



Human Rights
Commission
Te Kāhui Tika Tangata

1 September 2014

Franks & Ogilvie
PO Box 10388
90 The Terrace 6143
Wellington

Attention: Stephen Franks

Dear Mr Franks

I write in response to your request (on behalf of Mr Lee Short) for the Human Rights Commission to intervene in the Proposed Auckland Unitary Plan (PAUP) in relation to what you describe as the unjustified intrusion of the mana whenua provisions on private property rights. You say that this has the effect of preferring one ethnic group over others.

Compliance with domestic legislation

You question the creation of groups purporting to exercise mana whenua and consider that the way in which the concept is applied in the PAUP goes much further than what is required under the Local Government Act and Resource Management Act.

Section 5 of the Local Government (Auckland Council) Act 2009 sets out the relationship between that Act and the Local Government Act 2002 stating that where there is an inconsistency between the two Acts, the Local Government (Auckland Council) Act 2009 prevails.

Local Government (Auckland Council) Act 2009

Under section 3(f) of the Local Government (Auckland Council) Act 2009 the purpose of the Act is stated to be (inter alia) "to establish arrangements to promote issues of significance for mana whenua groups and mataawaka for Tamaki Makaurua".

A mana whenua group is defined as an iwi or hapu that –

- a) Exercises historical and continuing mana whenua in an area wholly or partly located in Auckland; and
- b) is one of the following in Auckland:
 - (i) a mandated iwi organisation under the Maori Fisheries Act 2004;
 - (ii) a body that has been the subject of a settlement of treaty of Waitangi claims; or
 - (iii) a body that has been confirmed by the Crown as holding a mandate for the purposes of negotiating Treaty of Waitangi claims and that is currently negotiating Treaty of Waitangi claims and that is currently negotiating with the Crown over the claims.

Part 7 establishes a Board for promoting issues of significance for mana whenua groups. Under section 81 the Board's purpose includes ensuring that the Council acts in accordance with statutory provisions referring to the Treaty of Waitangi: s.81(b); and under s.84(b) it is required to develop a schedule of issues of significance to mana whenua groups and mataawaka of Tamaki Makaurau giving priority to each issue to guide the board in carrying out its purpose.

In the Commission's view the provisions in the Local Government (Auckland Council) Act 2009 relating to mana whenua and the Treaty justify the approach to cultural harvesting taken by the Council in the PAUP. We note in this regard that whether the council chooses to allow cultural harvesting is discretionary and, further, that the provision applies to new subdivisions which suggests that prospective purchasers will be aware of the requirement when buying the property and able to decide whether to continue with the purchase if the council has decided to allow cultural harvesting.

Effect of international instruments

In relation to the allegation of preferential treatment you refer to the long titles of the Human Rights Act 1993 and the New Zealand Bill of Rights Act 1990 and their reference to the international human rights treaties and the right to non-discrimination. In particular, you cite article 2(3) of the ICERD which refers to special measures and the qualification that "*such measures shall in no circumstances have as a consequence the maintenance of unequal or separate rights for different racial groups*".

The question of special measures is complex and, while we do not consider that what is proposed falls within this category for the reasons that follow, it is at least arguable that it could be considered to be a special measure in this context. We note also that the CERD Committee's General Recommendation No.32 - *The meaning and scope of special measures in the International Convention on the Elimination of Racial Discrimination*¹ - notes that special measures should not be confused with specific rights pertaining to certain categories of persons or communities such as, for example, the rights of persons belonging to minorities to enjoy their own culture ... including rights to land traditionally occupied by them. The Committee notes:

Such rights are permanent rights, recognised as such in human rights instruments, including those adopted in the context of the United Nations and its agencies. States Parties should carefully observe distinctions between special measures and permanent human rights in their law and practice. The distinction between special measures and permanent rights implies that those entitled to permanent rights may also enjoy the benefits of special measures.

The recommendation also explains what is meant by the requirement that "measures should not lead to the maintenance of separate rights for different racial groups". It states that the requirement is narrowly drawn and refers to practices such as Apartheid imposed by authorities of the State and the practice of segregation. It goes on...

¹ Available at www2.ohchr.org/english/bodies/cerd/docs/GC32.doc

The notion of inadmissible 'separate rights' must be distinguished from rights accepted and recognised by the international community to secure the existence and identity of groups such as minorities, indigenous peoples and other categories of person whose rights are similarly accepted and recognised within the framework of human rights.

It follows in our view that what is proposed in the PAUP is not the maintenance of separate rights but rather is consistent with the application of a measure designed to secure the identity of mana whenua. We are reinforced in this view by the Declaration on the Rights of Indigenous People.

Declaration on the Rights of Indigenous People

Although it cannot be ratified New Zealand has confirmed its support for the declaration. The declaration recognises the rights of indigenous peoples to self-determination, to maintain their own languages, to protect their natural and cultural heritage and manage their own affairs. It also recognises the right of indigenous peoples to participate in processes relating to recognition of their traditions and customs: Article 27.

Right to private property

While the Commission accepts that Article 17 of the Universal Declaration of Human Rights (UDHR) recognises a right to property, it was not translated into an enforceable right in the major treaties. The right to property was also specifically excluded from the New Zealand Bill of Rights Act 1990. This is not to say that the right to property does not exist domestically but rather that it is not as straightforward as simply invoking the UDHR. It also raises issues in relation to the Treaty and the rights in the declaration referred to above.

Section 5 functions

You say that your client wishes the Commission to inform the Council that the mana whenua provisions in the PAUP as currently drafted unjustifiably impinge on property rights and are likely to have the effect of exciting racial disharmony. Your client considers that this would go some way towards upholding the rights in the international instruments you have identified.

You ask that the Commission effectively exercises the function in s.5(2)(c) to point out that the mana whenua provisions should be amended or deleted to ensure compliance with the Bill of Rights and other rights in the international instruments outlined in your complaint. Whether to exercise the functions in section 5 of the HRA is at the discretion of the Commission. However, it would be difficult for the Commission to do as you say since our interpretation of the rights you have identified is not the same as yours. We also consider that the Local Government (Auckland Council) Act 2009 mandates this type of provision.

Yours sincerely,



Sylvia Bell
PRINCIPAL LEGAL & POLICY ANALYST