WAITANGI TRIBUNAL

Wai 2344

CONCERNING	the Treaty of Waitangi Act 1975
AND	an application for an urgent hearing by Rudolph Taylor and Patu Hohepa on behalf of the whānau and hapū of Hokianga

MEMORANDUM-DIRECTIONS OF THE PRESIDING OFFICER

Introduction

1. On 18 November 2011 the Tribunal received an application for an urgent hearing by Rudolph Taylor and Patu Hohepa, on behalf of the whānau and hapū of Hokianga.[1]

2. The application concerns the Crown's settlement policy and processes adopted in relation to Northern iwi. In particular the applicants allege that Ngāpuhi has interests in lands which have been included in Te Rarawa's Deed of Settlement and that the Crown has failed to actively protect these interests.

3. The application is declined for the reasons I have outlined below. In particular I have come to the view that there is no significant and irreversible prejudice to the applicants.

Background

4. Following receipt of the urgent application the Deputy Chairperson, directed the Crown and any interested parties to respond by 13 December 2011.[2]

5. On 30 November 2011 the Crown sought Tribunal directions requesting that the applicants provide further information addressing which parties the claimants alleged to represent.[3] A response was received from the applicant on 1 December 2011.[4]

6. The Deputy Chairperson directed the applicants to file information, as requested by the Crown, by 7 December 2011.[5] The applicants did not file any further submissions in response.

7. On 13 December 2011 I was delegated the task of determining the application.[6]

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[1] Wai 2344, #3.1.1.
[2] Wai 2344, #2.5.1.
[3] Wai 2344, #3.1.2.
[4] Wai 2344, #3.1.3.
[5] Wai 2344, #2.5.2.
[6] Wai 2344, #2.5.3.

8. On 16 December 2011 the Tribunal received a further urgent application regarding the Te Rarawa Deed of Settlement. This was filed by counsel for Wai 2350, the Ngā Hapū o Te Wahapū o Hokianga nui ā Kupe and Te Rarawa Deed of Settlement Claim. This Claim is lodged by Cheryl Turner, John Klaricich and Harerei Toia on behalf of the people of Ngāti Korokoro, Ngāti Wharara and Te Pouka (also known as Ngā Hapū o Te Wahapū o Hokianga nui ā Kupe).[7]

9. On 16 December 2011 I was also delegated the task of determining the Wai 2350 application.[8]

10. On the same day the Tribunal received a Crown memorandum opposing the Wai 2344 application.[9] Counsel indicated that the memorandum was an interim response and further details would be provided in a full response to the other applications concerning the Te Rarawa Treaty settlement (including Wai 2350).

11. As both the Wai 2344 and 2350 urgent applications ("the applications") concerned the Te Rarawa Deed of Settlement and involved a majority of the same parties I determined that it would be prudent to process the applications concurrently. In light of this, I issued directions on 21 December 2011 setting out a timetable for the filing of submissions.[10]

12. Following receipt of all memoranda I convened a teleconference on 23 February 2012 to determine how to proceed and whether it was still effective to progress the applications together.[11]

13. I subsequently convened a further judicial teleconference on 5 March 2012 to hear the substantive submissions on the applications.[12]

14. The following counsel were in attendance:

    a) Jason Pou for the Wai 2344 applicants;

    b) Katharine Taurau for the Wai 2350 applicants;

    c) Janet Mason for Te Rūnanga Nui o Te Rarawa (accompanied by Haami Piripi and Paul White);

    d) Jeremy Prebble and Isabella Clark for the Crown (accompanied by Maureen Hickey, Margaret Joiner and Pat Snedden from the Office of Treaty Settlements);

    e) Jennifer Braithwaite for Te Rūnanga Nui o Te Aupōuri Trust;

    f) Brooke Loader for Wai 1968;

    g) Linda Thornton for Wai 1507; and

    h) Maryanne Mangu for Wai 1857.

15. Counsel for the Crown and Te Rarawa have provided the Tribunal with numerous updates on their discussions with the Wai 2350 applicants.[13] From these updates, it appears that

[7] Wai 2350, #3.1.1.
[8] Wai 2350, #2.5.1.
[9] Wai 2344, #3.1.4.
[10] Wai 2344, #2.5.4; Wai 2350, #2.5.2.
[11] Wai 2344, #2.5.8; Wai 2350, #2.5.6.
[12] Wai 2344, #2.5.9; Wai 2350, #2.5.7.

those parties have agreed a process to address the Wai 2350 applicants' concerns. As such I adjourned the Wai 2350 application pending further monthly updates.[14]

Summary of the Applicants' submissions

16. The applicants allege that the whānau and hapū of Hokianga are likely to be prejudicially affected, in breach of the principles of the Treaty of Waitangi, due to the Crown's failure to engage and failure to actively protect their interests. Furthermore the applicants allege that the Crown is negotiating with a body, Te Hui Topu o Te Hiku o Te Ika ("Te Hiku Forum") that is now inconsistent with the original Deed of Mandate conferred by the Crown in 2008[15]. The amended statement of claim also refers to Te Karae Farm and the offer to Te Hiku iwi of a right of first refusal over core Crown lands.[16]

17. The applicants seek an urgent hearing on the basis that they are likely to suffer significant and irreversible prejudice for the following reasons:

    a) The Crown proposal to transfer Crown assets in the Hokianga to Te Rarawa will remove its ability to provide such redress to Hokianga whānau and hapū, effectively erasing the Ngāpuhi presence in the northern Hokianga region;

    b) The proposed Te Rarawa Deed of Settlement ("the Te Rarawa Deed") will provide Hokianga lands as redress to iwi who are not tangata whenua of Hokianga;

    c) The social and political landscape of Hokianga will be effected by the failure to provide a Hokianga-wide settlement, with the Hokianga identity being altered to facilitate the political desire to expedite settlement; and

    d) The Crown displayed a lack of integrity by promoting the parallel settlements for Te Rarawa and the Te Hiku Forum.[17]

18. The applicants further submit that there is no alternative remedy which is reasonably available for them to exercise, and they are ready to proceed to an urgent hearing.

19. They seek a variety of relief including findings that the Crown has breached the principles of the Treaty by adopting a process that disregards the mana of Hokianga whānau and hapū and recommendations that the Crown stop negotiating with the Te Hiku Forum and adopt a Treaty compliant process.

Summary of the Crown's submissions[18]

20. The Crown opposes the application for an urgent hearing on the basis that the applicants have failed to demonstrate who they represent, and have not shown that they are suffering or are likely to suffer significant and irreversible prejudice.

21. While the applicants state they represent all whānau and hapū of Hokianga the Crown submits that they have failed to provide any evidence on this point. According to the Crown, this failure must give rise to uncertainty on the matter and is therefore a relevant consideration in determining whether to grant the application. In particular, the Crown submits that as a consequence of this uncertainty, the Tribunal cannot assess whether any

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[13] Wai 2350, #3.1.11; #3.1.23; #3.1.24.
[14] Wai 2344, #2.5.10; Wai 2350, #2.5.8.
[15] Wai 2344, 3.1.16.
[16] Wai 2344, #1.1.1.
[17] Wai 2344, #3.1.16.
[18] Wai 2344, #3.1.16.

prejudice to whānau or hapū has actually arisen and to what extent the application has the support of others. Counsel relied on the Tribunal's *Ngāti Tuwharetoa ki Kawerau Settlement Cross-Claim Report* and the Court of Appeal's decision in *Attorney-General v Mair.*[19]

22. The Crown further submits that the applicants fail to identify any clear prejudice. In this respect, counsel note that:

    a) The claimed prejudice is unclear but appears to involve the divesting of all Crown assets in the northern Hokianga and the disturbance of the social and political landscape;

    b) The underlying complaint appears to be that the Te Rarawa Deed of Settlement will erase Ngāpuhi from northern Hokianga. The Crown disputes this argument on the basis that it has engaged in ongoing consultation with the applicants and various other potentially affected parties. As a result they have provided for Ngāpuhi's overlapping interests in this area. In particular:

        i. The Te Rarawa Deed of Settlement provides redress to the whānau and hapū in northern Hokianga, some of whom also have affiliations with Ngāpuhi;

        ii. There is provision for shared cultural redress for Ngāpuhi over Hokianga Harbour and Maungataniwha; and

        iii. There is nothing preventing the Crown providing statutory acknowledgements for any future settlements in the region.

    c) The applicants underlying desire appears to be for a Hokianga-wide settlement. However, the decision of the whānau and hapū of northern Hokianga to mandate Te Rarawa, and not to provide for an exclusive Hokianga-wide settlement, was not a decision made by the Crown and does not meet the test of significant and irreversible prejudice. Further, this effectively amounts to an unreasonable request that Te Rarawa consent to a settlement where a significant portion of their area of interest is not addressed and instead is put on hold indefinitely without any certainty as to when, or if, it will be included in a future settlement.

23. In response to the applicant's allegations that the Crown are offering lands as redress to iwi who are not tangata whenua of the Hokianga, the Crown submits this is an oversimplification of the Te Rarawa Deed of Settlement. Counsel references the Deed of Settlement and submits that Te Rarawa clearly has tangata whenua rights in the area concerned.

Summary of submissions in support

Mr Shepherd for Wai 1538, Wai 1733, Wai 1259 and Wai 1534[20]

24. Counsel represents these claims of Te Ihutai hapū and associated hapū from the Kohukohu area in support of the application for an urgent hearing. Counsel submit that these hapū affiliate with Ngāpuhi iwi.

25. These claimants support the grounds for an urgent hearing advanced by the applicants, but submit that further grounds are also available to meet the criteria for an urgent hearing.

[19] *Attorney-General v Te Kenehi Mair and Ors* [2009] NZCA 625.
[20] Wai 2344, #3.1.25.

26. In particular, the proposed Te Rarawa Deed includes the transfer of land in the Kohukohu area to Te Rarawa, including Te Karae Station. The claimants allege that Te Ihutai and associated hapū from the Kohukohu area have the strongest claim to Te Karae Station and the proposed transfer would represent a significant loss and be prejudicial to the hapū they represent. There is no other remedy available to these claimants as the transfer would extinguish Te Ihutai and Ngāpuhi interests. It is also contended that the method of ratification, by individual votes, means Te Ihutai votes will be completely overshadowed by the large voting pool. Furthermore, most of the Te Ihutai hapū members are registered on the Ngāpuhi roll and are therefore not eligible to participate in the vote.

27. Counsel also submits that Te Rūnanga has no basis to maintain that it still has a mandate to negotiate a settlement on behalf of Te Ihutai and associated hapū as the mandate was not properly consented to by the hapū and all reasonable steps have been taken to revoke any claimed mandate. Therefore, the Crown continuing the Te Rarawa settlement process significantly prejudices Te Ihutai and breaches Te Tiriti.

28. I note that counsel for Te Rarawa and counsel for Wai 2359 have subsequently been referred to Tribunal assisted mediation.[21]

Other Parties

29. Mr Coombes for Wai 1669 and Wai 2348 submits that these claimants support the application for an urgent hearing and sought inclusion as an interested party in the proceedings.[22]

30. Ms Thornton for Wai 1507 notes that these claimants support the applicants' allegations and sought inclusion as an interested party.[23]

31. Mr Naden for Wai 1968 submits that this claim supports the application and shares the concerns raised in the application, particularly in relation to the allegations regarding inadequate consultation occurring prior to the initialling of the Te Rarawa Deed. Counsel also sought leave to be included as an interested party.[24]

32. Mr Potter for Wai 2354 submits that this claim has interests within the Te Rarawa Deed of Settlement area and seeks to be included as an interested party to the proceedings to preserve those interests.[25]

Summary of submissions in opposition

Counsel for Te Rūnanga o Te Rarawa[26]

33. Te Rūnanga o Te Rarawa ("Te Rūnanga") opposes the application for an urgent hearing. In particular, counsel submit that:

    a) The application does not meet the Tribunal's urgency criteria because the applicants cannot demonstrate that they are suffering significant and irreversible prejudice as a result of the Te Rarawa Deed of Settlement;

    b) Te Rūnanga have a Crown recognised mandate to negotiate the historical Treaty claims of Te Rarawa and this is not dependent on the existence of the Te Hiku

[21] Wai 2359, #3.1.1; #2.5.3.
[22] Wai 2344, #3.1.5,
[23] Wai 2344, #3.1.10.
[24] Wai 2344, 3.1.11.
[25] Wai 2344, #3.1.12.
[26] Wai 2344, #3.1.6; Wai 2344, #3.1.18.

Forum or all five Te Hiku iwi being part of the Te Hiku Forum. In particular, the mandate is not affected by the withdrawal of Ngāti Kahu from the Te Hiku Forum, nor is the Te Hiku Forum Agreement in Principle;

c) The applicants' allegations regarding a lack of consultation are without substance. Te Rūnanga made significant efforts to engage with Hokianga hapū throughout the settlement process, including both Te Rarawa and Ngāpuhi whānau. Taking into account the consultation also undertaken by the Crown, such consultation is more than adequate;

d) The applicants' allegations that the proposed settlement will lead to a divestment of all the Crown's settlement assets on the northern side of the Hokianga Harbour, leaving nothing to offer Hokianga whānau and hapū and effectively erasing the Ngāpuhi presence in the northern Hokianga region, cannot be substantiated. In this respect, counsel submit that:

   i. Ngāpuhi have iwi manawhenua on the southern side of the Hokianga Harbour not the northern side;

   ii. Key redress items have been reserved and the Crown retains an ability to provide a full and final settlement to Ngāpuhi in the future; and

   iii. Ngāpuhi claims are not being settled under the Te Rarawa Deed of Settlement.

e) The proposal for one collective settlement is inconsistent with the Crown's policy to settle on an iwi-wide basis not a region-specific basis and ignores the importance of whakapapa within Māori society; and

f) Te Rarawa recognise that Ngāpuhi whānau and hapū may have interests lesser than manawhenua in northern Hokianga and propose entering into discussions with the applicants to see if these could be provided for.

Counsel for Te Rūnanga nui o Aupōuri[27]

34. Counsel for Te Rūnanga nui o Aupōuri, the post settlement governance entity for Te Aupōuri, seek to be involved in the proceedings as an interested party to the extent that the applications may relate to the wider aspects of the Te Aupōuri Deed of Settlement.

Summary of the Applicants' response

35. Counsel submit that the Crown's assertion that the applicants seek to halt the Te Rarawa settlement in favour of a Hokianga-wide settlement is misdirected. The applicants contend that although they seek a process that would allow Hokianga to progress together as one, this does not necessitate a single settlement. Rather, this requires that the Hokianga component of the Te Rarawa settlement be "ring-fenced" to allow settlement of Hokianga issues to be arrived at co-operatively. The applicants submit that this is the approach being used to protect the interests of Ngāti Kahu.

36. Mr Pou also challenges the Crown's disagreement with the notion that the Te Rarawa settlement will erase Ngāpuhi from northern Hokianga. The Crown has confirmed, the claims being settled are only those of Te Rarawa, therefore the redress being provided is exclusively for Te Rarawa and the Ngāpuhi interests are effectively erased. As a result, it is argued that the Crown will have reduced the redress available to Ngāpuhi.

[27] Wai 2344, #3.1.9.

37. The applicants further argue that the Crown's submission that other remedies are available, as the applicants will be able to participate in any future Ngāpuhi settlement, is farcical given that the settlement with Te Rarawa will remove redress available to Ngāpuhi within the Hokianga.

38. Regarding the Crown's submissions as to consultation, the applicants submit that Mr Taylor has not been contacted by the Crown regarding the proposed settlement with Te Rarawa since he attended a consultation hui in 2007. Counsel submits Mr Taylor did not receive the Crown's letters sent in September 2011. It is submitted that having regard to Mr Taylor's ongoing opposition, the Crown's failure to contact him when the settlement was in its final stages is a startling omission.

39. The applicants challenge the Crown's assertion of ultimate power in determining the content of settlements. In this respect, the applicants submit that the Crown cannot breach the Treaty principles in order to achieve settlement targets. Furthermore the proposition is inconsistent with the process of settlement negotiation in which the outcome is meant to be mutually determined.

40. The applicants also dispute that the lack of clarity as to who they represent precludes an assessment of prejudicial effect. In particular they state that:

    a) Such a proposition is misdirected and fails to take into account section 6 of the Treaty of Waitangi Act 1975, which requires the Tribunal to inquire into claims lodged by any Māori person who claims to be prejudicially affected by acts of the Crown;

    b) The Crown is well aware of the support the applicants have within the Hokianga region. As evidenced by the support shown for them at several hui, which are detailed in the evidence of Ms Hickey, where messages consistent with those advanced by the applicants were forwarded; and

    c) The application is supported by the Wai 2350 claimants, Te Ihutai hapū and the four claims listed on the intituling page of the Wai 2344 statement of claim (Wai 549, 1513, 1526 and 1728)

Urgency criteria

41. The Tribunal's Practice Note 2.5 of the *Guide to the Practice and Procedure of the Waitangi Tribunal* ("the Guide") sets out the factors to be considered when deciding an application for an urgent hearing. These include 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 are ready to proceed urgently to a hearing.

42. Other factors that the Tribunal will consider include whether:

    a) The claim or claims challenge an important current or pending Crown action or policy;

b) An injunction had been issued by the courts on the basis that the claim or claims for which urgency has been sought have been submitted to the Tribunal; and

c) Any other grounds justifying urgency have been made out.

Discussion

43. I am mindful that the current application must be assessed against the above criteria.

Context

44. I am also guided by the recent memorandum-directions of the Chairperson issued on 26 April 2012. This addresses the "unprecedented increase in the number of urgency and remedies applications received by the Tribunal and subsequently granted" of late and the need for re-prioritisation of Tribunal resources as a result.

45. It is within this context that the Tribunal is being asked to consider this application. As with all urgency applications, a claimant asks the Tribunal to have their claim heard before other claims. An application for urgency must therefore meet a high threshold. This must also be considered in the context of the current significant financial constraints on the Tribunal, on all Government funded departments, coupled with the increase in urgency applications.

46. It is understood that the Tribunal has finite resources and the urgent hearing of a claim has the effect of leap-frogging it ahead of many other claims that are already being inquired into or are waiting to begin that process. The invariable effect of a grant of urgency is that the Tribunal's progression of other claims is delayed.

Significant and irreversible prejudice

47. In particular I turn to whether the applicants can demonstrate that they are suffering, or are likely to suffer, significant and irreversible prejudice as a result of the settlement policy and processes the Crown has adopted in the northern Hokianga. From the information before me, they have failed to do so.

48. It is not clear as to what, if any, prejudice will be suffered by the applicants. The claimed prejudice appears to involve the divesting of all Crown assets in the northern Hokianga and the disturbance of the social and political landscape.

49. The applicants do not agree to the vesting of specific lands to Te Rarawa. At the heart of the application is a desire that negotiations relating to the northern Hokianga be halted until such time as the Crown is able to negotiate in parallel with all claimant groups. However, the applicants have failed to demonstrate that a Hokianga-wide settlement would inevitably result in a different outcome from that currently before the parties.

50. In and of it, the Crown's offer of redress to Te Rarawa in the northern Hokianga, where Ngāpuhi also assert manawhenua, does not in my opinion automatically deem the application to be exceptional.

51. Throughout the process the Crown has sought to actively engage with parties in the area so as to inform their negotiations. The applicants were provided with the opportunity to participate in this engagement.

52. Furthermore, although they will be precluded from the specific lands included in the Te Rarawa Deed of Settlement, the applicants will still have the opportunity to negotiate other redress in northern Hokianga as part of their own separate Treaty settlement negotiations. Redress recognising shared manawhenua in the northern Hokianga, should this be proven, is still open to the parties.

Level of support for the application

53. The level of support for the application is also a relevant factor to my consideration.

54. The applicants have on two occasions addressed the matter of representation.[28] On both occasions they have failed to provide specific information on the groups and/or numbers that they represent. As a result it is still unclear to me as to the exact nature of the support for this application.

55. I do not expect the claimants to go through a mandating process to demonstrate the level of support for their position. However, there does need to be something more than simply stating their represent Hokianga whānau and hapū.

56. I do not question the leadership of the applicants. There are known leaders within their communities, whānau, hapū and at a national level. What is being questioned and something the Tribunal has sought clarification on twice is the level of support the applicants have for their position.

57. If the applicants had demonstrated that they represent all whānau and hapū of Hokianga then this would need to be assessed in considering the significance of the prejudice. However, the representation and level of support has not been demonstrated.

58. In balancing all factors I find that the claimants will not suffer significant and irreversible prejudice. It is certainly not significant enough to cause the Tribunal to reallocate limited resources on an urgent basis away from current inquiries in progress to this matter.

Decision

59. For the reasons outlined above, I am not persuaded that the situation warrants the diversion of Tribunal resources and as such I decline this application for urgent hearing.

- The Registrar is directed to send a copy of this direction to counsel for the claimants, Crown counsel, and all those on the distribution list forWai 2344, the Hokianga (Taylor and Hohepa) and Te Rarawa Deed of Settlement Claim; and
- Wai 2350, the Ngā Hapū o Te Wahapū o Hokianga nui ā Kupe and Te Rarawa Deed of Settlement Claim.

DATED at Rotorua this 19th day of June 2012

Judge C T Coxhead
Presiding Officer
WAITANGI TRIBUNAL

[28] Wai 2344, #3.1.3; #3.1.7.