IN THE WAITANGI TRIBUNAL

Wai 2478
Wai 2512

CONCERNING

the Treaty of Waitangi Act 1975

AND

applications for urgent hearings concerning the review of Te Ture Whenua Māori Act 1993

DECISION OF THE TRIBUNAL ON APPLICATIONS FOR AN URGENT HEARING

30 September 2015

Introduction

1. This decision concerns two applications for an urgent hearing before the Tribunal regarding the review of the Te Ture Whenua Māori Act 1993 (TTWMA).

The claims

2. On 1 August 2014, the Tribunal received a statement of claim and an application for an urgent hearing from Marise Lant in relation to the prospective repeal of Te Ture Whenua Māori Act 1993. This claim was registered as Wai 2478, the Repeal of Te Ture Whenua Māori Act Claim (Wai 2478, #2.1.1). Ms Lant later revised her pleadings through an amended statement of claim and amended application for urgency filed on 24 September 2014 (Wai 2478, #1.1.1(a) and #3.1.1(a)).

3. On 2 October 2014, the Tribunal received a statement of claim and an application for an urgent hearing from Lorraine Norris, Michael Beazley, William Kapea, Owen Kingi, Ani Taniwha, Justyne Te Tana, Pouri Harris, Vivienne Taueki and Tamati Reid on behalf of themselves and their hapū concerning the Crown's review and proposed repeal of Te Ture Whenua Māori Act 1993. This claim was registered on 17 April 2015 as Wai 2512, the Review, Repeal and Reform of Te Ture Whenua Māori Act 1993 Claim (Wai 2512, #2.1.1).

4. The Tribunal also has another claim and application for urgency before it concerning the review of TTWMA, filed by the New Zealand Māori Council on 21 August 2014 and registered on the same day as Wai 2480, the New Zealand Māori Council Review of Te Ture Whenua Māori Act claim (Wai 2478, #1.1.2 & 2.1.2). This application for urgency was adjourned for three months on 9 June 2015, as such it did not form part of these proceedings however the Wai 2480 claim was consolidated with the Wai 2478 claim on 21 August 2015 (Wai 2478, #2.5.7).

5. On 20 July 2015, counsel for Mrs Nellie Rata sought interested party status in these proceedings for Mrs Rata and counsel also sought leave to have added to the Record of Inquiry a letter from Mrs Rata, an application for urgency and a memorandum of counsel in support of an application for urgency. These documents had been filed originally as a new claim but that request was withdrawn and then one made for interested party status (Wai 2478, #3.1.20).

6. The Tribunal also received a memorandum from counsel for Pita Tipene, Rudolph Taylor and Te Hapae Ashby on behalf of Te Kotahitanga o Nga Hapu Ngāpuhi seeking to be added as an interested party to these proceedings (Wai 2478, #3.1.29).

7. On 16 September 2015 the Presiding Officer issued memorandum-directions granting interested party status to Mrs Nellie Rata and Te Kotahitanga o Nga Hapu Ngāpuhi (Wai 2478, #2.5.20).

Procedural History

8. On 19 June 2015 the Chairperson issued memorandum-directions consolidating the Wai 2512 claim into the Wai 2478 claim for inquiry purposes (Wai 2478, #2.5.12).

9. The Panel to hear the Wai 2478 consolidated claim was confirmed on 19 June 2015. Ronald Crosby was appointed Presiding Officer following Tim Castle's decision to stand down as Presiding Officer after the expiry of his warrant (Wai 2478, #2.5.12). Tureti Moxon was appointed as a member of the Panel and Rawinia Higgins and Sir Hirini Mead were confirmed as members, having already been appointed alongside Mr

Castle. Due to unforeseen circumstances, Mrs Moxon was unable to fulfil her duty as a Tribunal member, as such she stood down and Miriama Evans was appointed on 24 July 2015 as a member of the Tribunal panel (Wai 2478, #2.5.15). The Tribunal panel was delegated the task of determining the applications for urgency.

10. On 24 July 2015, the Presiding Officer issued memorandum-directions directing the Crown to provide the Tribunal with an update on the reform of TTWMA. Following this update the applicants were to advise the Tribunal as to whether or not they would file amended pleadings (Wai 2478, #2.5.13). As directed, the Crown filed an update and the applicants advised the Tribunal that they would file amended pleadings. In memorandum-directions of 8 July 2015, the applicants were directed to file their amended pleadings by 15 July 2015, the Crown were then to respond by 29 July 2015 and the applicants to provide a reply by 5 August 2015 (Wai 2478, #2.5.14).

11. Amended pleadings were filed by the applicants on 17 July 2015, after seeking a two day extension (Wai 2478, #1.1.1(b), #1.1.3(a), #3.1.1(b) & #3.1.23(a)). The Crown filed their response on 3 August 2015, after receiving a corresponding extension. The applicants filed their submissions in reply on 10 August 2015 (Wai 2478, #3.1.22). On 14 August 2015, the Presiding Officer issued memorandum-directions advising parties that a judicial conference would be convened on 17 September 2015 to hear from parties regarding the applications for urgency and also on the issue of non-disclosure by the Crown, which was raised by the applicants (Wai 2478, #2.5.17).

12. A judicial conference was held at the Waitangi Tribunal Offices in Wellington on 17 September 2015.

Background

13. TTWMA is at present the primary legislation for Māori land and it has its origins in the hīkoi led by Dame Whina Cooper in 1975. The purpose of this hīkoi was to end the alienation of Māori land. In 1978, a bill was introduced to the House of Representatives to consolidate Māori land laws. At the same time a Royal Commission was appointed to inquire into the Māori Land Court and Māori Appellate Court. As a result of the release of the report by the Royal Commission, the 1978 bill did not proceed. Instead, the New Zealand Māori Council released a policy paper setting out recommendations for new legislation. Following this, a new bill was introduced in two parts; this new bill took 6 years to be enacted and eventually became Te Ture Whenua Māori Act 1993 (Wai 2478, #A1 paras 4-12).

14. TTWMA underwent a review in 1998, which resulted in mainly technical changes. However, it also gave the Māori Land Court more specific jurisdiction in relation to landlocked Māori land. The current review is the only other review of TTWMA (Wai 2478, #A1, paras 14-16).

15. The current review came about following a 2006 review of Māori land tenure undertaken by Hui Taumata, which resulted in a paper identifying areas of the current TTWMA for change to help improve Māori land utilisation. Following this review, Te Puni Kokiri (TPK) commissioned a report, which was released in April 2011. The report summarises the findings of a number of hui held for the purpose of understanding the aspirations of Māori land owners. The authors of this report considered that there should be a broad review of regulatory and non-regulatory influences on Māori land and Māori land tenure (Wai 2478, #A1, paras 17-19).

Current Review

16. On 3 June 2012, the Associate Minister of Māori Affairs announced that an independent panel of experts would be formed to review TTWMA. The Panel was chaired by Matanuku Mahuika, who was joined by Toko Kapea, Patsy Reddy and Dion Tuuta.

17. The Panel were informed by existing literature and also met with a number of people who have knowledge of the current Act, including Judges of the Māori Land Court, the Māori Trustee and a former Māori Land Court Registrar.

18. The Panel published a discussion document in March 2013 based on five key propositions. 20 consultation hui were held between 29 April 2013 and 13 June 2013 to discuss the document. In addition to statements received at these hui, 189 written submissions on the discussion document were received. In July 2013, the Panel submitted its report to the Associate Minister of Māori Affairs, which recommended among other things that the laws relating to Māori land should be changed and clarified. The government accepted the Panel's view that, to give effect to their recommendations new legislation rather than amendments to the current TTWMA was required (Wai 2478, #A1, paras 23-28).

19. A technical panel was tasked with developing detailed policy required for a new bill. This panel was chaired by John Grant who was joined by Matanuku Mahuika, John Stevens, and Linda Te Aho. A group of external advisors also assisted this panel; they included Spencer Webster, Dayle Takitimu, Donna Flavell, Kerensa Johnston, Willie Te Aho, Rawson Wright, Tamarapa Lloyd, Hore Manuirirangi and John Hooker (Wai 2478, #A1, paras 32-33). Several workshops with this group of advisors have been held. The Associate Minister of Māori Affairs led presentations on the outcome of the review and the government's legislative intentions to groups of Māori land owners and administrators between September 2013 and April 2014 (Wai 2478, #A1, paras 35-36). Further engagement hui with Māori land owners were held in August 2014. The technical panel were responsible for compiling and reviewing all feedback received and to determine how it would be reflected in the development of a bill.

20. The Minister of Māori Affairs announced the appointment of a Ministerial Advisory Group who would provide him with advice on the development of an exposure draft of Te Ture Whenua Māori Bill, which would include the development of a Māori Land Service. This group has met several times and consulted with various groups including, the New Zealand Māori Council, and Federation of Māori Authorities. On 22 May, 2015 they met with the Judges of the Māori Land Court. The exposure draft of the bill was not ready in time for the hui with these groups (Wai 2478, #A5, paras 10-11).

21. The exposure draft of Te Ture Whenua Māori Bill was released to the public on 27 May 2015, along with a consultation document describing the reform proposals. Twenty three consultation hui were held in June 2015 to coincide with this release. Submissions on the exposure draft could be made up until 7 August 2015; they were then to be analysed and a summary of submissions provided to the public (Wai 2478, #A5, paras 15-24).

22. TPK continues to work on the development of the bill which proposes to provide a reformed framework for Māori land. The Minister of Māori Affairs has decided that more time is needed to ensure work on the development of the Māori Land Service and Māori Land Networks is more advanced before the Bill is introduced. As such, the Bill will not be introduced into the House of Representatives now until the first quarter of the 2016 calendar year (Wai 2478, #A5, para 27).

Parties Submissions

Wai 2478 claimant

23. The claimant submits that; whenua is a taonga tuku iho, Māori were guaranteed their tino rangatiratanga over their taonga in the Treaty of Waitangi, and TTWMA is a manifestation of the way in which the principles of the Treaty of Waitangi can apply to Māori land. The claimant submits that the Crown has a duty to recognise and actively protect Māori rights and interests under the Treaty (Wai 2478, #1.1.1(b)).

24. It is alleged that the Crown has acted inconsistently with the principles, obligations and duties set out in the Treaty in the following ways (Wai 2478, #1.1.1(b)):

    a) By assuming for itself the authority to make, amend, reform and repeal laws, regulations and policies which impact on and prejudicially affect the claimant's land, estates, property and taonga, including Māori land;
    b) By failing to engage with the claimant in good faith, reasonably and honourably; and
    c) By promoting reform proposals for Māori land which will prejudicially affect the claimant.

25. The claimant submits that this claim should be heard urgently by the Tribunal; if not, there will be no realistic prospect of it being heard before the Crown introduces new legislation in relation to Māori land into the House of Representatives (Wai 2478, #3.1.1(b), para 5).

26. In accordance with the Tribunal's criteria for urgency the claimant submits that she can demonstrate that she will suffer significant and irreversible prejudice as a result of the Crown's actions in relation to the review of TTWMA. The Crown's policies and review process of TTWMA is prejudicial to the claimant because of the process that has been followed and because of the substantive provisions in the draft bill (Wai 2478, #3.1.1(b), para 4).

27. The claimant submits that this claim challenges an important current Crown action that being, the complete repeal and replacement of TTWMA with new principles, new definitions, new administrative structures and new governance arrangements for Māori land (Wai 2478, #3.1.1(b), para 10).

Wai 2512 claimants

28. The Wai 2512 claimants allege that the TTWMA review process is not Treaty compliant and has been flawed from the beginning. They allege that the structure of the resulting report suggests predetermination of the recommendations made, as well as excessive haste in the preparation of the report and proposed changes. Further, the claimants allege that the conclusions reached by the review Panel will cause prejudice to Māori if implemented, and the missed opportunity of having a comprehensive and effective report is also causing prejudice to Māori (Wai 2478, #1.1.3).

29. The claimants allege that the Crown's review of TTWMA constitutes a breach of the Treaty of Waitangi and if their claim is not heard urgently, the enactment of new legislation will result in irreversible prejudice to the applicants and others like them (Wai 2478, #3.1.23).

30. For the following reasons, the claimants submit that they are suffering and will continue to suffer significant and irreversible prejudice as a result of the review and proposed reform:

a) The review was conducted by a group that was selected by the Crown and never mandated by Māori;
b) The review panel did not comply with their terms of reference;
c) Hui with affected Māori were done on inadequate notice, and at times that were inconvenient and conflicting;
d) Conduct at hui was designed to impair the transfer of information; and
e) Hui voting adverse to the TTWMA review, as well as other expressions of opposition, has been ignored.

Crown Response

31. The Crown opposes the applications for an urgent hearing and submits that the material filed does not reach the threshold required to demonstrate that an urgent hearing is warranted (Wai 2478, #3.1.22, para 14).

32. It is submitted by the Crown that the claimants will not suffer or are not likely to suffer significant or irreversible prejudice as a result of the review process. The Crown submits that it is appropriate for TPK to lead the review process as the agency responsible for administering TTWMA. Further to this, the Crown has received independent advice on the reforms and has undertaken significant consultation which has involved substantial opportunities for Māori landowners to understand and contribute to reforms. The review process has been and will continue to be a collaborative process with input from Māori (Wai 2478, #3.1.22, paras 15-17).

33. The Crown submits that the claimants have failed to detail any specific significant and irreversible prejudice resulting from the proposed reforms. It is submitted that more than general assertions are required; it is not enough for the applicants to disagree with the policy. They must be able to demonstrate that they are suffering or likely to suffer significant and irreversible prejudice. Evidence filed by the Crown demonstrates that a number of assertions made by the applicants are unfounded (Wai 2478, #3.1.22, paras 18-21).

34. Support from the wider claimant community has been accepted as a relevant consideration for the Tribunal, the Crown submits. The claimants have not demonstrated any support beyond themselves for their claims. The Crown further submits that in contrast to this, a number of pan-Māori groups and other key stakeholders have been actively involved in the reform process. This engagement along with a lack of evidence of support for the claimants claim counts against the grant of urgency (Wai 2478, #3.1.22, paras 22-24).

35. Finally, the Crown submits that the claimants are not ready to proceed to hearing. The Crown refers to the Wai 2512 claimants' submission, which states that they are ready to proceed "on reasonable notice" and also notes that the Wai 2478 claimant has reserved the right to file further amendments once the Crown's response to the consultation hui and submissions are made known. These circumstances, the Crown submits, demonstrate that the claimants are not ready to proceed (Wai 2478, #3.1.22, paras 25-27).

Discussion

Relevant considerations for urgency applications

36. Both in its May 2012 Waitangi Tribunal Practice Note '*GUIDE TO THE PRACTICE AND PROCEDURE OF THE WAITANGI TRIBUNAL'* and in a number of decisions on applications for urgent hearings, the Tribunal has stressed that because of its resourcing limitations and the importance of concluding its historical District Inquiries,

an urgent hearing should only be granted in exceptional cases. Such grants are only to be made where grounds are met for an urgent hearing and the diversion of its limited resources warrants that course.

37. On 26 April 2012 the Chairperson of the Tribunal had issued a memorandum-directions emphasising that while urgencies would be given priority for Tribunal resources, any grant of an urgent hearing would require diversion of resources and delay in the completion of historical District Inquiries. We are mindful, therefore, in considering these applications that the grounds for a grant of an urgent hearing must be genuinely established.

38. Pages 5 & 6 of the Tribunal's Practice Note helpfully stipulate the type of considerations to which regard will be had in considering whether to grant urgency, particularly 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;
- There is no alternative remedy that, in the circumstances, it would be reasonable for the claimants to exercise; and
- The claimants can demonstrate that they are ready to proceed urgently to a hearing.

Other Factors that the Tribunal may consider include whether:

- The claim or claims challenge an important current or pending Crown action or policy;
- An injunction has been issued by the courts on the basis that the claimants have submitted to the Tribunal the claim or claims for which urgency has been sought; and
- Any other grounds justifying urgency have been made out

39. These claims plainly arise from both current and pending Crown actions and policies because:

a) an exposure draft of the proposed Bill has been issued by the Crown;
b) the provisions of that draft Bill were drafted by the Crown;
c) Crown agents in the form of TPK officials, and its consultant advisers in the form of the Māori Advisory Group and a an independent academic consultant adviser, are considering submissions seeking rejection of, or possible changes to, the Bill;
d) the Tribunal was advised that the process from here on is that the submissions on the draft exposure Bill, with advice on any amendments suggested to be made, will be considered by the Crown, after which the Bill will be introduced into the House of Representatives;
e) there is currently no intention to take the amended form of the Bill back out to Māori generally for further input by way of consultation or submission, with the Crown relying on the Select Committee process to allow that further input.

40. To the level required for what is a preliminary consideration, what we must consider is whether the claimants have established that they are suffering or are likely to suffer significant and irreversible prejudice as a result of those actions or policies. In undertaking that consideration we can take into account the importance of the actions or policies, and any other grounds justifying urgency being granted.

Importance of Crown actions and policies

41. Because these Crown actions and policies affect Māori land we commence by observing that few if any issues under the Treaty have historically given rise to more concerns among Māori than the issue of past Crown breaches of the Treaty in respect of Māori land. The reasons for that concern among Māori are very plain.

42. The Māori version of the Treaty specifically guaranteed, ('*ka wakarite ka wakaae*'), to Māori '*tino rangatiratanga o o ratou wenua'* – the utmost authority over their whenua or lands. In other words the Māori version of the Treaty guarantees to Māori the utmost right to control how their lands are to be held and managed.

43. In the English version of the Treaty that guarantee is expressed less strongly, but nonetheless in very clear terms. Importantly, again the term is that the Queen '*guarantees*' to Māori, including the chiefs, tribes, families and individuals, '*the full and undisturbed possession of their Lands* …' and, again importantly, for '*so long as it is their wish and desire to retain the same in their possession*.' Once more then in the English version control and management of Māori land is specifically guaranteed to Māori for as long as <u>they</u> desire.

44. The claimants in essence argue that search as one might, there is no reference in the Treaty to Māori land having to be used in any particular way. Specifically of relevance to these claims, they say that nor is there anywhere in the Treaty any reference to Māori land having to be utilised *'kia whakamahi rawatia'* - or to achieve '*optimum utilisation'.* Yet those are the respective Māori and English phrases used in subclauses 1 and 2 of clause 3 containing the aronga or purpose of the draft exposure Bill.

45. That background is, in our view, crucial to the assessment of the importance of the issues raised in this case, because attempts in the past by settler governments to treat Māori land as 'waste' or 'idle' lands requiring utilisation, supposedly in the best interests of the new nation from a Pākehā viewpoint, led to war initiated in part by the Crown seeking the better quality Māori lands.

46. Those historical wars were succeeded by widespread land confiscations by the Crown in gross breach of the Treaty, as this Tribunal has held in report after report. And then the Crown initiated a Native Land Court system, which once again numerous Tribunal reports have held was purposely designed by the Crown to individualise Māori land titles. The purpose of that Court-supervised individualisation process was to make it easier for the Crown to acquire the better Māori lands for settlers.

47. Those processes were remarkably successful in stripping Māori of most of their lands. The result today is that Māori retain in the North Island less than 5% of the lands they were guaranteed in the Treaty by the Crown that they could hold '*so long as it is their wish and desire to retain the same in their possession*'. That occurred despite the Crown guarantee in the Treaty to Māori that they would have tino rangatiratanga – the utmost control – over their lands. In the South Island the areas retained in Māori ownership are tiny. In both islands the bulk of land retained in Māori ownership is poorer quality land.

48. The processes of Crown acquisition did not cease in the 19th century. As recently as the 1960's legislation was passed by the Crown enabling the confiscation of Māori land which was deemed 'uneconomic' – another Crown-led legislative practice which Tribunal reports have held to be in Treaty breach.

49. Those outcomes created a bitterness in Māori – Crown relationships that only 150 years later is finally slowly being addressed by Tribunal hearings and Treaty settlement

processes, which are still ongoing. In those districts where hearings are still occurring, or Treaty settlements are still being negotiated, these emotions remain very raw. Even among those who have settled, historical wariness of Crown intentions in respect of Māori land remains significant, justifiably when historical events are taken into account.

50. More recent history is not so grim. As described earlier in this decision in 1975 a famous hīkoi led by Dame Whina Cooper known as the Māori Land March drew attention to Māori land woes under a banner of '*Not an acre more'*. That event was so momentous that it was followed by such legislative responses over time as the Treaty of Waitangi Act 1975 which set up this Tribunal, and the 1985 amendment that enabled it to consider historical Treaty breaches. Then 1993 saw the passage of TTWMA which created a Māori Land Court in a new protective role and for the first time it became supportive of Māori land owners. In addition, to the credit of various Crown Ministries over the last 20 years, an active process of settling Māori claims of Treaty breach by the Crown has been undertaken and confirmed in repetitive settlement legislation.

51. The importance of the passage of TTWMA was that at the request and drive of Māori, for the first time legislation affecting Māori land, and the Court that controlled it, had in its Preamble an overriding duty of application of the Treaty – with its guarantees. The Preamble specifically recorded as a principle that land was a taonga tuku iho *"e tino whakaaro nuitia ana e te iwi Māori*," – an ancestral taonga of special significance to Māori. The interpretation provision at the commencement of the Act gave the Treaty principles specific statutory effect:

> *"2(1) It is the intention of Parliament that the provisions of this Act shall be interpreted in a manner that best furthers the principles set out in the Preamble."*

52. We have to assess the strength of these claims against those background historical and recent statutory settings which have created that special significance of land to Māori. It would be almost trite to say that it would be difficult to imagine a more fraught area for the Crown to now intrude upon by itself proposing legislation affecting Māori land. That is particularly so if it can be shown that the proposed new legislation by the Crown might affect the retention of Māori ownership, or Māori control and management of Māori lands, whether as a matter of strict law, or as a matter of practical fact or perception.

53. The challenge made by the claimants is essentially that it matters not whether the Crown intentions are said to be of empowering and assisting Māori to develop and utilise their lands for their own benefit. (A Crown witness has even described the Crown's role in one particular respect in the exposure Bill as being in the role of a 'parens patriae' – akin to a benevolent parent to the nation - Paragraph 31.1 of the 4th affidavit of John Alexander Grant.)

54. The claimants say, though, that the Treaty specifically guarantees only to Māori the total control of the management of their own lands, and that the Treaty does not provide for the Crown to have any such controlling or managing role in relation to their lands. Even if it is said by the Crown and its consultants that the proposed legislation is in the best interests of Māori and the nation in financial and economic terms, the claimants' response is that under the Treaty that is not for the Crown to decide.

55. That is the fundamental issue raised by these claims. Our view is that the challenge to the Crown repealing TTWMA and replacing it with its own style of Crown 'benevolence' to Māori owners does warrant in all the background circumstances a full and proper consideration as to whether those proposed Crown actions and policies are in breach of the Treaty.

56. For it is plain that if the current or pending Crown actions and policies are in Treaty breach, then prejudice will be suffered by Māori landowners, including the claimants. That prejudice would be significant if those actions and policies meant that Māori lost, or were exposed to the potential loss of ownership, or control of the management of their lands, whether in strict legal or practical terms. If on a substantive consideration of the effects of the draft exposure Bill it was found such losses could arise, then tino rangatiratanga for Māori over their lands would plainly be negated to that extent.

Treaty Compliance arguments

57. The Crown argued strenuously that it had met its Treaty obligations by consulting broadly with Māori in a range of ways and at various stages, including a broad consultation process at policy formulation stage by a Review Panel of experienced Māori and also by a Minister. Crown counsel also argued that it had further met its Treaty duties by providing opportunity through a rather unique process of releasing a draft exposure Bill for submissions, before introducing a Bill to the House in final form after considering those submissions – and in fact by extending the time for those submissions.

58. Moreover, the Crown pointed to the fact that it is seeking independent assessments of those submissions to the Advisory Group comprising Māori experienced in Māori land matters and of the Māori Land Court Judges' joint submission from a Māori academic lawyer.

59. The claimants' response in essence is that none of those steps meet the Crown's Treaty obligation of recognising and giving effect to Māori tino rangatiratanga over their own lands. The claimants say the Crown is the paymaster for all those consultant advisers, and furthermore it is the Crown which decides whether or not to accept their advice, not Māori.

60. Moreover, the claimants argue that much of the Crown's asserted consultation occurred either in a vacuum as to what was proposed (the Review Panel); or in too short a time frame to be useful (the consultation on the draft exposure Bill); or with too many uncertainties in the draft exposure Bill as to crucial aspects yet to be settled (such as the default governance agreement provisions, identity of the unidentified 'Chief Executive', identity and manner of operation of the proposed Māori Land Service.)

61. We do not consider that the validity in Treaty terms of the competing arguments about those processes can be resolved at this preliminary stage without substantive hearing.

62. The basic thrust of the claims of Treaty breach have been outlined above as being that for the legislative process to be Treaty compliant requires the Tribunal to be satisfied that Māori control and drive the process and not the Crown.

63. The argument by the Crown that its own processes through its own Ministers, officers and consultants, which it solely controls in decision-making terms, meet its Treaty obligations will need to be addressed in detail. That needs to be done at the same time as the claimants' arguments are tested in detail as to whether in terms of compliance with the Treaty only Māori can seek the repeal of, or substantive amendment to, the current TTWMA.

Particular aspects of prejudice

64. Given the basic conclusions we have reached on the major fundamental Treaty compliance issues it is not necessary in this preliminary decision on urgency to identify definitively all aspects of potential prejudice in a very large exposure Bill (282 pages).

65. However, it may well be helpful to the process of settling issues for the substantive hearing if we at least identify some of the particular aspects of asserted prejudice which we consider, even on a restricted preliminary view, do require substantive consideration as to their compliance with Treaty guarantees to Māori in respect of their lands.

66. In addition to the major tino rangatiratanga arguments as to whether the Crown or Māori should initiate legislative change to Māori land laws, the claimants raise what might also be termed 'higher level' claims affecting all Māori land owners to some extent such as arguments that:

a) An apparent reduction of Treaty principles in significance in the Bill behind a purpose of "*optimum utilisation"* degrades the Treaty guarantee of the right to exercise *tino rangatiratanga* over their lands in whatever manner the owners see fit.
b) The draft exposure Bill for Māori land in its present form undermines the protective role of the Māori Land Court under TTWMA of ensuring retention of Māori land for the benefit of all owners and not just 'participating' owners, and for a range of purposes including cultural purposes, as well as for use and development
c) The recommendation of the Review Panel to the Crown of the repeal of the TTWMA misinformed the Crown as:
    i. repeal was not required to enable Māori to utilise or manage their lands,
    ii. its provisions already provide for the same or similar ownership structures as are now proposed by the draft exposure Bill; and,
    iii. those ownership structures do not need Māori Land Court approvals to manage or utilise their lands efficiently

All of these issues are significant and warrant further consideration in detail on the substantive claim.

67. The claimants also raise the potential for legal or practical land loss, short or long term, arising from:

a) Managing kaiwhakarite provisions removing owners for extended periods of time from any role in respect of their own lands, (other than trying to put in place a governance structure to remove the managing kaiwhakarite), and requiring reporting only to the unidentified Chief Executive.
b) Participating owners provisions removing protective role of the Māori Land Court for absent owners
c) Lack of default governance agreement provisions until regulations passed
d) Potential use of company structures removing direct obligations of trustees to owners and replacing them with company structure and directors owing duties only to the company
e) Whangai provisions ignoring tikanga
f) Compulsory whanau trusts on intestacy

(We record that the issues we have identified in these paragraphs were not the only ones raised in the claims and we return to that shortly.)

68. In respect of the first of those latter issues as to the managing kaiwhakarite provisions, they bear some arguable practical similarities to previous historic legislative treatment of so-called 'uneconomic' Māori land. We struggled at this preliminary stage to understand how the Crown could deny potential for prejudice arising from those provisions, when its witness Mr. Grant said the Māori Advisory Group had

recommended that these provisions be removed, and further that he personally expected these provisions would be removed and not replaced by similar provisions.

69. This is obviously a particularly important issue for the Tribunal to consider. That significance is accentuated by the facts that the current Bill places no maximum term on the appointment of the managing kaiwhakarite, (who the Bill requires is to be given a minimum term of 7 years (cl. 152)), with no statutorily expressed limit to his/her powers other than in any conditions imposed in the notice of appointment by the Chief Executive. Otherwise the powers of the managing kaiwhakarite are "*to do anything necessary for the purpose of carrying out the kaiwhakarite's responsibilities, including entering onto the land*…"(cl.150). As presently described in the Bill an arguable purpose of these provisions is to enable enforced utilisation so as to "*maximise the profit to be generated by the land*" (clause 148(2)) or "*to generate a net return for its owners*"(clause 151(c) (v)).

70. While the evidence is that these provisions have been recommended by consultants to be removed, it seems to us an issue of major importance to consider if these provisions are Treaty compliant for Māori land, and whether they should be retained or not. If the decision is that in Treaty terms they should not be retained, then it would be important for the Tribunal to endeavour to ensure by specific recommendation that their removal is carried out.

71. We will not at this preliminary stage go any further on the other issues beyond saying that they also appear to be arguable issues in terms of the Treaty impacts requiring consideration at a substantive hearing.

72. Nor are we seeking at this preliminary stage of consideration to restrict the issues to be identified in the settlement of issues for the substantive hearing. We will return to that aspect of the settling of issues when discussing disclosure.

Irreversible prejudice and alternative remedies

73. The start point to this consideration is that the Treaty of Waitangi Act 1975 provides at s. 6 (6):

> 6. Nothing in this section shall confer any jurisdiction on the Tribunal in respect of any Bill that has been introduced into the House of Representatives unless the Bill has been referred to the Tribunal pursuant to section 8.

74. We have been informed that once TPK has undertaken its consideration of the submission process to the draft exposure Bill, the Crown's intention is to amend the Bill, and then introduce it to the House. That would mean no other avenue of review is possible of Treaty compliance independent of the Crown, other than a consideration of an urgent claim by this Tribunal.

75. Crown counsel argued that we should nonetheless conclude that any such possible prejudice, (which was denied), would not be irreversible, because once the Bill was passed we then again had jurisdiction to consider whether an Act of Parliament was in breach of the Treaty. Moreover, Crown counsel also relied upon the opportunity for the claimants to make submissions to a Parliamentary Select Committee on the Bill's provisions. On the basis of those two points it was said we should not hold an urgent hearing, because those alternative remedies remained available by submission processes in the Select Committee and by claim to the Tribunal after passage of the Act.

76. Whilst those points may be correct as a matter of strict law, as a matter of practicality and Treaty compliance we discount them. The reason for that is that it is the Crown that holds the final decision-making in all respects in those processes. Yet they are processes in respect of Māori land, over which the Treaty guaranteed to Māori tino rangatiratanga, or the utmost control, and which the English version guaranteed Māori they could hold "*so long as it is their wish and desire to retain the same in their possession*".

77. It is not sufficient for Crown counsel to suggest the Tribunal could always revisit the claims as a matter of urgency if recommendations of Crown agents such as the Māori Advisory Group, or of Mr. Grant as a Crown official, were not reflected in the actual Act passed. We consider it highly unlikely that the Crown at that stage would then accept a Tribunal recommendation to revisit and amend or repeal the whole, or parts, of a recent Act, when the Tribunal had recently had the opportunity on an urgent basis to assess potential Treaty shortcomings in pending Crown policies and actions, but had decided not to do so.

Readiness for an urgent hearing and disclosure issues

78. While the claimants and interested parties maintained they were ready to proceed with an urgent hearing, the Crown asserted that the very fact that the claimants were still seeking disclosure of documents immediately before the Conference seeking urgency made it obvious they were not ready to proceed. The Crown also emphasised that that was further confirmed by submissions made by the claimants that expert evidence on Māori Land Court processes and the current TTWMA was intended to be called.

79. We are satisfied that as the claims will rely predominantly on legal submissions, other than evidence on consultation issues which has already been filed, the claimants will be ready to proceed. We will make some further observations below about the disclosure issue.

Decision on urgency applications

80. For all of the above reasons we have decided that urgency should be granted to the hearing of the substantive claims made by the claimants.

Disclosure issues

81. The disclosure sought related to requests by the claimants for copies to be disclosed by the Crown of the submissions it had received as part of the consultation process on the draft disclosure Bill. Amongst those submissions was a joint submission lodged by the Māori Land Court Judges ('the Judges' submission').

82. Crown counsel did not oppose the Tribunal reading a late affidavit filed by the claimant Marise Lant which exhibited copies of a number of other submissions on the draft exposure Bill which she had obtained. Strong exception was taken by Crown counsel, however, to the Tribunal on this application for urgency receiving or reading the Judges' submission on the grounds that it was in breach of constitutional convention about the separation of judicial and executive functions. (A copy of that submission copied from a Radio Watea webpage was purported to be lodged by Counsel for the interested party Nellie Rata on the day before the Conference.)

83. Rather than becoming side-tracked on procedural arguments as to whether the copy submission was an accurate copy of the Judges' submission, or whether there was any merit at all in the Crown objection, we have decided this application without considering the Judges' submission.

84. However, there does not appear to us to be any justification in this Treaty-laden context for the Crown to hold back any of the submissions it has received from third parties. Crown counsel seemed reluctantly prepared to acknowledge that, other than in respect of the Judges' submission. Opposition to disclosure of policy documents still internally being worked upon may be different, but documents produced by third parties do not fall within that purview. Moreover, most, if not all of those submitters, will be Māori, (with the exception of some of the Judges), whose views may be informative in terms of the Treaty. For similar reasons we can see no valid reason for the Crown holding back from the Tribunal and parties to these claims a copy of the Judges' submission, (an unconfirmed copy of which it would seem in any event is already out in the public arena.)

85. Moreover, we cannot let this issue pass without making the observation that we were surprised at an obvious inconsistency in the Crown approach about the Judges' submission. In preliminary argument on the disclosure point Crown counsel submitted that we should not be looking at the Judges' submission. However, later in formal submissions on the merits of whether to grant urgency Crown counsel urged that we should indeed take into account the fact of the Judges' submission to assess the force of his proposition that the very fact of its existence and considerable detail meant that the consultation process on the draft exposure Bill was well-informed and real. We struggle with how we are supposed to give weight to that proposition without actually reading the Judges' submission.

86. It is plain that the Māori Land Court Judges will be the most knowledgeable people available as to the workings of TTWMA and as to the Court's role and functions. The Waitangi Tribunal and all parties to these claims, including the Crown, will be better informed by having the full range of information available, including the Judges' submission, about the new draft exposure Bill as issues are settled, and for the purposes of the substantive hearing.

87. For those reasons the Crown is directed to liaise constructively with counsel for the claimants as to how it can make copies available most efficiently and speedily of any submissions requested by the claimants on the draft exposure Bill, and whether electronically or by hard copies. Copies are to be made available at the same time on a numbered bundle basis to the Tribunal.

88. Again, given the possible volume of that material, counsel for claimants and Crown are required to liaise with the Tribunal Registry staff to achieve the most practicable and speedy method of making the information disclosed available to the Tribunal. Disclosure in terms of these directions is directed to be made by the Crown within 10 days of the date of this decision.

89. In making those directions as to disclosure the Tribunal wishes to sound a note of caution to claimant Counsel. That direction for disclosure is not to be treated as a 'fishing expedition', and nor will the Tribunal welcome being swamped with a mountain of written material which does not assist it in focussing on the only issues it is interested in during the substantive hearing. Those issues are solely related to whether the claimants can demonstrate that pending or current Crown actions are in breach of the Treaty, and that prejudice flows from those breaches.

90. Moreover, the claimants are reminded that this substantive hearing is diverting scarce resources from historic district inquiries and the Tribunal will be ensuring that time is not wasted on unnecessary issues or evidence. While it is for counsel to decide what if any evidence they see as necessary, at this preliminary stage the issues seem to revolve predominantly around legal issues which are able to be advanced thoroughly by

submissions through counsel. Evidence on consultation issues had already been filed. Counsel are urged to ensure any further evidence filed is relevant and specific to Treaty related issues that will be settled by the Tribunal later next month.

Hearing date and venue, settlement of issues, exchange of evidence and submissions

91. Once disclosure has occurred and some appreciation can be made of the documents disclosed, a memorandum-directions will be issued timetabling all of these matters. The Tribunal can indicate that its desired process for settling the issues for the substantive hearing will be for counsel for claimants and the Crown to lodge with the Tribunal a Joint Statement of Issues within a further 5 days after disclosure has occurred.

92. If a joint statement cannot be fully agreed upon, the Tribunal would expect to see Joint Issues as far as they can be agreed, and otherwise by memorandum an explanation of the points where the parties differ and why, so that the Tribunal can finally settle the form of issues for the hearing. There would seem to be no reason why that process could not be advanced between counsel at the same time as disclosure matters are discussed.

93. At present it appears likely that a substantive hearing can be held sometime in November but the Registrar will advise final venue and hearing dates as soon as possible.

94. A memorandum-directions will also issue after issues are settled as to the timetabling of evidence and submissions exchanges. Counsel are placed on notice that given the need to complete the hearing in a practical time to enable a report to be completed early in the new year, opening submissions will be expected to be filed a week in advance of the hearing date so as to enable the Tribunal to read them before the hearing. That indication should encourage counsel to commence submission preparation at an early date.

95. Leave is reserved for any party to seek directions on any matters that might assist the speedy and efficient determination of this Inquiry.

The Registrar is to send a copy of this direction to the applicants, Crown counsel and all those on the notification list for Wai 2478, the repeal of Te Ture Whenua Māori claim.

DATED at Blenheim this 30th day of September 2015

Ron Crosby
Presiding Officer
WAITANGI TRIBUNAL