

**IN THE WAITANGI TRIBUNAL**

**WAI 2374**

**IN THE MATTER OF** the Treaty of Waitangi Act 1975

**AND** a claim by Sir Graham Latimer on behalf of himself and the hapū of Te Paatu; Mr Haami Piripi on behalf of himself and the iwi of Te Rarawa; Mr David Potter and Mr Andre Paterson on behalf of themselves and hapū of Ngāti Rangitihī; Ms Michelle Marino and Mr Errol Churton for and on behalf of themselves and the descendants of Tāringa Kuri (Te Kaeaea); and Mr Russell Kemp on behalf of himself and the hapū, marae and whānau of Te Uri o Hau

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**ORAL SUBMISSIONS OF COUNSEL**

**15 November 2012**

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Waitangi Tribunal
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<b>15 Nov 2012</b>
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Ministry of Justice WELLINGTON
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Pacific Law Limited  
Barristers & Solicitors  
200 Willis Street  
PO Box 27400  
Marion Square  
Wellington 6141  
Tel: (04) 384 1304  
Fax: (04) 384 1404  
**Counsel Acting: Janet Mason**

**MAY IT PLEASE THE TRIBUNAL****INTRODUCTION**

1. These oral submissions are presented jointly on behalf of:
  - (a) Sir Graham Latimer on behalf of himself and the hapū of Te Paatu;
  - (b) Mr Haami Piripi on behalf of himself and the iwi of Te Rarawa;
  - (c) Mr David Potter and Mr Andre Paterson on behalf of themselves and hapū of Ngāti Rangitahi;
  - (d) Ms Michelle Marino and Mr Errol Churton for and on behalf of themselves and the descendants of Tāringa Kuri (Te Kaeaea); and
  - (e) Mr Russell Kemp on behalf of himself and the hapū, marae and whānau of Te Uri o Hau (“the Claimants”).
  
2. On 1 June 2012, Counsel filed a Statement of Claim (“the SoC”) and an application for an urgent hearing (“the Application”) on behalf of the Claimants in relation to the administration of legal aid in the Waitangi Tribunal jurisdiction (“the Latimer and Piripi Claim”).<sup>1</sup>
  
3. Particulars relating to each of the Claimants are set out in paragraphs 2 – 22 of the SoC filed on 1 June 2012.<sup>2</sup>
  
4. Numerous Memoranda and evidence have been filed by Counsel, the Crown and other interested parties to date. Various Memorandum-Directions have also been issued to date.
  
5. On 5 June 2012, Your Honour directed the Crown and interested parties to respond to the Latimer and Piripi Claim by 22 June 2012.<sup>3</sup>

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<sup>1</sup> Wai 2374, #1.1.1 and #3.1.1.

<sup>2</sup> Wai 2374, # 1.1.1.

6. On 22 June 2012, counsel for the Wai 2375 Claimants<sup>4</sup> filed a Memorandum supporting the Latimer and Piripi Claim. Counsel for the Wai 2375 Claimants also filed a separate Statement of Claim and an application for an urgent hearing regarding legal aid for Waitangi Tribunal claims (“the Wai 2375 Application”).<sup>5</sup>
7. Counsel for the Wai 2375 Claimants subsequently withdrew their application for urgency, without prejudice, given their continuing participation in the Wai 2358 Urgent National Fresh Water and Geothermal Resources Inquiry and consequent difficulties associated with finalising evidence.<sup>6</sup> On 16 July 2012, Your Honour subsequently dismissed the Wai 2375 Application by way of Memorandum-Directions dated 16 July 2012<sup>7</sup> without prejudice to the right of the claimants to file an application in future, if necessary.
8. Other parties have filed Memoranda seeking leave to participate in the Latimer and Piripi Claim proceedings as interested parties:
  - a. the New Zealand Maori Council (who advised, inter alia, that they supported the Latimer and Piripi Claim in principle);<sup>8</sup>
  - b. claimants for Wai 764;<sup>9</sup>
  - c. claimants for Wai 1147;<sup>10</sup> and
  - d. claimants for Wai 972.<sup>11</sup>

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<sup>3</sup> Wai 2374, 2.5.1.

<sup>4</sup> Te Rarua McClutchie-Morrell, Pouri Harris, Ani Taniwha, Justyne Tetana, Vivienne Taueki and William Taueki.

<sup>5</sup> Wai 2375, #1.1.1, and #3.1.1.

<sup>6</sup> Wai 2375, #3.1.5.

<sup>7</sup> Wai 2375, #2.5.2.

<sup>8</sup> Wai 2374, 3.1.7.

<sup>9</sup> Wai 2374, 3.1.3; Wai 764 claimant, represented by Peter Johnston, Jo-Ella Sarich, Eve Rongo, Rainey Collins.

<sup>10</sup> Wai 2374, #3.1.3; Wai 1147 claimant; represented by Peter Johnston, Jo-Ella Sarich, Eve Rongo, Rainey Collins.

<sup>11</sup> Wai 2374, #3.1.5; Wai 972 claimant, represented by BD Gilling and C J Duncan, Morrison Kent.

9. On 22 June 2012, Mr Ian Millard QC, counsel instructed on behalf of the Ministry of Justice, (“the Ministry”) filed submissions, together with accompanying affidavits, opposing the Latimer and Piripi Claim.<sup>12</sup>
10. Following a direction from Your Honour dated 2 July 2012, Counsel filed a Memorandum further addressing the urgency criteria on 9 July 2012.<sup>13</sup> Counsel also subsequently filed sworn Affidavits of Ms Michelle Marino,<sup>14</sup> Mr Haami Piripi,<sup>15</sup> Mr Russell Kemp,<sup>16</sup> and Mr David Potter.<sup>17</sup>
11. On 16<sup>th</sup> July 2012, Counsel for the Wai 2378 Claimants,<sup>18</sup> Mr David Stone, filed a Statement of Claim<sup>19</sup> and Application for Urgent Hearing.<sup>20</sup> A Memorandum of Counsel was also filed by Mr Stone supporting the Latimer and Piripi Claim.<sup>21</sup>
12. The Ministry was given another opportunity (together with interested parties) to file any further response to the Application, by 27 July 2012 and filed submissions, as well as accompanying affidavits, responding to the Latimer and Piripi Claim as well as to the Wai 2378 Application (“the 27 July Ministry Submissions”).<sup>22</sup>
13. The Claimants were provided with a right of response and accordingly on 3 August 2012, Counsel filed submissions in response<sup>23</sup> along with a second Affidavit of Ms Michelle Marino<sup>24</sup>.

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<sup>12</sup> Wai 2374, 3.1.7, #A1, # A2.

<sup>13</sup> Wai 2374, #3.1.10.

<sup>14</sup> Wai 2374, #A5.

<sup>15</sup> Wai 2374, #A3 -#A3(a).

<sup>16</sup> Wai 2374, #A4 -#A4(a).

<sup>17</sup> Wai 2374, #A6 -#A6(a).

<sup>18</sup> Apihaka Mack of Ngatiawa ki Kapiti, Diane Holloway of Ngai Tahu, and Gina Mahara of Ngati Te Wehi.

<sup>19</sup> An amended Statement of Claim was filed on 26 July 2012 and that is recorded as Wai 2378, #1.1.1.

<sup>20</sup> Wai 2378, #3.1.1.

<sup>21</sup> Wai 2378, #3.1.2 and Wai 2374, #3.1.14.

<sup>22</sup> Wai 2374, #3.1.5; #A7 -#A9.

<sup>23</sup> Wai 2374, #3.1.16.

<sup>24</sup> Wai 2374, #A10.

A second Affidavit of Haami Piripi was also subsequently filed.<sup>25</sup> No new issues were raised in Counsel's submissions, nor in the second Affidavits of both Ms Marino and Mr Piripi.

14. Notwithstanding this, Counsel for the Ministry proceeded to file a Second Affidavit of Ms Sarah Kalmakoff<sup>26</sup> and an Affidavit of Mr Peter Galvin.<sup>27</sup> Counsel objected to the placing of these Affidavits onto the Record of Inquiry,<sup>28</sup> however the Tribunal subsequently directed that the Affidavits be placed onto the Record of Inquiry.<sup>29</sup>
15. On 14 September 2012, Counsel for the Wai 2378 Claimants filed a Memorandum<sup>30</sup> advising, inter alia, that he had recently had a productive meeting with the Agency and sought leave for an extension to provide a response to the 27 July Ministry Submissions following the seeking of instructions from the Wai 2378 Claimants.
16. By way of Memorandum-Directions dated 19 September 2012, her Honour directed the parties to make contact with each other to see whether further discussions between them might be of assistance and to advise the Tribunal whether they have been able to make any progress.<sup>31</sup>
17. Counsel filed a Memorandum with the Tribunal on 21 September 2012<sup>32</sup> and advised, inter alia, that while Counsel was scheduled to meet with the Agency, it was in relation only to the issues which Counsel, as a Provider, is facing. Counsel also reiterated in that Memorandum that whilst there is some overlap between the issues faced by Providers and the prejudice suffered by the claimants, the

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<sup>25</sup> Wai 2374, #A11.

<sup>26</sup> Wai 2374, #A13.

<sup>27</sup> Wai 2374, #A12.

<sup>28</sup> Wai 2374, #3.1.19.

<sup>29</sup> Wai 2374, #2.5.5.

<sup>30</sup> Wai 2374, #3.1.28; Wai 2378, #3.1.14.

<sup>31</sup> Wai 2374, #2.5.7; Wai 2378, #2.5.4.

<sup>32</sup> Wai 2374, #3.1.29.

Latimer and Piripi Claim was based on the prejudice suffered by the Claimants.

18. On 8 October 2012, Counsel filed an update Memorandum with the Tribunal,<sup>33</sup> accompanied by a third Affidavit of Mr Haami Piripi<sup>34</sup> (filed on 9 October 2012) and an Affidavit of Ms Priscilla Agius<sup>35</sup> (filed on 10 October 2012). That Memorandum included, inter alia:
- a. submissions on the distinction between provider issues and claimant issues and the distinction between Agency practices and Agency policies; and
  - b. an update on discussions that had taken place with the Agency.
19. The Memorandum also advised that the Claimants wished to pursue these proceedings as a matter of urgency and requested that a judicial conference in person be convened.<sup>36</sup>
20. On 17 October 2012, Counsel for the Wai 2378 Applicants filed a Memorandum<sup>37</sup> advising that the Ministry and Mr Stone were entering into mediation and accordingly requested an adjournment of the Wai 2378 Application for a period of 8 weeks. The Tribunal subsequently adjourned the Wai 2378 Application until 19 December 2012.<sup>38</sup>
21. By way of Memorandum-Directions dated 25 October 2012,<sup>39</sup> Your Honour directed that a Judicial Conference be convened today to hear from parties as to whether the Application for an urgent hearing should be granted and timetabling.

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<sup>33</sup> Wai 2374, #3.1.33.

<sup>34</sup> Wai 2374, #A17.

<sup>35</sup> Wai 2374, #A18.

<sup>36</sup> Wai 2374, #3.1.33; Wai 2378, #3.1.19.

<sup>37</sup> Wai 2374, #3.1.21.

<sup>38</sup> Wai 2374, #2.5.11; Wai 2378, #2.5.8.

<sup>39</sup> Wai 2374, #2.5.12.

## EXECUTIVE SUMMARY

22. Counsel respectfully submits that the Latimer and Piripi Claim meets the criteria for an urgent inquiry as set out in the “Waitangi Tribunal Practice Note – Applications Seeking Urgent Tribunal Consideration”<sup>40</sup> (“the Practice Note”), namely that:
- a. 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 including:
    - i. the introduction of legislative changes and new policies by the Crown in relation to the administration of the legal aid system in the Waitangi Tribunal jurisdiction which have prejudicially affected the Claimants rights of access to justice;
    - ii. legal aid being unreasonably declined for the Claimants to participate in Tribunal proceedings to protect their interests;
    - iii. a substantial reduction in the amount of legal aid being approved for the Claimants to participate in Tribunal proceedings to protect their interests;
    - iv. unreasonable delays in legal aid funding for legal services provided to the Claimants to participate in Tribunal proceedings to protect their interests;
    - v. disestablishing the previous independent Legal Services Agency thus compromising the independence of legal advice;
  - b. there is no alternative remedy that, in the circumstances, it would be reasonable for the Claimants to exercise; and

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<sup>40</sup> *Waitangi Tribunal Practice Note – Applications Seeking Urgent Tribunal Consideration* (28 May 2012).

- c. the Claimants can demonstrate that they are ready to proceed urgently to a hearing.
23. The Tribunal has jurisdiction under section 6 of the Treaty of Waitangi Act 1975 (“TOW Act”) to inquire into claims that any act done or omitted or proposed to be done or omitted by or on behalf of the Crown was or is inconsistent with the principles of the Treaty.
  24. The Claimants say that the prejudices set out at sub-paragraph 22(a) above are a breach of and are inconsistent with the principles of Te Tiriti/the Treaty in the following manner:
    - a. the principles of partnership and acting in good faith have been breached in the various acts of the Crown that have resulted in making legal aid unavailable for the Claimants to pursue their claims thus giving the Crown the upper hand in its dealing with the Claimants. This includes the introduction of legislative changes that fundamentally breach the terms of the private agreement between the Crown, Sir Graham and the New Zealand Maori Council (“NZMC”) in 1987 (“the NZMC – Crown Private Agreement”) in relation to the Crown promising an improved ability to resolve Te Tiriti/Treaty matters by, inter alia, the provision of legal aid funding to Maori claimants before the Waitangi Tribunal;
    - b. the principle of active protection has been breached as the Claimants are unable to properly and justly protect and progress their claims for redress in the Tribunal. In some instances, land which is currently owned by the Crown is at this very moment being disposed for sale on the open market removing it forever from the Claimants (see Affidavits of Michelle Marino<sup>41</sup>).

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<sup>41</sup> Wai 2374, #A5 and #A10.

25. These are not isolated incidences – they reflect widespread policies and implementation that have had the consequence of significant prejudice to the claimant community. Counsel has been advised that the Executive of the Te Hunga Roia Māori (Maori Law Society Inc) today are considering an application to seek leave to intervene as amicus in these proceedings to assist the Tribunal, given the significant prejudice to the claimant community, including the effect on Maori lawyers.

## **THE CLAIM**

26. The Latimer and Piripi Claim was filed in the Waitangi Tribunal (“the Tribunal”) on 1 June 2012.
27. The Claimants are Māori for the purposes of section 6(1) of the TOW Act.
28. The Claimants claim that they have been and continue to be or are likely to be prejudicially affected by the various ordinances, Acts, regulations, orders, proclamations, notices and other statutory instrument, or by the various policies, practices, acts or omissions of or on behalf of the Crown, their agents or their successors in relation to the administration of legal aid in the Treaty of Waitangi jurisdiction.
29. The Claimants further claim that that these prejudices are a breach of the principles of Te Tiriti/the Treaty, namely the principles of partnership (acting towards each other reasonably and with the utmost good faith) and active protection (a duty of the Crown analogous to fiduciary duties).

## **BACKGROUND**

### *Historical Context*

30. The provision of legal aid to Waitangi Tribunal proceedings was as a direct result of intensive negotiations between the Crown and Sir Graham Latimer and the NZMC, following the decision of the Court of Appeal in *The New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 (“*The Lands Case*”).
31. The NZMC – Crown Private Agreement was entered into on the 9th of December 1987 (refer to copy on Record of Inquiry: Wai 2374, #3.1.10(a)) arising as a result of intensive negotiations following the decision of the Court of Appeal in *The Lands Case*.
32. The NZMC – Crown Private Agreement as recorded in a letter, set out the terms of agreement between the Crown and the NZMC to settle litigation regarding the transfer of Crown assets to State Owned Enterprises.
33. The NZMC – Crown Private Agreement confirmed that it was the “Government’s intention to establish an improved ability to resolve these sorts of issues, whether before the Waitangi Tribunal, or by direct negotiation by the Crown and Maori interests.”
34. One of the terms of the NZMC – Crown Private Agreement was for the provision of legal aid to be made available to claimants before the Waitangi Tribunal. Paragraph (e) of the NZMC – Crown Private Agreement provided that:

The draft Bill contains a means for making legal aid available to claimants before the Waitangi Tribunal. This provision is not seen as anything other than a stop-gap measure pending the detailed review of the whole of the legal aid structure to be contained in the Legal Services Bill which is to be introduced during 1988.

35. The administration of legal aid in the Treaty of Waitangi jurisdiction commenced with the promised changes by the Crown under the NZMC – Crown Private Agreement.
36. The Treaty of Waitangi State Enterprises Act 1988 introduced the first amendments to the Legal Aid Act 1969 which allowed for the provision of legal aid to claimants pursuing claims in Waitangi Tribunal proceedings.
37. The current legal aid framework is governed under the Legal Services Act 2011 (“the 2011 Act”).
38. The purpose of the Act is:
- To promote access to justice by establishing a system that –
- a. provides legal services to people of insufficient means;  
and
  - b. delivers those services in the most effective and efficient manner
39. The predecessor statute to the current Act was the Legal Services Act 2000 (“LSA 2000”). Following a review of the legal aid regime by Dame Margaret Bazley (“the Bazley Review”) in 2009, a number of amendments were made to the LSA 2000, which resulted in the introduction of the 2011 Act. The majority of the provisions of the 2011 Act were brought into force on 1 July 2011.
40. The Ministry currently administers legal aid through the Agency.
41. From 1st January 2012, funding for legal aid for Te Tiriti/the Treaty pre-mandate settlement negotiations and settlement negotiations services were removed from the Agency and transferred to the Office of Treaty Settlements (“OTS”).

42. Under the previous LSA 2000, the independent entity that was established to dispense legal aid – the previous Legal Services Agency which had its own board – was removed and legal aid is now dispensed through a division of the Ministry of Justice.

***Overall Changes in Legal Aid Legislation and Policy***

43. Since the introduction of the 2011 Act, the administration of legal aid in the Treaty of Waitangi jurisdiction has changed substantially. This has been as a direct result of the legislative changes introduced under the Act as well as the introduction of a number of new practices and policies by the Agency which have been implemented to the detriment of legal aid providers of Waitangi Tribunal legal aid services.
44. The cumulative effect of these actions has been the erosion of access to justice for the Claimants in this important and vital Treaty sector and the consequent breaches of the Crown's obligations to Maori under Te Tiriti/the Treaty.

**GROUNDS FOR URGENCY**

45. The Urgency Application is essentially made upon the following grounds:
- a. As a result of the Crown's acts and omissions, the Claimants have been and continue to be, prejudicially affected by the administration of the legal aid system in the Waitangi Tribunal jurisdiction in a manner that has detrimentally affected the provision of quality legal services to enable the progression of claims before the Waitangi Tribunal. This in turn, significantly impacts on the Claimants' entitlement to have avenues for access to justice in relation to resolution of past Crown breaches of Te Tiriti/the Treaty – the Claimants are therefore suffering or are

likely to suffer significant and irreversible prejudice as a result of the actions of Crown actions and policies of the Crown.

- b. The prejudices are a breach of and are inconsistent with the principles of Te Tiriti/the Treaty of partnership and acting in good faith as the various acts of the Crown have resulted in making legal aid unavailable for the Claimants to pursue their claims thus giving the Crown the upper hand in its dealing with the Claimants. This includes fundamentally breaching the terms of the NZMC – Crown Private Agreement in relation to the Crown promising an improved ability to resolve Te Tiriti/Treaty matters by, inter alia, the provision of legal aid funding to Maori claimants before the Waitangi Tribunal.
- c. The prejudices are also a breach of and are inconsistent with the principle of active protection as the Claimants are unable to properly and justly protect and progress their claims for redress in the Tribunal – this includes a present situation where land which is currently owned by the Crown is at this very moment being disposed for sale on the open market removing it forever from the Claimants (see Affidavits of Michelle Marino<sup>42</sup>).
- d. There is no alternative remedy that, in the circumstances, it would be reasonable for the Claimants to exercise.
- e. The Claimants can demonstrate that they are ready to proceed urgently to a hearing.

## **APPLICABLE LAW**

### ***Statutory Scheme***

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<sup>42</sup> Wai 2374, #A5 and #A10.

46. In relation to the Latimer and Piripi Claim, the following sections of the TOW Act are relevant:

**5 Functions of Tribunal**

- (1) The functions of the Tribunal shall be—
- (a) to inquire into and make recommendations upon, in accordance with this Act, any claim submitted to the Tribunal under section 6...;

**6 Jurisdiction of Tribunal to consider claims**

- (1) Where any Maori claims that he or she, or any group of Maoris in which he or she is a member, is or is likely to be prejudicially affected— ...
- (d) by any act done or omitted at any time on or after the 6<sup>th</sup> day of February 1840, or proposed to be done or omitted, by or on behalf of the Crown,—

and that ... the act or omission, was or is inconsistent with the principles of the Treaty, he or she may submit that claim to the Tribunal under this section.

- (2) The Tribunal must inquire into every claim submitted to it under subsection (1), unless—
- (a) the claim is submitted contrary to section 6AA(1);  
or
- (b) section 7 applies.
- (3) If the Tribunal finds that any claim submitted to it under this section is well-founded it may, if it thinks fit having

regard to all the circumstances of the case, recommend to the Crown that action be taken to compensate for or remove the prejudice or to prevent other persons from being similarly affected in the future.

- (4) A recommendation under subsection (3) of this section may be in general terms or may indicate in specific terms the action which, in the opinion of the Tribunal, the Crown should take.

...

#### **7 Tribunal may refuse to inquire into claim**

- (1) The Tribunal may in its discretion decide not to inquire into, or, as the case may require, not to inquire further into, any claim made under section 6 of this Act if in the opinion of the Tribunal—
- (a) the subject-matter of the claim is trivial; or
  - (b) the claim is frivolous or vexatious or is not made in good faith; or
  - (c) there is in all the circumstances an adequate remedy or right of appeal, other than the right to petition the House of Representatives or to make a complaint to the Ombudsman, which it would be reasonable for the person alleged to be aggrieved to exercise.
- (1A) The Tribunal may, from time to time, for sufficient reason, defer, for such period or periods as it thinks fit, its inquiry into any claim made under section 6 of this Act.

- (2) In any case where the Tribunal decides not to inquire into or further inquire into a claim or to defer its inquiry into any claim, it shall cause the claimant to be informed of that decision, and shall state its reasons therefore.

### *Practice Note*

47. In relation to urgent inquiries, the Practice Note states that claimants or the Crown may apply to the Tribunal for an urgent inquiry into a claim or a group of claims, or into an aspect of a claim or a group of claims. The Tribunal will grant an urgent hearing only in exceptional cases and only once it is satisfied that adequate grounds for according priority have been made out.<sup>43</sup>
48. The Practice Note further states that, in deciding an application for urgency, the Tribunal has regard to a number of factors (“the Urgency Criteria”). Of particular importance are whether:
  - a. 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;
  - b. there is no alternative remedy that, in the circumstances, it would be reasonable for the claimants to exercise; and
  - c. the claimants can demonstrate that they are ready to proceed urgently to a hearing.<sup>44</sup>
49. Other factors that the Tribunal may consider in deciding an application for urgency include whether:
  - a. the claim or claims challenge an important current or pending Crown action or policy;

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<sup>43</sup> *Waitangi Tribunal Practice Note – Applications Seeking Urgent Tribunal Consideration* (28 May 2012), para 2.5.

<sup>44</sup> *Ibid*, para 2.5.

- b. 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
  - c. any other grounds justifying urgency have been made out.<sup>45</sup>
50. The factors set out in the Practice Note must now be read in light of the Supreme Court's recent decision in *Haronga v Waitangi Tribunal* [2011] NZSC 53.

### *Consideration of Relevant International Law Instruments*

51. It is now accepted that international legal obligations have, in the exercise of a statutory decision, the status of a mandatory relevant consideration: *Tavita v Minister of Immigration*.<sup>46</sup>
52. In making its decision in relation to whether or not to grant an urgent inquiry, the Tribunal must turn its mind to any relevant international law instruments.
53. In particular, Counsel submits that the following instruments are relevant:
- a. International Convention on Civil and Political Rights 1966 ("ICCPR")<sup>47</sup> – in particular, Article 26, which states:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or

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<sup>45</sup> Ibid.

<sup>46</sup> [1994] 2 NZLR 257 (CA) at 266.

<sup>47</sup> International Covenant on Civil and Political Rights 1966, Ratified 28/12/78.

other opinion, national or social origin, property, birth or other status.

- b. International Convention on the Elimination of All Forms of Racial Discrimination 1965 (“CERD”)<sup>48</sup>, in particular, Article 5(a), which states:

In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights:

- (a) The right to equal treatment before the tribunals and all other organs administering justice.

- c. Universal Declaration of Human Rights 1948 (“UDHR”)<sup>49</sup> – in particular, Articles 8 and 10, which state:

Article 8: Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law; and

Article 10: Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.

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<sup>48</sup> International Convention on the Elimination of All Forms of Racial Discrimination 1965, Ratified 22/11/72, Entry into force 22/12/72.

<sup>49</sup> Universal Declaration of Human Rights 1948 (“UDHR”), Adopted 10/12/48.

- d. United Nations Declaration on the Rights of Indigenous People 2007 (“UNDRIP”)<sup>50</sup> – in particular, Articles 27, 28 and 40, which state:

Article 27: States shall establish and implement, in conjunction with indigenous peoples concerned, a fair, independent, impartial, open and transparent process, giving due recognition to indigenous peoples’ laws, traditions, customs and land tenure systems, to recognize and adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources, including those which were traditionally owned or otherwise occupied or used. Indigenous peoples shall have the right to participate in this process.

Article 28:

1. Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent.

2. Unless otherwise freely agreed upon by the peoples concerned, compensation shall take the form of lands, territories and resources equal in quality, size and legal status or of monetary compensation or other appropriate redress.

Article 40: Indigenous peoples have the right to access to and prompt decision through just and fair procedures for

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<sup>50</sup> United Nations Declaration on the Rights of Indigenous Peoples 2007, Endorsed April 2010

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.

54. These provisions generally relate to access to justice (including through prompt decisions and through just and fair procedures and effective remedies) and the right to be free from discrimination. Access to justice is an essential component of the Rule of Law. It refers to the ability of people to seek and obtain a remedy through formal or informal institutions of justice, and in conformity with human rights standards.

## **DOES THE APPLICATION MEET THE TRIBUNAL'S URGENCY CRITERIA?**

55. In this section, Counsel applies the particular facts in relation to the Latimer and Piripi Claim to the Urgency Criteria.

### ***Is There Significant and Irreversible Prejudice?***

56. The first of the Urgency Criteria in the Practice Note 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.
57. Counsel respectfully submits that the Claimants can demonstrate that they are suffering and are likely to suffer, significant and irreversible prejudice as a result of the Crown's acts and omissions in the administration of the legal aid system in the Waitangi Tribunal

jurisdiction in a manner that has detrimentally affected the provision of quality legal services to enable the progression of claims before the Waitangi Tribunal.

58. Through the introduction of legislative changes and new policies in relation to the administration of the legal aid system in the Waitangi Tribunal jurisdiction, the Crown has prejudicially affected the Claimants' rights of access to justice. For almost a year now, legal aid has been unreasonably withheld and declined for the Claimants to protect their interests and hence Claimants do not have any representation from legal counsel in important proceedings before the Waitangi Tribunal. Counsel advises that as a recent update, in relation to legal aid applications for Mr Potter and Ms Marino, after extensive correspondence with the Agency and after extensive reconsideration applications, the Agency has upheld its own original decision to decline aid for both Mr Potter and Ms Marino, without providing any justification advising of the decision to uphold the refusal of aid.
59. Details of the actual prejudice suffered is contained in the evidence in the various Affidavits that accompany the Latimer and Piripi Claim as follows:
- a. Affidavits of Haami Piripi<sup>51</sup>, claimant for Wai 1699 the Tangonge (Kaitaia Lintel) Claim and Wai 1701, the Te Rarawa (Piripi) Claim, and Chair of Te Runanga o Te Rarawa, the representative body of the Iwi of Te Rarawa ("Te Rarawa"). The Iwi of Te Rarawa last year initialed a Deed of Settlement. There have been 9 applications for urgency in the Tribunal by groups who oppose the Te Rarawa Deed. Te Rarawa's participation in these urgency hearings has been necessary and crucial. Despite this, the Agency has initially declined applications for funding

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<sup>51</sup> Wai 2374, #A3, #A11, and #A17.

for a number of the proceedings to date<sup>52</sup> stating that it does not fund “interested parties” to a proceeding. Te Rarawa is also an interested party in the National Fresh Water and Geothermal Resources Claim and in this instance, their application for funding has been granted. Such inconsistencies demonstrate the level of arbitrariness and capriciousness that strike at the heart of any expected good faith and active protection obligations. Mr Piripi states, inter alia, that the cumulative effect of the Agency’s decisions has been to erode any level playing field between Te Rarawa and the Crown – they are unable to have access to necessary legal resources to pursue and settle their claims.

- b. Affidavit of Russell Kemp,<sup>53</sup> claimant for Wai 2196, the Te Uri o Hau (Latimer and Others) Contemporary Matters Claim. Te Uri o Hau filed a contemporary claim in October 2009 and an application for funding in March 2010. Despite this, they still have not received approval for legal aid funding. The Agency are instead assessing the merits of their claim, even though it has been registered and accepted by the Tribunal as a valid claim. The Agency suggests that the Claimants seek alternative remedies in the Environment Court and have made judgments about what certain Treaty obligations are, judgments which do not accord with Treaty principles.
- c. Affidavits of Michelle Marino,<sup>54</sup> claimant for Wai 377, the Kaiwharawhara and Hutt Valley Lands Claim, who deposes that although her application for aid was lodged with the Agency well over a year ago, the Application has recently been declined. After over a year of waiting, the Wai 377 Claimants have recently discovered that the Crown has made a decision to sell the main property of their tupuna, Te Kaeaea, after they had

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<sup>52</sup> Counsel is still awaiting formal decisions on reconsideration applications lodged for some of the Urgency Application.

<sup>53</sup> Wai 2374, #A4.

<sup>54</sup> Wai 2374, #A5, and #A10.

been led to believe that it would be landbanked. That property is their turangawaewae. In addition, following a reconsideration application to the Agency, the original decision to decline aid was recently upheld by the Agency with no reasons provided by the Agency for their decision.

- d. Affidavit of David Potter,<sup>55</sup> claimant for Wai 996, the Ngati Rangitahi Inland and Coastal Land Blocks Claim, who deposes that his application for aid for an urgent remedies hearing has taken 8 months to date to get to a Specialist Adviser for a recommendation, following the exchange of correspondence from the Agency that was based on erroneous assumptions and that sought information that was already readily available, and notwithstanding the provision of extensive and fulsome information to the Agency on his behalf. The application for aid was subsequently declined, and on reconsideration, the Agency has recently made a decision to uphold the refusal of aid, however no reasons were provided.

60. The particular actions and omissions of the Crown in the administration of the legal aid system that has caused, and continues to cause, significant and irreversible prejudice to the Claimants are as follows:

- a. Introducing legislative changes that fundamentally breach Te Tiriti/the Treaty and the terms of the NZMC – Crown Private Agreement in relation to promising an improved ability to resolve Te Tiriti/the Treaty matters by, inter alia, the provision of legal aid funding to Maori claimants before the Waitangi Tribunal.
- b. Compromising the independence of the provision of legal representation – the independent entity that was established to

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<sup>55</sup> Wai 2374, #A6.

dispense legal aid – the previous Legal Services Agency which had its own board – was removed and now legal aid is dispensed through a division of the Ministry of Justice.

- c. Failing to administer the legal aid system in a manner consistent with the obligations of the Crown under Te Tiriti/the Treaty.
- d. Removal of pre-mandate and settlement negotiations funding from legal aid services to Office of Treaty Settlements thus compromising the independence of legal representation of Claimants.
- e. Lengthy delays in processing of applications for aid, in payments and in processing of reconsideration applications and other applications/documentation under the 2011 Act.
- f. Continual and unreasonable requests from the Agency for information.
- g. Blanket policy of not funding “interested parties” – the Agency has adopted a blanket policy that it will not fund “interested parties” to Tribunal proceedings and will only fund parties who take action against the Crown directly. This practice is ultra vires the Act as it is illegally fettering the discretion of the decision-maker.
- h. Reversal of previous policy for funding certain items such as invoicing and administrative costs, local travel, and service fees for flights.
- i. Inconsistent, arbitrary and capricious decisions in relation to funding, including office disbursements and other costs and expenses.

- j. Decrease in secondary provider rates effective 1 April 2012 from \$120.00 per hour (excl. GST) – to \$92.00 per hour (excl. GST).
  - k. Failure to adequately staff and resource the Agency.
  - l. Overall, failing to ensure that the Claimants are provided with adequate funding for legal aid services in relation to claims before the Tribunal, thereby impacting on the progression of those claims and hindering the Claimants' rights of access to justice, and ultimately giving the Crown the upper hand in all of its dealings with Maori.
61. The cumulative effect of these actions has been a detrimental impact on the timely and effective provision of quality legal services to the Claimants in relation to the progression of their claims before the Waitangi Tribunal and the erosion of access to justice for the Claimants in this important and vital Treaty sector and the consequent breaches of the Crown's obligations to Maori under Te Tiriti/the Treaty, ultimately giving the Crown the upper hand in all of its dealings with Maori.
62. Moreover, through the actions and omissions of the Crown in the administration of legal aid, the Claimants are at risk of losing experienced and capable lawyers, thus prejudicing Maori in the long term.
63. The Claimants' rights of access to and utilisation of legal representation has now been constrained substantially. The erosion of funding for legal aid has had the effect of weakening Claimant positions in resolving their long-standing grievances against the Crown. The Claimants are in effect being prevented from having legal representation in important proceedings before the Tribunal in which they are required to participate in order to protect and

preserve their respective rights and interests as guaranteed under Te Tiriti/the Treaty.

64. Consequently, the Claimants are suffering significant and irreversible prejudice as a result of these Crown actions and policies – viewed on its merits, an urgent hearing cannot be withheld.

### **Crown Position**

65. The 27 July Ministry Submissions state that there is currently no adequate evidence before the Tribunal that any prejudice is being suffered.<sup>56</sup>
66. As Counsel has submitted previously, it is clearly misleading and incorrect for Counsel for the Ministry to submit that there is no evidence when ample evidence has already been submitted to the Tribunal. The evidence provided in the Affidavits of Mr Haami Piripi, Ms Michelle Marino, Mr Russell Kemp and Mr David Potter clearly demonstrate that the Claimants are suffering and are likely to continue to suffer significant and irreversible prejudice.
67. Details in relation to the actual prejudice suffered are clearly articulated in paragraphs 43 – 51 of Counsel’s submissions dated 9<sup>th</sup> July 2012,<sup>57</sup> in particular at paragraph 46.
68. The evidence filed demonstrates clearly that the prejudice is widespread and systemic.
69. Counsel for the Ministry then goes on to say at paragraph 5.3 of the 27 July Ministry Submissions that:

The nearest evidence is that some land is potentially being sold being the AgResearch Centre at Wallaceville, Upper Hutt. But...

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<sup>56</sup> Wai 2374, #3.1.15; Wai 2378, #3.1.3, paragraph 5.2.

<sup>57</sup> Wai 2374, #3.1.10.

The land is not being sold as it has not been discharged from the Crown's obligations to protect Māori interests so the disposal for sale cannot commence...<sup>26</sup>

26: Second Affidavit of Michelle McCreddie, Para 7.7.

70. The Affidavits of Michelle Marino had set out that the statement of Ms McCreddie that the land is not being sold is "at best misleading and at worst an outright lie". Ms Marino had received a letter from the Crown (attached as Annex A to Ms Marino's Affidavit of 3 August 2012<sup>58</sup>) stating:

This letter outlines key messages discussed at our meeting dated 24 April regarding the former AgResearch Wallaceville Centre site, Upper Hutt (the Wallaceville site).

*Decision to release the Wallaceville site from the Protection Mechanism*

The Minister for Treaty of Waitangi Negotiations and the Minister of Maori Affairs **agreed for the vendor agency to release the Wallaceville site for disposal on the open market, for the following reasons:**

- the site has significant fiscal implications to the Crown; and
- landbanking would place further cost pressure on the Landbank maintenance budget and hinder the Crown's ability to improve the overall condition of properties in the Landbank over time.

.....

*Next steps*

**The property will now be disposed of** by the vendor on the open market. If you would like to seek protection of any waahi tapu on Wallaceville site prior to its disposal, you are able to

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<sup>58</sup> Wai 2374, #A10.

submit an application under Te Puni Kokiri's Sites of Significance process....

Given the Wallaceville site **will be made available for sale on the open market** you are free to pursue whatever purchase arrangements you have. I understand Mr Garlick may seek to purchase the site to pursue his project. He has advised that he is keen to include and work with Maori on the project [emphasis added].

71. As Counsel has previously submitted, not content with misleading the Tribunal by stating that land is not being sold, the 27 July Ministry Submissions then go on at paragraph 5.4 to state that:

To the extent that the claimants use the possibility of sale of land as a potential prejudice, most former Crown land will have a s27B memorial registered against the title. The existence of a s27B memorial over the relevant land provides adequate protection for claimants so that significant and irreversible prejudice justifying urgency does not exist [sic];<sup>27</sup>

<sup>27</sup>: Waitangi Tribunal, memorandum of directions, 12 June 2006, Wai 848 (Tokoroa Post Office Site), Paper 2.3.

72. It is extraordinary that Counsel for the Ministry could have proffered such an argument without even checking the facts. If he had done so, as Counsel had advised the Tribunal previously, he would be availed of the fact that there is no section 27B memorial over the Wallaceville Property.<sup>59</sup>
73. This example provides clear evidence of significant and irreversible prejudice.

***Legal Aid Affects Providers Rather Than Claimants***

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<sup>59</sup> See Wai 2374, #A10.

74. The 27 July Ministry Submissions state that there is no evidence that the **Claimants** are suffering or are likely to suffer irreversible prejudice. Although the Agency concedes that there have been delays in payment, they contend that it is the **legal aid providers** rather than the Claimants who are affected.
75. Counsel reiterates that it is quite simply preposterous to suggest that in the face of substantial delays in payments and other practices and policies which have the consequence of frustrating the provision of legal services to the claimant community, that such actions would not affect the Claimants. The Affidavits of Mr Haami Piripi, amongst others, provides evidence of the numerous examples by which significant prejudice is being suffered. Mr Piripi specifically states, for example, that “increasing prejudice is caused to Te Rarawa given the restriction on the ability of Pacific Law to undertake substantive legal work to progress our claims.”<sup>60</sup>
76. Counsel refers to the following statement at paragraph 1.5(f) of the 27 July Ministry Submissions:

Although there have been delays in payments, those are being overcome and, again, affect providers rather than claimants.<sup>61</sup>

77. Counsel for the Ministry also states at paragraph 1.6 that:

**It is important to focus on the position of the claimants rather than the legal aid providers** [our emphasis]. Even if the Crown has treated legal aid providers unfairly (not accepted) this would not be a breach. It only potentially becomes a breach if the rights of Māori Treaty claimants to bring Treaty claims are

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<sup>60</sup> Affidavit of Haami Piripi sworn 12 July 2012, Wai 2374, #A3, para 98.

<sup>61</sup> Wai 2374, #3.1.15 and Wai 2378, #3.1.3, para 1.5(f).

materially and irreversibly affected and they have no other remedy which it is reasonable for them to exercise.<sup>62</sup>

78. Ironically, Counsel for the Ministry then however goes on to expend significant energy attacking providers.

79. Counsel for the Ministry states at paragraph 8.2(e) of the 27 July Ministry Submissions:

The only things that could possibly qualify as policy changes are...The consistent application of standard secondary provider rates across all types of claims (criminal, civil, family, Waitangi Tribunal). **Again this is hardly a major item and it only affects providers rather than claimants** [our emphasis].<sup>63</sup>

80. Counsel for the Ministry then states at paragraph 8.5:

Relevantly, in relation to the claims about the operation of legal aid, there are still many lawyers willing to appear in the Tribunal on legal aid. Currently there are 134 such providers. **It has to be assumed that they will not reduce their standards just because the level of remuneration is not as high as they would like. There is no erosion of access to the Waitangi Tribunal** [our emphasis].<sup>64</sup>

81. Just because there are many lawyers currently registered as providers, it does not necessarily follow that they are all willing to appear before the Tribunal. The cumulative effect of the policies and practices of the Crown in relation to legal aid will eventually drive the best providers out, such that the claimant community will be deprived of quality legal services.

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<sup>62</sup> Wai 2374, #3.1.15 and Wai 2378, #3.1.3, para 1.6.

<sup>63</sup> Wai 2374, #3.1.15 and Wai 2378, #3.1.3, para 8.2(e).

<sup>64</sup> Wai 2374, #3.1.15 and Wai 2378, #3.1.3, para 8.5.

82. Counsel refers to the oral opening statements of Counsel for the claimants in the Fresh Water/SOE Urgent Inquiry, Mr Felix Geiringer, in relation to the circumstances under which Mr Geiringer undertook the work for the claimants in that Inquiry.<sup>65</sup> Other senior Treaty bar counsel including Ms Donna Hall and Ms Annette Sykes also participated in that discussion. A copy of the relevant parts of the transcript was included in a Memorandum of Counsel filed by Counsel dated 3 August 2012.<sup>66</sup> Some excerpts from that transcript are set out below:

MS HALL:

I understand the point of why I have come in at this stage, is that for the Māori Council and 16 co-claimants it goes to equity between the parties to bring this claim. And that is an issue that I can put before this Tribunal because effectively a case of this size should have had the benefit of Queen's Counsel, that was declined. Mr Geiringer picked it up, he is sole counsel, I was not able to instruct two barristers, so he has had the carriage of a major file that ought to have had the benefit of exactly the same quality and level of representation as the Crown has. We have senior counsel here and the Crown's had the benefit of that and I don't think senior counsel here would be getting \$92 an hour, which is what my barrister is getting. So working 15 hour days and being paid half the rate that was expected and then the final straw was that we weren't even paid that because the new regulations we've had to devise an entire project to manage this claim. It is large on any basis and the urgency caused the crisis to hit a peak. And so I think that if I can just make the point that it does go to the equity between – the ability of the parties to be able to present properly and that we have been seriously hampered.

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<sup>65</sup>Transcript of Wai 2358 National Fresh Water and Geothermal Resources Inquiry Hearing 9 – 20 July 2012.

<sup>66</sup>Wai 2374, #3.1.16(a).

Now, this is not over because this is only part 1 of a three stage hearing. And it's not only run my barrister ragged but it's run my team ragged and we are used to running big cases. This, it's been dealing with the huge hours required to bring a case of this size into the requirements of legal aid for the purposes of Waitangi Tribunal claimants.<sup>67</sup>

....

MR GEIRINGER:

Sir, I'm not going to quite leave it, I'll leave it very soon, but I don't accept that there's no role for the Tribunal, there's a serious role for the Tribunal. I, Sir, seriously considered not turning up today. I do not see myself as having any ethical or legal obligation to be here giving you these submissions. It's quite clear that any obligation I have is contingent on my fee, a reasonable fee being paid. I never expected a reasonable fee. I just expected a fee that covered costs, and when I was told that I wasn't even going to get that, I very seriously considered not turning up. And I was told it before I had prepared, before I had worked non-stop on these closing submissions. Sir, this makes it essentially impractical for the claimants to be bringing this claim. We're manufacturing a claim out of no resources and in those circumstances it would be quite proper if this Tribunal were to say simply because the Crown through its actions have made it impractical for the claimants to bring their claim, we are going to give the claimants the interim relief that they request until such a time as the Crown provides the claimants with the necessary

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<sup>67</sup> Transcript of Wai 2358 National Fresh Water and Geothermal Resources Inquiry Hearing 9 – 20 July 2012, pages 1118 – 1119.

resources so that the hearing can continue. That would be quite a proper action from this Tribunal.<sup>68</sup>

....

MR GEIRINGER:

It's utterly unacceptable. And it's not the Tribunal's fault, and it shouldn't get in the way of the submissions but it does get in the way of the submissions. I am impeded in my ability to give these submissions today and it is the Crown's fault and how can we have that, how can we have a hearing where the Crown is on one side of the hearing and through its actions it's impeding the ability of the other side.<sup>69</sup>

....

MS HALL:

Sir, can I just ask this – I have a difficulty in terms of your proposal. Our legal aid ceases as from Monday. We have only eight hours of paid time approved to respond to the Crown's submissions and I had – I've been very careful to keep that time within your directions. If you are to give us that extra time and extra material then my participation will be subject to a further grant of legal aid and I know that that's certainly for all the third parties. They are being very difficult, Sir. They won't even meet with us at the moment so I just raise that as a practical difficulty for myself.<sup>70</sup>

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<sup>68</sup> Transcript of Wai 2358 National Fresh Water and Geothermal Resources Inquiry Hearing 9 – 20 July 2012, page 1120.

<sup>69</sup> Transcript of Wai 2358 National Fresh Water and Geothermal Resources Inquiry Hearing 9 – 20 July 2012, page 1121.

<sup>70</sup> Transcript of Wai 2358 National Fresh Water and Geothermal Resources Inquiry Hearing 9 – 20 July 2012, page 1458.

MS SYKES:

I've attempted to put a lot into a submission. I know it's long, I don't propose to talk to all of it. It's been very difficult I have to endorse the submissions from my friend Mr Geiringer this morning. Without the legal aid resources it's just almost impossible to do a proper submission to be frank. We had no typists available to us, Sir, we've had very little photocopying facilities available to us and so we've tried to do this as well as we can in those limited resources.<sup>71</sup>

83. The above excerpt is telling in that it demonstrates the clear and significant prejudice occurring to claimants as a direct result of the policies and practices of the Agency. Proprietary interests in water and the proposed sale of the power generating SOEs are of critical interest to the claimant community. The prejudice caused to them as demonstrated in the excerpt above is beyond doubt.
84. It remains noticeable and worth mentioning that the submissions of Counsel for the Ministry and the information in the accompanying Affidavits filed to date do not actually address the evidence or the issues before the Tribunal but instead constitute a wholesale attack and vilification of the individual providers who have done no more than act on instructions from their claimant clients. These very personalised attacks contained in the 27 July Ministry Submissions ought to be seen for what they are.
85. A handful of the comments are as follows:
  - a. Moreover the obligations owed by the Crown are owed to the Māori people, not to lawyers per se. In the context of the present application it is important to distinguish between matters that

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<sup>71</sup> Transcript of Wai 2358 National Fresh Water and Geothermal Resources Inquiry Hearing 9 – 20 July 2012, page 1234.

may affect the lawyers and matters that may affect Māori claimants. Many of the claims made are, in reality, gripes by the legal providers rather than truly by their clients, which gripes refuse to recognise the short comings of those legal providers.<sup>72</sup>

- b. The information contained in paragraph 2.13 of the Second Affidavit of Ms Michele McCreddie<sup>73</sup> setting out the amounts paid to Counsel for the Wai 2378 Claimants, Mr Stone, and Counsel. These details do not have any relevance whatsoever to the proceedings – they are meaningless without any breakdowns as to the work that was actually undertaken, the numbers of clients the figures relate to, and how many providers undertook the work.
- c. The very confidential information in relation to Mr David Stone's IRD issues, as set out in paragraph 35 of the Affidavit of Ms Sarah Kalmakoff.<sup>74</sup>

*Give The Agency A Chance?*

86. The 27 July Ministry Submissions concede and accept that there have been unreasonable delays in the administration of legal aid. Counsel refers to a number of statements below:

- a. Although it is accepted and regretted that the Legal Aid Services has experienced delays in processing applications for legal aid and processing invoices, strenuous efforts have been and are being made to overcome these delays and put streamlined systems in place<sup>75</sup>
- b. The Crown accepts and regrets that there have been delays in administering of Waitangi Tribunal legal aid for which it is

<sup>72</sup> See paragraph 4.2 of 27 July Ministry Submissions.

<sup>73</sup> Wai 2374, #A8 and Wai 2378, #A4.

<sup>74</sup> Affidavit of Sarah Catherine Kalmakoff, affirmed 28 July 2012.

<sup>75</sup> See paragraph 1.5(c) of MoJ Submissions.

responsible. But... The delays that are the responsibility of Legal Aid Services are in part delays inherited from the old Legal Services Agency and in part “bedding down” issues arising from new systems and the new Operational Policies introduced in 2011. Given a chance, they will be overcome.<sup>76</sup>

- c. In these circumstances, the Tribunal should give Legal Aid Services that chance and give it time for these remedial steps to bear further fruit.<sup>77</sup>
- d. The Crown accepts that there have been some delays in processing Treaty legal aid applications and invoices. It regrets such delays. However, the Legal Aid Services is working very hard to overcome those delays...<sup>78</sup>
- e. Even since the first set of affidavits were filed, further remedial steps are being taken by the Ministry of Justice.<sup>79</sup>

87. Changes to the policies and practices of the Crown in relation to the provision of legal aid has caused significant prejudice to the Claimants for most of last year but got to a crisis point towards the end of last year. Eventually, an Agency/Counsel Working Party (“the Working Party”) was established in an attempt to work through these issues. At that time, Counsel understood that late payments to providers amounted to in excess of \$3 million.

88. Counsel respectfully submits that, in relation to its practices, the Agency has already had ample time to work with the Working Party to improve matters but has not done so. After over a year on, matters have not improved. In fact, there is anecdotal evidence to suggest that Agency practices have worsened. The Claimants have

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<sup>76</sup> See paragraph 1.7(b) of 27 July Ministry Submissions.

<sup>77</sup> See paragraph 1.8 of 27 July Ministry Submissions.

<sup>78</sup> See paragraph 5.13 of 27 July Ministry Submissions.

<sup>79</sup> See paragraph 5.14 of 27 July Ministry Submissions.

already indicated in previous submissions that they will be calling evidence from a representative of Te Hunga Roia Māori, who will be Mr Tavake Afeaki, who was also on the Working Party. Mr Afeaki will address these matters in more detail at the hearing.

89. Counsel refers again to the oral statements of Mr Geiringer during the Fresh Water/SOE Urgent Inquiry as set out at paragraph ~~[TBA]~~ 82 above. Clearly the claimant community is still suffering significant prejudice.
90. The assurances of the Agency to “improved turnaround times” and delays in payments being “overcome” are simply not accurate in the Claimants’ experience. Turnaround times remain largely outside of the standard 20 working day timeframe for response (which previously was a 15 working day timeframe). The Agency also hypocritically continues to attempt to strictly penalise the Claimants by rigidly enforcing limited timeframes for responses or further information when such is requested. Yet the Agency continues to breach its own agreed timeframes for responding to Claimants.
91. Moreover, even if it is accepted that practices are improving, which the Claimants deny, then giving the Agency a chance may possibly only address its practices and does not in any way address the policies and the legislative changes that have been made.

*Access to Legal Aid Is a Treaty Duty of Active Protection*

92. The Claimants express concern at the comparisons that the 27 July Ministry Submissions make between Treaty legal aid and criminal legal aid. Counsel refers to paragraph 4.4 of the 27 July Ministry Submissions:

At best for the claimants their right has to be a right to be heard which right the Crown is obliged to protect. That right cannot be

higher than the similar right of those charged with a criminal offence.<sup>80</sup>

93. Counsel rejects outright the proposition that the rights of the Claimants cannot be higher than the similar rights of those charged with a criminal offence.
94. The rights of the Claimants stem from Te Tiriti o Waitangi/the Treaty of Waitangi which is the constitutional foundation of this country. It is well accepted that great injustices have been perpetrated against the Maori people, such injustices forming the very basis for the establishment of the Waitangi Tribunal. The Tribunal's key function is the difficult job of reconciliation.
95. The Tribunal must be vigilant to ensure that the injustices of the past are not perpetuated. It is unacceptable that in the resolution of widely accepted injustices, an inequality of arms be allowed to pervade proceedings and any attendant negotiations. This is particularly so when there are very well documented and recognised long-standing abuses and grievances. The Crown has carte blanche access to the deep pocket of the taxpayer as it can utilise whatever funds it wishes to utilise in defending whatever proceedings it wishes, as has been so clearly demonstrated in the Fresh Water/SOE Urgent Inquiry. Counsel refers again to the excerpts from the Fresh Water/SOE Urgent Inquiry set out in paragraph 82 above.
96. As Counsel has pointed out previously, the fact of the engagement of a QC in the current proceedings, as opposed to the Ministry using their own internal lawyers, or other Crown lawyers, speaks for itself.
97. Counsel further rejects the argument that the Treaty protects land and other taonga but not representation. Paragraph 4.6 of the 27 July Ministry Submissions state:

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<sup>80</sup> Wai 2374, #3.1.15 and Wai 2378, #3.1.3, para 4.4.

Even if some claimants do not receive the legal aid they hoped for and that does impact on their ability to be represented at a hearing that still does not establish a breach of the Treaty, which Treaty protects land and other treasures and requires remedies rather than representation.<sup>81</sup>

98. This is inconsistent with earlier statements at paragraph 4.4 of the 27 July Ministry Submissions which state:

At best for the claimants their right has to be a right to be heard which right the Crown is obliged to protect. That right cannot be higher than the similar right of those charged with a criminal offence.<sup>82</sup>

99. One of the principles of the Treaty necessary to give effect to the Articles of the Treaty, is the duty of active protection and good faith. As set out above and in Counsel's previous Memoranda, a substantial "inequality of arms" is a breach of these duties.

#### *Allegations of Bad Faith On The Part of Claimants*

100. Counsel refers to paragraph 4.8(a) of the 27 July Ministry Submissions which states that:

It cannot be acting reasonably and in good faith towards the Crown for Māori...To double or triple dip funds for negotiations. Note, it is not being said that the present Claimants are doing this but it must be legitimate for the Crown to take steps to prevent this from occurring generally especially when an independent investigator has raised that as a major concern;<sup>83</sup>

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<sup>81</sup> Wai 2374, #3.1.15 and Wai 2378, #3.1.3, para 4.6.

<sup>82</sup> Wai 2374, #3.1.15 and Wai 2378, #3.1.3, para 4.4.

<sup>83</sup> Wai 2374, #3.1.15 and Wai 2378, #3.1.3, para 4.6.

101. These submissions make reference to double or triple dipping as referred to in the Report of Dame Margaret Bazley, however no examples are provided in the 27 July Ministry Submissions and accompanying Affidavits of such behaviour on the part of Waitangi Tribunal claimants.
102. These wild allegations do not withstand scrutiny.
103. Counsel for the Ministry does not even provide a reference for where exactly in the Bazley Report the alleged double or triple dipping is contained.
104. In relation to Mr Russell Kemp, Counsel for the Ministry states in the 27 July Ministry Submissions that:

....It implied that the claimants were now restricted to Sir Graham Latimer, Russell Kemp and Esther Gray. The reasons for this change were not made clear but it may have been an attempt to distance the claimants from the Settlement Trust so as to avoid the assets of the Settlement Trust being brought into consideration....<sup>84</sup>

105. Counsel submits that the reasons for this were made clear. This was because Sir Graham Latimer and Mr Russell Kemp were no longer trustees.<sup>85</sup>
106. The comments of Counsel for the Ministry are misleading, as the sentence quoted above is clearly inaccurate. Sir Graham and Mr Kemp were no longer at that time Trustees of the Te Uri o Hau Settlement Trust (“the Trust”) and Counsel no longer acted for the Trust.

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<sup>84</sup> Wai 2374, #3.1.15 and Wai 2378, #3.1.3, para 9.8.

<sup>85</sup> Refer to Affidavit of Russell Kemp, sworn 10 July 2012, Wai 2374, #A4, paras 17, 18 and 24.

107. Counsel for the Ministry then goes on to say in the 27 July Ministry Submissions that:

Mr Kemp at paragraph 24 of his affidavit of 10 July 2012 now states (in effect) that the Trustees of the Settlement Trust are still involved in the claim. **Why then does he require legal aid?** [our emphasis] No evidence has been provided to Legal Aid or in his affidavit that either he or Sir Graham Latimer have an interest that could not be properly represented by the Settlement Trust.<sup>86</sup>

108. Counsel submits that these questions had not been asked of Mr Kemp. This was the first time that these issues had been put to him. If this was an issue, why was this not raised at the time?
109. Counsel submits that historical Treaty settlements are in recognition of the serious injustices perpetrated by the Crown against the Maori claimants. It would be improper for these funds to be used for legal representation in resolving fresh or contemporary grievances.
110. We refer to paragraph 9.12 of the 27 July Ministry Submissions where Counsel for the Ministry states:

Relevantly, that comment was made in an affidavit sworn 18 days after the first Jasmine Thompson affidavit dealing with the Kemp application and a similar period after the Crown's memoranda of 22 June 2012 which contained paragraphs similar to paragraphs 9.6 to 9.8 above. **That is, the rather inflammatory statement in paragraph 26 of Mr Kemp's affidavit was made ignoring the facts that were already before the Tribunal.** [our emphasis]

111. Counsel submits that the matters that were in Jasmine Thompson's Affidavit were already known to Mr Kemp even before Ms

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<sup>86</sup> Wai 2374, #3.1.15 and Wai 2378, #3.1.3, para 9.9.

Thompson's Affidavit – they did not arise by virtue of Ms Thompson's Affidavit.

112. There is no denial of the delay that occurred as a result of changes made to the trustees of the Trust and the attendant state of flux. This does not alter the fact of the **unacceptable delays on the part of the Agency**, including taking 89 working days to respond to Mr Kemp at a critical time.

*Ability of Crown To Regulate*

113. Counsel refers to the 27 July Ministry Submissions at paragraphs 4.9 and 4.12 setting out extracts of fairly benign statements and principles of trite law around the ability of duly elected governments to follow their chosen policy.

114. There is no corresponding analysis of the applicability of these principles to the facts and evidence before the Tribunal.

115. Counsel refers to paragraph 4.19 of the 27 July Ministry Submissions which states that:

Moreover, it cannot be a breach of the Treaty to allow Legal Aid to scrutinise with care the applications made to it and to seek proper explanations before parting with public money....<sup>87</sup>

116. The Claimants do not challenge the fact that scrutiny should be applied – that is not the issue. The issue is the policies and practices of the Agency which are significantly and irreversibly prejudicing the Claimants in the settlement of Treaty breaches. In particular, who should be “the scrutineer”.

117. The issues are clearly visible in the following analogy:

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<sup>87</sup> Wai 2374, #3.1.15 and Wai 2378, #3.1.3, para 4.19.

- a. Nation A and Nation B entered into an agreement setting out some rules for sharing resources.
- b. Nation A immediately breaks these rules, takes much of Nation B's resources by force and by manipulation.
- c. Eventually, almost 130 years later, Nation B manages to get Nation A to acknowledge the grave injustices it has committed on Nation A and agrees to a process – which is intended to be independent to look into Nation B's actions.
- d. Nation A retains all power over Nation B and is the country responsible for establishing and for paying for all staff of the “Independent Investigation Process”. It does not however exert obvious direct forms of control over the independent forum.
- e. Nation A also provides some funding for advocates for Nation B's case. This funding is “allocated” by staff directly under the control of Nation A.

118. It is easy to see that a clear way of Nation A controlling outcomes is by denying access to funding to representatives of Nation A.

*Transfer of Legal Funding from Legal Services Agency to Office of Treaty Settlements*

119. In relation to the transfer of legal funding from the Agency to the Office of Treaty Settlements, paragraph 5.5 of the 27 July Ministry Submissions state that because no immediate application was made by Maori claimants at the point at which the transfer of funding came into effect, then these matters were not seen as urgent.<sup>88</sup>

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<sup>88</sup> Wai 2374, #3.1.15 and Wai 2378, #3.1.3, para 5.5.

120. Counsel for MoJ appears to not want to appreciate that it is the **cumulative effect** of the range of policies and practices that is having significant prejudice on the claimant community. The definition of cumulative is as follows:

increasing or increased in quantity, degree, or force by successive additions: the cumulative effect of two years of drought<sup>89</sup>

121. These proceedings have been brought on the basis of the cumulative effect of the practices and the policies of the Crown which have now reached a crisis stage.

122. Counsel for the Ministry further states that “no examples of prejudice have been put forward in respect of either policy”<sup>90</sup>.

123. However, it is submitted that it is a well accepted principle of access to justice that the dispensation of legal aid ought to be independent of the very agency who is likely to be on the other side of the proceedings. In this case, lawyers are expected to be, without fear or favour advancing the interests of their clients. Sitting across the negotiating table is the other party to the dispute, namely OTS on behalf of the Crown. The other party to the dispute is then directly responsible for providing funding to the claimant for legal aid. This could hardly, in anybody’s language, be seen as independent and neutral dispensation of legal aid.

124. No information has been provided in relation to what the policies of OTS are in relation to the distribution of legal aid funding. Counsel understands that it is made on a “case by case” basis. It is a system designed to reward and provide incentives for lawyers for claimants

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<sup>89</sup> <http://oxforddictionaries.com/definition/english>.

<sup>90</sup> Wai 2374, #3.1.15 and Wai 2378, #3.1.3, para 5.6.

to be more obliging in relation to Crown demands at the negotiating table.

### *No Alternative Remedy*

125. The Practice Note provides that, in deciding an application for urgency, it is of particular importance that the Tribunal consider whether there is no alternative remedy that, in the circumstances, it would be reasonable for the claimants to exercise.<sup>91</sup>
126. This aspect of the Practice Note in effect reflects similar provisions in the ToW Act. Section 7(1)(c) of the ToW Act allows the Tribunal a discretion to decide not to inquire into, or, as the case may require, not to inquire further into, any claim made under section 6 of that Act, if in the opinion of the Tribunal, there is in all the circumstances, an adequate remedy or right of appeal, which it would be reasonable for the person alleged to be aggrieved to exercise.
127. Section 7(1)(c) of the TOW Act does not apply to the Latimer & Piripi Claim.
128. Counsel submits that there is no alternative or adequate remedy that would be reasonable for the Claimants to exercise. The actions and omissions of the Crown giving rise to the significant and irreversible prejudice are far-reaching and affect the Claimants in relation to all of their claims before the Waitangi Tribunal. The Latimer & Piripi Claim goes to the heart of provision of access to justice for Claimants who wish to pursue claims in the Waitangi Tribunal in relation to Crown actions or omissions that are inconsistent with the principles Te Tiriti/the Treaty.

### *Reconsiderations and Reviews Not Alternative Remedies*

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<sup>91</sup> Waitangi Tribunal Practice Note – Applications Seeking Urgent Tribunal Consideration (28 May 2012), para 2.5.

129. Counsel refers now to the arguments contained in the 27 July Ministry Submissions that there are other alternative remedies available for the Claimants to pursue.

130. The 27 July Ministry Submissions state:

The Claimants do have alternative remedies. In particular they can:

- (a) apply for a “reconsideration” under s51 of the Legal Services Act 2011 which reconsideration has to be by a person other than the one who made the original decision;
- (b) appeal to the Legal Aid Tribunal. For that purpose a “decision” is defined to include a failure or refusal to make or reconsider a decision with a further right of appeal to the High Court.<sup>41</sup> <sup>92</sup>

41: S52(4).

131. Counsel reiterates its previous submissions on this point and respectfully submits that these are **not** sufficient alternative remedies. They **do not** enquire into breaches of the Treaty. The Tribunal is the only specialist body able to inquire specifically into breaches of the Treaty. Counsel refers to the fact that the joint Agency-Treaty Lawyer Working Party referred to in paragraph 87 above, which was established to work through many of these issues, has not made much progress. Mr Tavake Afeaki will be providing evidence directly on this point should a hearing be granted. Good faith efforts have been made by senior members of the Treaty bar on behalf of the claimant community for some substantial period of time now, to very little avail.

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<sup>92</sup> Wai 2374, #3.1.15, Wai 2378, #3.1.3, para 7.7.

132. With all due respect, reconsideration applications and review applications deal with isolated and piecemeal matters on an ad-hoc basis – they do not address the issue of the widespread prejudicial effects of Crown policies and practices in the dispensation of legal aid in the Treaty sector and any associated Treaty breaches.
133. The cumulative effect of these practices and actions is demonstrative of a concerning systemic failure on the part of the Agency which has had a detrimental impact on:
- a. the timely and effective provision of quality legal services to the Claimants in relation to the progression of their claims before the Waitangi Tribunal; and
  - b. the erosion of access to justice for the Claimants in this important and vital Treaty sector; and
  - c. the consequent breaches of the Crown's obligations to Maori under Te Tiriti/the Treaty;
  - d. ultimately giving the Crown the upper hand in all of its dealings with Maori before the Tribunal and in the negotiation of Treaty settlements.
134. The Claimants are at risk of losing experienced and capable lawyers, thus prejudicing Maori in the long term and the Claimants' rights of access to and utilisation of legal representation have now been constrained substantially.
135. In light of these factors, Counsel reiterates that there is no alternative or adequate remedy that would be reasonable for the Claimants to exercise. The actions and omissions of the Crown giving rise to the significant and irreversible prejudice are far-reaching and affect the Claimants in relation to all of their claims before the Waitangi

Tribunal. The Latimer & Piripi Claim goes to the heart of the provision of access to justice for Claimants who wish to pursue claims in the Waitangi Tribunal in relation to Crown actions or omissions that are in breach of the principles of Te Tiriti/the Treaty.

136. As Counsel has previously submitted, the Crown has introduced and implemented a framework of policies, legislative changes and decision-making that has had the end result of barring the Claimants from being able to participate in proceedings before the very body set up to hear and determine their long-standing Te Tiriti/the Treaty claims against the Crown. Given the special and unique role of the Tribunal in this regard, and the widespread impact of the Crown's actions and omissions on all claimants in the Waitangi Tribunal jurisdiction, an urgent inquiry by the Tribunal is the only appropriate remedy in the circumstances.

*Meetings with Agency Not An Alternative Remedy*

137. As Counsel has submitted previously, the Wai 2374 Claim concerns prejudice suffered by the claimants as a result of the Agency's practices and policies.
138. Whilst some matters in relation to the practices of the Agency may be resolved through mediation and other discussions with the Agency, there are on-going problems which Legal Aid Providers ("Providers") and the claimant community have been suffering. Counsel notes that these issues reached a crisis point late last year. Although almost a year has elapsed, the situation has not improved, in fact, the evidence demonstrates that it has worsened.
139. The prolonged, systemic nature of the problems demonstrates a deeper issue which Counsel submits will not be fixed by the addition of a additional staff. What is required is a thorough investigation by an independent and neutral body, such as the Tribunal.

140. The Latimer and Piripi Claim, in addition to the practices of the Agency, also concerns the **policies** of the Agency. The Wai 2374 Claimants note that the Agency does **not** appear to be proposing to amend or review its policies and it is these very policies, along with the Agency's practices, that are causing significant and irreversible prejudice.
141. While Counsel has met with the Agency already, these meetings only discussed issues which Counsel, as a Provider, was facing. As Counsel had noted in its Memorandum of 8 October 2012,<sup>93</sup> it was only after contact initiated by Pacific Law that a meeting was subsequently convened between Agency staff and Pacific Law on Wednesday the 26<sup>th</sup> of September. At the beginning of that meeting, Pacific Law raised the issue of Your Honour's Directions to the parties to discuss the issues that had arisen in the proceedings and requested that this matter be put on the Agenda.
142. The Agency officials present advised that they had no delegated authority to deal with the Tribunal directions at the 26<sup>th</sup> September meeting and that the meeting was only to be confined to the Provider issues as outlined in Pacific Law's previous correspondence dated 9<sup>th</sup> August and 18<sup>th</sup> September 2012 (included as Annexures A and B respectively to the Affidavit of Priscilla Agius<sup>94</sup>).
143. Whilst there is some overlap between the issues faced by Providers and the prejudice suffered by the claimants, Counsel reiterates earlier submissions that the Wai 2374 Claim is about the prejudice suffered by the Claimants. Providers are able to take separate civil action against the Agency for issues which Providers are facing.

### *Mediation Not An Alternative Remedy*

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<sup>93</sup> Wai 2374, #3.1.33.

<sup>94</sup> Wai 2374, #A18.

- 144.** Counsel refers to the Third Affidavit of Michele McCreadie,<sup>95</sup> and the associated letter dated 3 October 2012 (attached as Exhibit 3MM-A – Document 3), where she invited Pacific Law to enter into formal mediation or to meet with her to discuss broader issues. Counsel already filed a Memorandum on 8 October 2012<sup>96</sup> which addressed the contents of Ms McCreadie’s Affidavit.
- 145.** Counsel advises that the Claimants have agreed to enter into mediation, however this will not erase or replace the need for an urgent hearing to take place. While mediation may be useful in relation to narrowing down the matters for the Tribunal to consider in the Urgency Inquiry in relation to distinct Provider issues, the Claimants have instructed Counsel of their continuing concern at the continuing significant prejudice to them and their desire to have these proceedings dealt with urgently.
- 146.** The Tribunal would be aware on the basis of various submissions made by Counsel that the issues relating to the Providers are distinct from the issues relating to the Claimants and that the Claimants have issues in relation to the policies of the Agency, which the Agency does not appear to be considering amending.
- 147.** The recent Granting Aid for Waitangi Tribunal Matters Operational Policy (“the Policy”) was approved and circulated by the Agency on the evening of Friday 28 September 2012, to come into effect on 1 October 2012. Our clients continue to have major issues in relation to the Policy and note that no amendments that actually are beneficial to claimants’ interests have been made.
- 148.** This includes, for example, the fact that there are now fixed fees set for three categories of urgency applications, whereas previously, there were no fixed fees for any aspect of Tribunal proceedings.

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<sup>95</sup> Wai 2374, #A16; Wai 2378, #A9..

<sup>96</sup> Wai 2374, #3.1.33; Wai 2378, #3.1.19.

149. While mediation would assist in narrowing down the issues for the Tribunal given the Tribunal's limited resources, mediation will **not** address the fundamental breaches that have been alleged by the Claimants. The Agency is continually turning a blind eye to addressing the serious policy issues and the systemic practices which are a breach of Te Tiriti o Waitangi/the Treaty of Waitangi.
150. It is clear from the particular actions alleged to be a breach as listed in paragraph 60 subparagraphs (a) – (l) above, that the majority of those matters, given the approach of the Crown thus far, could not possibly be resolved in mediation.
151. Counsel also notes that a fourth Affidavit was filed by Ms McCreadie on 8 November 2012<sup>97</sup> advising that she had made an offer to mediate the issues between Pacific Law and the Agency and that she did not get a reply from Counsel. Ms McCreadie further states in her fourth Affidavit that she followed that up with a further letter dated 16 October 2012 and that no reply has been received to that either.
152. Counsel points out that since the time that Pacific Law received the first letter on 5 October 2012 proposing mediation, Pacific Law has undertaken the following:
- (a) sought instructions from Claimants as to whether to enter into mediation with the Agency;
  - (b) invested time into researching and contacting potential mediators for the mediation;
  - (c) has had a number of teleconferences with a preferred mediator and his EA regarding retaining mediation services for the mediation with the Agency; assessing the mediator's

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<sup>97</sup> Wai 2374, #A19.

availability and willingness to provide mediation services for the Provider issues in these proceedings; and discussing potential dates for mediation – we have identified available dates in late November 2012 and early December 2012.

153. Counsel is in the process of writing to the Agency confirming the above.

*Conclusion – No Other Alternative Remedy*

154. The only remedy available to the Claimants is to bring this claim before the Tribunal for urgent determination.

*Readiness to Proceed*

155. The third Urgency Criteria set out in the Practice Note is whether or not the Claimants are ready to proceed urgently to a hearing.
156. Counsel submits that the Claimants are ready to proceed to an urgent inquiry. Counsel refers to the previous Affidavits filed as providing evidence of the Claimants readiness to proceed.

*Evidence Proposed to Be Called*

157. Because urgency is yet to be granted, Counsel has not been able to prepare terms of reference for the engagement of expert witnesses to prepare evidence. However, Counsel has been in discussions with both claimants and various academics and senior practitioners with, inter alia, human rights and international expertise, including the following persons who have indicated that they could be willing to provide claimant and/or expert evidence on behalf of the Claimants:
- a. Mr Haami Piripi, Chair of Te Runanga o Te Rarawa for the last 6 years. Mr Piripi has a Social Work degree majoring in sociology and postgraduate pares in Maori and counselling along

with 30 years of experience as a senior civil servant across a range of government agencies and entities including as Chief Executive Officer of the Maori Language Commission, Department of Conservation, Department of Labour, Office of Treaty Settlements, Department of Social Welfare, Corrections and the Ministry of Justice;

- b. Mr Russell Kemp, named claimant for the Wai 996 Te Uri o Hau (Latimer and Others) Contemporary Matters Claim (“the Contemporary Claim”). Mr Kemp is Trustee of the Te Uri o Hau Settlement Trust (“the Settlement Trust”), Trustee of the Otamatea Marae and Vice Chairman of the Taitokerau Trust Board;
- c. Mr Errol Churton, named claimant for the Wai 377 Kaiwharawhara and Hutt Valley Lands Claim;
- d. Mr David Potter, named claimant for the Wai 996 Ngati Rangitahi Inland and Coastal Land Blocks Claim. Mr Potter is Secretary of the Ngati Rangitahi Raupatu Trust Inc and Chairman of the Matata Awakaponga Cemetery Trust;
- e. Professor Margaret Wilson, former Attorney-General of New Zealand and speaker of the House, Foundation Dean of the University of Waikato Law School, and currently Professor of Law and Public Policy at the University of Waikato;
- f. Mr Maanu Paul, a representative from the Mataatua District Maori Council;
- g. several senior practitioners of legal firm who specialise in complex civil litigation, to provide a comparison of costs of taking other civil proceedings comparable with Tribunal proceedings;

- h.** Professor Brad Morse, Dean Of Law and Professor of Law at the University of Waikato and Professor of Law in the Faculty of Law, at the University of Ottawa. His past career appointments include as Executive Director of the Native Legal Task Force of British Columbia (1974-75); Research Director of the Aboriginal Justice Inquiry of Manitoba (1988-91); and Chief of Staff to the Hon. Ronald A. Irwin, Canadian Minister of Indian Affairs and Northern Development (1993-1996). Professor Morse has served as legal advisor to many First Nations in Canada as well as national and regional Aboriginal organisations since 1974 in a broad range of constitutional, land claim, governance, economic and treaty issues. He was General Counsel to the Native Council of Canada from 1984-93 during which time he was directly involved in the First Ministers Constitutional Conference Process (1984-87), Meech Lake Accord Constitutional proposals (1987-90) and Charlottetown Constitutional Accord proposals (1990-92). He has been a consultant to various royal commissions, government departments and Indigenous peoples' organisations in Canada, Australia and New Zealand and as a Chief Federal Negotiator on several land claims and treaty issues in Canada. Professor Morse will provide evidence on policies and practices of legal aid administration in relation to native title and customary rights of indigenous peoples in the United States, Canada and Australia and evidence on rights of access to justice for indigenous peoples as a subset of access to justice as a generic human right, including international comparisons with other jurisdictions.
- i.** Mr Tavake Afeaki, Barrister and Solicitor of Afeaki Chambers, a representative of Te Hunga Roia Maori (Maori Law Society Inc). Mr Afeaki has been on working committees for the Agency and its predecessor, the Legal Services Agency, since 2000;

- j. a representative of the New Zealand Law Society in relation to costs issues, including the measures used by the NZLS to determine what comprise reasonable costs for the taking of various proceedings before the Courts and in relation to the professional obligations binding on lawyers in assessing whether they are able to properly take up and progress a case on behalf of a client;
- k. Ms Priscilla Agius, Barrister and Solicitor of Pacific Law Limited.

158. The involvement of the proposed witnesses would have to be confirmed once there is approval to proceed with the urgent hearing..

**Proposed Timetabling**

- 159. Counsel proposes below various factors for the Tribunal to consider in approving a draft timetable for the urgent hearing, if granted.
- 160. Counsel refers to the 27 July Ministry Submissions alleging that “there is no evidence that the claimants are ready for a hearing”.<sup>98</sup>
- 161. It appears that Counsel for the Ministry was concluding that at the time, Counsel’s request for an extension in relation to Affidavits to be filed in support of the Latimer and Piripi Claim somehow lead to the conclusion that the Claimants are not ready to proceed to a hearing. Such an approach, devoid of any sort of deductive reasoning, implies that somehow the Claimants, as a result of the seeking of this extension, would not be prepared for a hearing. Put simply, it is far-fetched to conclude that the Claimants are not ready to proceed merely because an extension for the filing of Affidavits was sought, which extension was granted.

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<sup>98</sup> Wai 2374, #3.1.15 and Wai 2378, #3.1.3, para 6.1.

162. There were various valid reasons for the delay in filing the Affidavits in question at the time. For instance, there was uncertainty as to other claimants joining the proceedings or filing applications for urgency in their own right. The matters dealt with in the Latimer and Piripi Claim are not isolated incidences – they reflect widespread policies and practices that have had the consequence of significant prejudice to the claimant community. Counsel had been liaising with and discussing matters with Counsel for other claimants who have similar grievances.
163. Counsel had also been fully immersed in other proceedings before the Tribunal, as well as other private client work, one of these being the Fresh Water/SOE Urgent Inquiry.
164. Moreover, Counsel was also somewhat reluctant to press “full steam ahead”, spending large amounts of limited time working on the Latimer and Piripi Claim prior to the granting of legal aid as a result of the consistent pattern encountered by the Claimants in relation to various Agency practices.

#### **Confirmation of the issues to be addressed during the hearing**

165. Counsel submits that the Tribunal will need to have a finalised and focused list of final issues to consider for determination in the Urgency Inquiry, which Counsel submits will be largely in relation to Claimant Issues.
166. Counsel submits that the primary issues that the Tribunal will need to address in during the hearing to resolve the Claim are as follows:
- (a) **What are the obligations of the Crown in relation to access to justice under Te Tiriti o Waitangi/the Treaty of Waitangi?**

- (b) Are the various policies and practices of the Crown surrounding the dispensation of legal aid in breach of these obligations;**
- (c) If so, what recommendations should be made as to a Treaty-compliant approach?**

**167.** The Claimants will be seeking that the Tribunal make general and specific recommendations in relation to each of the final issues for determination by the Tribunal.

#### **Role and Funding of Expert Witnesses**

- 168.** The Claimants have been liaising with and organising a group of claimant and expert witnesses who have indicated their willingness to provide evidence on a range of matters central to the Application, as set out in paragraph 157 above. The availability of each expert witness, however, remains dependent on confirmation of terms of reference and sufficient funding from the Agency being approved.
- 169.** In finalising a draft timetable, sufficient time will need to be taken into account for Counsel to apply for legal aid for the funding of expert witnesses, including the time that will be required by the Agency to consider and approve any expert witness funding applications.
- 170.** It is proposed that each expert witness will:
- (a)** prepare terms of reference for each witness' evidence relevant to their area of expertise for the purposes of clearly setting out how it is proposed each witness will inform the Tribunal's determination of the final issues;

- (b) identify key literature, case law and other documentation that may be used to answer the issues of relevant to their particular area of expertise;
- (c) provide the Tribunal with a bibliography of materials for inclusion on the Record of Inquiry, which others may seek to add to during the course of the hearing;
- (d) be provided with all evidence filed by the Crown and other parties;
- (e) drawing on all evidence filed, their own identified materials and drawing on their own expertise, attempt to answer those issues relevant to their area of expertise and explain the relevance of those answers to the final issues for determination by the Tribunal;
- (f) provide within a set timeframe a completed brief of evidence and/or report to the Tribunal for consideration.

### **Disclosure**

171. Counsel requested information from the Agency as the Claimants were concerned about the Agency's practice of engaging Specialist Advisers and in particular, over the quality of that advice, the process used in writing that advice, and the inherent conflict of interest issues in using certain selected Treaty practitioners as specialist advisers.
172. The information requested was not provided within the 20 working day timeframe set out in the Official Information Act 1982 and Counsel received no correspondence either acknowledging the request, or advising that the information had been provided.

173. Counsel is concerned that documents and information requested under disclosure will not be provided in a timely manner by the Agency and respectfully requests the Tribunal include disclosure timeframes in any agreed timetable.

#### **Timeframes for Filing of Evidence**

174. The Claimants propose the following directions for a timetable for the filing of evidence for an urgent hearing:
- (a) Agreed Statement of Issues by 23 November 2012;
  - (b) Request for disclosure filed by 26 November 2012;
  - (c) Crown response to disclosure filed by 14 December 2012;
  - (d) All Claimant evidence to be filed by 21 January 2013;
  - (e) All parties to file rebuttal evidence by 4 February 2013;
  - (f) All parties to file expert witness evidence by 25 February 2013;
  - (g) Claimants and interested parties supporting the Application to file submissions by 11 March 2013;
  - (h) Crown to file submissions by 18 March 2013;
  - (i) Hearing to be scheduled on first available late March – early April 2012.

#### **Proposed Hearing Time Necessary**

175. The Claimants submit that the Tribunal will benefit from hearing the oral evidence of a number of witnesses, including those expert witnesses being called on behalf of the Claimants. It is also

anticipated that interested parties to the proceedings may wish to be heard.

176. The Claimants anticipate that a hearing length of approximately one week will be required at this stage.
177. The Claimants propose dividing the time allotted to the hearing as follows:
- (a) presentation of the case for the Claimants covering all issues for determination;
  - (b) presentation of the case for interested parties, who have been given leave to appear, on all issues for determination;
  - (c) presentation of the Crown case on all issues for determination;
  - (d) reply from the Claimants on all issues for determination and on any such matters that are required to be addressed by the Tribunal.
178. Counsel advises that there will be **no** difficulty in preparing for an urgent hearing in relation to the Latimer and Piripi Claim, if granted. Counsel points out that the Claimants and Counsel were able to prepare for and participate in Phase 1 of the Fresh Water/SOE Urgent Inquiry, which dealt with novel and polarising national issues and involved complex legal arguments and analysis on various issues.
179. The Claimants **are ready** to proceed to an urgent hearing.

#### **Other Factors The Tribunal May Consider**

180. Counsel advises that, in relation to other factors that the Tribunal may consider in assessing whether to grant an urgent hearing,<sup>99</sup> in relation to whether the claim or claims challenge an important current or pending Crown action or policy, the Latimer and Piripi Claim challenges the current Crown actions and policies in relation to a vital and important matter – the ongoing administration of legal aid for Claimants with claims within the Tribunal jurisdiction.
181. In relation to whether an injunction has not been issued by the courts on the basis that the Claimants have submitted to the Tribunal the claim for which urgency has been sought, Counsel advises that an injunction has not yet been sought by the Claimants.
182. In relation to whether there are any other grounds justifying the granting of an urgent hearing, Counsel notes that the current circumstances raise serious issues in relation to the Claimants' rights of access to justice and the right to be free from discrimination. In this regard, Counsel refers to Articles 8 and 10 of the UDHR and articles 27, 28 and 40 of the UNDRIP set out in paragraph 53(c) and (d) above. The right to a fair hearing and an effective remedy is a fundamental human right. A subset of this right is set out in Article 40 of the UNDRIP which states that:

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.

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<sup>99</sup> *Waitangi Tribunal Practice Note – Applications Seeking Urgent Tribunal Consideration* (28 May 2012), para 2.5.

183. Counsel respectfully submits that an urgent hearing is vital to matters that directly impact on the hearing and resolution of their long-standing grievances before the Tribunal, and consequently to the Claimants' human rights of access to justice.

#### **AMENDED STATEMENT OF CLAIM**

184. Counsel advises that the Claimants have instructed Counsel to file an amended statement of claim that adds a number of causes of action.
185. These include firstly the Crown's lack of funding for groups for civil legal aid – Legal Aid is not available for claimant groups to challenge decisions of the Government which are clearly contrary to issues that have been raised before the Waitangi Tribunal – Counsel refers, for example, to the serious issues that have arisen for Claimants as a result of the Government's decision to press ahead with the sale of shares for power generating State Owned Enterprises notwithstanding the findings and recommendations of the Tribunal in the 2358 Freshwater and Geothermal Resources Claim urgent inquiry. The Claimants are significantly prejudiced by the lack of funding for groups to take civil action against the Crown.
186. The second cause of action that will be added to the Statement of Claim is in relation to the new Provider Contract, which has no remedy for Providers in the event of misbehaviour or breach of the Provider Contract by the Agency except that Providers are entitled to cancel the Provider Contract – this is farcical and indicative of the contempt by which the Agency is treating the Claimant community.
187. The third cause of action that Counsel seeks leave to be added to the Statement of Claim relates to the Crown's lack of funding for legal aid for Maori claimants wishing to take proceedings under the Marine and Coastal Area (Takutai Moana) Act 2011 ("the MCA"). Under the Legal Services Act 2011, legal aid is generally not

available for groups (except in Waitangi Tribunal proceedings). It is generally only available for individuals. This means that groups who wish to assert native/aboriginal title under the Act are effectively prevented from doing so - raising serious access to justice issues.

**188.** The fourth cause of action relates to the changes to criminal legal aid. Elements of these changes have been the subject of litigation by the Criminal Bar Association. The issue is that Maori figure disproportionately in the numbers of persons apprehended, charged and received custodial and non-custodial sentences. For example, data from the Ministry of Justice shows that in 2007:

- (a) Maori were four to five times more likely to be apprehended, prosecuted and convicted than their non-Maori counterparts;
- (b) Maori were also 7 ½ times more likely to be given a custodial sentence, and eleven times more likely to be remanded in custody awaiting trial.<sup>100</sup>

**189.** Counsel considers that the current restrictions around the availability of legal aid to groups under the LSA are inherently unfair and are a form of indirect discrimination against Maori. If the Claimants wish to pursue their customary rights in the marine and coastal area, the Claimants have no option but to file applications or enter into negotiations with the Crown as a group.

**190.** Subsequently, because Claimants are excluded from legal aid funding under the LSA, they face a critical financial barrier to protecting their customary rights.

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<sup>100</sup> *Maori Over-Representation in the Criminal Justice System – Does Structural Discrimination Have Anything To Do With It?* A Discussion Paper, Kim Workman, Executive Director, Rethinking Crime and Punishment, 8 November 2011, pages 12 – 13.

- 191.** It is in Counsel's view particularly harsh to expect Māori groups to expend what little resources they have on the costs of proceedings without any financial support from the Crown.
- 192.** Counsel refers to the Treaty principles of partnership and good faith – it would be manifestly unjust and in breach of these principles if claimant groups are left to cover these significant and unnecessary costs simply to utilise the processes in place that were forced upon Claimants by successive Governments as means to pacify the international community over wholesale expropriation of customary property rights.
- 193.** Counsel refers to the 2006 Report of the Special Rapporteur specifically recommended, relation to the predecessor legislation to the 2011 Act – the LSA 2000 – that:

The Legal Services Act should be amended to ensure that legal aid is available to Maori iwi and hapu as bodies of persons so as to afford them access to the protection mechanisms of human rights, and in order to eliminate discrimination against Maori collectives.<sup>101</sup>

- 194.** Counsel submits that the 2011 Act should provide for legal aid to be available to claimant groups in relation to all native/aboriginal rights claims in the foreshore and seabed, including in respect of proceedings under the MCA.
- 195.** Counsel advises that an amended statement of claim reflecting the above causes of action will be filed with the Tribunal during the week beginning 19 November 2012.

## CONCLUSION

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<sup>101</sup> Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Rodolfo Stavenhagen, Addendum, Mission To New Zealand, 13 March 2006, page 20, paragraph 88.

196. Counsel respectfully submits that the Claimants have more than adequately met the Urgency Criteria and therefore ought to be granted an urgent hearing.
197. Counsel notes that for many hearings that Counsel has been involved in before the Tribunal, it has become commonplace for such hearings to commence with various comments from Treaty bar lawyers as to the lack of legal aid funding for proceedings.
198. The situation remains dire and has extensive consequences on the claimant community. The claimant community is suffering severe prejudice.

## REMEDIES

199. Counsel refers to the specific relief sought in paragraph 49 of the SoC filed on 1 June 2012.<sup>102</sup>
200. Counsel respectfully submits that the Latimer and Piripi Claim should be granted.

**Dated** 15 November 2012



Janet Mason  
Counsel for the Claimants

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<sup>102</sup> Wai 2374, #3.1.1, para 49.