WAITANGI TRIBUNAL

Wai 45

CONCERNING the Treaty of Waitangi Act 1975

AND an application for remedies on behalf of Te Rūnanga-ā-Iwi o Ngāti Kahu

MEMORANDUM-DIRECTIONS OF THE PRESIDING OFFICER

Introduction

1. On 5 June 2012 the Waitangi Tribunal convened a judicial conference to discuss principles of relief and other matters in preparation for the hearing of a remedies application filed by Te Rūnanga-ā-Iwi o Ngāti Kahu ("Ngāti Kahu").

2. A memorandum-directions of 8 June 2012 provided preliminary directions on a number of matters, filing dates and a date for hearing.[1] It also indicated that further directions would be issued in relation to:

   (a) The claim area; and,

   (b) Whether identified properties fall within the boundaries of any pre-1865 transaction and whether the Tribunal has jurisdiction in respect of these properties etc. [2]

3. This memorandum-directions sets out the Tribunal's conclusions on these two issues and a number of other matters raised in the written submissions and orally at the judicial conference.

Claim area map

4. In its 18 April 2012 decision the Tribunal adopted Ngāti Kahu's representation of their 2008 AIP area of interest (the yellow dotted line on Map "D" accompanying that direction) as the remedies area.[3]

5. The Crown submits that the blue line on Map "B" appended to that direction more accurately represents the boundaries of Ngāti Kahu's 2008 AIP area of interest.

[1] Wai 45, #2.407
[2] Wai 45, #2.407, para 2
[3] Wai 45, #2.389, para 80

Therefore, the Tribunal ought instead to have adopted this map as the remedies area.[4]

6. In order that all parties could see clearly the difference between these two representations of the Ngāti Kahu AIP area of interest the Tribunal asked the Crown to provide a revised map on which the two lines were overlaid.[5] This map and an accompanying affidavit by Mr Adam Levy of the Office of Treaty Settlements were placed on the Wai 45 record of inquiry as R13(a) and R13 respectively.

7. The Crown maintains that this is a simple matter of clarifying which map ('B" or "D") most accurately plots the line shown on the map in the 2008 AIP. Ngāti Kahu oppose the adoption of Map "B," and say that the map in their 2008 AIP was always intended to be an approximation of their area of interest. In support of their position they point to the fact that the boundary on that map is shown as a dotted line and the text on the map indicates its provisional nature.

8. Ngāti Kahu also submit that the 2008 AIP area of interest map was created in the context of their participation in the Te Hiku forum, which had been established a few months before by the five Te Hiku iwi to agree collectively on the allocation of shared redress. Therefore, the boundaries shown on the map in their AIP were chosen at that time to assist this collective process and to be minimally intrusive in the settlement negotiations. Ngāti Kahu maintain that the yellow dotted line on map "D" is the most appropriate boundary for the remedies inquiry because it best represents their claim area during the Mangonui Sewerage inquiry and the Muriwhenua land and fisheries inquiries, from which spring their well-founded claims.

9. Notwithstanding the Crown's submissions we are persuaded by Ngāti Kahu's arguments. We do not consider that this remedies inquiry should be unduly fettered by what were considered by both the Crown and Ngāti Kahu to be simply working boundaries for the purposes of further negotiation. We remain satisfied that the yellow dotted line on map "D" equates most closely to Ngāti Kahu's claim area during the original Muriwhenua land inquiry. This is precisely what the Tribunal asked Ngāti Kahu to identify when it sought additional information from them in December last year.[6] This in turn approximates, but is not identical to, the Ngāti Kahu area of interest shown in the 2008 AIP. Therefore, we affirm our initial decision of 18 April 2012 to adopt Map "D" as the claim area for the purpose of this application.

Jurisdiction regarding properties which do not fall within the boundaries of any pre-1865 purchase

10. The Crown has identified eight resumable properties within the claim area that they say are located on blocks of land which were not subject to pre-1865 private or Crown transactions. Six of these properties are numbered 97, 103, 105, 106, 107 and

[4] Wai 45, #2.397, paras 14 and 15
[5] Wai 45, #2.403, para 18
[6] Wai 45, #2.364, para 2(e)

216 on Mr Levy's latest map. The seventh property is part of the Takahue forest, which is bisected by the boundary of the remedies area. The final property comprises three of the Mangonui forest blocks.[7]

Position of the parties

11. In the Crown's submission these properties cannot relate to any well-founded claim by Ngāti Kahu because those lands were not subject to, or within, any pre-1865 private or Crown transaction or purchase. Therefore, it considers that the Tribunal does not have jurisdiction to order resumption of these properties.[8] In the case of the Mangonui forest lands the Crown submits that the three blocks are outside the Tribunal's resumption jurisdiction because those lands:

    (a) Remained in Māori ownership as at 1865;

    (b) Were outside any Old Land Claims grant;

    (c) Were outside any pre-1865 Crown purchase; and,

    (d) Were outside any Crown "surplus or scrip" land.[9]

12. Ngāti Kahu oppose this position and maintain that the Treaty of Waitangi Act 1975 simply requires the Tribunal to determine if the applicant has well-founded claims and then to identify what properties are available for resumption. In their submission it is irrelevant whether this land was lost before 1865 or not because the intent of the legislation is to compensate for land loss, and such compensation must be met from any and all returnable[10] land within the remedies area. They say that it cannot have been the intent of the legislation to exclude properties from resumption merely because they happen to be located on blocks that remained in Māori ownership after 1865.[11]

Discussion

13. On this question of a causal nexus, the Muriwhenua Land Tribunal previously suggested that 'compensation for general land losses from Crown policies and practices inconsistent with the principles of the Treaty could be met from binding recommendations in respect of any returnable lands in the tribal district.'[12]

14. The Muriwhenua Land Tribunal in its "Determination of Preliminary Issues" further discussed this issue.[13] The Tribunal closely examined the meaning of the words "relates... to" as used in sections 8A and 8HB of the Treaty of Waitangi Act 1975. It also discussed the statutory context of the litigation and settlement. The Tribunal

[7] Wai 45, R13(a) and Crown memorandum Wai 45, #2.406, para 2 and Wai 45, #2.409
[8] Wai 45, #2.397, para 9 and Wai 45, #2.406, para 2
[9] Wai 45, #2.409, para 11
[10] Throughout this direction we have used the term 'resumable' to describe lands that may be subject to the resumptive powers of the Tribunal but here and in other places where we paraphrase or quote the views of other Tribunals we have kept the term used in that text.
[11] Wai 45, #2.410
[12] *Muriwhenua Land Report* (1997), para 11.4.5 and Tribunal memorandum Wai 45, #2.125, para 3
[13] Wai 45, #2.166, Appendix "A"

were firmly of the view that the words "relates to" are words of general import and nothing in the statutory context calls for a specific or narrow construction.[14]

15. Secondly the Tribunal was of the view that as the claim relates to the whole tribal estate, the question is whether the returnable lands are part of it. Adopting that perspective they considered there is a relationship between the land, the claimants and the policies complained of.[15]

16. In the *Turangi Township Remedies Report* the Tribunal discussed the issue of a causal nexus and whether or not section 8A(2) requires a direct relationship between the historical wrong and the memorialised land before resumption of the land can be ordered. In that case the Tribunal accepted that sections 8A(2)(a) and 6(3) of the Treaty of Waitangi Act 1975 were clearly intended to be remedial provisions. They said:

> *"If it had been intended that they should be applicable only if they relate directly to some but not all such land, we would expect the statute to have said so. In our view, the provisions of section 8A(2)(a) and section 6(3) should be construed in accordance with section 5(j) of the Acts Interpretation Act 1924 as being remedial and given such 'fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act'*
>
> *We consider that the Crown attempted to read down the provisions, so as to apply only to claims which relate 'directly' to particular categories of land transfer to State enterprises, is inconsistent with such fair, large and liberal construction."*[16]

17. In this case we have accepted that certain claims brought by Ngāti Kahu before the Waitangi Tribunal have been found to be well-founded.[17] We were also satisfied that the claims of Ngāti Kahu are able to be severed from the claims of the other four Muriwhenua iwi.[18]

18. Furthermore we have effectively determined the Ngāti Kahu tribal estate (at least for the purposes of the remedies hearing) at paragraphs 55-82 of our decision dated 18 April 2012 (Nothing changes in so far as this memorandum is concerned. The first part of this memorandum-direction merely clarifies what the claim area is for the purpose of the forthcoming remedies hearing). [19]

19. We are satisfied that the claim area is one which generally reflects the core Ngāti Kahu area of interests as discussed by the Mangonui Sewerage, Muriwhenua Fishing and Muriwhenua Land Reports. It is an area which Ngāti Kahu have previously described as being their core customary area of interest. It is an area in which Ngāti Kahu and the Crown have previously agreed, for the purposes of settlement negotiations, that Ngāti Kahu have interests.

20. On that basis we are satisfied Ngāti Kahu have a relationship with the lands within the claim area. On the issue of a causal nexus, we adopt the line of thinking initially mooted by the Muriwhenua Land Tribunal and then expressly set out by the Turangi

[14] Ibid, Appendix "A", page 14
[15] Ibid, page 9
[16] *The Turangi Township Remedies Report* (1998) section 2.72, page 18
[17] Wai 45, #2.389, paras 48 and 49
[18] Ibid, para 54
[19] Wai 45, #2.389

Township Remedies Tribunal. It is that there need not be a direct relationship between the resumable lands within the claim area and the well-founded claim. The relationship can be an indirect one. The well-founded claims of Ngāti Kahu relate to the tribal estate, as we have defined it. The returnable lands are part of that tribal estate and Ngāti Kahu have a relationship with all of the lands in that tribal estate, as we have defined it.

21. When having regard to all the circumstances of the case, we may make recommendations (including resumption orders) pursuant to ss 6(3), 8A and 8HB of the Treaty of Waitangi Act 1975, to compensate for or remove the prejudice or to prevent other persons from being similarly affected in the future. When assessing the prejudice suffered as a result of the Crown actions or omissions arising from any pre-1865 claims, we consider that we have jurisdiction to make resumption orders in relation to all returnable lands within the Ngāti Kahu tribal estate, as defined for the purposes of this remedies hearing.

Properties whose resumable status is disputed

22. The Crown has indicated that there continues to be disagreement between Ngāti Kahu and the Crown about whether a number of properties within the 2008 claim area are resumable.[20]

23. In my memorandum-directions of 31 May 2012 I asked to hear further from the parties about why this disagreement remains.[21] At the judicial conference on 5 June the Crown provided clarification about which properties fall into this category. They are the properties numbered 200 to 216 and marked in yellow on Mr Levy's most recent map.[22]

24. It is a matter of some concern that this issue has not been resolved. The Tribunal requires a definitive list of resumable properties within the claim area.

25. We direct that counsel for Ngāti Kahu and the Crown are to liaise in an effort to identify as far as possible an agreed list of those properties within the 2008 claim area which are resumable. That agreed list of properties is to be filed with the Tribunal by **midday, Friday 10 August 2012**.

26. If Ngāti Kahu consider that there are other properties which they consider are resumable, but which are not agreed to by the Crown, then the Tribunal expects Ngāti Kahu to refer to those properties in their reply evidence and to set out in their submissions the basis upon which we have jurisdiction over those properties.

[20] Wai 45, #2.406, para 9
[21] Wai 45, #2.403, para 30
[22] Wai 45, R13(a)

Principles for relief

Introduction

27. We received submissions from Ngāti Kahu, the Crown and Te Aupōuri on what principles the Tribunal ought to adopt in this remedies inquiry.[23] In terms of a broad approach both Ngāti Kahu and the Crown agree that having determined that the applicants have well-founded claims and having regard to all the circumstances of the case, section 6(3) of the Treaty of Waitangi Act 1975 allows the Tribunal to '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.' The *Muriwhenua Land Report* briefly set out some factors which it identified the Tribunal could consider when approaching the question of relief. They are:

    - The seriousness of the case – the extent of property loss and the extent of consideration given to hapū interests;
    - The impact of that loss, having regard to the numbers affected and the lands remaining;
    - The socio-economic consequences;
    - The effect on the status and standing of the people;
    - The benefits returned from European settlement;
    - The lands necessary to provide a reasonable economic base for the hapū and to secure livelihoods for the affected people;
    - The impact of reparation on the rest of the community (so that the local and national economic constraints are also relevant); and,
    - The thrust being to compensate for past wrongs and removed the prejudice, by assuring a better arrangement for the hapū in the future.[24]

28. In its 1998 Determination of Preliminary Issues the Muriwhenua Tribunal did not reach a final conclusion on reparation principles. It did however make some comments on this topic. It made the following relevant comments:

    - Assuming that strict compensation for property loss is unachievable, the reparation approach must be referable to the task of putting the grievance to rest;
    - It is important to ask how those aggrieved (including Ngāti Kahu) think the grievance can be removed, and not to impose another view on them, provided that those responses are within the bounds of reason. (The claimants then appearing before the Tribunal favoured the establishment of an independent, economic base which would support development opportunities);

[23] Wai 45, #2.393 & #2.401, Wai 45, #2.397 and Wai 45, #2.398 respectively
[24] *Muriwhenua Land Report* (1997), section 11.4.4, pages 405-406

- The approach should be referable to Treaty principles, in particular the principle that Māori should have retained sufficient land. Where this did not happen as a result of Crown acts or omissions, redress requires the restoration of a sufficient endowment for the future;

- Restoration, defined as the provision of an economic base to support future development opportunities, is not, a return to a hypothetical past position. It is axiomatic however that had lands been adequately reserved for tribes, there would be a land base for those tribes today;

- Current socio-economic circumstances inform the assessment of the extent of an economic base now required where a restorative approach is adopted;

- Such an approach also aims to reinstate the mana of the tribe in the local Māori and Pākehā community;

- The extent of property loss has to be measured according to the numbers affected, then and now, and the continuing impact of property loss; and,

- The Tribunal stated that "national financial constraints" and "proportional consistency" arguments required more debate. Having said that the Tribunal did not consider that there was any yardstick for the level of redress unless the Tainui and Ngāi Tahu settlements are benchmarks.[25]

29. In summary the Tribunal said:

> *"A summary of our view at this stage is that the Tribunal should adopt a restorative approach to remedies, costed according to that necessary to re-establish the people in the social and economic life of the district and in which data on development opportunities and current socio-economic indicia are relevant. Evidence to that effect would therefore assist. The level of redress must have regard, however, to the extent of property loss weighed with the numbers affected, and the causes and extent of mana-loss. The relevance of certain fiscal factors (proportional consistency, national financial constraints and impact on local and national community) requires further debate."*[26]

Principles identified by Ngāti Kahu

30. Ngāti Kahu submitted that there were four underlying concepts relevant to any consideration of principles for remedies as follows:

- The first being that Ngāti Kahu are entitled to early relief.

- The second that the Tribunal should avoid a narrow or restrictive interpretation of the relevant statutory provisions.

- Third, that in exercising its discretion the issue is not mainly about jurisdiction but about a lawful exercise of discretion.

[25] Wai 45, #2.166, Appendix "E", pages 5-10 inclusive
[26] Wai 45, #2.166, Appendix "E", page 10

- Fourth, that the Tribunal is not constrained by remedies suggested by the claimant. The Tribunal has a function to determine whether persons are prejudiced and if so, the action that might be taken to compensate or remove that prejudice.[27]

31. Specific principles for relief referred to by Ngāti Kahu were:

- The Tribunal should not be constrained by practical or convenient results;
- The Tribunal should have regard to those Treaty principles which it has found the Crown to have breached; and,
- The Tribunal should adopt a restorative approach which would restore Ngāti Kahu to a position that will allow the iwi to survive into the future.

32. On the restorative approach, Ngāti Kahu referred to factors identified in the Orakei Report these being:

- That the tribal losses were substantial;
- That but for various breaches of the Treaty by the Crown, [Ngāti Kahu][28] would likely have maintained a handsome endowment;
- That land loss was not all that [Ngāti Kahu] suffered. They suffered a continued degradation of their identity as a tribe;
- That there is a need to secure an adequate economic base for the tribe to ensure its continued presence; and,
- That regard must be had to the tribe's current resources, and whether those resources can meet reasonable tribal needs.[29]

33. Of the principles referred to by the *Muriwhenua Land Report*, Ngāti Kahu consider the following to be most apposite:

- The seriousness of the case – the extent of property loss and the extent of consideration given to hapū interests;
- The impact of that loss, having regard to the numbers affected and the lands remaining;
- Current socio-economic circumstances;
- The effect on the status and standing of the people;
- The benefits returned from European settlement; and,

[27] Wai 45, #2.393, paras 6-7 inclusive
[28] Ngāti Kahu substituted for Ngāti Whatua
[29] Wai 45, #2.398, para 15

- The lands necessary to provide a reasonable economic base for the hapū and to secure livelihoods for the affected people.[30]

34. Counsel for Ngāti Kahu also referred to some of the principles identified in the *Turangi Township Remedies Report* at pages 77 and 78. We set out in full what the Turangi Township Tribunal said:

> ***"5.1.2 Relevant factors***
>
> *Factors relevant to the Tribunal's determination of remedies are:*
>
> - *The claimants are entitled to rely on all the Tribunal's findings as to facts and as to Treaty breaches and the Tribunal is required to have regard to all the Treaty breaches it has held to be well-founded and to the reasons for such findings.*
> - *The power of the Tribunal to make binding recommendations is remedial in nature. It was conferred to protect the position of Maori claimants and to provide safeguards to ensure such protection.*
> - *The Tribunal should have regard to those Treaty principles which it has found the Crown to have breached.*
> - *In assessing the relevance of such breaches the Tribunal should have regard to the relative seriousness of the various breaches and to their prejudicial effect on the claimants.*
> - *The redress to claimants should bear some proportion to the nature of the breaches and the prejudice identified.*
> - *A restorative approach to remedies is appropriate. This should include facilitating the restoration, to an extent reasonably possible, of the rangatiratanga and hence the mana of Ngati Turangitukua. While the Crown cannot restore rangatiratanga in the abstract, resources can be restored to the hapu that enable it to exercise rangatiratanga. The return of land is an essential component of the restoration of rangatiratanga. A policy of restoration should attempt to assure the hapu's continued presence on the land, the recovery of its status in the district and the recognition of its tribal authority. Thus, where the place of a hapu has been wrongly diminished, an appropriate response is to ask what is necessary to re-establish it.*[31]
> - *The Tribunal does not consider that, as a matter of law, there must be a 'direct' relationship between the historical wrong and memorialised land, before resumption can be ordered, or that there must be some specific feature of the history of the asset which means that it should be returned to Maori. However, the Tribunal considers that there is such a 'direct' relationship between the historical wrongs recorded in our findings and all the land, whether memorialised or non-memorialised land, taken by the Crown in breach of Treaty principles. All such land was ancestral land, part of the papakainga of Ngati Turangitukua and of special importance and significance to the hapu.*
> - *The Tribunal may have regard to the condition of the land and any improvements to it up to a time immediately before its transfer by the Crown to a State enterprise, but not*

[30] Ibid, para 28

[31] The Tribunal considers the various factors formulated by the Muriwhenua Land Tribunal noted in our earlier chapter 2, at section 2.6.3, to be relevant, although not all will have equal weight.

to any change in such condition and improvements or in its ownership or possession since that time.

- *Before deciding what properties the Tribunal considers should be returned, whether memorialised or Crown-owned land, or a mixture of both, it should review all such properties. In so doing it should have regard to the claimants' proposals for a comprehensive relief package.*

- *When deciding which memorialised or Crown-owned properties it proposes to recommend be returned to Ngati Turangitukua, it should have regard to the aggregate value of all such properties.*

- *The Tribunal should have general regard to the relativity between the present claimants and the Tainui, Ngai Tahu and Ngati Whakaue settlements. However, for reasons noted in chapter 2, we have been able to obtain only limited assistance in making a meaningful assessment of the relativity between the three settlements and the present claim.*

- *In considering what recommendations it should make in this case, the Tribunal must have regard to all relevant circumstances. These will include the nature, extent, and effect of the Treaty breaches by the Crown, and the additional evidence and submissions received during the remedies hearing.*

- *In considering whether to make a binding recommendation for the return of memorialised land, the Tribunal will take into account the greater consequences that a binding recommendation of memorialised land would have for the Crown than would a non-binding recommendation for the return of Crown-owned land."*[32]

35. Ngāti Kahu submitted that issues of "proportional consistency" the relevance of fiscal factors, national "financial constraints" and the impact of relief on the local and national community should carry only minimal weight.[33]

Principles identified by the Crown

36. The Crown submitted that in this situation, all the circumstances of the case would require an assessment of the following factors:

- The prejudice suffered by Ngāti Kahu as a result of the Crown actions or omissions that gave rise to well-founded pre-1865 claims. On that point the Crown submitted that an assessment needs to be made by the Tribunal as to what prejudice Ngāti Kahu suffered as a result of the Crown actions or omissions that gave rise to the well-founded pre-1865 claims and that there needs to be evidence on that point;

- The Crown's Treaty settlement offer;

- Proportional consistency with other Treaty settlements generally and the Te Hiku settlements specifically;

[32] *Turangi Township Remedies Report* (1998)
[33] Wai 45, #2.393, para 33

- What the Crown is reasonably able to provide in settlement of Ngāti Kahu's pre-1865 claims, given the financial constraints that the Crown is under from a nation-wide perspective;

- The effect of making recommendations for pre-1865 claims only; and,

- Factors relating to any specific property about which the Tribunal makes binding or non-binding recommendations.[34]

37. The Crown expanded on the last point by saying that there are a number of factors relating to specific properties which the Tribunal should consider, these include:

- The significance of the property to the well-founded claim;

- The location of the property;

- The property's current market value;

- The extent to which the applicant wants the property as opposed to another or other property;

- Any particular reasons why the property might compensate for or remove identified prejudice;

- What impact, if any, returning the property may have on a third party or the local community generally; and,

- Who currently owns the property.[35]

38. To those factors, Crown counsel also added that the zoning of a property was also a factor which the Tribunal should consider in particular the use which Ngāti Kahu may be able to make of a property given any zoning restrictions.

Submissions of Te Aupōuri

39. Counsel for Te Aupōuri made two broad submissions on this point:

(a) That the words 'having regard to all the circumstances of the case' in section 6(3) of the Treaty of Waitangi Act necessarily involve a consideration of the settlement packages currently agreed to or on offer to Te Hiku iwi, including Ngāti Kahu;[36]

(b) The effect of any recommendations on other iwi, hapū and Māori. In particular the effect any recommendations may have on agreements which the other Te Hiku o Te Ika iwi have negotiated.[37]

[34] Wai 45, #2.397, para 33
[35] Ibid, para 55
[36] Wai 45, #2.398, paras 8-16
[37] Ibid, paras 17-18

Tribunal's position on principles of relief

40. We acknowledge that there is very little in section 6(3) of the Treaty of Waitangi Act 1975 which provides specific guidance to the Tribunal about the principles it should adopt in making a decision about relief (which may include both binding and non-binding recommendations).

41. Subject to a claim being well-founded, the Tribunal is left with a broad discretion, having regard to all the circumstances of the case, as to the type and extent of recommendations that it will make.

42. To date there has been a paucity of discussion on the topic of principles for relief. A major reason is of course that many historical claims which were found to be well-founded have been settled directly with the Crown. Thus there has been little need for the Waitangi Tribunal to set out a series of principles, which it would invariably consider when making recommendations pursuant to section 6(3).

43. Having said that we note the factors previously identified by the Muriwhenua Land, the Orakei and the Turangi Township Tribunals. Generally speaking we consider that all of those factors are broadly relevant to the exercise which this Tribunal needs to undertake.

44. So too are the matters identified by the Crown in its memorandum of 18 May 2012.[38] There does not appear to be anything in the factors which the Crown identified which we would rule out from consideration at this stage.

45. Having said that on the issue of who currently owns a property, we have some reservations. If the submission was intended to mean that the Tribunal does not have jurisdiction in relation to privately owned properties, clearly that is incorrect if a property is liable to resumption. We suspect the submission is more nuanced than that and is to the effect that privately owned properties, albeit with section 27B memorials on them and subject to resumption, should only be subject to resumption orders as a final resort. We consider it is premature to make any assessment of that point.

46. Therefore, given the very broad discretion the Tribunal has, we do not consider it appropriate to set out in detail at this stage, a list of principles against which we will assess this application. There is a danger in that we will place undue emphasis on some factors than others. We may inadvertently overlook relevant criteria. During the course of hearing the evidence and the presentation of legal submissions some matters will assume greater importance to us than others. We are also conscious that applications seeking to resume properties pursuant to sections 8A and 8HB have been rare until relatively recently. This is the first time in which the Waitangi Tribunal will hear a resumption application in relation to privately owned property, subject to section 27B memorials. In advance of the hearing we therefore do not wish to set out a list of principles which we may be tied to other than to say that all of the factors identified by the parties to us in the

[38] Wai 45, #2.397

submissions thus far, will be broadly relevant to the exercise of discretion that we need to undertake.

47. Despite being cautious at this point to define which principles of relief we will adopt in this remedies inquiry, this process has been worthwhile. The submissions received regarding principles of relief have put the full range of factors to be considered before the Tribunal and all parties and form a basis for further thinking. In particular, the Crown has altered us to a number of considerations not identified in previous Tribunal reports and directions.

Notice issues

48. On the face of it, sections 8C and 8HD of the Treaty of Waitangi Act 1975 prevent private land owners, whose properties are resumable from having any right to appear and be heard on this application.

49. We note that the Treaty of Waitangi Act 1975 and the Tribunal's Practice Note are silent on the issue of notice for remedies applications. The notice provisions of sections 8G and 8HH are not relevant to this application. No assistance is to be gained from the Commissions of Inquiry Act 1980. However, even if a private land owner does not have a right of audience pursuant to sections 8C and 8HD, I consider that they are entitled to be notified of the application pursuant to the rules of natural justice. It is one thing arguably not to have a right of audience, it is an entirely different matter to not be notified that the Tribunal is considering making a resumption order in relation to your property.

50. To date apart from some generic public advertisements and newspaper articles it cannot fairly be said that any of the owners of the properties, subject to this application have been specifically notified of this application.

51. The matter of notice was discussed at the judicial conference. There was broad agreement among the parties that such notice was required but reluctance on the part of Ngāti Kahu and/or the Crown to take responsibility for service and/or notification of this application. The Tribunal will have to take responsibility for notification of the application and hearing dates. However, the Tribunal requires information, for example the name and address of the owners affected, the legal description of the property and certificate of title references.

52. We consider that the Crown is best able to assist us and we direct the Crown to provide the Tribunal with a complete list of those properties which potentially are affected by this application. That list is to be filed with the Tribunal by **midday, Friday 13 July 2012**. Accompanying that list/schedule of properties should be information setting out the following:

    (a) The names and addresses of the registered proprietors. That information should be ascertainable from Valuation New Zealand and/or the relevant territorial authority;

    (b) The parcel identification, legal description, area (ha) and title reference for each property.

53. Thereafter I direct the Registrar to:

(a) Prepare a public notice for advertising in the *New Zealand Herald* and a local newspaper circulating in the Ngāti Kahu claim area notifying the general public, interested and affected parties of the application and hearing dates. The advertisement is to appear twice, the first occasion being **Saturday 28 July 2012**, the second being **Saturday 11 August 2012**;

(b) In addition, the Registrar is to write to each of the affected owners advising them of the application and hearing dates. Those letters should be sent to the address provided by the Crown by registered post. Those letters should be posted no later than **4.00pm, Friday 20 July 2012**. Both the advertisements and letters will need to provide a contact address for the Tribunal and a person whom any affected owner may contact concerning the application.

Interested parties

54. For the avoidance of doubt the following are parties to this remedies inquiry and have the right to be heard and make submissions under sections 8C and 8HD of the Treaty of Waitangi Act 1975:

(a) Mr Graham Neho for himself and on behalf of the Ngāti Kuri Trust Board (Wai 663);

(b) Te Rūnanga Nui O Te Aupōuri;

(c) Mr Rangitane Marsden for himself and on behalf of the Ngāi Takoto a Iwi Research Unit Trust;

(d) Mr Haami Pirpiri for himself and on behalf of the Te Rūnanga O Te Rarawa (Wai 1699 and Wai 1701);

(e) Mr Chappy Harrison for himself and on behalf of the hapū of Ngāti Tara (Wai 2000); and,

(f) Sir Graham Latimer for himself and on behalf of the hapū of Te Paatu (Wai 1359).

Evidence

55. In my memorandum-directions of 8 June 2012 I set out a timetable for the filing of evidence.[39]

56. Broadly speaking it is for the parties to brief whatever evidence they consider relevant to the application. Having said that we will undoubtedly find the following types of evidence to be of value:

[39] Wai 45, #2.407, para 10-12

(a) The prejudice Ngāti Kahu have suffered as a result of the Crown actions or omissions arising from any pre-1865 claim;

(b) The Crown may also have evidence on the issue of prejudice suffered by Ngāti Kahu. It seems that must be so, as the Crown has been prepared and continues to be prepared to offer a settlement to Ngāti Kahu. We presume the Crown carried out some analysis of the basis upon which it would make an offer to Ngāti Kahu. Evidence of the basis upon which the Crown has arrived at that offer and the factors the Crown took into account would be relevant; and,

(c) Clearly evidence of valuation in relation to the SOE, education institution and Crown forest land and the compensation provisions contained with the Crown Forest Assets Act 1989 is relevant.

57. I direct that by **midday, 10 August 2012** the Crown is to file the most up to date schedule/s showing the following:

(a) All properties which Ngāti Kahu and the Crown agree are subject to the Tribunal's resumption jurisdiction under section 8A(2) and 8HB(1) of the Treaty of Waitangi Act 1975 and are within the 2008 claim area;

(b) Any properties within the 2008 claim area that Ngāti Kahu continue to consider are resumable but which the Crown does not consider are resumable;

(c) All Crown-owned properties within the 2008 claim area which the Crown proposes to offer to iwi other than Ngāti Kahu through Treaty settlements;

(d) Any Crown-owned properties within the 2008 claim area which the Crown has previously proposed to offer to Ngāti Kahu; and,

(e) Maps identifying the location of the properties.

Tangata Whenua Evidence

58. Given that the forthcoming hearing is a remedies hearing, we would expect that tangata whenua evidence relating to matters of mana whenua, historical and customary associations to lands and resources to be relatively minimal. Certainly we do not expect to hear from any tangata whenua witnesses on any issues outside the 2008 claim area.

59. Where it will be relevant (other than setting background contextual factors) is with regard to what appears to be a contest as to mana whenua status in relation to Rangiputa Station and we would expect to hear evidence on that issue from Ngāti Kahu and the Ngāti Tara claimants.

Timetable

60. Ngāti Kahu are to file and serve their evidence by **midday, Friday 13 July 2012**.

61. The Crown is to file a list/schedule of properties affected by this application to enable the Tribunal to notify owners. That list is to be filed by **midday, Friday 13 July 2012.**

62. Registered letters advising owners of the application and hearing dates are to be sent by the Waitangi Tribunal no later than **4.00pm, Friday 20 July 2012.**

63. First public notification of application and hearing dates is to be in newspapers, **Saturday, 28 July 2012.**

64. The Crown is to file and serve their evidence by **midday, Friday 10 August 2012**. That information is also to include the list/schedules and maps identified in paragraph 56 above.

65. Interested parties are to file and serve their evidence by **midday, Friday 10 August 2012.**

66. Second public notification of application and hearing dates is to be in newspapers, **Saturday 11 August 2012.**

67. Ngāti Kahu are to file and serve any reply evidence by **midday, Friday 17 August 2012.**

68. Hearing week, **3 – 7 September 2012 inclusive**. The Registrar is directed to liaise with Ngāti Kahu concerning the proposed marae.

69. Closing submissions, **Tuesday 18 September 2012 at**:

The Environment Court,
Specialist Courts and Tribunal Centre,
Level 2 – Courtroom 2.01,
41 Federal Street,
Auckland.

The Registrar is to send copies of this direction to counsel for the claimant, Crown counsel and all those on the distribution list for Wai 45, the combined record of inquiry for the Muriwhenua Land Claim.

DATED at Hamilton this 25th day of June 2012

Judge S R Clark
Presiding Officer
WAITANGI TRIBUNAL