Te Hunga Roia Maori o Aotearoa
(Maori Law Society Inc.)

SUBMISSION: TREATY OF WAITANGI (REMOVAL OF CONFLICT OF INTEREST) AMENDMENT BILL

6 AUGUST 2007

TE HUNGA ROIA MAORI O AOTEAROA, SUBMISSION REGARDING THE TREATY OF WAITANGI (REMOVAL OF CONFLICT OF INTEREST) AMENDMENT BILL

1 Appearance

1.1 Te Hunga Roia Māori o Aotearoa / The New Zealand Māori Law Society Inc (THRMOA) does wish to appear before the Committee.

2 Executive summary

2.1 THRMOA opposes this Bill on the grounds that it believes that there is no prima facie conflict of interest in allowing serving Judges of the High or Māori Land Courts presiding as members of the Waitangi Tribunal or having a serving Judge of the High Court or the Chief Judge of the Māori Land Court preside as Chairperson of the Waitangi Tribunal.

2.2 Having considered and dismissed the notion that there is an inherent conflict of interest in this context, we are accordingly left with the impression that either the Bill's drafters do not understand the principles relating to conflicts of interest, or the Bill is merely a rather unsophisticated attempt to attack and discredit the current Māori Land Court bench. That in our view is completely inappropriate.

3 Te Hunga Roia Maori o Aotearoa

3.1 This submission is made for and on behalf of Te Hunga Roia Maori o Aotearoa (THRMOA).

3.2 The THRMOA has a membership totalling more than 350 members of Maori lawyers. In addition to these members THRMOA also incorporates students who are studying towards a Bachelor of Laws (LLB).

3.3 THRMOA ensures the effective networking of members, holds a mandate to make submissions on a range of policies and proposed legislation, ensures representation of its membership on selected committees and organises regular national hui which provides an annual opportunity for Maori lawyers to discuss and debate issues relevant to Maori.

4 Introduction

4.1 The Waitangi Tribunal was created by the passage of the Treaty of Waitangi Act 1975 (the principal Act) and holds the status of a commission of inquiry pursuant to the Commissions of Inquiry Act 1908 (paragraph 8 Schedule 2 principal Act refers). At its inception the principal Act provided that the Chief Judge of the Māori Land Court was to be the Chairperson of the Waitangi Tribunal. This was only amended in 1998 by including reference to a High Court Judge due to the elevation of the Chief Judge of the time to the High Court (Chief Judge Durie becoming Justice Durie).

4.2 The Bill seeks to remove what the explanatory note describes as the inherent conflict of interest that allows serving Judges of the Māori Land Court to serve as members of the Waitangi Tribunal; and which allows a serving Chief Judge of the Māori Land Court or High Court Judge to be the Chairperson of the Waitangi Tribunal. It is proposed to amend the principal Act by amending sections 4 & 4A (and amending the Second Schedule), the cumulative effect of which is:

a. Only a retired High Court Judge or a retired Chief Judge of the Māori Land Court may be appointed as Chairperson of the Waitangi Tribunal; and

b. Only a retired Judge (including a retired Chief Judge of the Māori Land Court) may be appointed as the Deputy Chairperson of the Waitangi Tribunal by the Chairperson of the Waitangi Tribunal; and

c. Only retired Judges of the Māori Land Court may be appointed by the Chairperson to sit as presiding officers (and be deemed members of the Waitangi Tribunal).

5 General position

5.1 THRMOA is opposed to this Bill on the grounds that there is little evidence to suggest that there is (as the explanatory note to the Bill suggests) "an inherent conflict of interest" in having sitting Judges of the Māori Land Court acting as presiding officers and deemed members of the Waitangi Tribunal, or having a current Chief Judge or current High Court Judge appointed to the position of Chairperson of the Waitangi Tribunal. In particular situations where conflicts of interest arise, Māori Land Court Judges are obliged, like any other member of the judiciary, to act appropriately by disqualifying themselves from appointment: to consider that they act otherwise seems to us to be an attack on the ability and integrity of the Māori Land Court bench itself.

6 Analysis

6.1 Whilst it is difficult for us to identify the ill that this Bill is attempting to remedy, it seems to us that there are likely to be two main arguments that might be made on the grounds of principle. These are:

a. separation of powers arguments

b. jurisdictional overlap arguments

Separation of powers arguments

6.2 Montesquieu popularised the doctrine of the separation of powers in the 18th century which has served as a basis for democratic thought and as a pillar of our political system. The doctrine states that each branch of the state should have separate and individual powers and areas of responsibility. Thus, the executive is responsible for enforcing the law, the legislature for making the law and the judiciary for interpreting the law.

6.3 A key plank of such a view is that the judiciary must retain its independence from both the legislature and the executive: it is the relationship between the executive and the judiciary which is most relevant in the context of this Bill. It might be argued that the

appointment of judicial officers to, for example, commissions of inquiry, fetters this judicial independence. However, in our view it does not – whilst caution should be exercised in particular appointments (due to the particular work a judicial officer may have undertaken in their judicial role), there is no need for a blanket exclusion per se. On this point, we note that there are a number of pieces of legislation which specifically allow judicial officers to serve in other capacities in other Crown entities (effectively instruments of the executive).

6.4 We find it difficult to believe that if an inherent conflict of interest arises in the context of this Bill, how such conflicts do not arise elsewhere. If conflicts are not seen to be inherent in such circumstances, for example, the appointment of a Judge who routinely hears criminal cases to the Police Complaints Authority, it seems difficult to justify in the case of the Māori Land Court/Waitangi Tribunal. The answer is, of course, that should an actual conflict of interest arise in that context, that the Judge concerned would deal with it by standing aside from considering the matter before, for example, the Authority. The position is no different in the case of Māori Land Court Judges. We include a table below of legislation that we are aware of which explicitly recognises the utility of having sitting Judges appointed to various Crown entities.

Act	Section	Position
Commissions of Inquiry Act 1908	13	Serving and retired Judges are able to be appointed to commissions of inquiry
Electoral Act 1993	8	Membership of Electoral Commission must include the Chief Judge of the Māori Land Court and another retired or serving Judge
Human Rights Act 1993	20C(2)	A Judge may be appointed as a Member of the Commission
Law Commission Act 1985	9	The President is be a retired or serving Judge of the Court of Appeal or a barrister and solicitor of not less than seven years' practice
Police Complaints Authority Act 1988	4(4)	A Judge may be appointed as a Member of the Authority
Privacy Act 1993	19(2)	A Judge may be appointed as the Privacy Commissioner

Jurisdictional overlap arguments

6.5 We agree that some argument could similarly be made justifying the Bill's intentions should a significant overlap occur between the jurisdictions of the Māori Land Court and the Tribunal. However, we think such overlap cannot be shown on the facts.

6.6 The jurisdiction is set out in section 6(1) of the Treaty of Waitangi Act 1975 and focuses on acts or omissions on the part of the Crown that breaches the principles of the Treaty of Waitangi:

> **6 Jurisdiction of Tribunal to consider claims**
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> (1) Where any Maori claims that he or she, or any group of Maoris of which he or she is a member, is or is likely to be prejudicially affected—
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> (a) By any ordinance of the General Legislative Council of New Zealand, or any ordinance of the Provincial Legislative Council of New Munster, or any provincial ordinance, or any Act (whether or not still

in force), passed at any time on or after the 6th day of February 1840; or

(b) By any regulations, order, proclamation, notice, or other statutory instrument made, issued, or given at any time on or after the 6th day of February 1840 under any ordinance or Act referred to in paragraph (a) of this subsection; or

(c) By any policy or practice (whether or not still in force) adopted by or on behalf of the Crown, or by any policy or practice proposed to be adopted by or on behalf of the Crown; or

(d) By any act done or omitted at any time on or after the 6th day of February 1840, or proposed to be done or omitted, by or on behalf of the Crown,—

and that the ordinance or Act, or the regulations, order, proclamation, notice, or other statutory instrument, or the policy or practice, or the act or omission, was or is inconsistent with the principles of the Treaty, he or she may submit that claim to the Tribunal under this section.

6.7 The Māori Land Court's general jurisdiction is contained within section 18 of Te Ture Whenua Māori Act 1993 and relates primarily to the ownership and possession of Māori land:

18 General jurisdiction of Court

(1) In addition to any jurisdiction specifically conferred on the Court otherwise than by this section, the Court shall have the following jurisdiction:

(a) To hear and determine any claim, whether at law or in equity, to the ownership or possession of Maori freehold land, or to any right, title, estate, or interest in any such land or in the proceeds of the alienation of any such right, title, estate, or interest:

(b) To determine the relative interests of the owners in common, whether at law or in equity, of any Maori freehold land:

(c) To hear and determine any claim to recover damages for trespass or any other injury to Maori freehold land:

(d) To hear and determine any proceeding founded on contract or on tort where the debt, demand, or damage relates to Maori freehold land:

(e) To determine for the purposes of any proceedings in the Court or for any other purpose whether any specified person is a Maori or the descendant of a Maori:

(f) To determine for the purposes of this Act whether any person is a member of any of the preferred classes of alienees specified in section 4 of this Act:

(g) To determine whether any land or interest in land to which section 8A or section 8HB of the Treaty of Waitangi Act 1975 applies should, under section 338 of this Act, be set aside as a reservation:

(h) To determine for the purposes of any proceedings in the Court or for any other purpose whether any specified land is or is not Maori customary land or Maori freehold land or General land owned by Maori or General land or Crown land:

(i) To determine for the purposes of any proceedings in the Court or for any other purpose whether any specified land is or is not held by any person in a fiduciary capacity, and, where it is, to make any appropriate vesting order.

6.8 A major point of difference between the two jurisdictions is that in the case of the Tribunal, its powers are (with some limited exceptions) of a recommendatory nature only – the government of the day is free to (and might we say too often does) ignore its recommendations. On the other hand, the Māori Land Court has a judicial decision making function, which may be appealed to superior courts. While there are some

points of overlap, particularly in relation to matters of mandate (s.30 Te Ture Whenua Māori Act 1993) and some Māori reservation matters (s.338 Te Ture Whenua Māori Act 1993), we think it difficult to justify the argument that the holding of conjoint offices is, on principle, significantly problematic.

6.9 Again, in the case of conflicts of interest in particular cases, it is up to the Judge concerned to exclude himself or herself from appointment – this is a fundamental issue that this Bill seems to neglect, and is one that the judiciary as a whole takes seriously. We are not aware of any particular circumstance where particular conflicts of interest have arisen due to a Māori Land Court Judge being the presiding officer on any Waitangi Tribunal hearing. Indeed, it is our experience that where any potential conflicts may have arisen, that the Māori Land Court Judges concerned have either excluded themselves from appointment, or have not been appointed by the Chairperson for that reason. Many of our members have been involved in Tribunal hearings which have discussed matters of this type, so we are acutely aware of the judges' attention to real or perceived conflicts of interest.

7 Effects of passage of Bill

7.1 Having explicitly recognised that Māori Land Court Judges ought and will exclude themselves from appointment in appropriate circumstances, we consider that the passage of the Bill would have deleterious effects on the operation of the Waitangi Tribunal and the Māori Land Court which includes (but is not limited to):

a. the removal of the Judges of the Māori Land Court from the Tribunal would have the unintended effect of frustrating the current government's (as well as the opposition parties' stated) goals of completing Treaty settlements in a timely fashion. Given the experience of Māori Land Court Judges dealing with the types of issues as well as dealing with Māori claimants, passage of the Bill would severely disrupt the work of the Tribunal for some years.

b. the inclusion of Māori Land Court Judges on the Tribunal (along with Māori Tribunal members) makes it easier for kawa, tikanga and te reo to be observed and used in its proceedings (given that their training and work on the bench involves learning and practising these things) some of which are expressly required by paragraph 5(9) of the Second Schedule of the principal Act.). Given the cathartic role that the Tribunal also plays, this should not be underestimated in the process. Whilst there are other judicial officers with some of these skills, with respect to the other benches, it is very much the exception, rather than the rule, both in the case of sitting Judges and retired Judges.

c. removing the ability for Māori Land Court Judges to sit on the Waitangi Tribunal may make recruitment to the Māori Land Court bench more difficult. Given the increase in the number of Judges due to a wider jurisdiction which the court has received, senior lawyers (many of whom come from a Tribunal background) may not wish to be restricted to sitting solely in the court.

d. inevitably the bulk of claims before the Tribunal include claims to land. Given the jurisdiction of the court, it makes sense having judicial officers with experience in dealing with matters of Māori customary law in relation to land inquiring into claims before the Tribunal. This is one of the reasons that Māori Land Court Judges were appointed to the Tribunal in the first place – the claims

before the Tribunal have not changed to a significant degree to consider that their expertise is no longer required.

8 Conclusion

8.1 Ultimately it is our view that there are no better judicial officers than the current Maori Land Court Judges to preside over Waitangi Tribunal hearings. They deal with Maori issues on a daily basis and not only do they have a strong grasp of the applicable law but also of Maori custom and tikanga, hence their appointment to the Maori Land Court bench in the first place.

8.2 To implement the Bill as currently proposed would in our view be a return to the flawed processes conducted pursuant to Native Land legislation commencing with the Native Land Act 1865, followed by the Native Land Act 1873 and succeeding legislation. These acts provided for the appointment by the Crown of judicial officers to the Native Land Court who were not Maori, not from the area, had no comprehension of the customs and tikanga that applied to the areas they sat in and predominantly could not speak Maori. The Native Land legislation and the Native Land Court itself have been criticised by a number of historians and in a number of Waitangi Tribunal reports, one as recently as the Central North Island Report released in August 2007.

8.3 Importantly we consider the provisions of Section 4(2A) of the Treaty of Waitangi Act are apposite which provides;

> Section 4(2A) In considering the suitability of persons for appointment to the Tribunal, the Minister of Maori Affairs—
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> (a) Shall have regard to the partnership between the 2 parties to the Treaty; and
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> (b) Shall have regard not only to a person's personal attributes but also to a person's knowledge of and experience in the different aspects of matters likely to come before the Tribunal.

8.4 As set out above, Maori Land Court Judges have personal knowledge of and experience in the different aspects of matters that are likely to come before the Tribunal and therefore are the most appropriate people to preside over Waitangi Tribunal hearings.

8.5 We consider that the removal of the Māori Land Court Judges from the Waitangi Tribunal would be ‘throwing the baby out with the bathwater’, particularly as there are the usual ways of dealing with conflicts of interest as, when, and if, they arise. We believe that the judges of the Māori Land Court play important roles in the efficient operation of the Tribunal – removing them from such a position will have a number of serious effects on both the Tribunal and the Court. We also strongly defend the mana of the Māori Land Court Judges, who we consider highly competent judicial officers and a credit to our profession. This Bill seems to suggest that Māori Land Court Judges are different in some way in that they are unable to manage conflicts of interest (unlike their judicial brethren on other benches), a claim which we strongly deny. We therefore strongly oppose the passage of this Bill.

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