



**BELL GULLY**

# Resumption Mechanisms

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**Maori Legal Forum 2007**

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# Introduction

- Origins of the legal framework
- Effectiveness
- Crown Treaty settlement policies
- Update on case law and jurisprudence
- Conclusion

# Origins of the legal framework

- **Section 9 of the State-owned Enterprises Act 1986**

Nothing in this Act permits the Crown to act in a manner that is inconsistent with the principles of the Treaty of Waitangi

- **Lands case**

The Crown now has to work out a system to safeguard Maori claims regarding land covered by the 1986 Act before any land can be transferred to a State enterprise

- **Negotiation**

New Zealand Maori Council, Federation of Maori Authorities and the Crown

# Origins of the legal framework

- **Memorial regime**
  - Land transferred to SOEs would be memorialised
  - Land could be subject to a binding recommendation by the Tribunal that land be resumed by the Crown and provided to successful Maori claimants
  - Third party interests largely irrelevant
- **Treaty of Waitangi (State Enterprises) Act 1988**
  - Amended the 1986 Act to provide for the resumption mechanism

# Origins of the legal framework

- **Forests case**

It would be inconsistent with the principles of the Treaty to reach a decision as to whether there should be a general sale [of Crown forests] without consultation

- **Negotiation and agreement**

- New Zealand Maori Council, Federation of Maori Authorities and the Crown
- Deed of settlement, Deed Poll, CFRT

- **Crown Forest Assets Act 1989**

# Origins of the legal framework

- **Unique aspects**
  - compensation under the Forest Assets Act
  - level set by formula selected by Maori claimants
  - 5% compulsory award by the Tribunal
  - Discretion over remaining 95%
  - not yet invoked

# Effectiveness

- Turangi Township Remedies Report
  - number of memorialised properties subject to the claim
  - number of other Crown properties available
  - interim recommendation by the Tribunal
    - return of some, but not all, of the memorialised properties
    - return of some other Crown properties
  - negotiated agreement
  - interim recommendations did not become binding
  - perhaps only remedies report issued
  - 100% success rate
  - number of other remedies hearings sought

# Effectiveness

- Negotiation leverage
  - BATNA
  - threat of invoking the mechanisms
  - range of factors
    - may require withdrawal from negotiations
    - other redress mechanisms unavailable
    - time and cost
    - uncertainty
    - likelihood of success
    - delay
  - useful tool

# Crown settlement policies

- Land bank properties
  - surplus (for a reason)
  - consideration as to whether to land bank
  - 3 general types of land banks
    - raupatu
    - specific sites
    - general
  - limited cap

# Crown settlement policies

- **Memorialised properties**
  - not usually used in Treaty settlements
  - preference for Crown owned properties
  - private ownership issues
  - quantum caps
- **Issues**
  - land values
  - time delay
  - patchwork application of legislation regime
  - arguably memorialised properties are afforded less protection than other Crown properties

# Jurisprudence update

- **General courts**
  - High Court forest litigation
  - Court of Appeal decision
    - notable also for the discussion on the nature and origins of the concept of the Crown's fiduciary duty
- **Waitangi Tribunal**
  - Forestry related issues
  - report imminent

# Conclusion

- Almost 20 years since mechanisms created
- No binding recommendation yet
- Forest land used in Treaty settlements – “deemed recommendation”
- Uncertainty in exercise of the jurisdiction
- Impact of Crown settlement policies
- Review required