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 Māori.

The same exception has been rolled over in agreements since then, still without consulting Māori, even though today's agreements impose much greater restrictions on what actions governments (the Crown) can take.

The Government did not suggest any that any items of importance to Māori were suspended when they reviewed the TPPA after the US exited in 2017.

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 Tiriti compliance (eg regulating 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 especially not convinced that the exception would prevent a foreign investor from challenging actions the Crown takes, for example on water or mining.

Recently, the Government has admitted the Treaty Exception is 'not perfect', but say it's the best they can get.

The Tribunal advised the Crown to consult on stronger Tiriti protection. The Wai 2522 claimants suggested ways to guarantee full protection and a process that genuinely reflects a Tiriti partnership. Those have been ignored.

Far from revisiting the Treaty Exception, the Crown has repeated it in other negotiations since the TPPA.

The Trade Minister says it is too risky to change the wording, because that would open it up for negotiation and Māori might end up in something worse. The claimants say Māori should decide whether to take that risk.

Also, it's not true the Crown can't demand different wording and win. NZ did get new (albeit problematic) wording included in the TPPA at the last minute to allow a Tiriti-compliant approach to adopting a plant varieties convention (UPOV 1991), after the claimants pointed out that the Treaty Exception wouldn't apply.

The Government seems to be accepting an 'imperfect' Treaty protection as a trade-off for commercial benefits it sees in these deals, subordinating te Tiriti yet again to other interests.

The Crown says it has consulted with FOMA and the iwi chairs on the resurrected TPPA-11 and a process for Māori involvement if it gets sued and has to invoke the Treaty Exception. But this is tinkering.

It recently 'consulted' on this and other things with the claimants, but they have no power to change anything.

That's not the end of the story. The Waitangi Tribunal inquiry into the Wai-2522 claim is not over. The original hearing under urgency was limited to whether the wording in the Treaty Exception provided effective protection for Māori interests. It didn't cover Tiriti-related impacts of TPPA on traditional knowledge, water, health, etc.

Even the urgency inquiry was cut short because National rushed to introduce the TPPA's implementing legislation. Once that happened the Tribunal had no jurisdiction.

The Tribunal appears keen to complete the inquiry. But it faces a similar problem. Labour is rushing through the select committee process and wants to introduce legislation for implementing the TPPA in May. The Tribunal cannot hear the claim while legislation is before Parliament. It can still do so after the legislation is passed.

The Tribunal has also kept active oversight of the TPPA obligation to adopt the plant varieties convention (UPOV 1991) in a Tiriti-compliant way, which is a Wai 262 issue. This is part of a broader review of the Plant Varieties Act, but MBIE doesn't seem to know what to do.

Meanwhile, the Crown's right to make international treaties without equal tāngata whenua representation has been challenged in stage 2 of Te Paparahi o te Raki (Wai 1040) claim.

Stage 2 of the National Freshwater claim (Wai 2358) has argued that TPPA and other agreements could be used to justify the Crown not taking action to remedy Tiriti breaches, having a 'chilling effect' on any effective redress.