

IN THE WAITANGI TRIBUNAL**WAI 2358****IN THE MATTER** of the Treaty of Waitangi Act 1975**AND IN THE MATTER** of the National Freshwater and Geothermal Resources Inquiry

**MEMORANDUM OF COUNSEL FOR THE CLAIMANTS ON FURTHER
ISSUES RELATING TO COMITY AND THE APPLICATION OF
SECTION 6(6) OF THE TREATY OF WAITANGI ACT 1975**

Dated: 22 March 2017

Presiding Officer: Chief Judge Isaac



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MAY IT PLEASE THE TRIBUNAL:

A. Context

1. This memorandum is filed in response to the memorandum-directions of 8 March 2017 (#2.6.11) through which the Tribunal seeks submissions on:
 - a. Whether the release of the Select Committee's report, containing the recommendations to include the MW-IPA in the Bill, affects the Waitangi Tribunal's ability to consider the mana whakahono proposals in *Next Steps*; and
 - b. Whether the Waitangi Tribunal is precluded by s 6(6) of the Treaty of Waitangi Act 1975 from inquiring into the mana whakahono proposals.
2. In summary, it is the claimants' position that:
 - 2.1 The release of the Select Committee's report does not affect the Tribunal's ability to consider the mana whakahono proposals in *Next Steps*; and
 - 2.2 The Tribunal is not precluded by s 6(6) from inquiring into the mana whakahono proposals.
3. The claimants' reasoning in support is set out in **Section B** and **Section C** below. This memorandum then concludes in **Section D** with some consequential observations in relation to Tribunal reporting on Stage 2.

B. Issue #1: Impact of the release of the Select Committee's report

4. The approach set out in the claimants' memorandum of 27 January 2017 (#3.2.43) remains equally applicable following the release of the Select Committee's report. The essence of their challenge is to antecedent Crown conduct reflected in *Next Steps*. That conduct can be analysed without reference to any Parliamentary material, including the Select Committee's report, and the Tribunal by 'quarantening' its inquiry in that way will not infringe the comity principle, properly understood.

5. The Crown's position to the contrary has a significant constitutional downside, which the Crown has not yet confronted. It concerns law changes proposed in Parliamentary material (most obviously in a Bill, but not necessarily restricted to that 'medium') which, intentionally or not, will never be enacted in the form of a statute relevantly changing the law. The Crown's memorandum of 9 February 2017 (#3.2.56) alludes to but does not adequately address this issue. In particular it suggests in para 3 that the introduction of a Bill addressing the same subject-matter will stay the Tribunal's consideration of that subject-matter "until the Bill is enacted **or discharged**". On this approach, there is a lot that turns on what is meant by the ambiguous term "discharged". Notably, the Crown does not say what it means for a Bill (or for that matter, a change proposed in Parliamentary material short of a Bill) to be "discharged".
6. On the Crown's approach could a Bill remain in a state of limbo, being neither enacted nor discharged, for a number of years?¹ If it could, what incentives, and safeguards, are there to stop the Executive from avoiding (timely) Tribunal scrutiny of Crown conduct by introducing a Bill that the Executive has no intent to (timely) progress through the House? And who is it that decides when the Bill has been "discharged"? If it is the Crown, then won't the Executive in that situation be overstepping its constitutional role and effectively acting as the sole arbiter of its own justice?² These questions highlight that there is no obvious, or principled, place to draw the line necessary for determining when a Bill has been "discharged" so as to re-enliven the jurisdiction of the Tribunal. It follows that the artificiality lies not in the claimants' principled approach to the application of the principle of comity (and to s 6(6)), but in the Crown's approach.³

C. Issue #2: Application of s 6(6) of the Treaty of Waitangi Act 1975

¹ This is no fanciful concern. By way of example, the Legislation Amendment Bill was introduced on 20 May 2014 but appears to have progressed no further in the House since.

² See *Port Nicholson Block Settlement Trust v Attorney-General* [2012] NZHC 3181, para [63] (Williams J: "Provided they are careful not to cross the boundary into the domain of Parliament or the executive's role in advancing legislation, it would be wrong in principle and dangerous in practice for the courts to leave the Crown to 'acquit itself as best it may' as the 'sole arbiter of its own justice' [quoting *Wi Parata v Bishop of Wellington* [1878] 3 NZ Jur 73 (NS) (SC) at 78], where the controversy raises justiciable issues of statutory or deed interpretation or indeed of customary law if properly pleaded").

³ Cf. Crown memorandum of 9 February 2017 (#3.2.56), paras 5, 33 and 47.

7. Section 6(1) sets out the Tribunal's jurisdiction in broad terms. Exceptions to that broad conferral of jurisdiction are then set out in subsections (6)-(8). Our focus, subsection (6), is in these terms:

(6) Nothing in this section shall confer any jurisdiction on the Tribunal in respect of any Bill that has been introduced into the House of Representatives unless the Bill has been referred to the Tribunal pursuant to section 8.

8. Textually, there are two ways to read this exception:

8.1 The narrow reading is that s 6(6) operates to stay inquiries (i) that claimants seek to commence after a Bill has been introduced, and (ii) that must involve the Tribunal scrutinising the Bill and associated Parliamentary material (eg, because that material provides the only evidence of the Crown conduct that is in issue).

8.2 The wider reading is that s 6(6) operates to stay inquiries irrespective of when they are commenced (ie, before or after the Bill is introduced) and irrespective of whether the Crown conduct that is in issue can be evidenced in extra-Parliamentary material.

9. As set out below, the claimants submit that the first and narrower approach to s 6(6) is more appropriate as a matter of statutory interpretation. The claimants find support in their position from Baragwanath J in *Mair*.⁴
10. Before considering Baragwanath J's judgment in *Mair*, the claimants note that the legislative history to s 6(6) does not help to clarify its intended operation. Section 6(6) was not included in the Treaty of Waitangi Bill as introduced (ie, the bar-1 version of the Bill). It was inserted by the Māori Affairs Committee in its report back (ie, the bar-2) version of the Bill. There does not appear to be a Māori Affairs Committee report on the bar-2 version of the Bill, so the correct approach to take to s 6(6) falls to be ascertained without assistance from legislative history material.
11. Against that background, *Mair* provides the starting point. It was a judgment of the Court of Appeal issued on 22 December 2009, and is

⁴ *Attorney-General v Mair* [2009] NZCA 625 (copy attached as **Annex 1**).

notable in not being referred to in the Crown memorandum of 9 February 2017 (#3.2.56). Justice Baragwanath’s judgment in *Mair* contains the most detailed consideration by a higher court judge of the meaning and effect of s 6(6), as Williams J subsequently recognised in *Baker*.⁵

12. Justice Baragwanath’s analysis of s 6(6) is to be found in paras [118]-[175] of his judgment. The analysis admittedly is obiter⁶ and, as Dobson J has subsequently noted⁷ the other two Court of Appeal judges (Chambers and O’Regan JJ) chose not to express a view on s 6(6).⁸
13. Nevertheless, the claimants submit that Baragwanath J’s constitutional analysis of s 6(6) is compelling, and that it should be drawn on by the Tribunal to conclude that the essential challenge by the claimants is not to the Bill but to antecedent Crown conduct in breach of the principles of the Treaty, and that neither the principle of comity nor s 6(6) precludes that.
14. The following analysis by Baragwanath J is particularly relied on:

[89] The third issue, as to when and to what extent the jurisdiction of the Waitangi Tribunal is ousted by the presentation by the Executive of a bill to Parliament, is of general constitutional significance. It brings out the need for the three elements of the Crown – Executive, Legislature and Judiciary – to see as complementary their roles in the administration of justice and to handle with sensitivity and vision the challenging issues of Treaty jurisprudence.

...

[120] On the Crown’s argument the Waitangi Tribunal is barred by s 6(6) from delivering to Māori claimants rights for breach of the Treaty of Waitangi by wrongful seizure of ancestral land, including Crown forest land. That is so, it argues, even though land of that description is the subject of specific legislation, enacted after s 6(6) in settlement of proceedings in this Court, by which the Executive relinquished authority to interfere with decision-making by the Waitangi Tribunal. Yet acceptance of such argument would not only interfere with, but also exclude, the Tribunal from exercising its function which here, exceptionally, equates to that of the Court of declaring and enforcing legal rights. It does so by reference to general legislation which on its plain reading does not

⁵ See *Baker v Waitangi Tribunal* [2014] NZHC 1176, [2014] 3 NZLR 390, paras [72]-[73] (and in particular the observations in footnote 15). See too *Koia v Waitangi Tribunal* HC Wellington CIV-2010-485-1519, 22 February 2011, para [124] per Dobson J.

⁶ See *Mair* (above), para [176].

⁷ See *Koia* (above), para [124].

⁸ See *Mair* (above), para [81].

contemplate such a result and is to be presumed to accord with rather than to defy basic principles of our unwritten constitution.

...

[122] ... acceptance of the Crown argument on s 6(6) would mean that the strengthened procedures can be swept aside, by action not of Parliament but of the Executive, in introducing an inconsistent bill into the House. The argument relies on a reading of a subsection of the Treaty of Waitangi Act which the text does not require. It asserts that a wider reading should be given to the subsection as a result of the principle of comity – that the Tribunal, although acting as a court, will defer to Parliament to the extent of being deflected from the processes Parliament has established by the Executive's placing a bill before it. The consequence of this wider reading would be that the Waitangi Tribunal is debarred from exercising its constitutional function of giving effect to legal rights. MacKenzie J was not prepared to accept such a result. Nor am I.

...

[139] Implicit in the argument [for the Crown] is, first, that unless subs (6) is read as meaning that the Tribunal may not examine prior conduct which overlaps with anything said in the bill, the subsection is meaningless; Parliament is not to be taken to have legislated in vain. Secondly, it is implicit that any other construction will bring the Court into collision with Parliament.

...

[141] The essential challenge by claimants who seek clawback is not to the bill. It is to antecedent Crown conduct in breach of the principles of the Treaty. ...

...

[149] Here, unless s 6(6) is read up, there is no question of the courts' interfering in parliamentary proceedings as was in issue in that case. The issue is the reverse: whether the Executive may interfere in Tribunal proceedings by presentation of a bill to the House.

...

[153] What then is the scope of s 6(6)? As with all classification judgments the test is one of substance and proportion. Certainly the deed of settlement (discussed at [11] of the joint judgment) is closely associated with the parliamentary processes it contemplates and recites that it is effectively identifiable with the bill prepared for introduction into the House. Tribunal discussion of either would infringe the policy of art 9 [of the Bill of Rights].

[154] On the other hand, had the respondents possessed authority to represent Ngā Wairiki, their submission that on an application of Treaty principle Ngā Wairiki should now be recognised as a distinct iwi and provision made for it in a s 8HC recommendation, would be focused upon the proper function not of Parliament but of the Tribunal. The fortuity that an extra-statutory process and a bill to give it effect are inconsistent with such a remedy is, in my opinion, beside the point. Of course Parliament might have chosen

to enact the bill in its present form and so terminate the Tribunal proceeding. But a further option for it to consider would have been to await whatever further information fell from the Tribunal, which it might have wished to take into account.

[155] Section 5 of the Interpretation Act 1999 requires the court to consider text and purpose. Section 6(6) of the Treaty of Waitangi Act does not say it may be used to stop the agreed statutory process. It does no more than its text states: it concerns freedom of parliamentary speech and prevents the Tribunal from examining a bill; not the conduct that preceded it.

[156] Since the text supports the respondents, if the Crown's argument is to be accepted the text must be read up, according to some inconsistent purpose, to capture what its plain language does not cover.

[157] The argument for doing so is that the courts of New Zealand would infringe principles of comity with Parliament by presuming to examine conduct that preceded a bill with overlapping content.

[158] But art 9 of the Bill of Rights has no greater application here than is provided by s 6(6). It is the very purpose of the Treaty of Waitangi Act to subject to the jurisdiction of the Tribunal all conduct of the Crown both as Executive and as Legislature, even including Acts of Parliament, other than what falls within the language of the s 6(6) exception. ...

...

[161] It is contrary to settled principles of Crown dealing with indigenous peoples for legislation to be read up against them and their interests. Parliament has chosen to limit the constraint on the Tribunal's jurisdiction only to specific interference with its own processes; apart from that the Tribunal is empowered to examine all prior conduct. There is no reason to make any assumption to the contrary.

[162] Since Parliament has authorised the Tribunal to review statutes it must a fortiori countenance review of all Legislative and Executive conduct short of the bills referred to in s 6(6).

[163] In considering purpose there is need for comparative examination. While there is good reason for it, it is the case that New Zealand courts are now alone in the free world in not claiming the power to set aside legislation as unconstitutional. To a significant extent the United Kingdom and Israel have left that category. By not claiming such a power the New Zealand courts recognise that such an exceptional regime has proved broadly satisfactory for this small community. But to withdraw from reviewing conduct antedating introduction of the bill would take us even further from what elsewhere is considered necessary to protect the constitutional rights from the very kind of loss in this case to which, since Mr McLean, Māori have been vulnerable.

[164] Elsewhere there are effective protections against and remedies for expropriation. In Italy the Constitutional Court has

recently applied the principle of equality in order to reject Prime Minister Berlusconi's claim to be the only citizen exempt from the criminal law: Judgment no 262 of 2009 19 October 2009. It is inconsistent with New Zealand jurisprudence to apply that principle in reverse: that while other New Zealanders can come to the ordinary courts to vindicate their property rights, Māori who received a statutory protection for theirs by ss 8HA – 8HI will be prevented from enforcing them if a backbencher happens to have obtained a ballot permitting presentation of an inconsistent bill.

[165] Since art 1 of the Bill of Rights of 1688, the law has excluded the Executive from overriding vested legal rights. It is one thing for Parliament to be able to do so, but to permit the Executive to revoke a legal right of access to the s 8HA – 8HI procedures is another thing again. Whatever the construction of s 6(6) before the enactment of ss 8A – 8H and 8HA – 8HI, Parliament has come nowhere near saying that the clawback they guarantee can be stopped in its tracks as the Crown proposes.

[166] Section 6 of the Interpretation Act requires the courts to construe legislation in the light of changing circumstances. One can imagine the reaction of the plaintiffs in the *Lands* and *Forests* cases if during the negotiations the Crown had said “You realise that we can disapply the whole scheme of ss 8A – 8H and 8HA – 8HI by deciding to lodge an inconsistent bill in the House”. Any such suggestion would have run foul of the “honour of the Crown”. It still does.

...

[170] It is however a wholly different matter to assert that the Executive by the extra-statutory process is able, prior to any enactment of legislation: (a) to override a statutory Tribunal hearing, in which it participated throughout, and (b) to brush aside the right that could result from the hearing, by the presentation of an inconsistent bill.

[171] The Court may not seek to restrain the presentation of a bill to Parliament. But as MacKenzie J correctly held, it can and will resist attempts to restrain access to judicial bodies to which there is a legal right of access. In this case the bodies are the Tribunal, at least in clawback cases, and the courts.

...

[175] I do not read subs (6) as inhibiting the Tribunal from pursuing its hearing for the following reasons. First, in terms of s 5 of the Interpretation Act there is lacking the clear language that would be required to bring about such result (*R v Secretary of State for the Home Department, ex parte Simms* [2000] 2 AC 115 (HL)). Secondly, s 6(6) is to be read against later developments, among them that the parties to the settlements could never have contemplated that the Crown could easily escape the fetters of ss 8A – 8H and 8HA – 8HI hammered out in the constitutional settlements (s 6 Interpretation Act). Thirdly it is in my opinion inconceivable that such purpose could properly be attributed to a New Zealand Parliament of the 21st century (see ss 5 and 6 of the Interpretation Act).

15. The claimants acknowledge that aspects of Baragwanath J’s reasoning turned on the clawback regime for SOE and CFL land. But not all of it. Significantly, Baragwanath J’s identification of the ‘plain meaning’ of s 6(6), his separation of powers reasoning, and his reasoning based on the constitutional principle that legislation conferring rights on indigenous peoples should not be read up against them and their interests, are all independent of the reasoning that relates to the clawback regime.
16. In addition to Baragwanath J’s judgment in *Mair*, the claimants submit that the narrow approach they advance for s 6(6) (see para 8.1 above) is supported by UNDRIP, which relevantly affirms rights to effective remedies in articles 8(2)(a), 11(2) and 40, which respectively provide:

States shall provide effective mechanisms for prevention of, and redress for: (a) Any action which has the aim or effect of depriving them of their integrity as distinct peoples, or of their cultural values or ethnic identities...

States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs.

Indigenous peoples have the right to access to and prompt decision through just and fair procedures for the resolution of conflicts and disputes with States or other parties, as well as to effective remedies for all infringements of their individual and collective rights. Such a decision shall give due consideration to the customs, traditions, rules and legal systems of the indigenous peoples concerned and international human rights.
17. These UNDRIP rights provide a further constitutional backdrop against which s 6(6) needs to be applied, and relevantly serve as further pointers against a ‘reading up’ of s 6(6) in the manner the Crown has suggested in paras 17-21 of its memorandum of 9 February 2017 (#3.2.56).
18. Finally the claimants note that the problems they have identified in paras 5-6 above in relation to “discharged” are equally relevant to s 6(6).

D. Consequential observations in relation to reporting on Stage 2

19. Before concluding this memorandum, the claimants wish to raise a wider issue of concern to them. It relates to the speed with which the Wai 2358 inquiry is presently progressing. The Crown noted in para 33 of its memorandum of 9 February 2017 (#3.2.56) the questionable utility of inquiring into outdated Crown policy. The claimants draw attention to this reasonable Crown observation, as one which is relevant to the timely progression of, and Tribunal reporting on, Stage 2 of this inquiry.

20. To do justice to the issues that have been raised by the claimants and interested parties in the Stage 2 evidence that has been filed and part-heard, the claimants anticipate that the Tribunal's Stage 2 report will not address *Next Steps* in a vacuum. In particular, the claimants anticipate the Tribunal's report will have wider utility through its inclusion of analysis – perhaps in separate chapters preceding a chapter on *Next Steps* – on the status quo (eg, the current state of degradation of freshwater bodies, and Crown laws/policies/practices contributing to that state); and on what a Treaty-consistent legal/policy framework for freshwater would look like (eg, a 'greenfields' analysis and identification of what, in positive terms, a Treaty-consistent framework needs to address, including any minimum or Treaty 'non-negotiable' Māori rights and interests). A Stage 2 report that analyses *Next Steps* in that context will have utility for the claimants, interested parties, the Crown and the wider public, irrespective of the age of the *Next Steps* consultation paper as at the date that report is released.

Dated: 22 March 2017



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