OFFICIAL

Wai 2665, #2.5.11
Wai 2753, #2.5.6
Wai 2730, #2.5.9

WAITANGI TRIBUNAL

Wai 2665
Wai 2753
Wai 2730

CONCERNING	the Treaty of Waitangi Act 1975
AND	applications for an urgent hearing by Patrick Nicholas and others

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DECISION
ON APPLICATIONS FOR AN URGENT HEARING

9 November 2018

Introduction

1. We have been appointed to determine a number of applications seeking an urgent hearing before the Tribunal concerning the Pare Hauraki Collective Redress Deed, Marutūāhu Collective Redress Deed and some aspects of the individual Hauraki iwi deeds of settlement. This decision determines the Wai 2665, Wai 2730 and Wai 2753 applications.

2. These applications are brought by the same claimant, Patrick Nicholas, although he is joined by Riki Hona and Roimata Nicholas as co-claimants in the Wai 2730 application. Each application is framed as raising different issues, however, they all contain substantively similar allegations about the relative rights of Hauraki iwi within Tauranga Moana as provided for under the proposed settlement redress.

3. The Tribunal's *Guide to Practice and Procedure* states:

> In deciding an urgency application, the Tribunal has a regard to a number of factors. Of particular importance is whether:
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> - 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.
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> Other factors that the Tribunal may consider include whether:
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> - 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.
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> 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.

4. At present, we are only considering the applications for urgency. We are not considering the substantive merits of these claims. It is only if urgency is granted, that this Panel will proceed to hear the substantive claims (Wai 2665, #2.5.9). As the Tribunal has noted on several occasions, the threshold to obtain an urgent hearing is necessarily high. The implications of granting urgent hearings are serious, including the rescheduling of the Tribunal's hearing calendar and the withdrawal of resources from those Tribunal inquiries already underway. With this in mind, we consider each application below.

Summary of applications

Wai 2665

5. This application is brought by Mr Nicholas on behalf of himself, and concerns the Crown's overlapping claims policy (Wai 2665, #1.1.1). The application focuses on allegations that the Crown has failed to properly consider whakapapa when applying their policy to

Tauranga and Hauraki overlapping interests. Mr Nicholas alleges that the Crown has misinterpreted the Tribunal's *Te Raupata o Tauranga Moana: Report on the Tauranga Confiscation Claims* (the Tauranga Report) when deciding that Marutūāhu have customary interests in Tauranga Moana, when these interests derive from whakapapa links to Ngāti Ranginui and Waitaha.

6. While the Crown did not file a substantive response to this application, the applicant did file additional submissions (Wai 2665, #1.1.1(a)), detailing further allegations. These included alleged issues with the application of the overlapping claims policy within the Hauraki Collective between Ngāti Maru and Ngāti Tamaterā; and Ngāti Rāhiri Tumutumu, Ngāti Tara Tokanui and Ngāti Porou ki Hauraki. The applicant also notes the allegations contained in the urgency application filed by Ngāti Huarere concerning the Hauraki Collective's mandate to negotiate the settlement of those claims. The applicant challenges the offer of the Athenree Forest to Te Patukirikiri and Ngāi Tai ki Tāmaki, whom he alleges have no customary interest in the forest. With respect to Te Patukirikiri the applicant notes the seeming disparity between their size and their settlement offer, when compared to Ngāti Porou ki Hauraki.

7. The applicant asserts that the Crown breached the Treaty of Waitangi and seeks a number of Tribunal recommendations, including that the Crown:

   (a) develop an overlapping claims policy consistent with whakapapa;

   (b) develop a policy consistent with tikanga;

   (c) recognise all mana whenua of Hauraki;

   (d) cease misinterpreting and misapplying the Tauranga Report; and

   (e) remove all Tauranga Moana lands from the Pare Hauraki Collective Redress Deed.

8. Mr Nicholas also refers throughout the application to a meeting between himself and Office of Treaty Settlement (OTS) officials. He alleges that the hui determined that the Crown had misinterpreted and misapplied the findings in the Tauranga Report.

Wai 2730

9. This application is brought by Mr Nicholas, Riki Hona and Roimata Nicholas on behalf of Ngāti Ranginui and Waitaha of the Te Puna Katikati area (Wai 2730, #1.1.1 and #3.1.2). As with the Wai 2665 application, these applicants raise concerns over the way the Crown has interpreted whakapapa. Again, the applicants allege that the Crown has appropriated Ngāti Ranginui whakapapa and misinterpreted the Tribunal's Tauranga Report to support the claims of Hauraki iwi in the Tauranga Moana region, specifically with respect to the Te Puna Katikati area. The applicants allege that Hauraki iwi rely on descent from intermarriage between Ngāti Rāhiri Tumutumu and Ngāti Ranginui to provide customary interests where they do not exist.

10. The applicants again make a number of general submissions on the overlapping claims policy, this time also including the actions of the Māori Land Court and the Waitangi Tribunal. The applicants submit the overlapping claims policy fails to develop or use a methodology that accurately determines tribal interests, which allows iwi to access redress in rohe beyond their legitimate area of interest. In addition, the applicants allege that the policy allows Māori to claim as individuals, rather than iwi, which is at the heart

of the current overlapping claim issues. The policy is interested in individual interests, rather than tribal ownership. The applicants make extensive submissions on the evolution of the Crown's overlapping claims policy from the Crown's early native land policies and the mechanisms of the Māori Land Court (Wai 2665, #3.1.2). The applicants allege that this has allowed for the current situation where interests derived from intermarriage are recognised by the Crown, which does not follow traditional custom. Were a tikanga process to be followed, the applicants allege that there would be no need for an overlapping claims policy, as iwi-based interests would clearly determine who should receive redress within specific rohe.

11. The applicants make a further submission that the Crown is in breach of s 6(e) of the Resource Management Act 1991, with respect to the relationship of Māori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga.

12. The applicants seek the same recommendations as those detailed at [7] above.

13. The Crown denies that it has supported or defended the use of Ngāti Ranginui whakapapa by another iwi. Crown counsel submits that the interests of Hauraki iwi in the Te Puna and Katikati land blocks were assessed taking into account the findings of the Tauranga Report, and additional research 'carried out by historians employed and contracted by the Office of Treaty Settlements based on the evidence cited in the 2004 Tauranga Moana report and other sources' (Wai 2730, #3.1.9 at [69]).

14. In reply, the applicants reiterate their earlier allegations – adding that the Crown has misled Parliament and the public with respect to them. They submit that the Crown's overlapping claims policy amounts to raupatu – they note the offer to Hauraki of the Athenree Forest as an example (Wai 2730, #3.1.10). They reiterate their allegations concerning whakapapa, tikanga, and the Resource Management Act 1991. In reply to the Crown's submissions regarding how the interests of Hauraki iwi in Te Puna and Katikati land blocks were considered, the applicants refer to Mr Nicholas's meeting with OTS officials, where he asserts that agreement was reached that the interests were incorrectly determined.

Wai 2753

15. This application is brought by Mr Nicholas on behalf of himself (Wai 2753, #1.1.1). It focuses on the actions of the Minister for Treaty of Waitangi Negotiations, the Honourable Andrew Little, in relation to the Hauraki settlement negotiations. The applicant alleges that the Minister has deliberately misled Parliament and the public about the Tribunal's Tauranga Report and the Pare Hauraki Collective Redress Deed. The applicant believes the iwi of Tauranga Moana would inevitably prevail if the overlapping claims issues were resolved in accordance with tikanga, but alleges that the Minister is biased towards the interests of the iwi of Hauraki. The applicant's earlier allegations concerning the Crown's misunderstanding of tribal interests, whakapapa and tikanga are, in this application, directed towards the Minister.

16. The applicant alleges that the actions of the Minister have and will continue to prejudicially affect him by having his rights as tangata whenua reduced and given to the iwi of Hauraki.

17. Mr Nicholas again makes mention of his hui with OTS officials and makes similar statements to those at [8] above.

18. The Crown opposes the application and denies the allegations regarding the actions of the Minister. Counsel submit that the applicant has failed to provide any evidence to substantiate his allegations; and to establish what significant and irreversible prejudice he is suffering (Wai 2753, #3.1.6). The Crown asserts that this application does not meet the threshold required for urgency.

19. In reply, Mr Nicholas makes further allegations of untoward behaviour from the Minister, including misleading the Tribunal (Wai 2753, #3.1.8). Again, the applicant reiterates his allegations that the Minister is responsible for the overlapping claims policy and its application, which in this case fails to recognise tikanga and supports individual interests, similar to those discussed at [11] above. He again asserts there would be no need for an overlapping claims policy were a tikanga approach developed for settlement negotiations. Mr Nicholas also again refers to the Ngāti Huarere urgency application noted at [6] above.

20. Mr Nicholas disputes the Crown's submission that this is not an exceptional case referring to the 'covert and inhouse' process used to negotiate this settlement (Wai 2753, #3.1.8 at [9]).

21. In addition to the recommendations sought at [7] above, the applicant requests that Minister Little resign.

Discussion

22. When considering these applications, we are not determining the relative interests of iwi within the contested area. Instead, we are considering whether these applications have sufficiently addressed the Tribunal's criteria for urgency to warrant a reordering of the current work programme.

23. At the heart of each application is a desire for the settlement negotiations to cease and for an alternate process to be developed to manage overlapping claim issues. In making their case the applicants have made numerous allegations against the Crown. However, the applicants have failed to clearly define how each of these allegations has led to specific prejudice.

24. The applicants have taken a wholesale approach to the allegations, reliant on breadth in lieu of clarity; making a variety of disparate allegations against the Minister, Crown officials, and Crown policy, and alleging that these have caused or will cause prejudice to them. These allegations are prolix, and at times, unintelligible. The applicants have not demonstrated how any particular actions of the Crown have caused significant and irreversible prejudice to them.

25. The applicants assert that the entire overlapping claims policy is flawed. They say it is grounded in the individual, rather than iwi, and in historical Crown policies akin to raupatu rather than Māori tikanga. This line of argument appears to in part refer to the policies and procedures of the Waitangi Tribunal, particularly with respect to the concept of individual claimants. Such allegations are not relevant to the application seeking an urgent hearing into the actions of the Crown. We also note that the Crown is not entering into settlements with individuals in the present case. The Tribunal has previously upheld

in principle the Crown's policy to negotiate settlements with large natural groupings and to undertake an overlapping claims process where competing interests are evident.

26. Mr Nicholas also asks us to consider the actions of Minister Little within the Hauraki settlement negotiations and the Crown within these urgent Tribunal proceedings. He has made broad allegations of untoward, misleading and biased behaviour. Even on the limited information before us we do not consider there is any merit to those allegations. Any allegations of such behaviour by Ministers and Crown officials are serious. They must be grounded in evidence. This is simply not the case with respect to these applications.

Decision

27. For the reasons set out above these applications for urgent hearing are dismissed.

The Registrar is to send a copy of this direction to counsel for the applicants, Crown counsel and those on the notification lists for:

- Wai 2665, the Hauraki Collective Deed of Settlement (Nicholas) claim;
- Wai 2730, the Ngāti Ranginui Whakapapa claim; and
- Wai 2753, the Pare Hauraki Collective Settlement Process (Nicholas) claim.

DATED this 9th day of November 2018

Judge M P Armstrong
Presiding Officer
WAITANGI TRIBUNAL

Professor Rawinia Higgins
Tribunal Member
WAITANGI TRIBUNAL

David Cochrane
Tribunal Member
WAITANGI TRIBUNAL