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Background

1. On 30 July 2014 this firm on behalf of a client complained to Dame Susan Devoy, as Race Relations Commissioner, about the Proposed Auckland Unitary Plan (PAUP). We noted the stated purposes of her office[1]. The complaint letter explained why we think the PAUP breaches New Zealand's domestic and international human rights and anti-racial discrimination obligations.

2. On 1 September 2014 the Human Rights Commission replied.

3. The reply shows no sign of an attempt to work out whether the Plan is likely to improve or worsen race relations. It shows no evidence of a concern to find out if it remedies, or might exacerbate, any disadvantage if it exists. Even in relation to the legal questions it reads as the suspicious reaction of an ideologue rather than a genuinely open minded attempt to grapple with the arguments.

4. We publish the original letter and the Commission's reply in full here .

5. The HRC's response repeatedly claimed that Council's actions were legally permitted. Without saying why, the HRC implied that if it was legally permissible that was the end of the matter.

6. That is an extraordinary stance for a body which is expressly established and empowered to influence how people should behave, whatever the law's position on how they may, or must, behave:

    6.1. It is extraordinary given the HRC's frequent interventions across a range of contentious issues, to tell New Zealanders what they think governments and employers should do and even what the law should be[2].

    6.2. It is an extraordinary approach, when the HRC operates in the human rights field where our highest courts have held that ambiguity or uncertainty in law should be resolved in a way that is most consistent with

[1] The functions of the Race Relations Commissioner are specified in the Human Rights Act 1993 (HRA). They Include (inter alia) s 16 (a) "to lead discussions of the Commission in relation to matters of race relations" and (b) "to provide **advice and leadership** on matters of race relations arising in the course of activities undertaken in the **performance of the Commission's functions**, both when engaging in those activities and otherwise when consulted."

[2] The HRC is not afraid of taking a normative stance. For instance it called for rent controls following the Christchurch earthquakes: (http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=1117023); and campaigned for female representation on the NZRU board: (http://www.stuff.co.nz/sport/rugby/7994733/Calls-for-women-on-NZRU-board).

established human rights principles (*Baigent's Case*)[3]. The HRC response manages to look at each statute it considers without mentioning that principle of interpretation, let alone the human rights (including equality before the law) with which the PAUP provisions might conflict.

6.3. It is extraordinary that the HRC did not take the opportunity to discuss the relevant human rights principles of general application, even if it had contrived to find that there was not enough ambiguity in the relevant empowering statutes to allow for application of that most favoured interpretation principle of NZBORA and human rights law[4].

6.4. It is extraordinary for an advocacy and protection body not to take every opportunity to remind New Zealanders of the applicable basic human rights principles, even where it finds that an exception has been created.

6.5. It is extraordinary because the HRC's legal analysis is superficial. It might have been expected to analyse the relevant statutes critically, with a view to finding ways to help persuade the Council to an approach more consistent with the rights of Auckland citizens other than the 1.8% who may appoint the representatives who will exercise the PAUP's hereditary powers over their neighbours.

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[3] As the Legislation Advisory Committee notes, "the courts will not hesitate to look beyond the words embodied in legislation to the relevant international obligations": http://www.lac.org.nz/guidelines/lac-guidelines/chapter-6/

[4] The functions of the Commission are 5 (1) "to **advocate and promote** respect for, and an understanding and appreciation of, human rights in New Zealand society", (b) "to encourage the maintenance and **development of harmonious relations** between individuals and among the diverse groups in New Zealand society."

In carrying out the functions in s 5 (1) the Commission has a range of further functions under s 5(2) including: advocating human rights (a), making public statements on matters affecting human rights (c), promoting a better understanding of the human rights dimensions of the **Treaty of Waitangi** (d), to receive and invite representations from members of the public on any matter affecting human rights (f), and to **inquire generally** into any matter, including **any enactment or law**…if it appears to the Commission that the matter involves, or **may involve**, the infringement of human rights (h).

7. The reply from the HRC contained no argument or analysis over whether the PAUP provisions relating to Mana Whenua were a good idea. This could have included assessment of the likely practical effect of the PAUP provisions such as:

    7.1. Whether they might create corruption temptations that would weaken Maori institutions;

    7.2. Whether they contain mechanisms to confine and mitigate any risks that the religious or cultural preferences of non-Mana Whenua residents could be over-ridden;

    7.3. Whether they contain mechanisms to minimise intrusions into property rights;

    7.4. Whether the PAUP's regional policy statement and rules reflect a valid understanding of the Treaty of Waitangi;

    7.5. What the likely effects of the PAUP will be for racial harmony;

    7.6. What protections there might be against adverse reactions of others in the community;

    7.7. Whether the perceived benefits outweigh the potential damage to race relations that might be created or exacerbated by involving unelected iwi in local body decision making.

8. Provisions that create co-governance arrangements may be based on a fond belief that they advance Maori. This is highly questionable. At most an infinitesimal proportion of Maori can even sit at the table exercising such inherited power. A prudent and realistic human rights perspective assumes that in all human groups, people allowed to exercise 'governance' (or 'co-governance') powers without the discipline of potential removal under democracy, or other practical accountability, will exploit them for personal and family advancement.

9. Claims and expectations that wide discretions and ill-defined power will be used benignly might be expected from those defending inherited privileges but it is inexcusable from a human rights body. Human rights are given constitutional and other legal protections for a simple reason – because long and often bloody experience has shown that power will inevitably be abused without entrenched limits, and effective monitoring, appeal and removal mechanisms. Of those, democracy has proved the most effective and enduring.

10. New Zealanders are entitled to expect that the Human Rights Commission might show a close and sceptical interest in provisions that effectively institute in New Zealand law a form of seigneurial or aristocratic privilege from putative occupancy of land over 170 years ago.

You decide

11. To help you decide whether the Race Relations Commissioner puts race relations at the front and centre of her efforts, and whether the Human Rights Commission thinks it is there to protect human rights, such as the right to equality before the law and representative electoral democracy, we set out below the HRC letter, annotated with our comments.

Letter from the Human Rights Commission, 1 September 2014

"1 September 2014

Franks & Ogilvie

.....

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 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."

12. *This is accurate. Note however that in this purpose it is* the Act *itself that establishes arrangements*[5]*. The purpose is not stated as being to empower Auckland Council to do so.*

"A mana whenua group is defined *[in the LG(AC)A]* 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 claims."

13. *This is not the definition used in the PAUP.*

14. *The PAUP uses Mana Whenua as a noun and defines them as "Maori with ancestral rights to resources in Auckland and responsibilities as kaitiaki over their tribal lands, waterways and other taonga. Mana Whenua are represented by iwi authorities. Defined as tangata whenua in the RMA." This definition is vague. It begs further questions and is probably circular. It cannot be reconciled with the legislation (the Resource Management Act 1991 (RMA)) to which it makes reference. It is unsuitable for application in a law. Law must be intelligible to people in advance. This is a serious deficiency given that the Mana Whenua provisions already directly affect the properties of thousands of people.*

15. *The RMA actually defines mana whenua (un-capitalised) to mean "customary authority exercised by an iwi or hapu in an identical area." It defines tangata whenua as meaning "in relation to a particular area, the iwi, or hapu, that holds mana whenua over that area."*

[5] The way it does so is by establishing an Independent Maori Statutory Board.

16. *It is unclear why Auckland Council decided to elevate the concept of Mana Whenua as a group (where it has traditionally been primarily a power)*[6]*. In our opinion it is* ultra vires *the empowering legislation. The Human Rights Commission, of all bodies, should be very concerned to ensure that rights can only be affected under a rule of law that is predictable. The Mana Whenua provisions confer on local authorities the discretion to exercise arbitrary power by deciding, from time to time, how to interpret deliberately vague words.*

17. *The PAUP's Mana Whenua definition should be consistent with the RMA and the LG(AC)A but it cannot be reconciled with the two Acts. The PAUP's empowering legislation is the RMA. It is a combined (via s 80) proposed regional (s 68) and district (s 76) plan. The PAUP is lower in hierarchy however than the Auckland Plan which is authorised by the LG(AC)A so the LG(AC)A also functions as empowering legislation*[7]*. This is not a semantic point. It begs the awkward question: to qualify as Mana Whenua under the PAUP is it enough to be an iwi or hapu that exercises mana whenua (as per the RMA) or does the group need to meet the requirements of the LG(AC)A s 3(f)(b) as well? Does it mean customary authority within the respectable legal meaning associated with property rights under customary law (requiring effectively continuous and exclusive occupation or use) or is this a new type of right previously unknown to our law?*

18. *Parliament should be involved when a tiny minority are given what appear to be perpetual hereditary rights to exercise novel powers that go beyond those exercised by 'tangata whenua' or 'mana whenua groups.' When Sir Douglas Graham was reassuring people that the Treaty was between the Crown and iwi, he reportedly said that it would not affect a square foot of private land. This new power, allegedly derived from "ancestral rights to resources", is a serious constitutional development in direct contravention of that kind of reassurance.*

19. *It would be easier to sympathise with Auckland Council's constitutional radicalism if it stemmed from a desire to 'fill a gap' where Parliament had failed to engage with the issues. Parliament has already created arrangements to deal with the preservation of Maori wahi tapu and historic places with the Heritage New Zealand Pouhere Taonga Act 2014 (HPA). This included the creation of a Maori Heritage Council to allow tangata whenua input. The Auckland Council practice notes for determining the*

[6] It appears to have first done so in the Auckland Plan, however in the AP 'tangata whenua' is still used and 'mana whenua' appears both capitalised and uncapitalised and is vaguely defined as "iwi, the people of the land who have mana or authority – their historical, cultural and genealogical heritage are attached to the land and sea."

[7] In Practice the PAUP is the Plan 'with teeth", but the Auckland Plan is an interpretative instrument and in theory there may be an argument that it takes precedence over the PAUP where there are inconsistencies.

application of the mana whenua sites of value overlay notes that the HPA "provides for the identification, protection, preservation and conservation of the historic and cultural heritage of New Zealand."

20. *The HPA provides a robust framework within which Councils can make arrangements for the protection of Maori heritage. The HPA provides for input from tangata whenua and from archaeological experts, in a manner consistent with the RMA. It envisages thresholds to balance the protection of cultural heritage and the rights of private property owners. The Auckland Council, through the PAUP, has unnecessarily created a second protection regime that is riddled with deficiencies and raises serious constitutional issues. The New Zealand Archaeological Association has made a submission expressing concern about the ways in which the HPA and the PAUP interrelate. It is of the opinion that the "sites and places of value to Mana Whenua Overlay" will "impose considerable (and for the most part unnecessary) costs on landowners and land managers and because of this will erode public support for archaeology."*

"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."

21. *We noted above that one of the LG(AC)A's purposes is to establish arrangements to promote issues of significance for mana whenua groups. The creation of a Board is how it achieves this. It is unclear to us why the HRC feels that this authorises the approach taken by Auckland Council in the PAUP. The LG(AC)A also notes that the Board is independent of Auckland Council (s 82(2)). Further, it does not grant the Board any power over Auckland Council and only subjects Auckland Council to a duty to consult the Board and to take into account the Board's advice (s 88(1)).*

22. *The proper role for the Commission when faced with something novel that may affect equality before the law, and incite race tension, should be to examine carefully whether the authority trying to create new powers to intervene is actually authorised to do so. The Human Rights Commission has started with the opposite intention; to excuse and to justify intrusions of coercive power over citizens.*

23. *Because Auckland Council is not bound by the Board, no statutory authorisation for the Board empowers the Council to create rules and regulations* ultra vires *their*

empowering legislation. If Auckland Council chooses to act on the Board's advice it must do so within the constraints of the law.

24. *The LGA still applies to the PAUP to the extent that it is not inconsistent with the LG(AC)A. The HRC failed to demonstrate any inconsistency between the LGA and the LG(AC)A that would invalidate the arguments in our original letter.*

"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 be able to decide whether to continue with the purchase if the council has decided to allow cultural harvesting."

25. *Even if the LG(AC)A authorises an exercise of wide power (on which we differ) the existence of a power does not justify use of it in ways that conflict with important principles and freedoms. We expected the HRC to be concerned about justification first and only then to look at powers. The Treaty is similarly respectful of other constraints.. Neither local government nor private citizens are parties to the Treaty. They have no obligations under the Treaty except where those are defined in specific functional areas of legislation. Neither the RMA nor the LGA create the right to access or cultural harvest.*

26. *Subdivision, and rights to cultural harvest, could be a matter of Council discretion. It is arguable that even when Council grants cultural harvest this would not constitute a 'taking.' Nevertheless the cultural harvesting provisions cannot be justified by the empowering legislation alone, or the Treaty, and raise race relations and human rights issues.*

27. *The orthodox legal position is that conditions attaching to subdivision are not an invasion of property rights per se. Normatively we think that is wrong, but we accept that subdivision is not a property right. Council have discretion to deny a consent application or grant consent with conditions. These conditions however are ordinarily restrictions and limitations on use. The Council is proposing to use its discretion, arguably* ultra vires *empowering legislation, to create perpetual property rights of access and harvest that are only available to a hereditary minority. This is an irregular, and improper, use of Council discretion. The Council are using an opaque and undemocratic process (where private property owners apply for consent) as a 'backdoor' to implement unprecedented access rights incrementally and by stealth,*

for an ethnically derived group. How is that not a concern for the Human Rights Commission and the Race Relations Commissioner?

28. *These access rights are also inconsistent with the Treaty of Waitangi. Article Two, in English, guarantees the "Chiefs and Tribes of New Zealand and…the respective families and individuals thereof the full and undisturbed possession of their Lands and Estates Forests Fisheries and other properties…so long as it is their wish and desire to retain the same in their possession." Article 2 also allowed Maori to alienate their land. Where land was improperly taken by the Crown it is right that there be redress. The Treaty did not contemplate that Maori would have perpetual rights over land formerly occupied, based on previous cultural significance. Such a right is directly incompatible with the ability to alienate and to occupy and enjoy exclusively without interference, granted by Article 2.*

"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) (sic) 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 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 a special measure in this context."

29. *The HRC response to our original letter shows confusion over how the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) is interpreted. Note that the ICERD has been ratified by New Zealand. New Zealand performed its obligations to reflect it in domestic law, with the Race Relations Act 1971. It is proper to resolve ambiguity in other New Zealand law on the assumption that the other law should be given meanings that are consistent, if possible, with the treaty. A ratified treaty also takes precedence over un-ratified international instruments such as the Declaration on the Rights of Indigenous People.*

30. *The HRC reply proceeds on the hypothetical basis that the PAUP provisions are 'special measures' and argues that, if they are, they are justified ones. But it does not explain why they could be 'special measures' or attempt to outline and apply the tests that govern such questions. Even more oddly, the reply also says that the provisions*

are not 'special measures' for the "reasons that follow" then fails to provide these reasons.

31. *The HRC seems to have decided that if the provisions are not 'special measures' then they cannot be in breach of the ICERD. This is false. The 'special measures' provision is not a prohibition – it is a limited exception.*

32. *Article 1 (1) of the ICERD states that "In this Convention, the term 'racial discrimination' shall mean any distinction, exclusion, restriction or preference based on race, colour,* ***descent****, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in political, economic, social, cultural or any other field of public life" (emphasis ours). Rights to impose cultural/religious land use restrictions that are inherited through descent from putative occupancy 170 years earlier privilege those whose cultural and religious views are given that superior recognition, as well as impairing the Treaty assured property rights of exclusive use, possession and enjoyment of property on an equal footing.*

33. *In Article 2 (1) ratifying States undertake "to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms" and pertinently "undertakes to engage in no act or practice of racial discrimination against persons, groups of persons or institutions, and to ensure that all public authorities and public institutions, national and local, shall act in conformity with this obligation."*

34. *The PAUP provisions constitute 'racial discrimination' for the purposes of Article 1 (1). The framework of co-governance it creates allows unelected iwi members to share in Council decisions and is a distinction based on descent. They impair the enjoyment and exercise on an equal footing of the fundamental political right of democratic participation. Provisions that force private property owners to pay for CIA's (Ch G2.7.4) or allow the Council to make successful subdivision applications contingent on granting iwi access rights (Ch H5.2.3.3) represent a preference based on race and descent that has the effect of impairing the enjoyment on an equal footing of the right to free and undisturbed possession of private property and freedom of belief.*

35. *Article 2 (2) allows States "when the circumstances so warrant" to "take special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms. These measures shall in no case entail as a consequence the maintenance of unequal or*

separate rights for different racial groups after the objectives for which they were taken have been achieved."

36. *Article 1 (4) notes that 'Special measures taken for the **sole purpose** of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals **equal enjoyment** or exercise of **human rights and fundamental freedoms** shall not be deemed racial discrimination, provided however, that such measures do not, as a consequence, lead to the **maintenance of separate rights** for different racial groups and **that they shall not be continued after the objectives for which they were taken have been achieved**."*

37. *Both Articles 1 (2) and 1 (4) are only justified to achieve "equal enjoyment of human rights and fundamental freedoms." The purpose of the PAUP provisions is expressly to create in perpetuity unequal rights. It is to subordinate the rights of all affected landowners to the descendants of groups who may have been in the neighbourhood 170 years ago. The provisions have no sunset. There has been no Council attempt to establish that there is any disadvantage relevant to the ICERD and certainly no disadvantage that is addressed by giving 1.8% of the Auckland population the power to subject property owners to their cultural value assertions. We see no Council precaution to ensure that the measures expire when the objectives have been achieved.*

38. *The 'special measures' provisions are exception provisions. They legitimise State action which would otherwise be in breach of the ICERD Articles 1 (1) and 2 (1).*

39. *Though the HRC does not take the embarrassing (for it) step of spelling out its reasoning, we agree with the HRC conclusion that the PAUP's Mana Whenua provisions are* not *'special measures'. Consequentially, they are in breach of the ICERD.*

"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[8] - notes that special measures should not be confused with specific rights pertaining to categories or 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

[8] Available at www2.ohchr.org/English/bodies/cerd/docs/GC32.doc

> 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 benefit of special measures."

40. *We agree that special measures are distinct from the permanent rights discussed above. The provisions in the PAUP are neither. The passive right of a minority group to enjoy its own culture is very different to the right of a minority to impose its culture on others undemocratically. The PAUP is not merely a formal acknowledgement of pre-existing permanent rights such as native title. The rights to require a CIA, and to determine freshwater catchment limits in partnership with Council (Ch C5.15.1) are entirely novel. The rights the PAUP grants to iwi are not Treaty based. The Treaty claims processes address rights in respect of land traditionally occupied which was not properly alienated.*

"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…

> 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."

41. *The HRC begins by claiming that it does not believe the provisions are special measures, and concludes that they are "consistent with the application of a measure designed to secure the identity of mana whenua." This self contradiction signifies the deeper flaws in the analysis.*

42. *The PAUP does not secure the identity of mana whenua; it largely* creates *the identity of Mana Whenua. The group may have a very similar constituency to 'mana whenua groups' or 'tangata whenua' but it has entirely new powers – and a body is defined as much by its powers and purpose as by its membership.*

43. *The quote from the recommendation above simply paraphrases the ICERD in a more ambiguous way. "Inadmissible 'separate rights' must be distinguished" from the rights accepted and recognised "to secure the existence and identity of groups such as minorities…" The way one makes this distinction is by reference to the Articles of the ICERD. As the HRC reply fails to explain why the provisions are not 'special measures' we will do so here:*

44. *Article 2 (2) allows States to take 'special measures' only "when the circumstances warrant." The "sole purpose" that warrants this is "securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary to ensure such groups or individuals* ***equal*** *enjoyment or exercise of human rights and fundamental freedoms."*

45. *In the No. 32 recommendation relied on by the HRC it is noted that "appraisals of the need for special measures should be carried out on the basis of accurate data, disaggregated by race, colour, descent and ethnic or national origin and incorporating a gender perspective…"*

46. *Mana Whenua are a group, based on shared ancestry, which makes up 14.5% of Auckland's Maori population. They comprise approximately 1.74% of Auckland's total population. There is no factual evidence that Mana Whenua require protection to ensure equal enjoyment or exercise of human rights and fundamental freedoms. Mana Whenua enjoy the same rights and freedoms under the Bill of Rights Act 1990 and the Human Rights Act 1993 as all New Zealand citizens. Statistics regarding Maori inequality cannot be used to justify the PAUP provisions. The PAUP provisions are not directed at Maori. They may in fact harm many Maori, and attract resentment for many who can never benefit from any conceivable advantage Mana Whenua as a small percentage of Auckland Maori are given.*

47. *The recommendation also notes that "adequate advancement… implies goal-directed programmes which have the object of alleviating and remedying disparities in the enjoyment of human rights and fundamental freedoms affecting particular groups and individuals, protecting them from discrimination." Measures must be done for this "sole purpose" and such a motivation should be made apparent from "the nature of the measures themselves, the arguments used by the authorities to justify the measures, and the instruments designed to put the measures into effect."*

48. *The PAUP does not create goal directed programmes. Any object that goes towards securing human rights and fundamental freedoms is peripheral at best. The PAUP's regional policy statement claims as reasons for the Mana Whenua provisions:*

    "Ch B 5.1 Recognition of Te Tiriti o Waitangi partnerships and participation;

    Ch B 5.2 Recognising Mana Whenua values;

    Ch B 5.3 Maori economic, social, and cultural development;

    Ch B 5.4 Protection of Mana Whenua culture and heritage."

49. *The No. 32 recommendation notes that special measures must be for the **sole purpose** of ensuring equal enjoyment of human rights and fundamental freedoms and that this motivation should be apparent (inter alia) from the arguments used by the authorities to justify the measures as well as the measures themselves. The regional policy statement makes it clear that the Council did not implement the Mana Whenua provisions for this required sole purpose.*

50. *Ch B 5.3 is illegitimate because, as discussed, it is wrong to conflate Mana Whenua with Auckland's Maori population. According to the 'explanation and reasons' section of the regional policy statement, Ch B 5.1, 5.2, and 5.4 are to recognise the Council's (perceived) responsibilities under the RMA and the NZCPS. In Ch B 5.1. the Council states that "the strongest RMA mechanisms to encourage greater Mana Whenua participation in resource management are the ability for Mana Whenua and the Council to establish joint management arrangements, and for the Council to transfer powers over a particular resource to Mana Whenua.[9]"*

51. *No other undemocratically created group of citizens is able to enter into a joint management agreement or have the power to allocate resources. The intention behind the Mana Whenua provisions is not "equal enjoyment". It is manifestly unequal. It creates a privilege.*

52. *The Mana Whenua provisions are not 'special measures' but if they were, they could not be justified. The No. 32 recommendation notes that 'special measures' should be temporary. The Mana Whenua provisions are permanent. It notes that they should be "designed and implemented on the basis of prior consultation with affected communities." The Mana Whenua provisions became legally active before any consultation with the public had taken place.*

[9] The Council has stated in recent meetings that the joint management arrangements are only in relation to Maori land, however Mana Whenua rights to work with council in establishing sites of significance and value, and in allocating freshwater catchment limits appear have all the appearance of joint management.

"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."

53. *The Declaration on the Rights of Indigenous People's (DRIP) is non-ratified and non binding. New Zealand has confirmed its support for the Declaration, but it did not do so without caveats. New Zealand's support for the Declaration was in the form of a statement delivered by the Minister of Maori Affairs on 19 April 2010. The statement said New Zealand "reaffirms the legal and constitutional frameworks that underpin New Zealand's legal system. Those existing frameworks, while they will continue to evolve in accordance with New Zealand's domestic circumstances,* ***define the bounds*** *of New Zealand's engagement with the aspirational elements of the Declaration.*[10]*"*

54. *The statement above, and the appended footnotes, all speak of New Zealand's frameworks in the past tense. The statement makes very clear that, while the Government reserves the right for our legal and constitutional framework to evolve, the DRIP will not an instrument of this evolution. These pre-existing frameworks are the* ***bounds*** *of our engagement with the DRIP. In supporting the DRIP, New Zealand's position was effectively to support it inasmuch as its principles are* already *recognised by our established processes and institutions.*

55. *A supporter of the PAUP might attempt to advance a fallacious argument around the part of the statement that notes "where the Declaration sets out principles for indigenous involvement in decision-making, New Zealand has developed, and* ***will continue to rely upon****, its own distinct processes and institutions that afford opportunities to Maori for such involvement (our emphasis)." We anticipate the argument that the PAUP is an example of a distinct process developed to afford Maori involvement in line with the principles of the DRIP.*

[10] The statement went on to say "In particular, where the Declaration sets out aspirations for rights and restitution of traditionally held land and resources, New Zealand has, through its well-established processes for resolving Treaty claims, developed its own distinct approach." Further it noted that New Zealand "maintains, and will continue to maintain, **the existing legal regimes** for the ownership and **management of land and natural resources** (our emphasis)."

56. *A careful reading of the statement shows this argument is not supported. The statement used 'developed' in the past tense; it does not anticipate, let alone authorise, spontaneous Council developments of processes and institutions. Our existing constitutional frameworks will evolve in response to domestic pressures and international obligations, but they are the full extent of our engagement with the DRIP. When it comes to assessing the constitutional validity of new law such as the PAUP, the DRIP should not be invoked authoritatively as part of this debate.*

57. *In supporting the DRIP the government did not delegate power to Auckland Council to embark on constitutional experiments in indigenous involvement in decision making, let alone the specific and radical form of this that is co-governance. Like all delegated legislation the PAUP must be consistent with its empowering Acts and any domestic or international law to which it is subordinate.*

58. *It is also false to claim that Article 27 "recognises the right of indigenous peoples to participate in processes relating to recognition of their traditions and customs." Article 27 notes the process must give "due recognition to indigenous peoples' laws, traditions, customs…" but the relevant process is one to "**adjudicate** the rights of indigenous peoples pertaining to **their lands, territories, and resources**." The Waitangi Tribunal is the process established for this purpose in New Zealand, and the PAUP Mana Whenua provisions are expressly about the lands of people* other *than the indigenous people. The PAUP's CIA provisions include the recognition of spiritual and cultural values and do not create an adjudicative framework. They cannot be justified by 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."

59. *We are aware (sadly) that defending private property rights is not as straightforward as simply invoking the UDHR. While our original letter did mention the UDHR in its concluding paragraph, we invoked the International Covenant on Civil and Political Rights (ICCPR). The ICCPR was ratified by New Zealand on the 28th December 1978. The preamble to the New Zealand Bill of Rights Act 1990 (BORA) explicitly affirms New Zealand's commitment to the ICERD. Under the principles of international law New Zealand is bound by the ICERD.*

60. *As we made clear in our original letter, Article 17 of the ICERD states:*

    1. *No one shall be subject to arbitrary or unlawful interference with his privacy, family, **home** or correspondence, nor to unlawful attacks on his honour or reputation (our emphasis).*

    2. *Everyone has the right to protection of the law against such interference or attacks.*

61. *Article 26 states that:*

    *"All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, **the law shall prohibit any discrimination** and guarantee to all persons equal and effective protection against discrimination on any ground such as **race**, colour, sex, language, religion, political or other opinion, national or social origin, **property**, birth or other status" (our emphasis).*

62. *The conflation of cultural and religious (spiritual) values in Maori tradition makes it likely that Council acceptance of cultural impact assessments will in effect demand obeisance to particular religious opinion held by people of a birth status defined by ethnic descent. In other words property owners are not given equal and effective protection of their preferences.*

63. *It is true that the right to property was excluded from the BORA, however the BORA s 29 notes that "an existing right or freedom shall not be held to be abrogated or restricted by reason only that the right or freedom is not included in this Bill of Rights or is included only in part." The reason 'property' was not protected by the BORA was Government opposition. The Prime Minister of the day, Sir Geoffrey Palmer believed that "Bills of Rights tend to focus on procedural rather than substantive rights" but he went on to say "that does not mean that those rights are of lesser importance…[11]"*

64. *There are strong arguments that a right to the free and undisturbed possession of private property has always existed in New Zealand. Many of these arguments were **made by the HRC itself** in a submission to the Constitutional Advisory Panel. The*

[11] Hansard: Introduction of New Zealand Bill of Rights, 10 October 1989, Rt. Hon Geoffrey Palmer. See also G. Palmer, *New Zealand's Constitution in Crisis* (Dunedin, McIndoe, 1992) at 57 (cited in Joseph, P. *Constitutional and Administrative Law in New Zealand* (2nd ed) Wellington, Brookers, 2001 at para 26.3)

submission advocates the inclusion of property in the BORA and makes strong arguments for the right's existence in international and domestic law[12].

65. *For the HRC to suggest now that there exists in New Zealand no identifiable right to property deserving of defence against unlawful and discriminatory law-making is worse than laughable.*

66. *Further, as the Attorney General noted on the 6th May 2004*[13] *"while nothing in BORA guarantees property rights as such…section 19 BORA does mean that where legislation affects the enjoyment of property rights it must do so in a non discriminatory manner, which does not unfairly target or affect one racial group as against another." The PAUP violates this. Non Mana Whenua land owners will be affected adversely, whereas Mana Whenua landowners will not because even though the CIA provisions apply equally to all land owners, Mana Whenua have total discretion as to whether or not a CIA will be required.*

"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

End of HRC letter"

[12] http://www.hrc.co.nz/2013/08/21/commissions-review-of-new-zealands-constitutional-arrangements-to-the-constitutional-advisory-panel-released/

[13] http://www.justice.govt.nz/policy/constitutional-law-and-human-rights/human-rights/bill-of-rights/foreshore-and-seabed-bill

67. *The HRC claims that the LG(AC)A mandates 'this type of provision' referring to the Mana Whenua provisions. The Council says in the PAUP's regional policy statement that ss 5 to 8 of the RMA are the basis for the provisions and that they are mandated by RMA ss 6 and 7. The LG(AC)A doesn't mandate the substance of the plan; it mandates the process. The substance comes from the RMA. The HRC ignored our arguments about how the obligations imposed by the RMA have been interpreted in case law.*

68. *The Executive's responsibilities and limitations under international and domestic law are not entirely mutable and subjective. The HRC cannot simply 'agree to disagree.' There are established legal rules and principles that exist to determine these responsibilities and limits. The HRC's interpretation of the rights identified is incorrect, but even if it were correct that should be just the start of the enquiry for the HRC. With most law, the Commission does not consider itself snookered by the existence of a power. It proceeds to examine the wisdom and the consistency of exercises of the power with human rights principles, and in particular anti-discrimination principles. It seems to us inescapable that the HRC has decided that there are people and privileges who and which are exempt from human rights scrutiny. This approach makes the HRC an agent of the wrongs and the discrimination it was set up to combat, and turns on its head the Race Relations Act of 1971.*

Concluding Franks Ogilvie Remarks

69. The HRC's response repeatedly claimed that Council's actions were legally permitted. Without saying why, the HRC implied that if it was permissible that was the end of the matter.

70. Instead the HRC's legal analysis is variously incomplete, wrong, or debateable for the reasons discussed in the annotations above.. Perhaps our complaint looked as if it meant to allege only legal invalidity. That was not meant. It would not assuage the concerns if, for example, the PAUP's Mana Whenua provisions were authorised under the LG(AC)A (though we do not think they are).

71. In short, the Commission is intended to be proactive. It frequently asserts that responsibility in addressing controversial human rights concerns. The HRC is not the Regulations Review Committee. Its function is not just to assess whether the PAUP is lawful in terms of its empowering legislation, though that is a starting point.. Rather the question should be whether it is consistent with our constitutional documents such as the HRA and the BORA (and ratified international law) and the unwritten constitutional conventions that exist to protect our human rights.

72. Even where there is no breach of our constitutional documents the HRC is empowered and expected to advocate and make statements about how things *should* be.

73. The Council has given no sign that it has required or even thought about law or other mechanism to make the iwi 'representatives' accountable for the exercise of their privileges to anyone:

    73.1. The property owners who could suffer arbitrary decisions, and arbitrary charging;

    73.2. Other iwi members whose practical remedies for disappointment or embarrassment at what is done in their name could run into the endemic difficulty of tribal governance in handling succession and removal issues;

    73.3. The vast majority of Maori who are not in that resuscitated mana whenua iwi elite.

74. There is no indication in what we have seen of the background papers that Auckland Councillors were provided with reports or exploration of any such matters. If someone asked whether these arrangements of debateable social value, and net economic cost, might be coming at the expense of private property rights and in our view, of racial harmony, we have seen no record of it.

75. The Commission is supposed to enquire independently into any enactment or law that may infringe human rights. When we brought our concerns about the PAUP to the Commission's attention the Commission should have already formed a well researched and considered view of the PAUP and should have been able to provide this in response. A responsible and vigilant Commission should not need to rely on public complaints to become aware of legislation that infringes human rights.

76. For some reason, the HRC viewed the complaint as a hostile legal challenge. It tried to diminish the complaint's request to its stated arguments and dismiss these with what we think are disingenuous interpretations of the law.

77. We consider this to be inexcusable. Members of the public may often approach the Commission with inchoate or crude arguments that a certain law or practice is corrupt. The Commission should work to see if there is a kernel of good reason for concern, not apply legal sophistry to overwhelm the lay supplicant. Though we fully expect to be held to a higher standard of letter writing on such topics than lay people, the HRC reply policy to a lawyer's letter should be the same – to welcome the public as partners in blowing the whistle on official erosion of human rights, and to look diligently to see if a complaint might be justified.

78. The Commission instead seems to have decided that when inherited Maori power is supplanting democratic decision-making it should quickly stifle dissent through the adversarial application of black-letter law – including with convenient but incorrect claims about the law. An impartial and attentive Commission would have been put on notice by our complaint and taken a broad unbiased look at the PAUP through a human rights lens.