkai Pātea.
>
> 20. We have been advised by the Crown that it will recognise a Large Natural Grouping of Mōkai Pātea for the purpose of the settlement of Treaty claims. It is intended that all of those of us who are of Ngāti Hinemanu and Ngāti Paki descent will form a part of the Large Natural Grouping that will eventually settle the claims of the Mōkai Pātea Iwi Confederation.

74. Counsel for the Wai 1705 claimants further submits that the claims, Wai 662 and Wai 1835 (the historical claims of NHNP), are not supported by the descendants of Ngāti Paki and Ngāti Hinemanu and there is no evidence filed which demonstrates the applicant has significant support for the application.

---

[42] Wai 2542, #A5

Urgency criteria

75. The Tribunal's *Guide to Practice and Procedure* on urgency provides:

> In deciding an urgency application, the Tribunal has a regard to a number of factors. Of particular importance is whether:
>
> - The claimants can demonstrate that they are suffering, or are likely to suffer, significant and irreversible prejudice as a result of current or pending Crown actions or policies;
> - There is no alternative remedy that, in the circumstances, it would be reasonable for the claimants to exercise; and
> - The claimants can demonstrate that they are ready to proceed urgently to a hearing.
>
> Other factors that the Tribunal may consider include whether:
>
> - The claim or claims challenge an important current or pending Crown action or policy;
> - An injunction has been issued by the courts on the basis that the claimants have submitted to the Tribunal the claim or claims for which urgency has been sought; and
> - Any other grounds justifying urgency have been made out.
>
> Prior to making its determination on an urgency application, the Tribunal may consider whether the parties or the take or both are amenable to alternative resolution methods, such as informal hui or formal mediation under clause 9A of schedule 2 to the Treaty of Waitangi Act 1975.

Discussion

76. Central to the applicant's claim is that the Heretaunga Tamatea settlement will remove the ability of the Crown to fully address the historical claims of Ngāti Hinemanu me Ngāti Paki as they relate to the Kaweka and Gwavas CFLs.[43] Ngāti Hinemanu me Ngāti Paki claim customary interests in the CFLs and the applicant asserts that the current process of settling these lands exclusively with Heretaunga Tamatea and Mana Ahuriri means that Ngāti Hinemanu me Ngāti Paki will be left in a situation whereby they have legitimate interests in lands with no viable remedy available for the Crown to offer them. Thus, they will suffer significant and irreversible prejudice.

77. The Crown opposes the application for urgency. It does not accept that the applicant will suffer significant and irreversible prejudice as a result of the Crown's settlement with Heretaunga Tamatea. Essentially, the Crown argues that its consultation process has been robust, and its assessment of overlapping interests based on historical research and information provided by the claimants.[44] The Crown submits that its settlement with Heretaunga Tamatea will not remove the ability of the Crown to fully address the historical claims of Ngāti Hinemanu me Ngāti Paki if it is determined they are well-founded.

---

43 Wai 2542, #1.1.1

44 Wai 2542, #A3

78. It is not the function of the Tribunal at this stage to delve too deeply into the merits of the applicant's claim. Rather, the Tribunal is tasked with assessing whether or not, having regard to the broad criteria for urgency, the applicant has prima facie made out a case.

Significant and irreversible prejudice

79. The first issue to determine is whether the applicant has demonstrated that significant and irreversible prejudice will or is likely to result from the Crown action being complained of in this case. We consider the following aspects of the application which are relevant to an assessment of prejudice:

    (a) The extent to which the Heretaunga Tamatea settlement will settle Ngāti Hinemanu me Ngāti Paki's historical claims; and

    (b) The overlapping claims process undertaken by the Crown.

The Wai 1835 claim and claimant definition in the Deed of Settlement

80. When this application was originally filed with the Tribunal, the Wai 1835 claim was listed in the Heretaunga Tamatea Deed as a claim that would be partially settled by settlement legislation.[45]

81. The inclusion of the Wai 1835 claim in the Deed was contested by NHNP.[46] It was argued that HTT do not have a mandate to settle Wai 1835 and further that the Crown had acted irrationally by excluding Wai 1868 (another claim of Ngāti Hinemanu me Ngāti Paki) from the Deed, but allowing Wai 1835 to remain. NHNP was also concerned that it was uncertain to what extent Ngāti Hinemanu would be caught by the broader claimant definition in the Deed (Ngāti Paki is not listed as a hapū in the claimant definition). The applicant submitted that Ngāti Hinemanu me Ngāti Paki would be prejudiced by the settlement because they would not be able to pursue their claims in the Waitangi Tribunal's Taihape: Rangitīkei ki Rangipō district inquiry. NHNP asserted the relevance of the Supreme Court's decision in *Haronga* where the court considered that an important consideration in an urgency context is whether the applicant will lose the right to the adjudication of their claim.[47] This is of particular significance when the claim relates to the restoration of land.[48]

82. The Crown argued that no prejudice could arise from the inclusion of Wai 1835 in the Deed.[49] It submitted that the Deed would only partially settle the Wai 1835 claim. While the settlement would fully settle Wai 1835 so far as it relates to the claims of Ngāti Hinemanu in Heretaunga Tamatea that derive from Taraia II, Ngāti Hinemanu's claims as they derive from Punakiao would remain extant and unaffected.[50] The Deed would not settle the Wai 1835 claim as it relates to Ngāti Paki in any way.

83. As foreshadowed, we referred this claim to mediation. While mediation was not fully successful in settling the claim, one matter on which the parties were able to reach agreement was the removal of Wai 1835 from the list of those

---

45 Wai 2542, #A1(a)
46 Wai 2542, #1.1.1
47 *Haronga v Waitangi Tribunal & Others*, above n 37, at [100]
48 Ibid, at [101]
49 Wai 2542, #3.1.8
50 Wai 2542, #A1(a), p. 93

claims being settled under the Deed, or any subsequent legislation giving effect to that settlement.[51] The Crown has since submitted that although Wai 1835 remains, at present, listed in the Deed, it will seek agreement with HTT to remove the specific reference as was agreed during mediation.[52]

84. The Crown maintains however, that even if explicit reference to the claim is removed, Wai 1835 will still be at least partially settled under the Deed to the extent it is a Heretaunga Tamatea claim as per the claimant definition. This reflects the understanding of the Crown that:[53]

> Ngati Hinemanu interests in Heretaunga Tamatea, including the Kaweka and Gwavas CFL lands, derive through descent from Taraia II while interests in inland Patea derive through descent from the ancestor Punakiao.

85. The applicant by contrast has asserted that Ngāti Hinemanu claims in respect of the CFLs derive from Punakiao and relate predominantly to their whakapapa links in Pātea. If that is correct, then from our perspective it does not follow that Wai 1835 is a Heretaunga Tamatea claim for the purposes of the Deed. Accordingly, it is unclear the extent to which Wai 1835 will be settled under the Deed.

86. The opposing views as to whakapapa and relevant customary interests which underpin this issue are not questions we can answer at this point. However, should Ngāti Hinemanu me Ngāti Paki have customary interests in the CFLs by virtue of their descent from other ancestral lines which warrant a return of land (reflecting a fair distribution of redress among settling groups), and there is no space for the interests of those ancestors in the proposed settlement, then we consider that there is a real likelihood they will suffer significant and irreversible prejudice. That prejudice has the potential to be more than just commercial. At a deeper level, the settlement would fail to recognise a distinct ancestral link to the land.

87. The application then turns on the Crown's actions in negotiating the settlement and whether the Crown has sufficiently informed itself of the overlapping interests in the CFLs to arrive at its current position; that being, the proposed redress reflected in the Deed.

The Crown's overlapping claims process

88. The Crown and HTT have negotiated this settlement without the benefit of a full Tribunal inquiry and report on customary interests in that rohe. While the decision to proceed to direct negotiations was for the Heretaunga Tamatea claimants to make, and does not mean the Crown's approach was wrong in principle, it does mean that the Crown has had a particularly difficult 'balancing exercise on its hands'.[54] This Tribunal must be satisfied without hearing the claim in full that the Crown has taken care to balance competing interests, so as not to cause the applicant significant and irreversible prejudice.

89. The Crown's approach to dealing with overlapping claims is set out in the Office of Treaty Settlement publication *Healing the Past, Building a Future* (the

---

51 Wai 2542, #2.8.1

52 Wai 2542, #3.1.21

53 Wai 2542, #3.1.21 at [7]

54 Waitangi Tribunal, *The Ngāti Awa Settlement Cross-Claims Report*, (Wellington: Legislation Direct, 2002), p.80

Red book). The Tribunal has previously endorsed the principles set out in the Red Book as being generally Treaty compliant.[55]

90. Where there are overlapping claims to an area that the Crown and a negotiating party may consider using as redress, the Red Book states that claimant groups are encouraged to discuss their interests with neighbouring groups at an early stage and establish a process by which they can reach agreement on how overlapping interests can be managed.[56] Where there is an absence of mutual agreement between claimant groups, it may be that the Crown is required to make a final decision about whether to include particular redress in a settlement.[57]

91. Crown policy is more specific when the proposed redress includes Crown forest land and there are overlapping claims to that land. In those situations, the Crown must consider whether a 'threshold level' of customary interest has been demonstrated by each claimant group. If a threshold interest is demonstrated, the Crown then considers the following; the potential availability of other forest land for each group, the relative size of likely redress for Treaty claims and the relative strength of the customary interests in the land.[58] *The Ngāti Awa Settlement Cross-Claims* Tribunal essentially found this policy to be fair, but stated that the Crown would still need to establish an understanding of the range of customary interests in the Crown forest before proceeding with any settlement, and that it could not make such an assessment in a 'factual vacuum'.[59] Furthermore, it would need to ensure that like-for-like redress was available to groups who had established a threshold interest.[60] The Tribunal then said that while the Crown did not necessarily have to provide redress in the same forest in which there was an established interest, the potential availability of other forest land would be a relevant consideration.[61]

92. The question for this Tribunal is: has the Crown prima facie met the overlapping claims standard outlined in the Red Book? In particular, in the way it has established whether or not Ngāti Hinemanu me Ngāti Paki have threshold interests in the CFLs independent of Heretaunga Tamatea?

93. In 2014 the Crown commissioned independent research to inform itself of the competing interests in the CFLs.[62] The Crown submits that the historical research suggests that people affiliating to Ngāti Hinemanu claimed interests in both the Heretaunga and Pātea region.[63] The research did not reveal any evidence of individuals identifying as Ngāti Paki, or claiming through key Ngāti Paki ancestors, asserting customary rights in the CFLs.[64] We have not seen that research and accordingly cannot comment on it in any meaningful way. However, in the *Tāmaki Makaurau Settlement Process Report,* the Tribunal recommended that to help understand the customary underpinning of tangata

---

55 See for instance: Waitangi Tribunal, *East Coast Settlement Report*; *Tamaki Makaurau Settlement Process Report*; *Te Arawa Mandate Report: Te Wahanga Tuarua*; *The Ngāti Awa Settlement Cross-Claims Report*

56 Wai 2180, #A29 at [8] & Wai 2542, #A3

57 Wai 2180, #A29 at [8.5]

58 Office of Treaty Settlements, 'The Negotiations Process', *Ka Tika A Muri, Ka Tika A Mua: Healing The Past, Building the Future,* p. 59

59 *The Ngāti Awa Settlement Cross-Claims Report*, above n 54, p. 79

60 Ibid, pp.76-79

61 Ibid.

62 Wai 2542, #A3

63 Wai 2542, #A3 at [20.1]

64 Wai 2542, #A3 at [18]

whenua groups' positions 'officials will need to engage with Māori sources of knowledge, both written and oral. Sometimes it may be necessary to seek external advice on customary interests'.[65] The *Tāmaki Makaurau* Tribunal considered such actions were necessary to comply with Treaty standards: [66]

> While it would not be expected officials would be expert in whakapapa, they need to have engaged with enough of the Māori knowledge inherent in customary interests to really understand where people are coming from, and why the perceptions of the various groups differ.

94. The *Tamaki Makaurau* report also recommended that communication from OTS 'should not be by letters alone; letters should be used only to supplement face-to-face communication'.[67] The engagement between Ngāti Hinemanu me Ngāti Paki and the Crown appears to largely have been by way of email and telephone correspondence.[68] Ngāti Hinemanu me Ngāti Paki submit that they never once met with OTS officials to discuss the historical report commissioned by OTS, their overlapping claims, or the settlement of the CFLs. The Crown accepts that no face-to-face meetings with Ngāti Hinemanu me Ngāti Paki have occurred.[69]

95. The Crown then relies on a Memorandum of Understanding (MOU) signed between HTT and Ngāti Hinemanu me Ngāti Paki in May 2014.[70] The purpose of the MOU was to clarify the Ngāti Hinemanu interests that would be negotiated by HTT in the Heretaunga Tamatea settlement negotiations (we note that the MOU does not appear to extend to the interests of Ngāti Paki). The MOU committed the parties to a process of ongoing engagement where issues arose during the settlement negotiations concerning areas in which the parties' interests converged. The Crown states that it has been guided by the MOU and has attempted to reflect the intention of the MOU at all times.[71] We do not think the Crown was wrong, in principle, to rely on the MOU. The MOU shows a clear intention by the parties to manage overlapping issues between themselves. It is consistent with the Crown's approach to settlement outlined in the Red Book.

96. However, in our directions of 30 November 2015 we identified some potential difficulties with the MOU, specifically the discrepancies between the Areas of Interest described at clause 4 and those outlined in the maps in schedules 1 and 2 to the MOU.[72] For clarity, those were:

    (a) The boundary depicted in Schedule 2 to the MOU and marked as Ngāti Hinemanu me Ngāti Paki's area of interest is *not* the same as the current Taihape boundary, as is suggested at clause 4.1(b); and

    (b) The boundary depicted in Schedule 2 to the MOU and marked as Ngāti Hinemanu me Ngāti Paki's area of interest therefore *appears* to include a small portion of the Kaweka CFL.

---

65 *Tamaki Makaurau Settlement Process Report*, (Wellington: Legislation Direct, 2007), p.109
66 Ibid, p.93
67 Ibid, p.109
68 Wai 2542, #A3(a), exhibits B and C
69 Wai 2542, #3.1.21
70 Wai 2542, #1.1.1(a)
71 Wai 2542, #3.1.8
72 Wai 2542, #2.5.3

97. It is unfortunate that there are inconsistencies. It seems that they have caused much of the confusion around the extent to which certain areas, including the CFLs, needed to be 'ring-fenced' pending agreement from both parties on how to proceed.[73] It is more unfortunate still that the discrepancies in mapping were not identified earlier by any of the parties it would seem. Moreover, the boundary issues identified in the MOU are at least significant enough to call into question the validity of that agreement and whether there was a meeting of minds between the parties who signed it. In any event, the evidence before us suggests that the inability of NHNP and HTT to agree on overlapping issues has been apparent to the Crown for some time.

98. Overall, we consider that there are questions as to whether the Crown sufficiently informed itself of the relevant 'threshold interests' in the CFLs to comply with Treaty standards, specifically:

    (a) Acknowledging the standard set out in the Red Book, as well as what previous Tribunals have stated regarding Treaty compliance, was the Crown's consultation process and engagement with groups with overlapping interests robust in this case?

    (b) Given the flaws identified in the MOU and the inability of parties to agree on a common interpretation, was the Crown justified in relying on the MOU to the extent it did to inform its decision on redress?

99. Though we are unable to say for certain what the nature of Ngāti Hinemanu me Ngāti Paki's interest in the CFLs is, we think there is a sufficient connection between the potential prejudice we have outlined and the actions taken by the Crown during settlement negotiations for the purposes of this application. In other words, the applicant's assertions of interests, coupled with our concerns with the Crown's process, suggests that there is a real prospect of the applicant suffering significant and irreversible prejudice should the settlement proceed in its current form.

Alternative remedies

The Crown's ability to provide redress

100. The Crown submits that there are alternative remedies available to the applicant.

101. While the Crown will relinquish its interests in the Kaweka and Gwavas CFLs, it has submitted that it will retain the capacity to fully redress Ngāti Hinemanu me Ngāti Paki's historical claims in a future settlement, if it is established those claims are well-founded. The Crown has provided a list of alternative Crown lands in Taihape that may be available to the claimants in a future settlement.[74] In his affidavit, Mr Henderson stated that 'the Crown, in agreeing to a settlement with a particular group, must ensure it retains sufficient capacity to enter into a fair settlement with others'.[75] In the *Ngāti Awa Cross-Claims Settlement Report,* the Tribunal stated that 'the Crown must ensure that it remains in a position to do for these cross-claimants what, out of a concern for good faith and fairness, it has done for Ngati Awa'.[76]

---

73 Wai 2542, #A3(a)
74 Wai 2542, #A1 exhibit I
75 Wai 2542, #A3 at [33]

102. We agree with the Crown that the fact Ngāti Hinemanu me Ngāti Paki do not yet have a well-founded claim in the CFLs distinguishes this situation from the *Haronga* case.[77] The right to the adjudication of a claim recognised by the Supreme Court only triggers once the Tribunal has inquired into the claim and has determined it to be well-founded.[78] Ngāti Hinemanu me Ngāti Paki have not yet reached that point.

103. Nonetheless, Crown forests are a valuable settlement asset and it is significant both generally and in terms of Crown policy that Ngāti Hinemanu me Ngāti Paki have not expressed an interest in any other CFLs. In the *Ngāpuhi Mandate Inquiry Report*, the Tribunal recognised that hapū would be prejudiced if their Treaty claims were negotiated, settled and extinguished, without their consent. This prejudice would be exacerbated in cases where the claims involved Crown forest assets, as hapū would potentially be denied their right to seek binding recommendations from the Tribunal should their claims under inquiry be adjudged well-founded.[79] It is at least arguable that a similar situation arises here.

104. Because it is unclear to us how Ngāti Hinemanu me Ngāti Paki's claims will be resolved in any future settlement with the Crown, ascertaining the adequacy of alternative redress that the Crown suggests might be available is difficult at this stage. However, as foreshadowed earlier in this decision, if Ngāti Hinemanu me Ngāti Paki have legitimate customary entitlements to the CFLs by virtue of their descent from Punakiao or other ancestors which are not recognised in the Heretaunga Tamatea settlement, we would be cautious about concluding now that the alternative land redress proposed by the Crown remedies any prejudice arising from a related historical Treaty breach, if one is established.

Benefit from Heretaunga Tamatea settlement

105. The Crown has argued that Ngāti Hinemanu me Ngāti Paki will still benefit from the Heretaunga Tamatea settlement to the extent that they are able to whakapapa to a recognised ancestor of Heretaunga Tamatea.[80] HTT has also expressed its commitment to work with Ngāti Hinemanu me Ngāti Paki in the course of, or following, their own settlement to explore commercial arrangements regarding the CFLs.[81]

106. We are not persuaded that those are appropriate alternative remedies either. They propose that Ngāti Hinemanu me Ngāti Paki consider their interests settled by the Heretaunga Tamatea settlement and use the structures established under the settlement to achieve their ends. It is understandable that Ngāti Hinemanu me Ngāti Paki are unwilling to proceed in this way because they say they have never given a mandate to HTT to settle their distinct interests in the CFLs, nor do they consider their claim a Heretaunga Tamatea claim.

---

76 *The Ngāti Awa Settlement Cross-Claims Report*, above n 54, p.80
77 Wai 2542, #3.1.21
78 Wai 532, #2.106 & Wai 2181, #2.5.7
79 Waitangi Tribunal, *The Ngāpuhi Mandate Inquiry Report* (Wellington: Legislation Direct, 2015), p.81
80 Wai 2542, #A3
81 Wai 2542, #3.1.22

107. Further, while we accept that members of Ngāti Hinemanu will likely be able to whakapapa to a recognised ancestor of Heretaunga Tamatea, we are not sure the same can be said for Ngāti Paki. It is unclear how Ngāti Paki will benefit in any way from the settlement.

Prejudice to He Toa Takitini and Mana Ahuriri

108. We are mindful of the fact that this settlement process is well advanced and that a grant of urgency would have the effect of delaying both the settlements of Heretaunga Tamatea and Mana Ahuriri. The outcome that the applicants seek – that the Kaweka and Gwavas Crown Forest Lands remain unsettled until such a time as NHNP are ready to proceed to settlement, or that a protection mechanism is put in place to reserve their specific rights – may require that aspect of those two settlements to be reconsidered, as occurred in the *Ngati Awa* case. This is very significant and serious consideration. Re-opening the settlements, resulting in fresh negotiations and ratification – processes that have already taken a number of years to achieve - would cause prejudice to those tribal communities who are entitled to have their settlements concluded.

109. In the decision on urgency for the *Tamaki Makaurau* applications, the Acting Chairperson, referring to other cross-claimant situations that had come before the Tribunal after the period for negotiation had ended, stated:[82]

> At that stage, it has been too late to amend the process. The Tribunal has been left with a choice between allowing the settlement to proceed notwithstanding the shortcomings in process, or stopping it in its tracks with all the attendant detriment to the settling parties. For this reason, the overlapping claimants were required to demonstrate a **very high level of prejudice** to them resulting from the poor process… the importance of securing settlement cannot, I think, continue to be used as an excuse for skimping on process: process often does determine outcome and overlapping claimants are entitled to a Treaty-based standard.
>
> [Emphasis added]

110. In that case, the Tribunal decided to grant urgency even though settlement legislation was imminent on the grounds that a very high level of prejudice had been demonstrated. Similarly, in the decision on the applications made by Ngāti Maniapoto for an urgent hearing into the Ngāti Tama settlement, the Tribunal, weighing the prejudice likely to be suffered by Ngāti Maniapoto and Ngāti Tama respectively, found that urgency was warranted despite the advanced stage of settlement negotiations:[83]

> If the Ngati Maniapoto argument is made out…then potential assets for a Ngati Maniapoto settlement may be removed from their reach. An inquiry is therefore warranted.

111. Following that reasoning, and having carefully reviewed the relevant interests, we consider that this application meets the very high threshold for urgency. That said, we acknowledge the position of Heretaunga Tamatea and Mana

---

82 Wai 1362, #2.5.10, p.4

83 Wai 788, #2.21

Ahuriri claimants and how this outcome will inevitably affect the final progress of their claim toward legislation. However, the short point is that we are not satisfied that any prejudice to them is outweighed by that which is likely to be suffered by the applicant should this settlement proceed as currently framed in respect to the Kaweka CFLs. In addition, we note that what is at issue here is an isolated part of the Heretaunga Tamatea settlement. Should all parties participate to their fullest extent, a swift inquiry and report will expedite an outcome sooner rather than later, mitigating any potential prejudice to Heretaunga Tamatea and Ahuriri claimants that may be caused by delay.

Delay

112. Delay is a relevant consideration when determining whether an application for an urgent hearing should be granted. In *Tūrāhui v Waitangi Tribunal,* Williams J, upholding the decision of the Tribunal to decline an application for an urgent hearing made by the Āraukūkū hapū, stated in his judgment:[84]

> It [the applicant] would be expected to set out the steps it has taken to avoid suffering significant and irreversible prejudice. The more extensive those steps, the more powerful the applicant's case. The reverse will also be true. An applicant that has sat on its hands is less likely to succeed.

113. The Court of Appeal recently dismissed a further appeal by Āraukūkū adopting the reasoning of Williams J that delay is a relevant consideration in the exercise of the Tribunal's discretion to grant an urgent hearing.[85]

114. In saying that, our view is that the application before us is distinguishable from Āraukūkū. We simply do not agree that the applicant has delayed in bringing this application. Though the issues raised may have been apparent for some time, it was not until recently that it became clear they would not be resolved through further discussion and negotiation, or by some other means. Those other means included the processes set out in the MOU, which of themselves became mired in controversy over the meaning of its terms and because of the apparent confusion surrounding the map. Far from sitting on their hands, NHNP appear to have attempted but ultimately exhausted all other potential methods of resolution without success.

Readiness to proceed

115. The applicant states that Ngāti Hinemanu me Ngāti Paki are ready to proceed.

Decision

116. The Tribunal will only grant an urgent hearing in exceptional cases and only where it is satisfied that adequate grounds have been made out for according priority over claims currently in or preparing for inquiry. The Tribunal's urgency criteria has been set to ensure the proper deployment of its limited

---

84 *Tūrāhui v Waitangi Tribunal* [2015] NZHC 1624, at [89]

85 *Lewis Ata Tūrāhui for and on behalf of Āraukūkū Hapū v The Waitangi Tribunal* [2016] NZCA 387, at [21]

resources to research, hear and report on all claims. We also acknowledge that the issues here are finely balanced and complex, as inevitably they will be where overlapping interests and competing interpretations over history and whakapapa are involved. Even so, after careful reflection and for the reasons discussed, we consider that, by a narrow margin, the application for an urgent hearing should be granted.

117. However, we stress that this urgent hearing is not an opportunity to hear the Ngāti Hinemanu me Ngāti Paki claims to the Kaweka block, including in respect of the CFLs. The issue is rather, whether the *process* by which the Crown has established interests in the CFLs informing its decision to offer that land as redress to Heretaunga Tamatea in the Deed constitutes a breach of the principles of the Treaty of Waitangi. If a breach is established, the second issue is whether prejudice results. While we acknowledge it can be difficult to maintain a distinction between the two, it will be important to focus on that distinction if the matter is to be completed in a timely fashion.

118. To avoid doubt, we consider that the issue for determination is of narrow scope which will mean a short and focused hearing of no more than two days that will assist in progressing this urgent claim expeditiously. To that end we direct the Registrar to liaise with counsel to ascertain their availability for the urgent hearing to be held in the next 4 to 6 weeks. It may also be necessary for us to convene a telephone conference of all affected counsel at short notice to deal with interlocutory matters.

119. One final point. While we have decided to grant urgency to this claim, this should not discourage the Crown, HTT and the claimants from trying to find ways to engage in respect of their particular issues and to even now explore the possibilities of resolution.

The Registrar is to send a copy of this direction to counsel for the applicant, Crown counsel and those on the notification list for Wai 2542, the Ngāti Hinemanu me Ngāti Paki Kaweka and Gwavas Forests claim.

DATED at Whanganui this 16th day of August 2016

Judge L R Harvey
Presiding Officer
WAITANGI TRIBUNAL

Dr Angela Ballara
Tribunal Member
WAITANGI TRIBUNAL

Professor Pou Temara
Tribunal Member
WAITANGI TRIBUNAL