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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 Rangitihi; 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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MEMORANDUM ON BEHALF OF THE CROWN ON STATEMENT OF ISSUES
25 July 2013

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Waitangi Tribunal
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Ministry of Justice
WELLINGTON

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MAY IT PLEASE THE TRIBUNAL:

1. Introduction

1.1 This Memorandum is the Crown's response to the Tribunal's direction of 28 June 2013[1] commenting on the claimants' proposed statement of issues dated 17 July 2013.[2]

1.2 By Memorandum-Directions dated 19 March 2013[3] this Tribunal adjudicated that as follows (emphasis added):

> **Decision**
>
> 79. The Tribunal is satisfied that the requirements for an urgent hearing have been met in respect of **some of the issues** identified by the claimants. As set out above we consider that there may be significant and irreversible prejudice to claimants in circumstances where they have settled and there is some expectation by LAS that they should use settlement assets to fund litigation in the Tribunal. There are also important issues to consider in relation to the decisions made by LAS determining whether to grant legal aid in circumstances where the claim may test the boundaries of Tribunal jurisprudence, and/or where it is debatable whether a party needs to appear before the Tribunal or not.

1.3 At the very outset of the Judicial Conference held on 27 June 2013, this Tribunal reiterated that it had only granted urgency on the limited matters set out in para 79 of that decision.

1.4 That decision, of course, followed:

(a) A lengthy exchange of sometimes complex affidavits (including lengthy claimant affidavits), and also memoranda;

(b) An almost full day Judicial Conference held on 15 November 2012;

(c) The presentation on that day of 65 pages of "oral" submissions on behalf of the claimants[4];

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1 Wai 2374 # 2.5.21.
2 Wai 2374 # 3.1.55.
3 Wai 2374 # 2.5.18.
4 Wai 2384 # 3.1.37.

(d) Submissions of counsel for the claimants in response to the Crown submissions which claimant submissions ran to 58 pages[5];

(e) More affidavits from the claimants[6]; and

(f) The claimants' response to the Crown's post hearing submissions which response ran to 31 pages.

1.5 At the 27 June 2013 Judicial Conference the claimants appeared to accept that the urgency hearing was to be limited to the matters set out at para 79 of the 19 March 2013 Tribunal decision although it was accepted by all that a "scene setting" issue would be appropriate relating to the scope of the Treaty right to legal aid in a generic sense.

1.6 It was in light of that apparent acceptance that the Crown:

(a) Indicated at the hearing it might be feasible to agree the Statement of Issues; and

(b) Consented to the request from the claimants for further time in which to file what was hoped to be an agreed position.[7] Such consent was before the Crown had seen anything from the Claimants subsequent to the Judicial Conference.

1.7 The Tribunal then reiterated its position in the Memorandum-Directions of 28 June 2013 at para 6 where it stated:

> 6. Apart from consideration of the applicable Treaty principles, the SOI for Wai 2374 will need to provide for the specific issues set out in the Tribunal's decision granting urgency dated 19th March 2013 (Wai 2374, #2.5.18), being the policy and principles applicable to the consideration of legal aid for:
>
> a. Claims that are testing the boundaries of Tribunal jurisprudence;
>
> b. Interested parties involvement in Tribunal inquiries; and
>
> c. Claimants who have received settlements.

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5 Wai 2374 # 3.1.33.
6 Wai 2384, # A21, A22.
7 See claimants' memorandum of 11 July 2013, Wai 2374 # 3.1.54.

1.8 The Crown was, therefore, concerned to receive in draft the memorandum that, with some edits, was filed with the Tribunal on 17 July 2013[8].

1.9 That seeks to rerun past arguments in an attempt to broaden the scope of the urgent hearing despite the explicit and limited ruling of the Tribunal.

1.10 That attempt highlights the concern expressed by counsel for the Crown at the Judicial Conference of 27 June 2013 that broadly expressed issues will allow the scope of inquiry to be widened. That will then leave the Crown in the quandary of whether or not to respond in kind.

1.11 It also runs the risk that the actual timetable for the hearings will be inadequate.

1.12 The issues suggested by the claimants at para 4.1 as issues (b)(iii) and (c) run the very real risk that the Tribunal will be dragged into the minutiae of legal aid, including levels of allowances for disbursements and whether or not booking fees are chargeable.

1.13 The Crown also notes that the issue of "equality of arms" was fully and fairly in front of the Tribunal before its decision of 19 March 2013.[9]

1.14 So too was the issue of the alleged lack of independence in relation to the role of the Legal Services Commissioner and granting of legal aid and the grant of pre-mandate funding. But the Claimants try to indirectly raise these issues when addressing remedies.

1.15 Moreover claimant issue (b)(iii) presupposes a factual matter that the Crown does **not** accept, namely that secondary provider rates were decreased (as opposed to the prevailing rate being applied consistently).

1.16 Other draft issues also attempt to prejudge the issue in question (eg issue (b)(ii)). Issue (b)(i) also blurs the line between Wai 2374 and Wai 2386.

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8 Wai 2374, # 3.1.55.

9 Note, for example, paras 59 to 78 of Wai 2374 # 3.1.49, responded to by the Crown at paras 5.1 to 5.15 of the Crown memorandum # 3.1.49, and replied to by the Claimants at paras 36 and 37 of the claimants' memorandum # 3.1.51.

1.17 It follows that the Crown rejects the issues as drafted by the Claimants and proposes its own.

2. Proposed Statement of Issues

2.1 Do the principles of Te Tiriti o Waitangi/the Treaty of Waitangi:

(a) Confer a right to legal aid?

(b) If so, is this an absolute right?

(c) If not, at a level of principle, what factors are relevant to the right of access to legal aid?

2.2 Under present legislation and policy, are applications for legal aid for Waitangi Tribunal proceedings likely to be unreasonably declined, in breach of te Tiriti/Treaty principles, for historical and contemporary claims for the following reasons:

(a) Because hapu and iwi are required to use settlement assets to fund proceedings before the Tribunal?

(b) As a result of the policy with regard to the provision of legal aid for Tribunal inquiries for "interested parties" (being parties who are not primary claimants in a Tribunal inquiry but who have related issues)?

(c) In relation to other claims (other than just "interested parties") where it is debatable whether that party needs to appear before the Tribunal or not?

(d) In relation to claims that may test the boundaries of Tribunal jurisprudence?

2.3 If the answer to any of the questions is that there is or is likely to be a Treaty breach have the present claimants suffered or are they likely to suffer prejudice?

2.4 If the answer to the third issue is also yes, what are the appropriate recommendations that should be made that expressly address the breach?

DATED at Wellington this 25th day of July 2013

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Counsel for the Crown