The TPPA-11 and The Treaty of Waitangi

IT'S **OUR** FUTURE

The TPPA has a Treaty of Waitangi exception that was drafted back in 2000, without consulting Maori.

The same exception has been rolled over in agreements since then, without any consultation with Māori, even though today's agreements impose much greater restrictions on what governments can do.

The Prime Minister has said NZ 'has an exemption that says it is always able to legislate and act to protect its obligations under the Treaty of Waitangi and that can't be challenged by other nations'. That is not true.

The Waitangi Tribunal in the TPPA claim (Wai 2522) said the Treaty exception 'may not encompass the full extent of the Treaty relationship'. That is because it only covers Crown actions that give preferences to Māori, not laws or policies that apply generally but are fully or partly for Treaty compliance (eg water, mining, fisheries).

The PM said the Tribunal found the 'exemption provides protections for the Treaty'. That is also not true.

In the limited hearing under urgency, the Tribunal found no breach of Treaty principles because the exception was 'likely' to offer a 'reasonable degree' of protection for Māori. But it did not accept the Crown's claim that 'nothing in the TPPA will prevent the Crown from meeting its Treaty obligations to Māori'.

The Tribunal was not convinced that the exception protects Crown actions from a dispute by a foreign investor, for example on water or mining.

The Wai 2522 claimants made proposals for more effective protection. These have been ignored. There has been no consultation on any stronger protection.

The wording of the Treaty exception has not changed in other negotiations since the TPPA. Officials say that they can't change the wording, because they currently insist they must have that clause; new wording would open the text for negotiation.

But New Zealand did get additional (and problematic) new wording in the TPPA at the last minute, which allows it to adapt the UPOV 1991 convention on plant varieties to meet Treaty obligations, because it wasn't convinced the Treaty exception would apply. So it's not true the Crown can't demand and win different wording.

The government seems to be accepting an 'imperfect' Treaty protection as a trade-off for other commercial benefits it sees in these deals.

Yet the Waitangi Tribunal inquiry into the TPPA (Wai-2522) claim is not over.

The Tribunal granted urgency to the claim, but limited its scope to whether the wording in the Treaty exception provided effective protection for Māori interests. It didn't address other issues, such as UPOV, IP, water, health.

Even its time for preparing the urgency report was cut because National shortened the select committee time so it could introduce the legislation to implement the TPPA. Once that happened the Tribunal had no jurisdiction.

The Tribunal said the Crown should consult on better protection and kept active oversight of the UPOV 1991 issue.

Now the Crown wants the Tribunal process terminated. The claimants point to a lack of good faith consultation over TPPA-11 negotiations since the Tribunal's report, and issues not addressed in the urgent hearing remain.

On 30 January 2018 the Tribunal asked the parties (basically the Crown) to say by 14 February

(a) when the text of the new agreement would be available,

(b) what its effect would be on the Crown's engagement with Māori on the Plant Varieties regime and adopting UPOV 1991,

(c) what issues in the TPPA claim remain live, and

(d) ***'when would be the appropriate time for the Tribunal to commence inquiry into the remaining substantive claims that have been filed with respect of the TPPA?'***