KI MUA I TE AROARO O TE RŌPŪ WHAKAMANA I TE TIRITI O WAITANGI

BEFORE THE WAITANGI TRIBUNAL

WAI 900
WAI 814
WAI 87
WAI 558
Wai 864
Wai 1781
Wai 2160

IN THE MATTER OF	**the Treaty of Waitangi Act 1975**
AND	
IN THE MATTER OF	**claims participating in the North-Eastern Bay of Plenty District (Wai 1750) inquiry that make claims to the Mangatū Crown Forest Licensed Land in the East Coast inquiry district**

MEMORANDUM OF CROWN COUNSEL

21 Whiringa-ā-nuku | October 2024

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MAY IT PLEASE THE TRIBUNAL:

1. This memorandum responds to the Chairperson's memorandum-directions inviting submissions on the disclosures by Prue Kapua and Professor David Williams in relation to their appointment to the panel "to determine the applications for the above-mentioned claims' asserted interests in the Mangatū CFLL to be inquired into".[1]

2. These submissions are filed in accordance with the extension granted by the Tribunal.[2]

3. The Crown wishes to record that it addresses the disclosure matters below subject to any submissions that it would seek to make on the scope of the Tribunal's jurisdiction to inquire into the claims listed in the memorandum-directions.[3] The Crown anticipates that once established the panel will address and determine jurisdictional and any other relevant procedural matters in the interlocutory phases of any inquiry.[4]

Legal principles

4. The issue raised by the disclosures is whether any of the individual matters disclosed give rise to a situation of apparent bias.[5] The common law test for apparent bias is whether a fair-minded lay observer might reasonably apprehend that the Tribunal might not bring an impartial mind to the resolution of questions which the panel is required to decide.[6] The

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1 Wai 1750, #2.6.15 Memorandum-directions of Chief Judge Fox, dated 11 October 2024, at [9]–[10].

2 Memorandum of Crown counsel seeking extension, dated 17 October 2024 and email of the registrar dated 21 October 2024 recording that the extension sought have been granted.

3 The Whakatōhea Claims Settlement Act 2024 fully settles the historical claims of Wai 87, Wai 1781, and Wai 2160, and settles the Wai 558 and Wai 864 historical claims insofar as they relate to Whakatōhea. The Act preserves the Tribunal's jurisdiction to complete its inquiry and reporting on the Wai 1750 district inquiry, and to make findings but not recommendations on the historical claims. See sections 14 and 15 of the Act.

4 Noting the Crown's position that the Tribunal is able to inquire into claims to the Mangatū blocks but is *functus officio* in relation to the remedy of making recommendations for the return of that land subject to the outcome of live litigation involving appeals from judicial review proceedings concerning the Tribunal's interim recommendations: Wai 1750, #3.2.8 Memorandum of Crown counsel, dated 30 April 2024 at [2] and [10]–[15].

5 The rule against bias, whether actual or apparent, stems from the need to preserve the requirement that justice should both be done and be seen to be done, and the importance of the principle that the Tribunal should be both independent and impartial: *Saxmere Company Ltd v Wool Board Disestablishment Company Ltd* [2009] NZSC 72, [2010] 1 NZLR 35 at [3].

6 *Saxmere Company Ltd v Wool Board Disestablishment Company Ltd*, above n 5, at [3]–[4], [37], [89], and [127].

question is one of possibility, not probability.[7] The lay observer standard is "a reminder to judges … that the standard that is applied is not simply the reaction of the judges to a particular complaint [of apparent bias]".[8]

5. The two steps for ascertaining apparent bias are:[9]

   5.1 to identify the circumstances that might lead the decision-maker to decide a case other than on its merits; and

   5.2 to articulate "the logical connection between the matter and the feared deviation from the course of deciding the case on its merits".

6. Apparent bias may arise where a decision-maker has some personal or professional relationship with a party or witness, or a prejudice against or preference towards a particular party or result, or a predisposition leading to a determination of the issues in a certain way.[10] The test is applicable to tribunals exercising a judicial function,[11] for which complete impartiality is to be expected.[12] The test is also reflected in the High Court recusal guidelines.[13]

7. The application of rules against bias are at their strictest when applied to courts and judicial decision-making bodies.[14] In this respect, it is relevant context that the Tribunal's jurisdiction under s 8HB of the Treaty of

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7 *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 (HCA) at [7].

8 *Saxmere Company Ltd v Wool Board Disestablishment Company Ltd*, above n 5, at [6].

9 *Saxmere Company Ltd v Wool Board Disestablishment Company Ltd*, above n 5, at [4], adopting *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 (HCA) at [9].

10 Philip Joseph *Constitutional and Administrative Law in New Zealand* (5th ed, Thomson Reuters, Wellington, 2021) at [25.5.4(5)]. See also the four-part categorisation by Deane J in *Webb v The Queen* (1994) 181 CLR 41 (HCA) at 74.

11 For an example of application of the test, see Wai 45, #2.566 at [13]–[20].

12 See Graham Taylor *Judicial Review: A New Zealand Perspective* (4th ed, LexisNexis NZ Ltd, Wellington, 2018) at [13.57]. In the same paragraph, it is noted that the apparent bias of one member can impact the decision of a multi-member authority. See also the Tribunal's *Guide to Practice and Procedure* (August 2023) at [3.4] which states that the Tribunal follows the rules of natural justice "to ensure that all parties and all other persons entitled to appear before it, receive a fair hearing".

13 High Court Recusal Guidelines, issued under s 171 of the Senior Courts Act 2016 <High Court recusal guidelines — Courts of New Zealand (courtsofnz.govt.nz)>.

14 *Greenpeace of New Zealand v Charities Registration Board* [2020] NZHC 1999 at [160].

Waitangi Act 1975 involves decision-making which is adjudicatory in nature.[15]

Disclosure by Ms Kapua—engagement for Te Aitanga a Māhaki

8. The memorandum-directions state that Ms Kapua acted in the past for Te Aitanga a Māhaki and the late John Ruru, the named claimant for the Wai 274 and Wai 283 claims. Ms Kapua advises that she did not act for Mr Ruru "in his pursuit of his claims interests in the Mangatū CFLL", and that "it has been years since she acted for these parties".[16]

9. Ms Kapua acted for Mr Ruru on behalf of his claims for Te Aitanga a Māhaki during the Wai 814 Tūranga district inquiry. Ms Kapua's engagement included filing the consolidated Wai 274 and Wai 283 amended statement of claim containing allegations concerning the CFL lands,[17] briefing the evidence of Mr Ruru for Te Aitanga a Māhaki,[18] and filing submissions opening and closing Te Aitanga a Māhaki's case in December 2001 and June 2002.[19] Ms Kapua was not involved in the subsequent Tribunal proceedings concerning applications for binding recommendations.[20]

10. In considering whether apparent bias arises in cases where a Judge has represented a party in proceedings before them, the Courts look at whether the issues arising in the proceeding are connected to those involved in the Judge's former instructions, and whether the Judge might be perceived as remembering even subconsciously something about their former client's instructions that would affect their impartiality in evaluating the issues in the present case.[21] If that factor is present, the

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15 *Haronga v Waitangi Tribunal* [2011] NZSC 53, [2012] 2 NZLR 53 at [88] per Elias CJ, Blanchard, Tipping and McGrath JJ.

16 Wai 1750, #2.6.15 at [11].

17 Wai 274, #1.1(b) Second Amended Statement of Claim at 81 "J Mangatu State Forest". At [133] the claim states that the Mangatū lands are the "ancestral domain of Te Aitanga a Mahaki". See also *Mangatū Remedies Report 2021* at 22–24 which discusses the consolidation of the two claims prior to hearing in the Tūranga district inquiry.

18 See for example Wai 814, #A55 Brief of Evidence of John Ruru introducing Te Aitanga a Mahaki, undated at [22] and [33] and Appendix B "Land Blocks – Approximate boundary of Te Aitanga-a-Māhaki Rohe".

19 See Wai 814, #B15 Outline of Opening Submissions, dated 10 December 2001 and Wai 814, #H1 Closing submissions for Te Aitanga a Mahaki, dated 24 June 2002.

20 See Wai 274, #1.1(c); Wai 283, #1.1(c) Supplementary First Amendment to the Statements of Claim of TAMA in respect of Remedies, dated 9 March 2011; Wai 274, #1.1(d); Wai 283, #1.1(d) Supplementary Second Amendment to the Statements of Claim of TAMA in respect of Remedies, dated 31 January 2012.

21 *Reekers v R* [2011] NZCA 125 at [14], applying *Erris Promotions Ltd v Commissioner of Inland Revenue* (2003) 16 PRNZ 1014 (CA) at [33]. The Court of Appeal discussed this principle as applicable in the civil

Courts have placed little weight on the passage of time and whether or not the Judge remembers anything about their former instructions as curing a perceived lack of impartiality.[22]

11. The High Court recusal guidelines reflect these principles. Under the heading "Recusal arising from legal practice", the guidelines state that a judge should recuse herself or himself if they served as a legal advisor in respect of the matter in issue when in practice.[23]

12. Here, the panel has been appointed "to determine the applications for the [groups participating in Wai 1750 inquiry] claims' asserted interests in the Mangatū CFLL to be inquired into".[24] Respectfully, the memorandum-directions are not entirely clear as to whether the panel would also be inquiring into claims by Te Aitanga a Māhaki regarding the Waipāoa CFL blocks, and whether the panel will inquire into claims concerning only the Waipāoa, and not Mangatū, blocks.[25] But the key point is that the panel would be inquiring into claims (insofar as the Tribunal has jurisdiction) involving asserted customary interests to the CFL lands. There is a connection between these issues—claims and asserted customary interests concerning the CFL lands—and Ms Kapua's previous engagement for Wai 274 and Wai 283, which involved claims and the asserted customary interests of Te Aitanga a Māhaki in the CFL lands. That connection would be strengthened if the panel were also inquiring into claims by Te Aitanga a Māhaki.

13. Consequently, applying the principles articulated by the Courts (see paragraphs 10 and 11 above), Ms Kapua's previous engagement for Te Aitanga a Māhaki could fairly be perceived as giving rise to a situation

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context.

22 *Reekers v R*, above n 21, at [14]: "… Harrison J's brief professional relationship with Mr Reekers occurred over 32 years ago and he remembers nothing about it. Nevertheless, this Court was influenced in *Erris* by a real danger that the Judge may be perceived as remembering even subconsciously something from Exicom's instructions which would affect his impartiality in the tax case".

23 High Court recusal guidelines, cl 3.1.

24 Wai 1750, #2.6.15 Memorandum-directions of Chief Judge Fox, dated 11 October 2024, at [9]–[10].

25 The cover page of the memorandum-directions refers to claims to the CFL lands "in the East Coast inquiry district", but also lists the Wai 814 inquiry district number in the list of Wai numbers, and appears to use "Mangatū CFLL" in relation to the Mangatū blocks, which are situated in the Tūranga inquiry district. The claims listed in [3] of the memorandum-directions also make claims to both the Waipāoa and Mangatū blocks (as summarised by the Crown in Wai 1750, #3.2.8 at [6]).

of apparent bias and warrants further consideration of recusal by Ms Kapua. The Crown does not raise this matter lightly and wishes to emphasise, again, that the apparent bias rule concerns the perception of partiality, rather than any allegation of actual bias. The Crown also raises this matter having in mind the adjudicatory nature of the Tribunal's decision-making in this context and the application of the rules about apparent bias, as discussed above in paragraph 7.

Disclosures by Professor Williams

First disclosure—Tribunal-commissioned tribal landscape report for Wai 1750 district inquiry

14. The memorandum-directions states that Professor Williams' report commissioned for the Wai 1750 district inquiry—*Tribal connections, settlement patterns and resource use in the North-Eastern Bay of Plenty prior to 1860*—mentions the CFL lands but makes no findings as to the hapū or iwi interests in those lands.[26]

15. Professor Williams was commissioned to examine the origins and settlement history of groups in the Wai 1750 inquiry district, how the groups have defined their respective rohe and interacted with groups inside and outside the district, resource use by the groups, and early contacts with Europeans prior to the 1860s.[27] The Crown accepts that Professor Williams does not make findings about customary interests in the CFL lands in his commissioned report or recently filed report summary.[28]

16. However, and with respect, the issue is less whether Professor Williams' commissioned report records explicit findings about hapū or iwi interests in the CFL lands, but whether his report and evidence could be taken as demonstrating that Professor Williams has formed a fixed opinion on, and would not approach with an open mind, issues that may be considered by the newly established panel of which he would be a member.[29] Given the

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26 Wai 1750, #2.6.15 at [12].

27 See Professor Williams' discussion of the commission on pages 11 to 15 of his report, Wai 1750, #A31.

28 David Williams *Tribal Connections, settlement patterns and resource use in the North-Eastern Bay of Plenty prior to 1860 Report Summary* (October 2024).

29 *Muir v Commissioner of Inland Revenue* [2007] NZCA 334, [2007] 3 NZLR 495 at [103]; Philip Joseph *Constitutional and Administrative Law in New Zealand* (4th ed, Thomson Reuters Wellington, 2014) at

focus of Professor Williams' commission and research, it seems possible that Professor Williams could be perceived to have reached a view about, for instance, the nature and extent of the customary interests of groups participating in the Wai 1750 district inquiry, and whether those interests extend to the CFL lands, even though it is not recorded as a finding in his report. The Crown also considers there is a material chance that a party could seek to have Professor Williams' commissioned report added to the record of inquiry for the newly established panel. This would put Professor Williams in the position of having to assess his own evidence as a member of the Tribunal.

17. The Crown raises these points so that Professor Williams may consider them and whether they raise a risk of apparent bias that warrants his recusal from the current panel. The Tribunal then may wish to record Professor Williams' consideration of this question in subsequent memorandum-directions.

Second disclosure—Legal opinion regarding Waerenga-a-Hika

18. Professor Williams has advised that this work was not related to any interests in the CFL lands.[30]

19. The question of legal principle that arises here is whether issues involved in Professor Williams' previous engagement would have any connection with issues before this panel. The panel has been established to inquire into claims concerning the CFL lands (insofar as they are within the Tribunal's jurisdiction) and may, in due course, come to consider applications for remedies and whether any claims determined to be well-founded relate to the CFL lands. In this respect, the Crown notes that the Wai 814 remedies Tribunal found that the events at Waerenga-a-Hika were relevant to the determination of applications for interim recommendations in respect of the Mangatū blocks (although the Crown has challenged that position on review).[31] As noted, it is not clear if this panel has been established to inquire into the claims to the Waipāoa blocks

1076, adopted in *R v Gan* [2016] NZHC 2031 at [8].

30 Wai 1750, #2.6.15 at [13].

31 Waitangi Tribunal *The Mangatū Remedies Report* (Wai 814, 2021) at 96–99.

of groups that participated in the Wai 814 inquiry.[32] However the Crown records that to date various Tribunals, including in the adjacent Wai 814 inquiry, have taken a broad approach to what claims and prejudice "relate to" CFL lands, so that events beyond (sometimes well beyond) the blocks concerned are taken into account in considering whether to transfer CFL lands to Māori ownership.

20. The Crown wishes to bring this matter to Professor Williams' attention so that he may consider whether it may give rise to any question of apparent bias if similar issues were to be considered by this panel at a future stage of its inquiry.

Third disclosure—Expert evidence in* Re Edwards *proceedings

21. The Crown does not perceive any issue of apparent bias arises in relation to this disclosure. Professor Williams' expert evidence in the *Re Edwards* proceedings does not appear to have any sufficiently close connection to the issues that may be before the current panel. Therefore, no potential issue of apparent predetermination (as discussed in paragraph 16 above) appears to arise.

21 Whiringa-ā-nuku | October 2024

C Linkhorn / D Hunt
Counsel for the Crown

TO: The Registrar, Waitangi Tribunal

AND TO: Claimant Counsel

[32] Claimants for Te Aitanga a Māhaki and Mangatū Incorporation and Ngā Uri o Tamanui have previously submitted that they would file "applications" concerning the Waipāoa blocks (Wai 1750, #3.2.6 at [66] and Wai 1750, #3.2.7 at [48]). The Crown is not aware if any such applications have been filed, noting that the Crown has recorded its assumption that these "applications" are requests for an inquiry into the claims, given that no claims that relate to CFL lands over parts of the former Waipāoa blocks have yet been the subject of a Tribunal inquiry (see Wai 1750, #3.2.8 at [17]).