Tamatea Pōkai Whenua

Rāpare 18, Paengawhāwhā 2024

CE APPENDIX 6

Committee Secretariat
Environment Committee
Parliament Buildings
Wellington
en@parliament.govt.nz

E te Kōmiti, tēna ra koutou,

Submission on the Fast-Track Approvals Bill by the Tamatea Pōkai Whenua Trust

1. Introduction

1.1. This submission on the Fast-track Approvals Bill [**the Bill**] is made on behalf of the Tamatea Pōkai Whenua Trust [**TPW**], the post settlement entity for Heretaunga Tamatea.

1.2. TPW wish to appear in person to speak to the issues raised in this submission.

1.3. Contact details for this submission are:

Darryn Russell
Chief Executive
Tamatea Pōkai Whenua Trust
L1/117 Heretaunga St West, Hastings.
06 876 6506
Darryn.R@tpw.iwi.nz

1.4. TPW is not opposed to the underlying rationale of this Bill – i.e. that there is a need for fast-track consenting processes. We have used existing processes ourselves for projects such as housing developments to support our people and the wider community. We are also involved in fast-track consenting processes as part of the response to weather events in our rohe.

Tamatea Pōkai Whenua

1.5. However, TPW does oppose the current Bill for the reasons that are set out in detail below. In summary these are that:

- The Bill has not included the projects to be listed in Schedule 1. As a result we have no input into the suitability of these projects for a fast-track consenting process and the potential impact on TPW and the Heretaunga Tamatea community.
- The Bill fails to adequately protect TPW and Heretaunga Tamatea interests and our relationship with the Crown as a Treaty partner. The reliance on Treaty settlement obligations misunderstands the nature of those obligations and offers little practical protection. The lack of reference to Te Tiriti principles is also inconsistent with our Treaty settlement arrangements.
- The Bill gives Joint Ministers an inappropriate role in the consenting process by giving them a discretion to depart from technical advice or to direct the way in which that advice is prepared.

1.6. Ultimately we are concerned that because of these issues the Bill may not achieve its policy aims in its current form, and will do harm to the relationship between Heretaunga Tamatea and the Crown.

2. Background to TPW and the Heretaunga Tamatea Treaty of Waitangi Settlement

2.1. TPW was, until 2023, known as the Heretaunga Tamatea Settlement Trust. TPW is the post settlement governance entity for Heretaunga Tamatea. Heretaunga Tamatea are one of the settlement groups for Ngāti Kahungunu, and consists of numerous hapū associated with 23 marae.

2.2. Our rohe is best described by '*te kanohi homiromiro o te haro o te kahu'* (the all seeing eye of the hawk in flight). It starts on the coast at Te Kauwae-a-Maui/Cape Kidnappers and follows the coast north to the mouth of the Tūtaekurī River. It then extends westward along the Tūtaekurī to the foothills and eastern slopes of the Ruahine Range. Heading south, it embraces the Kāweka and Gwavas Forests to the headwaters of the Manawatu River in the south. It then crosses eastwards to the coast at Te Poroporo and turns northwards up the coast embracing Parimahu, passing one of the nation's outstanding landscapes - Kohinurākau, Te Mata- o-Rongokako and Kahurānaki, the sacred mountain of the rohe - to arrive back at Te Kauwae-a-Māui/Cape Kidnappers.

2.3. Heretaunga Tamatea entered into a Deed of Settlement with the Crown, dated 26 September 2015, for the settlement of our historical Treaty of Waitangi claims [**the Deed of Settlement**].

Tamatea Pōkai Whenua

That settlement was given effect to via the Heretaunga Tamatea Claims Settlement Act 2018 [**the Settlement Act**].

2.4. The Deed of Settlement and Settlement Act included an acknowledgement and apology from the Crown for a range of actions, including that '*the modification and degradation of the Heretaunga Tamatea environment due largely to the introduction of weeds and pests, farm run-off, industrial pollution, and drainage works, has severely damaged traditional food resources and mahinga kai'* of Heretaunga Tamatea (clause 3.18(c) of the Deed of Settlement and s9(1)(c) of the Settlement Act).

2.5. The Crown also acknowledged in our Deed of Settlement that '*the settlement is intended to enhance the ongoing relationship between Heretaunga Tamatea and the Crown (in terms of the Treaty of Waitangi, its principles, and otherwise)*' (clause 4.1.4).

2.6. Our settlement included the transfer of a number of properties from the Crown on settlement date, as well as the option to acquire other properties at later dates through a deferred selection mechanism and rights of first refusal. Redress also included Crown forest lands in Kāweka and Gwavas.

2.7. Other redress included a range of Overlay Classifications, Statutory Acknowledgments, and Deeds of Recognition which provided us with better input into resource management decision making. It also included commitments to develop a Treaty based relationship with a number of Crown agencies – such as the Ministry for the Environment and the Department of Conservation.

2.8. The Regional Planning Committee [**RPC**] of the Hawke's Bay Regional Council [**HBRC**] established by the Hawke's Bay Regional Planning Committee Act 2015 [**the RPC Act**] is also an important part of our settlement redress, as it is for an number of other Ngāti Kahungunu settlement entities.

2.9. Since our settlement, TPW has been actively supporting the growth and sustainability of our marae and hapū. We have also invested significantly in our region in projects that both enhance our economic development and which also provide social returns for our members and the wider community. This has included housing developments and other projects.

2.10. As noted above, we are generally supportive of the aim of the Bill to help facilitate the delivery of projects in our rohe that have significant national and regional benefit. This aligns with our own aims and our approach to date. However we are concerned that the Bill in its current form may not achieve this, is contrary to the commitments and acknowledgements contained in our settlement, and has potential to do harm to the relationship between the Crown and Heretaunga Tamatea that has developed since our settlement.

Tamatea Pōkai Whenua

3. Schedule 1 of the Bill

3.1. The current Bill does not contain a completed Schedule 1 – neither Part A or Part B projects are listed.

3.2. Instead, we understand that there is currently an invitation to apply to be included on this schedule, and that those applications would be considered by an expert advisory panel based on the criteria for later applications set out in the Bill. The potential projects are unlikely to be made public before the cut of date for submissions on the Bill.

3.3. Our view is that this process is inappropriate and lacks any form of transparency or accountability as:

- It provides TPW with no insight into what those projects might be and their potential impact on TWP and Heretaunga Tamatea;
- We have had no input into the appointment of the expert advisory panel;
- There is no assurance as to exactly what criteria will be applied to this assessment what advice might be accessed by any expert panel, and no ability to challenge any view of the expert panel; and
- Ultimately the decision on what to include in the schedule will be that of Ministers, and there is no obligation on them to follow the advice of the expert panel.

3.4. This lack of transparency is a particular concern for us as the inclusion of a project in the Schedule to the Bill means that the protections that might apply to our interests under the Bill (such as in clauses 6, 18, 21 and 22) will not have been clearly and transparently applied, with our input, to the decision to fast-track these projects.

3.5. This process risks seeing the Crown failing to meet its Te Tiriti duties of active protection, providing for TPW participation, and working in partnership with us. It is inconsistent with the commitments in our Treaty settlement to develop a Te Tiriti based relationship. It also risks being inconsistent with the acknowledgement and apology in our Treaty settlement for the harm done in the past by poorly considered and regulated economic development in our rohe.

3.6. We also do not understand why there is such a need for this urgency at the expense of transparency.

Tamatea Pōkai Whenua

3.7. We appreciate the current Government's desire to move quickly and 'get things done'. But, in the context of the timespan of the projects that will likely be fast-tracked, waiting to apply until the Bill comes into force is unlikely to be a significant delay. Even if it were, then there are other ways to manage this concern. For example a fast-track process, with strong similarities to aspects of the current Bill, remains in force under the Natural and Built Environment Act 2023 [**the NBA**][1]. It would be possible for the current Bill to transition applications under that process today to the processes in the new Bill. This would mean that some projects are still 'ready to go' when the Bill comes into force but ensure that they have been identified via a transparent process.

3.8. Instead, the approach of the current Bill in using Schedule 1 – and particularly the projects listed in Part A of that schedule [**Part A listed projects**] - risks the listed projects becoming more controversial and seen as having been subject to political favouritism. This creates the risk of challenge and delay and undermines the policy aim of the Bill.

3.9. It is also not clear to us how the projects listed in Part B of Schedule 1 [**Part B listed projects**] will be assessed.

3.10. Unlike Part A listed projects, Part B listed projects are still discretionary and 'may' proceed to a fast-track process at the discretion of the Joint Ministers. However the assessment of discretionary projects – from clause 14 to 25 - appears to apply to an 'application' for a project that is made following the commencement of the Bill, and there are some inconsistencies that would result if this process were to be applied to Part B listed projects. For example an assessment of national and regional significance would be required for a Part B project that has already been deemed to meet this test by its inclusion in Schedule 1. In addition, if the processes set out in clause 14 to 25 are to apply to Part B projects as if they were later applications, then it is not clear why Part B is needed at all.

3.11. This uncertainty and lack of clarity about how a Part B listed project will be assessed creates a number of risks. We are concerned that the various protections of our interests that are provided in the Bill will be inconsistently applied to a Part B listed project. We are also concerned that this lack of certainty and clarity about the process risks challenges and delay which undermine the aim of the Bill.

3.12. **Therefore our recommendation is**:

- That Schedule 1 is removed, and the Bill should apply to applications for projects that are made following the Bill coming into force.

[1] See Part 2 of Schedule 10 of the NBA and clause 8 of Schedule 1 of the Resource Management (Natural and Built Environment and Spatial Planning Repeal and Interim Fast-track Consenting) Act 2023

It may also be that existing fast-track processes can be used to progress applications now and that the Bill includes transition provisions to pick these up.

4. Te Tiriti and Treaty settlements

4.1. We are concerned that the Bill makes no reference to decision makers having to have some engagement with the principles of Te Tiriti o Waitangi. In fact, in some instances such as in clause 32 of Schedule 4, reference to Te Tiriti is specifically excluded from a decision making process.

4.2. Instead, engagement with TPW and Heretaunga Tamatea interests appears to rely on a consideration of our Treaty settlement.

4.3. This raises a number of difficulties.

4.4. The first of these is that as noted above, our view is that our Treaty settlement arrangements include a commitment from the Crown, both generally and with reference to specific agencies affected by this Bill, to grow a relationship with Heretaunga Tamatea that is based on the terms and principles of Te Tiriti. In our view, upholding our Treaty settlement means applying the terms and the principles of Te Tiriti.

4.5. The removal of requirements to engage with Te Tiriti principles, while upholding our Treaty settlement, is therefore contradictory. How these contradictory pressures apply will likely be the source of ongoing dispute.

4.6. As we have also noted above, our Deed of Settlement and Settlement Act include specific acknowledgement from the Crown for the harm done by poorly regulated economic development in our rohe which did not consider our interests and views, or Te Tiriti. We view these acknowledgements and apologies as also being a key part of our settlement and one which places an obligation on the Crown not to repeat these mistakes. We are concerned that this wider reading of our settlement may not be the same as how the Crown views its settlement obligations. This is something that should be address as soon as possible to avoid misunderstanding and dispute.

4.7. Our Treaty settlement is also, generally, retrospective. It is intended to provide redress for the historical breaches of the Crown. In some cases redress does include specific participation rights under existing legislation as a mechanism to address the way those processes failed in the past and to grow a Tiriti based relationship. But these are relatively limited.

Tamatea Pōkai Whenua

4.8. Our Treaty settlement was not necessarily intended as a shield against future Crown action or designed to give us rights and protections within future legislation that was not contemplated at the time our settlement was developed. In fact, such an approach is something that expressly rejected by the Crown in developing settlement redress. But this is how the Bill now seeks to use our Treaty settlement – it uses our settlement for a purpose for which it was never intended, and as a result it is a poor fit.

4.9. To give a practical example, a key aspect of our settlement was participation in the RPC established by the RPC Act. This gives us input in the development of key planning documents for our region – for example we have input to what a regional plan may determine is a prohibited activity for our region.

4.10. But our role the RPC is not something that influences key decisions under the Bill. The Bill processes are new, and sit outside the RPC role. In addition, the decision making processes in the Bill gives less weight to the input that we do have via the RPC – for example the prohibited activity we may have been concerned about, and any success we have had in identifying this, does not prevent a fast track application proceeding (see clause 17(5)). It appears entirely possible for a decision maker under the Bill to act consistently with our Treaty settlement (as there is no impact on our role in the RPC) while making decisions contrary to our views and interests (by allowing a project that included a prohibited activity to proceed).

4.11. We note that the reliance on the protection of Treaty settlements in the current Bill appears to have been drawn across from the NBA and the fast-track provisions in its schedule 10.

4.12. However, the wider context of the NBA included a requirement that decision makers give effect to Te Triti (section 5 of the NBA). There was also a commitment to discuss with us what amendments might be needed to our settlement arrangements to ensure that they fitted into the new legislation (see section 15 and Schedule 2 of the NBA).

4.13. These provisions were important because they enabled reference to upholding Treaty settlements in the NBA to be read as incorporating the Te Tiriti based relationship that both us and the Crown aspire to in our settlement. It also provided scope for our settlements to be adapted to fit the new legislation.

4.14. But the current Bill does not include these provisions.

4.15. As a result when the current Bill references upholding Treaty settlements without these additional measures it makes that commitment less meaningful, confusing, and open to dispute.

4.16. We also note that the shift from a consideration of the principles of Te Tiriti o Waitangi to that of upholding Treaty settlement is a move away from requirements that have applied to environmental legislation for more that 30 years. Over those 30 years a wide body of case law has developed and there is some general understanding between ourselves, decision makers, and potential applicants as to what this requirement means and the work required to achieve this. A new test removes this understanding and creates a great deal of uncertainty. That comes with the risk of dispute and the possible need for future litigation (by any of the parties involved in these processes) to clarify how these new tests should be applied. If the aim of the Bill is to streamline an application process then, it appears to us, the better approach is to continue to rely on existing and well understood requirements – such as the need to consider the principles of Te Tiriti.

4.17. **Our recommendation is that**:

- The current Bill should include reference to decision makers giving effect to Te Tiriti, as a well as a commitment to adapt our existing Treaty settlement to provide better and clearer input into these processes.

5. Protection for land held by TPW

5.1. Some protection of our interests is also provided by the Bill referring to 'land returned under a Treaty settlement' or 'identified Māori land' as part of the eligibility criteria for fast tracking applications.

5.2. The definition of 'land returned under a Treaty settlement' turns on land vested in a Treaty settlement entity from the Crown. The definition of 'identified Māori land' is broader though and includes various types of Māori land as well as 'land that, under a Treaty settlement' is owned by a Treaty settlement entity but managed under conservation legislation, or other land transferred from the Crown 'with the intention of returning the land to the holders of mana whenua over that land'.

5.3. However these definitions are problematic, and do not adequately reflect the types of land interests held by TPW. For example:

- It is not clear how land transferred to TPW 'with the intention of returning the land to the holders of mana whenua over that land' might be applied. Issues arise whether redress to a collective such as TPW, rather than directly to hapū with mana whenua, meets this criteria or if the transfer of properties as commercial redress would meet this intention.

- Our settlement arrangement included the transfer of land directly from the Crown, as well as a cash component of settlement redress that could be, and has been, used to buy land from private sellers. Land from either source is still held under the terms of the TPW Trust Deed for the benefit of the Heretaunga Tamatea claimant community. It is not clear to us why, under these definitions, land we might hold that is sourced from the Crown warrants special protection, rather than land of special significance we might have acquired from private owners using settlement funds. Our interests and rights under the Bill appear to be defined by the Crown's role, not our own views or values.

- Related to this, we do not understand why land that we hold, but has restrictions placed on it under conservation legislation, is protected but other land we might hold is not. Again, our interests are being defined by the relationship a piece of land has with the Crown, and what the Crown values, rather than with us and our values.

- It is not clear how these definitions will apply to the Kāweka and Gwavas Crown forest lands [**the CFLs**] that were redress under both the Heretaunga Tamatea and Mana Ahuriri settlements. This is because under our settlement the CFLs are commercial redress properties that were not transferred to either of our post settlement governance entities, but were transferred to a limited liability company jointly held by the post settlement governance entities as well as a residual interest for the Crown. The reason for this was to avoid overlapping claim disputes arising from competing claims of mana whenua. As a result while the CLFs are clearly land returned under a Treaty settlement, they do not appear to meet the Bill's definition of 'land returned under a Treaty settlement' (as there is not a transfer to a post settlement entity), or 'identified Māori land' (as the transfer was not intended to return land to mana whenua but was commercial redress transferred in a way to expressly avoid defining holders of mana whenua).

5.4. **Therefore we recommend that**:

- The definition of land returned under a Treaty settlement or 'identified Māori land', is widened to include any land that a post settlement entity (or its related entities) might hold.

6. Treaty settlement entities and hapū

6.1. We are also concerned at the reliance of the Bill on engagement with Treaty settlement entities and iwi authorities and the diminishing of the role of hapū and marae in decision making processes. Under the Bill engagement with hapū and marae is largely at the discretion of a decision maker.

Tamatea Pōkai Whenua

6.2. However this is somewhat inconsistently applied. For example, while the majority of the Bill requires engagement primarily with iwi authorities and Treaty settlement entities, some parts of the Bill (particularly in the Schedules to the Bill) require some engagement with iwi and hapū, or 'tangata whenua' rather than iwi authorities or Treaty settlement entities. This inconsistency is likely to arise from the rushed nature of the preparation of the Bill and it sitting across several different pieces of existing legislation. However such an inconsistency is likely to cause process issues for various decision makers under the Bill. It also creates the potential to strain our own relationship with our hapū if roles, responsibilities, and relationships are not clear

6.3. TPW was established to hold and receive redress on behalf of our claimant community, including hapū and marae. As part of that, we continue to have a role in engaging with the Crown, local government, and others. But we hold that role because we were mandated to under our settlement arrangements by the Heretaunga Tamatea community or because that community continues to look to us to take on that role. We do not see that as an exclusive role, and instead we actively support the right of our hapū and marae to directly engage on matters which affect them.

6.4. By directing engagement with settlement entities, and lessening the rights of engagement of hapū, the Crown is dictating issues of representation for the Heretaunga Tamatea community. It removes the rights of our community to decide these issues for themselves, and is inconsistent with the Crown's Treaty obligations to hapū.

6.5. **We recommend that**:

- The Bill is amended is to require engagement primarily with iwi and hapū.

7. Decision making role for Ministers

7.1. We are also concerned at the nature of the decision making power that is given to Minsters under this Bill, particularly following the report of a Panel considering a project.

7.2. Clause 25(4) provides that Joint Ministers 'must not decide to deviate from a Panel's recommendation unless they have undertaken an analysis of the recommendations and any conditions included in accordance with the relevant assessment criteria'. This essentially enables the Joint Ministers to place their views overtop that of an expert Panel that has undertaken a detailed assessment of the application.

7.3. In addition, clause 25(6) enables Ministers to commission separate advice or seek further views from interested parties in relation to a Panel's report.

It is not clear who that separate advice might come from, the input interested parties might have into that advice, and the weight it is to be given in relation to the views of the Panel or information that may have been before the Panel.

7.4. Clause 25(7) enables the Joint Ministers to refer a Panel's recommendation back to the Panel to reconsider and Joint Ministers may give directions regarding that reconsideration. Again, it is not clear on what grounds the Joint Ministers may make such a referral, the scope of their directions, or the relationship of this referral to their ability to commission further advice or seek additional comment. Such a referral would place a Panel in an extremely difficult position and likely lead to conflict and dispute.

7.5. It is not clear why any of these powers are needed if the process set out in the Bill is a robust one that all parties can trust. If the applicant or an interested party is unhappy with the result of the Panel's process they are able to address that themselves given they have the right to appeal the decisions of the Panel on questions of law or to challenge a decision in other ways. Why is there the need for Joint Ministers to insert their views at this point ahead of the ability for all parties to exercise their legal rights in this process?

7.6. We also note that providing such a role for Joint Ministers may undermine the policy aims of the Bill. Such a role does not streamline the decision making process, instead it adds another decision making point that may be disputed and litigated, and increases the potential for delay. It adds the potential for judicial review of the Joint Ministers' decision to existing appeal rights.

7.7. **We recommend that**:

- The ability of Joint Ministers to deviate from, or direct reconsideration of, a Panel's recommendations is removed. Instead the process at this stage should revert to that currently set out in the NBA where the Panel makes a final decision, with all parties having rights of appeal if they disagree with that decision.

8. Conclusion

8.1. As we have noted above, we are generally supportive of the underlying aim of the Bill as we too wish to see quicker and streamlined processes for significant projects in our region.

8.2. Unfortunately, in its current form, the Bill is unlikely to achieve this as it creates a range of uncertainties that leave the processes set out in the Bill open to dispute and delay.

8.3. We are also concerned that the Bill provides little real protection for our interests or recognises the realities of our Treaty settlement arrangements.

Tamatea Pōkai Whenua

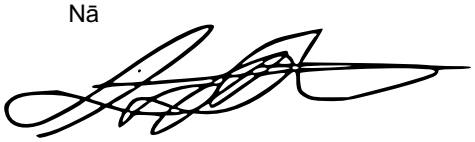
8.4. While purporting to uphold our Treaty settlement, we are concerned that the Bill itself, in its current form, is inconsistent with the commitments and acknowledgements of the Crown in our settlement.

8.5. Because of these fundamental flaws in the Bill, we ask that the Select Committee recommend that this Bill does not proceed in its current form. The Bill appears to have been hastily drafted and poorly thought through, and further time to refine it would be helpful. We again point out that existing fast-tracking provisions remain in the NBA that can still be utilised in the meantime.

8.6. If the Select Committee disagrees with this view and recommends that the Bill does proceed, then we ask that the various recommendations set out in the body of this submission are incorporated into the Bill so that it becomes as workable as possible.

As noted in section 1.3. of this submission, the contact details provided should you require further clarity or information with this regard.

Hai konā mai,
Nā



Pohatu Paku
Trustee Chair
TAMATEA PŌKAI WHENUA TRUST