IN THE WAITANGI TRIBUNAL Wai 2908

CONCERNING the Treaty of Waitangi Act 1975

AND the Lake Horowhenua (Tamarangi) Claim

DECISION
ON APPLICATION FOR AN URGENT HEARING

12 December 2019

Introduction

1. This decision concerns an application for an urgent inquiry into Wai 2908, the Lake Horowhenua (Tamarangi) claim. The claim concerns the alleged failure of the Crown to create an entity for the governance of Lake Horowhenua and in continuing to recognise as mandated and dealing with only the Muaūpoko Tribal Authority in relation to Lake Horowhenua.

Background

2. The historical claims of Muaūpoko were inquired into and reported on in the *Horowhenua: The Muaūpoko Priority Report* of 2017. This report found the following (*Horowhenua: The Muaūpoko Priority Report 2017,* at 651):

> We consider that, as the Crown was and remains responsible for the legislative regime under which local government operates, it is time for it to recognise that the multi-layered management regime that exists under the RMA 1991 and the Local Government Act 2002 and the role played by Muaūpoko on the Horowhenua Lake Domain Board are not sufficient in Treaty terms. The present regime does not ensure that Muaūpoko rangatiratanga and kaitiakitanga in terms of Lake Horowhenua and the Hōkio Stream are sufficiently provided for.
>
> It is also time for the Crown to recognise that, having acknowledged it breached the Treaty when it omitted a provision to prevent pollution at the very beginning in the 1905 Act, it must take a lead in putting the situation right. Only the Crown has the resources to work with its Treaty partner to solve these problems. It has a Treaty duty to do so. As the Privy Council has noted, the Crown should not avoid or deny its Treaty obligation of active protection of a vulnerable taonga when it is responsible for the taonga's parlous state and when it has the resources. That is what the parties to the Treaty are entitled to expect from an honourable Crown.

3. The report had the following two recommendations in relation to Lake Horowhenua (*Horowhenua: The Muaūpoko Priority Report 2017,* at 708):

> That the Crown legislates as soon as possible for a contemporary Muaūpoko governance structure to act as katiaki for the lake, the Hōkio Stream, and associated waters and fisheries following negotiations with the Lake Horowhenua Trustees, the lake bed owners, and all of Muaūpoko as to the detail. The legislation should at least be similar to the Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010 but may also extend to something similar to that used for the Whanganui River. This would necessarily mean dismantling the current Horowhenua Lake Domain Board. Any recommendations in respect of Ngati Raukawa are reserved until that iwi and affiliated groups have been heard, but we note that the Waikato-Tainui river settlement model allows for the representation of other iwi.
>
> That the Crown provide to the new Lake Horowhenua Muaūpoko governance structure annual appropriations to assist it meet its kaitiaki obligations in accordance with its legislative obligations.

Procedural History

4. On 3 September 2019, the Tribunal received a statement of claim from Vivienne Taueki (Wai 2908, #1.1.1). A brief of evidence of Vivienne Taueki was also filed (Wai 2908, #A1). An application for an urgent hearing was subsequently received on 9 September 2019.

5. On 13 September 2019, the claim was duly registered as Wai 2908, the Lake Horowhenua (Tamarangi) Claim (Wai 2908, #2.1.1).

6. On 27 September 2019, the Crown filed submissions opposing the application for urgent hearing (Wai 2908, #3.1.2). These submissions were also supported by two affidavits of Julie Tangaere and Julia May Price (Wai 2908, #A2 & #A3). Counsel for the Muaūpoko Tribal Authority, Wai 52 and Wai 2139, sought an extension to file submissions as an interested party; this was granted until 4 October 2019 (Wai 2908, #3.1.3 & #2.5.2).

7. On 2 October 2019, counsel for the applicant filed a memorandum seeking an adjournment sine die of the application for an urgent hearing (Wai 2908, #3.1.4). Crown and interested parties were subsequently asked to file in response to this application for adjournment by 11 October 2019 (Wai 2908, #2.5.3). The response of the Crown was received as requested.

8. On 4 October 2019, counsel for the Muaūpoko Tribal Authority, Wai 52 and Wai 2139, filed submissions in response (Wai 2908, #3.1.5). These submissions were also supported by the brief of evidence of Timothy Thomas Te Otimi Tukapua (Wai 2908, #A4). These submissions seek to clarify the position of the Muaūpoko Tribal Authority in relation to the Lake Horowhenua and settlement negotiations.

9. On 26 November 2019, I gave the applicant a final opportunity to respond to Crown submissions regarding her application to adjourn proceedings sine die. No further submissions were filed.

Parties Submissions

Applicants' Submissions

10. The applicant submits that she is suffering or is likely to continue suffering significant and irreversible prejudice as a result of the Crown continuing to allow and support representation of Muaūpoko by the Muaūpoko Tribal Authority, with particular reference to the governance of Lake Horowhenua.

11. The applicant submits that the Tamarangi hapū will suffer marginalisation, loss of areas in which they hold mana whenua and the rewriting of their history. The applicant submits this will occur as the Crown is allowing decisions about Lake Horowhenua to be made by the Muaūpoko Tribal Authority and the Lake Horowhenua Trustees, (in whom the bed of the Lake is vested), and is supporting those groups with substantial cash payments. The applicant submits that Lake Horowhenua is therefore being managed to the exclusion of people with customary rights in the area.

12. The applicant submits there is no alternative remedy available that would be reasonable to exercise in the circumstances.

13. Counsel for the applicant submits they are ready to proceed to hearing urgently.

Crown's Submissions

14. The Crown submits this is not an exceptional case which warrants the diversion of tribunal resources. The Crown acknowledges that it has not enacted legislation creating a new governance scheme for the Lake. However, it says that this is a complex task requiring consultation with many parties, some of which are still going through claims and litigation processes in the Maori Land Court and the Waitangi Tribunal. Further, the Crown submits that their engagement with the Muaūpoko Tribal Authority has not progressed to the point where lake governance can be discussed.

15. The Crown highlights that the Tribunal has already inquired into and provided recommendations on many of the issues raised in this claim and submits that it would be inefficient and unnecessary to begin a new inquiry on these issues.

16. It submits that the claimant has failed to demonstrate that she is suffering or is likely to suffer significant and irreversible prejudice. As the Crown has not settled on a process for developing the governance entity, the Crown submits that there is no marginalisation, loss of mana whenua or rewriting of claimant history as the claimant alleges.

17. It submits there are a range of alternative remedies available, such as the accountability mechanisms within the Muaūpoko Tribal Authority Deed of Mandate and involvement in the negotiation and settlement process by meeting with the Muaūpoko Tribal Authority.

18. The Crown submits that the claimant has not demonstrated she is ready to proceed to urgent hearing as she has indicated she would file additional evidence if urgency were granted.

19. The Crown acknowledges the issues raised by the claimant and would be prepared to provide future updates to the Tribunal regarding the proposed governance entity for the Lake and any policies which may assist with the remediation of the state of the Lake. However, the Crown maintains that the current applicant does not meet the criteria for the granting of an urgent hearing.

20. In regard to the claimant's application to adjourn sine die, the Crown submits that the request is inconsistent with the claimant's application for the Tribunal to grant urgency to her claim. The Crown therefore submits that the application for urgency should be dismissed.

21. The Crown submits it is open to the Tribunal to make a final determination on the urgency application on the papers, based on the submissions and evidence filed to date, including the request for adjournment.

Urgency Criteria

22. The Tribunal's *Guide to Practice and Procedure* states the following with regards to applications for an urgent hearing:

> In deciding an urgency application, the Tribunal has a regard to a number of factors. Of particular importance is whether:
> - The claimants can demonstrate that they are suffering, or are likely to suffer, significant and irreversible prejudice as a result of current or pending Crown actions or policies;
> - 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.

Prior to making its determination on an urgency application, the Tribunal may consider whether the parties or the take or both are amenable to alternative resolution methods, such as informal hui or formal mediation under clause 9A of schedule 2 to the Treaty of Waitangi Act 1975.

Discussion

23. First, it is clear to me that a request from an applicant for urgency that the application be adjourned sine die is problematic. It is almost certainly an indication that the matter is not ready for hearing. That proposition was one of the submissions from the Crown upon the request. The applicant was given the opportunity to rebut that assertion. She did not respond. I now find that the matter is not in fact ready to proceed urgently.

24. Secondly, the subject matter of the claim is the topic of a number of initiatives to reach a resolution or at least make progress. While those matters are current it is not appropriate for the Tribunal to enter the fray.

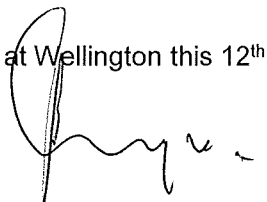
25. Thirdly, the evidence before me does not establish that if urgency is not granted there is a reasonable prospect of irreversible prejudice. The applicant has not met this key criterion for urgency.

Decision

26. For the reasons set out above, the application for an urgent hearing is declined.

The Registrar is to send a copy of this direction to counsel for the applicant, Crown counsel and those on the notification list for Wai 2908, the Lake Horowhenua (Tamarangi) Claim.

DATED at Wellington this 12th day of December 2019



Judge Name P J Savage
Deputy Chairperson
WAITANGI TRIBUNAL