JUNE 2006

update

MĀORI SERVICES

Bell Gully

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Significant legislation affecting Māori now before Parliament

"…the most significant legislation affecting Māori to be introduced into the House in the current Parliamentary term."

The much debated imposition of a cut-off date for the lodging of historical Treaty of Waitangi claims is now on the way to becoming law.

The change has been incorporated into the Māori Purposes Bill which passed its first reading in the House on 27 June 2006.

The Bill is perhaps the most significant legislation affecting Māori to be introduced into the House in the current Parliamentary term. As well as the Treaty claim deadline, it also proposes a raft of changes to various Acts. In this update, we outline the changes and their impact.

A deadline for Treaty claims

Labour's election promise to impose Treaty settlement deadlines is now about to become law with the Bill's introduction.

It proposes to amend the Treaty of Waitangi Act 1975 so that a cut-off date of 1 September 2008 is imposed for the submission of all historical Treaty of Waitangi claims. No further historical claims would be able to be submitted to the Waitangi Tribunal after this date. This is arguably the most significant change to the Treaty of Waitangi Act since the Tribunal's jurisdiction was extended in 1985 to allow it to inquire into historical claims dating back to 1840.

Defining "historical claim"

The Bill inserts into legislation for the first time a definition for an "historical claim". It defines an historical claim as one that relates to events that occurred before 21 September 1992. The date appears to have been selected because it is the date that the Māori commercial fisheries agreement was signed between the Crown and Māori.

Since the negotiation of historical Treaty claims began in the early 1990s, it has been internal Crown policy to define historical claims as those relating to acts or omissions that occurred before 21 September 1992.[1] The Treaty of Waitangi Act 1975, on the other hand, has not drawn a formal distinction between historical and contemporary claims. That will change if the Bill is enacted.

The Bill will formalise 21 September 1992 as the cut-off point for historical claims, and creates for the first time two separate jurisdictions for the Waitangi Tribunal: one relating to historical claims, and one relating to contemporary claims. All historical claims must be lodged with the Tribunal by the deadline of 1 September 2008, however, after that date Māori will still be able to make contemporary claims to the Tribunal, relating to breaches of the Treaty by the Crown that have taken place after 21 September 1992.

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What the deadline means

If the Bill is enacted in its current form, outstanding historical claims must be lodged with the Tribunal within the next two years. It is important to emphasise that the deadline only relates to the lodgement of claims in the Tribunal and not to their resolution. The Government has previously stated its intention to settle all historical Treaty claims by 2020.[2] However, the Bill does not indicate when negotiations to settle these claims must be completed. The work of the Tribunal will not stop in 2008. The Tribunal will continue to hear historical claims following this date until the backlog has been cleared. How long this will take will depend both on the resources available to the Tribunal and the number of claimants who choose to proceed straight to direct negotiations with the Crown. Following the hearing of all historical claims, the Tribunal will continue to have jurisdiction to hear contemporary claims, relating to breaches of the Treaty by the Crown arising after 21 September 1992.

If you have a claim that relates to an act or omission of the Crown prior to 21 September 1992, it is important that you lodge it with the Tribunal before the 1 September 2008 deadline. Making a claim to the Tribunal involves drafting and filing a statement of claim. A statement of claim must clearly set out the particulars of your claim. If you are unclear as to how to set out a statement of claim, you can contact the Waitangi Tribunal directly to request a template statement of claim to complete and submit. It is useful to involve a lawyer in this process.

Amending claims after the deadline

Once an historical claim is lodged in the Tribunal, it appears that it can be amended after 1 September 2008. However, the wording of the Bill attempts to close any potential loophole which could be used by claimants to amend their claims to such an extent that they are effectively able to make new claims.

A new section 6AA inserted into the Treaty of Waitangi Act 1975 by the Bill clarifies that claimants may only amend claims by adding evidence of an historical nature that makes up part of the factual backdrop to the claim. If the Bill is enacted, the Tribunal would not have jurisdiction to inquire into any part of an historical claim submitted after 1 September 2008, which is effectively making a new Treaty claim.

An opportunity for clarification?

Claims to the Waitangi Tribunal can be made by individual Māori, or by any group of Māori. The Treaty of Waitangi Act 1975 does not itself require a mandating process to be undertaken before a claim can be made. As a consequence, Wai claims can vary in scope and standing - some may be lodged on behalf of large iwi or hapu groups, while others may be lodged by individual Māori, or relate to relatively discrete issues. However, the ability for individual Māori to make claims does not reflect the basis upon which the Waitangi Tribunal will deal with claims, or how the Crown will enter into direct negotiations with claimants.

As at 30 April 2006, 1315 Wai claims were lodged with the Waitangi Tribunal.[3] The Tribunal’s “new approach” inquiry process deals with groups of Wai claims on a regional basis. The recent Central North Island Inquiry deals with over 165 claims.[4] Further, it is common practice for the Tribunal to allocate hearing time to a claimant, relative to how significant and representative that claim is. The Crown settles historical Wai claims in clusters pursuant to its “large natural grouping policy”.[5] Direct negotiations are not usually conducted between the Crown and individuals, whanau or smaller hapu. The Government has stated that it expects to reach a further 40 to 50 historical settlements.[6]

Rosalind Dawson Solicitor

FOOTNOTES

1 Ka tika a muri, ka tika a mua, Healing the Past Building a Future: a Guide to Treaty of Waitangi Claims and Negotiations with the Crown, Office of Treaty Settlements, p 27.

2 Speech from the throne, Dame Silvia Cartwright, 8 August 2005.

3 http://www.waitangi-tribunal.govt.nz/about/frequentlyaskedquestions.asp#16.

4 http://www.waitangi-tribunal.govt.nz/about/frequentlyaskedquestions.asp#16.

5 Ka tika a muri, ka tika a mua, Healing the Past Building a Future: a Guide to Treaty of Waitangi Claims and Negotiations with the Crown, Office of Treaty Settlements, p 32.

6 Labour Party "Treaty Settlements: Questions and Answers" www.labour.org.nz.

7 Hon. Michael Cullen, Budget 2006 speech to the House, 18 May 2006.

8 Treaty claim deadline creeps into law The Dominion Post 15 June 2006.

In our experience, the ability for individual Māori to make claims to the Tribunal can often give rise to an expectation of entering into direct negotiations with the Crown. Arguably, the Bill presents an opportunity for Parliament to deal with and address this. There are a number of ways in which that expectation could be addressed.

Increased funding

As has been previously noted, if a deadline was imposed on lodging historical Treaty claims, it would be vital that both Office of Treaty Settlements funding and claimant funding are increased. The May 2006 Budget allocates an additional $5.2 million to the Office of Treaty Settlements over the next four years. The Government claims that this amount will increase the Office of Treaty Settlement's negotiating capacity by 25%.[7]

However, while this additional money will no doubt help the Office of Treaty Settlements to process claims more efficiently, it appears that no funding is provided directly to claimants to help them formulate their Wai claims before the 1 September 2008 deadline. Nor does it appear that there is any additional funding provided to the Waitangi Tribunal to help it process the inevitable influx of claims it will receive in the next two years.

Māori Land Court

The Bill also makes several changes to Te Ture Whenua Māori Act 1993 over the operation of the Māori Land Court. Although the Minister of Māori Affairs has labelled these changes a "technicality"[8], the Opposition is less than happy with the proposed retrospective validation of many Māori Land Court decisions.

In summary the Bill will:

- increase the number of permanent judges that can be appointed to the Māori Land Court from 8 to 14;
- give the Deputy Chief Judge the power to exercise the Chief Judge's powers;
- retrospectively validate decisions and acts made by the Deputy Chief Judge when exercising the Chief Judge's powers;
- retrospectively validate the acts and decisions of former Deputy Chief Judge Norman Smith during a period in 2000, after his warrant had expired; and
- clarify the procedure and discretion of the Court in relation to its special jurisdiction under the Māori Fisheries Act 2004 and the Māori Commercial Aquaculture Claims Settlement Act 2004.

The change in the number of permanent judges able to be appointed to the Court is a result of the Court's increased workload caused by the Foreshore and Seabed Act 2004 and the Māori Fisheries Act 2004.

Fisheries Issues

Reduction of quota shares

The Māori Fisheries Act 2004 is proposed to be amended so that in the event that section 23 of the Fisheries Act 1996 is invoked (section 23 provides for a reduction in quota shares due to an increase in total allowable catch (TAC) under section 20) then Te Ohu Kaimoana Trustee Limited (TOKMTL) will be obliged to recalculate quota shares allocated to an iwi and amend its register following the allocation of a deepwater stock, but before its transfer (if a TAC increased and quota shares are reduced).

Other amendments are made to the Māori Fisheries Act 2004 showing revised numbers of quota shares available in respect of seven different stocks (the holdings of those stocks

> "If you wish to make a submission on any aspect of the Bill, you will have the opportunity to make either a written or oral submission to the Select Committee."

have reduced since the commencement of the Māori Fisheries Act 2004).

Harbour quota

The Bill also makes amendments to the determination of harbour quota, including amendments to confirm that:

- the process for making interim coastline claims does not apply to claims for harbour quota;
- TOKMTL must determine coastline entitlements for harbour quota by multiplying "the percentage set out in the claim" by the total number of harbour quota shares for the relevant stock and harbour; and
- if the number of shares available for distribution is reduced, TOKMTL must recalculate the iwi entitlement to quota shares for a stock and register that adjusted entitlement.

Validation of certain quota registrations

The Bill will also validate retrospectively any applications made to the Minister of Fisheries by TOKMTL for the registration of settlement quota interests before the Bill's enactment. It also retrospectively validates any registration of settlement quota by the chief executive of the Ministry of Fisheries against quota shares, after notification by TOKMTL.

These applications and registrations will be treated as if they had been made or effected in compliance with the reduced number of quota shares the Bill will create.

Aquaculture

The definition of "pre-commencement space" in the Māori Commercial Aquaculture Claims Settlement Act 2004 is amended to include areas subject to permits for exclusive occupation of space for aquaculture activities, including spat gathering, but to exclude areas subject to permits for free-gathering of spat.

This Act is amended so that the amount of pre-commencement space is reduced. This means that the amount of aquaculture space allocated to iwi is potentially decreased.

What happens next?

The Bill will now go to the Māori Affairs Select Committee for review. If you wish to make a submission on any aspect of the Bill, you will have the opportunity to make either a written or oral submission to the Select Committee. Submissions must be received by 18 August 2006. We have considerable experience in preparing submissions to Select Committees, and are able to assist you with this, if you require.

Following its deliberations, the Select Committee's report of its recommended amendments to the Bill is due on 21 November 2006. The Bill will then proceed to its second reading in the House, and the amendments recommended by the Select Committee will be voted on. Next, it is proposed that the Bill be separated into four separate Bills, before being finally debated by the Committee of the Whole House and proceeding to the third and final reading.

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