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BEFORE THE WAITANGI TRIBUNAL

WAI 2357
WAI 2358

IN THE MATTER OF The Treaty of Waitangi Act 1975

AND

IN THE MATTER OF Claim by SIR GRAHAM LATIMER AND OTHERS in respect of Māori proprietal interests and rights to access and use of water and geothermal resources

CROWN MEMORANDUM IN RESPONSE TO APPLICATIONS FOR URGENT HEARING

21 March 2012

RECEIVED
Waitangi Tribunal
21 Mar 2012
Ministry of Justice
WELLINGTON

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MAY IT PLEASE THE TRIBUNAL:

1. The Crown seeks leave of the Tribunal to file this memorandum.

2. The reason for seeking leave is that since the hearing, claimants have filed (and obtained leave to do so) various statements relevant to the Wai 2357 and Wai 2358 urgency applications. Obviously the Crown has not had an opportunity to respond. In particular, the Crown wishes to respond to the Aurere Law memorandum of 20 March 2012 and the memorandum for Ngāti Haka Patuheuheu dated 16 March 2012.

Memorandum of Counsel on hearing plan, Aurere Law, 20 March 2012

3. In their 20 March memorandum counsel for a range of claimants set out aspects of opposition to the hearing plan produced by the NZMC claimants, (#3.1.50). That first plan was intended to reassure the Tribunal that a full inquiry into, and report on, iwi-hapū-whānau rights in water (rivers, streams, aquifers, lakes, wetlands, geothermal) could be completed by mid-year.

4. Aurere Law note that as a law firm they represent a number of claimants with divergent interests, (paragraph 7). They seek that those claimants participate in any inquiry and, further, that the right to cross-examine "should not and cannot be denied to those whose rights might foreseeably be affected by any finding or recommendation of the Tribunal", (paragraph 10).

5. Aurere Law go on to note that limitations should not be imposed by pressure of time, (paragraph 12); they also say the hearing process should be managed so that counsel can be funded, ie no watching briefs, (paragraph 14); a QC or "someone of that ilk" should be appointed and presumably funded, (paragraph 20).

Crown response

Timing

6. The Crown has already set out the basis of its reasoning for opposing the scheduling of an urgent inquiry into the Wai 2358 claim (and what might be left of the Wai 2357 claim).

7. The Crown certainly agrees with the Aurere Law memorandum that there are difficulties posed by the hearing plan proposed by the NZMC, namely limitations as to hearing rights of iwi-hapū-whānau through NZMC and other confirmed legal representation.

8. The Aurere Law memorandum serves to further emphasise the complexity of any inquiry into property rights, and the length of time it would take, consistent with the Crown's submission at hearing that the time-frame proposed by the NZMC claimants is not a realistic one.

9. The parallels with the Tribunal's foreshore and seabed inquiry made in the Aurere Law memorandum are not valid. That was not a rights investigation inquiry, rather it was an inquiry into policy underpinning legislation which set up a framework for rights inquiry (which policy the Tribunal found in breach of Treaty principles). That is why the Tribunal was able to hear, consider and report on the claim in a relatively short period of time.

10. Rather, property rights definition, particularly if calibrated to hapū and whānau level (and many of the claimants are beneficiaries of land trusts and land block owners) and taking into account catchments, rivers, streams, aquifers, lakes, wetlands and geothermal interests and also taking into account where redress is sought in company shares (location of hydro dams; geothermal power stations) would be extensive and more akin to the (lengthy) experience of the Canadian courts' inquiries into customary rights and interests (see *Delgamuuk v British Columbia* [1997] 3 SC R 1010).

11. The nature of the NZMC application may also trigger a debate over pan-Māori allocations ("benefit for all Maori" (#33.1.53, NZMC Mandate, page 5)) and localised hapū and other claims to entitlement to shares in power generating companies (a point touched on in the ILG submission to the Tribunal).

Nature of inquiry

12. The Crown also takes this opportunity to respond to a point which was made in Sir Edward Taihakurei Durie's oral submission to the Tribunal, in lieu of a reply. The submission is that the Tribunal's contribution would be to assist in the design of a water ownership/management regime

accommodating Māori rights and interests. There is reference to a "framework by which all claims can be assessed eventually" (#3.1.53, page 6); there is then to be "Crown-Maori dialogue" (#3.1.53, page 2). This was a change in emphasis from the NZMC's primary submission that the task of the Tribunal is one of "rights definition", "detailed inquiry into and determination of their rights and interests in fresh water and geothermal resource", (#3.1.25, paragraph 3).

13. The claimants seem to the Crown to be inviting the Tribunal to formulate a solution to a complex and multidimensional policy issue, but through an adversarial process of inquiry (see the proposals of examination and cross-examination for example).

14. In the Crown's view the proper course is for the Crown to work with iwi-Maori (and others) to design an improved regime. All relevant stakeholders and the Treaty partners need to be involved. That is what the evidence set out in Mr Beatson's affidavit indicates is happening.

15. This connects with the points made by the Crown in its written and oral submissions at hearing that the Crown already understands that there are distinctive Māori rights and interests, recognised by the Tribunal, and the Tribunal has emphasised the need to engage with iwi-Māori (thus the reference to earlier Tribunal findings in oral submission and to the Wai 262 report); that this engagement is in train; that further and wider engagement is planned; and that it would be counterproductive for the Tribunal to halt that engagement, as requested by the claimants, to conduct an inquiry of the kind proposed by the claimants.

Ngāti Haka Patuheuheu memorandum, 15 March 2012

River Forum

16. The claimants support an urgent inquiry into claims relating to the Rangitaiki River and before any share sales might occur.

17. The Crown repeats its central submission that share sales do not compromise the claimants' claims to rights in water. A significant ministerial commitment has been made to this effect.

18. Particular statements are, however, made about the Crown historical claims settlement process.

19. The claimants refer to the Ngāti Manawa and Ngāti Whare Claims Settlement Bill. This is currently before the House. The claimants say the Bill which sets up a Rangitaiki River Forum excludes Ngāti Haka Patuheuheu.

Crown response

20. The contention is not correct:

20.1 Other iwi with interests in the Rangitaiki River can join the Rangitaiki River Forum at a later date through their settlement legislation.

20.2 Until then the Rangitaiki River Forum must operate in an open and inclusive manner - so include and have regard to the interests of other iwi.

20.3 Ngati Haka Patuheuheu are covered by the mandate of Te Kotahi a Tuhoe.

20.4 Membership of the Forum is available to Ngai Tuhoe and could be provided for through their settlement legislation.

21 March 2012

Virginia Hardy
Crown Counsel

TO: The Registrar, Waitangi Tribunal
AND TO: The claimants and their counsel