

MĀORI SERVICES



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Government to review land sale policies

Recent high profile land occupations in Northland and the Coromandel have resulted in a renewed focus on Landcorp's land sale policies and, more generally, the sale of Crown assets. The occupations were in protest against Landcorp's intention to sell land that is legally protected because it can be ordered to be returned to Maori as part of a future Treaty of Waitangi settlement. Those occupations have now led the Government to announce a review of not only Landcorp's policies, but the land sale policies of State-Owned Enterprises (SOEs), Crown entities and other Crown bodies.

Much has been said about the occupations, Landcorp's policies and, from a legal perspective, the legal framework upon which the land being sold by Landcorp is able to be returned to Maori. In this update, we examine that legal framework and comment on the scope of the Government's proposed review.

The famous "Lands" case

The genesis of this issue could be said to be the creation of SOEs in the 1980s. The State Owned Enterprises Act 1986 (the Act) was enacted to allow government to create SOEs. An important section of that Act, section 9, provides that nothing in the Act permits the Crown to act in a manner that is

inconsistent with the principles of the Treaty of Waitangi.

The establishment of SOEs was a contentious topic. Many will remember vividly the issues that were debated and discussed at the time. One of those issues was the fear by Maori that land owned by the Crown, but transferred to SOEs, would no longer be available to settle Treaty claims. Court proceedings were initiated in which it was argued that the establishment of, and transferring of land to SOEs, without ensuring that land remained available for future Treaty settlements, was inconsistent with the principles of the Treaty, and therefore breached section 9 of the Act.

The Court of Appeal, in what is commonly known as the Lands case,¹ agreed and held that the Crown was obliged to administer the Act so that Maori Treaty claims to land transferred to SOEs were protected.²

Following the Lands decision, the Crown and Maori agreed to a mechanism that would allow the Crown to transfer land to SOEs, while also ensuring that land would remain available for future Treaty settlements. Any land transferred to SOEs would have a "memorial" placed on the certificate of title, stating that it could be compulsorily repurchased by the Crown if the Waitangi

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Tribunal recommended its return to Maori.

What are these “memorials”?

The titles for land transferred by the Crown to SOEs include a notation that advises that the land is subject to section 27B of the Act. As required by section 27A of the Act, that notation reads:

Subject to section 27B State-Owned Enterprises Act 1986 (which provides for the resumption of land on the recommendation of the Waitangi Tribunal and which does not provide for third parties, such as the owner of the land, to be heard in relation to the making of any such recommendation).

Section 27B of the SOE Act was enacted in 1988 to reflect the agreement reached between Maori and the Crown following the Lands case. It provides that all land transferred to SOEs under the Act must be compulsorily acquired by the Crown and returned to claimants in the event that the Waitangi Tribunal makes a binding recommendation to that effect under section 8A of the Treaty of Waitangi Act 1975. The Tribunal is able to make such a recommendation if it finds that:

- a claim is well founded; and
- in all the circumstances of the case, the compensation to the claimant should include the return to Maori ownership of the whole or part of that land, or interest in land.³

In deciding whether to recommend the return of land, the Tribunal will not have regard to any changes that have taken place since the land was transferred to the SOE in:

- the condition of the land in which the interest exists, or any improvements to it; or
- the ownership or possession of any other interests in that land.⁴

The Tribunal is able to make a binding recommendation for the resumption regardless of whether the land is still owned by the SOE, or has been on-sold to a third party.

Have these memorials been invoked yet?

To date, the Waitangi Tribunal has only exercised its power to make binding recommendations in one instance, and even then the Crown and the claimants agreed a negotiated settlement before the Tribunal's interim findings became binding.

In the *Turangi Township Remedies Report*, released in 1998, the Tribunal made recommendations for the return of several memorialised properties to Ngati Turangitukua. As a result of those recommendations, the Crown and Ngati Turangitukua negotiated an agreed redress package, which included the return of certain memorialised properties.

The Crown argued that the Tribunal was obliged to adopt a higher standard of proof when considering whether or not to make a binding recommendation. However, the Tribunal ruled that a higher standard of proof was not required, and that the Tribunal will follow a common sense principle that greater care should be taken in considering more serious issues, stating that:

“When the Tribunal is considering whether or not, as part of its recommendation under s 6, [of the Treaty of Waitangi Act 1975], to make a binding recommendation for the return to Maori of memorialised land, it will be concerned with ‘a whole range of circumstances’ which it will need to weigh. Clearly, the consequences of such a recommendation would need to be given serious consideration given its effect on the Crown.”⁵

Although the Tribunal made binding recommendations for the return of certain memorialised properties, it declined to make

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binding recommendations for the return of memorialised residential properties, as there were sufficient properties available in the possession of Crown agencies that could be returned.⁶

Are memorialised properties being used in Treaty settlements?

Treaty settlements are being reached through direct negotiation between the Crown and Maori claimant groups. In that context, it is theoretically possible for the Crown to agree to resume memorialised properties. There are, however, a number of reasons why the Crown would be, and has been, unwilling to do so.

First, the Crown (itself, as opposed to SOEs), retains ownership of a significant number of properties that are theoretically available for use in Treaty settlements. The Crown’s preference is to use those properties as priority, rather than having to resume memorialised properties, many of which are now in private ownership.

Second, there are obvious political consequences if the Crown were to resume memorialised properties owned by private individuals.

Third, and perhaps most importantly, most commercial redress properties offered by the Crown must be purchased by the particular claimant group using cash that the Crown provides in settlement of Treaty claims. Ordinarily, claimant groups are limited to purchasing properties up to the value of their cash settlement amount.

In most instances, the value of Crown-owned properties that the Crown is able to offer claimant groups, without having to resort to memorialised properties, exceeds the cash amount that those groups receive in settlement of their Treaty claims. That means that there is usually not enough cash offered to claimants to allow them to purchase all Crown-owned properties offered

to them, as well as additional memorialised properties.

The Crown’s Treaty settlement policies therefore, raise the significant issue of land values. At the time that the memorial regime was devised in 1988, there was no fiscal cap on the value of Treaty of Waitangi settlements. However, in 1994 the then National Government released a proposal that a \$1 billion cap be placed on the value of all Treaty settlements.

This “fiscal envelope” policy was widely rejected by Maori, but was nevertheless adopted. Although the fiscal envelope policy was formally scrapped as part of the 1996 National-New Zealand First coalition agreement, this move was largely symbolic, as the Crown’s policy of relativity between settlements remains in place.

In order to achieve “relativity”, the Office of Treaty Settlements (OTS) assesses how much redress, including a cash amount, each claimant group is entitled to receive in settlement of their Treaty claims. In many cases, the value of a claimant group’s settlement is much less than the value of the land available for them to purchase as part of their Treaty settlement.

The value of land is rising, and in almost every instance, land is more valuable than when the first Treaty settlements were made in the mid-1990s. It is difficult to determine from the Crown’s application of its policy whether that rise in value, or even inflation in general, is factored into its assessments of the value of each claimant group’s Treaty claims.

Irrespective, it is clear that the longer the settlement process takes, the higher land values rise, and the less likely it becomes for claimants to secure all land that has been notionally, if not actually, set aside to settle Treaty claims.

Footnotes

1. *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641
2. *Ibid*, per Cooke P, 719
3. Treaty of Waitangi Act 1975 section 8A(2)(a)
4. Treaty of Waitangi Act 1975 section 8A(3)
5. *Directions of the Presiding Officer in re Ngati Turangitukua-Wai 84* (25 March 1997), cited in *The Turangi Township Remedies Report - Wai 84*, GP Publications, Wellington, 1998, p 5
6. *The Turangi Township Remedies Report-Wai 84*, GP Publications, Wellington, 1998, p 88
7. *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 147-149
8. *Protection of Maori Interests in Surplus Crown-Owned Land: Information for Crown agencies*, OTS publication, 2006, p 2, p 4, available at www.ots.govt.nz

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What properties are offered to claimants?

Claimants are usually first offered land within the OTS "land bank".

The Crown's Land Protection Mechanism requires surplus Crown, Crown departmental, Crown Research Institute, Public Health Sector and certain other Crown entity land to first be offered for sale to OTS, before it can be sold on the open market. If OTS decides to purchase that land, it will be placed in a "land bank" and made available to claimants in future Treaty settlements.

Once it receives notification that a surplus Crown property is available, OTS must advertise the availability of that property, and Maori with Treaty claims lodged in the Waitangi Tribunal may make submissions as to why that property should be land banked. If the property meets certain criteria for land banking, it will be protected. If not, it will be sold on the open market.⁷

However, the Land Protection Mechanism does not apply to land subject to other forms of protection, such as statutory memorials. When SOE land becomes available for sale, OTS is not obliged to look into purchasing that land in accordance with its Land Protection Mechanism policy.⁸ Therefore, somewhat ironically, land that was originally protected in the 1980s to be used for future Treaty settlements is now arguably afforded less protection than other Crown land.

Where to from here?

The Government has indicated that the terms of reference for its review of Crown land sale policies will be determined this month. There's no guarantee that the review will include an assessment of the adequacy (or otherwise) of the section 27B memorial regime, or indeed the Crown's current Land

Protection Mechanisms and associated policy.

It would seem, however, that the section 27B regime is in need of review. It was originally set up to protect land for future Treaty claims and, at the time, was heralded as a success and a workable solution. Time has shown, however, that in practice the spirit and intention of the architects of that regime has not been realised. In fact, non-memorialised land is arguably afforded greater protection than land that is subject to section 27B. The Crown's Treaty settlement policies also appear to exacerbate the inadequacies.

Maori claimant groups who have yet to settle their Treaty claims could now argue for a review of the section 27B regime and the wider land protection policies. That window of opportunity is unlikely to be left open for long.

Our Māori Services team

Bell Gully's Maori Services team has extensive experience in advising claimants on section 27B issues and on Treaty settlement policies generally. For more information about these matters, please contact Damian Stone.

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