

Chair

Cabinet Māori Crown Relations: Te Arawhiti Committee

RESPONDING TO THE *NGĀI TAI KI TĀMAKI* SUPREME COURT DECISION AND GIVING EFFECT TO TREATY PRINCIPLES IN CONSERVATION

Proposal

1. This paper provides an overview of the recent Supreme Court decision in *Ngāi Tai ki Tāmaki Tribal Trust v Minister of Conservation* [2018] NZSC 122 (*Ngāi Tai ki Tāmaki*) and outlines my views on an appropriate response. It also signals my intention to undertake a wider work programme aimed at giving effect to Treaty of Waitangi principles in conservation.

Executive Summary

2. In December 2018 the Supreme Court released its decision in *Ngāi Tai ki Tāmaki*, a case concerning the Department of Conservation (DOC)'s consideration of Treaty principles in the granting of two commercial tour concessions¹ on Rangitoto and Motutapu Islands.
3. Rather than representing any 'ground shift' in law, the *Ngāi Tai ki Tāmaki* judgment confirms and builds on previous jurisprudence regarding the allocation of commercial opportunities on public conservation lands and waters, including the Court of Appeal's 1995 *Whales* decision.² The judgment clarifies that DOC is required in some circumstances to consider the possibility of according a degree of preference to iwi as well as the potential associated economic benefit of doing so. It also confirms that section 4 of the Conservation Act 1987³ does not create a power of veto for an iwi or hapū over the granting of concessions, nor any exclusive right to concessions in their rohe.
4. The *Ngāi Tai ki Tāmaki* judgment has broader implications beyond the two concession decisions at issue in the case; it is relevant to DOC's statutory decision-making function, to statutory management planning, and to the operational delivery of conservation outcomes at place.

¹ Excluding mining (which is regulated by the Crown Minerals Act 1991), commercial activities on public conservation lands are managed through a concessions regime. The Minister of Conservation or her delegate may grant a concession in the form of a lease, licence, permit or easement in respect of any activity.

² *Ngāi Tahu Māori Trust Board v Director-General of Conservation* [1995] 3 NZLR 533.

³ Section 4 of the Conservation Act states: "This Act shall so be interpreted and administered as to give effect to the principles of the Treaty of Waitangi."

5. One aspect of the judgment requires the amendment of the Conservation General Policy to address an error identified by the Supreme Court. I propose to undertake a technical amendment process and partial review of the policy to this end.
6. The judgment also emphasises the fundamental importance of Treaty of Waitangi principles in the statutory scheme of the Conservation Act 1987 and highlights a need for DOC to consider more actively the role that partnerships with iwi/Māori can occupy in the delivery of conservation outcomes.
7. With respect to our Government's priority to build closer partnerships with Māori, I consider the development of a response to *Ngāi Tai ki Tāmaki* one part of a wider opportunity for DOC to improve its delivery of its responsibility under section 4 of the Conservation Act to give effect to Treaty principles in conservation. It is also consistent with our Government's recent decision to develop a whole-of-government approach to Wai 262 issues.
8. Making progress on these issues will require a phased approach comprised of both near- and long-term initiatives, including engagement with iwi/Māori. I intend to report back to the committee by March 2020 with an update on the development and delivery of a work programme.

Background

9. The Supreme Court released its decision in *Ngāi Tai ki Tāmaki* on 14 December 2018. The case concerned the application of section 4 of the Conservation Act 1987 to the grant of two commercial tour concessions on Rangitoto and Motutapu Islands in favour of Fullers Group Limited and the Motutapu Island Restoration Trust. The Ngāi Tai ki Tāmaki Tribal Trust opposed the grant of concessions to parties other than tangata whenua, including on the basis that economic opportunities should be preserved for iwi/hapū and as an incident of their mana whenua over the Islands.
10. Section 4 requires the Minister of Conservation and DOC to give effect to the principles of the Treaty of Waitangi in the interpretation and administration of the Conservation Act (including all enactments listed in Schedule 1 of the Act). Section 4 features one of the strongest weightings of Treaty of Waitangi principles in legislation.
11. At issue in *Ngāi Tai ki Tāmaki* was whether section 4 required consideration by the decision-maker of a degree of preference for an iwi concessionaire over others.
12. The Court found section 4 did require consideration of both the possibility of according a degree of preference to Ngāi Tai ki Tāmaki and the potential associated economic benefit of doing so. However, the Court also confirmed that section 4 does not create a power of veto for an iwi or hapū over the granting of concessions, nor any exclusive right to concessions in their rohe. DOC is reconsidering the two concessions at issue in light of this determination.
13. Rather than representing any "ground shift" in law, the *Ngāi Tai ki Tāmaki* judgment confirms and builds on previous jurisprudence, including the 1995 *Whales* decision.

It clarifies relevant considerations for decision-making on the allocation of commercial opportunities on public conservation lands and waters.⁴

14. Although the result of *Ngāi Tai ki Tāmaki* turned on its particular facts, the judgment has wider strategic and operational policy implications that need to be worked through. These relate to the relative strength of section 4 in the statutory scheme of the Conservation Act and to DOC's work.
15. Iwi/Māori maintain a close interest in this matter as the *Ngāi Tai ki Tāmaki* decision speaks directly to the nature of their engagement with DOC and relationship with the public conservation land and waters that DOC administers. Moreover, it sits at a nexus of contemporary Treaty partnership issues relevant to conservation. These are discussed below.

Increasing pressure on conservation resources

16. Over the past decade increasing economic benefits from tourism and mānuka honey production have driven a rise in interest in commercial opportunities on public conservation land. Resource allocation limits imposed by statutory plans and ecological carrying capacities have been reached in some areas (e.g. the number of helicopter landings allowed in a given national park).
17. Iwi/Māori and others have raised questions about allocation approaches in resource constrained situations, particularly in instances where Treaty Settlements acknowledge the interests of iwi/hapū in particular areas or in specific species (e.g. mānuka).
18. DOC has been considering the possible development of a framework to guide decision-makers' consideration of iwi/Māori rights and interests in the allocation of commercial opportunities on public conservation land and waters. The *Ngāi Tai ki Tāmaki* decision highlights the relative priority of this work.

Wai 262

19. Cabinet has agreed to develop a whole-of-government strategy to address issues raised in the Wai 262 claim and the Waitangi Tribunal's consequential recommendations in its 2011 report, "Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity" (CAB-19-MIN-0138.01 refers)." The Minister for Māori Development is leading this work.
20. Chapter 4 of the Wai 262 report ("Taonga and the Conservation Estate") features a range of recommendations for which DOC has primary responsibility. DOC also has responsibilities in respect of issues canvassed in other chapters of the report, including in respect of taonga species, mātauranga Māori, and rongoā Māori.
21. There is overlap between certain of the Waitangi Tribunal's recommendations and implications of the *Ngāi Tai ki Tāmaki* decision. For example, both envision

⁴ The opportunities at issue in the *Whales* case were permits for commercial sperm whale-watching. Other examples of commercial opportunities on public conservation land and waters include (but are not limited to) beekeeping, tourism infrastructure such as ski fields and gondolas, aerially-assisted trophy hunting, location filming, and transporting visitors to and from public conservation lands and waters by aircraft.

amendment of the Conservation General Policy to reflect the relative strength of section 4 in the statutory scheme of the Conservation Act.

22. Responding to *Ngāi Tai ki Tāmaki* and progressing a wider work programme to give effect to Treaty principles in conservation will enable DOC to address relevant findings and recommendations made in Wai 262. This will support our Government's aim to develop a meaningful and coordinated response to Wai 262.

Alignment with Government priorities

23. In March 2018 the Cabinet Priorities Committee agreed to include as one of twelve priorities for the Government "to build closer partnerships with Māori" [CPC-18-Min-0001 refers].
24. The *Ngāi Tai ki Tāmaki* decision underlines the importance of section 4 (and by extension, Treaty principles) in the statutory scheme of the Conservation Act.
25. Given the relative strength of section 4 compared to similar 'Treaty clauses', the direct impact of *Ngāi Tai ki Tāmaki* on other sustainability sector portfolio issues is likely limited. However, an effect of DOC improving its delivery of section 4 responsibilities may be to encourage a lift in performance across central government.

Implications of the judgment and proposed response

26. Although the case was decided on comparatively narrow and orthodox administrative law grounds, the *Ngāi Tai ki Tāmaki* judgment has practical implications beyond the two concession decisions at issue. Namely, it:
 - 26.1. raises matters to be considered in DOC's handling of existing and future concession applications and similar decisions where Treaty principles come into play;
 - 26.2. identifies errors in the Conservation General Policy and the General Policy for National Parks, and therefore may impact on some statutory management planning work until these matters are resolved or an interim solution implemented; and,
 - 26.3. requires further work around the way DOC gives effect to the Treaty of Waitangi principles in its work.
27. The implications of the *Ngāi Tai ki Tāmaki* judgment vary in their relative urgency and complexity. The required response sits within a wider opportunity for DOC to improve its delivery of section 4 responsibilities and give effect to the Treaty of Waitangi principles in conservation.
28. Addressing these issues effectively will require a phased approach comprised of both near- and long-term work programmes, including engagement with iwi/Māori.

Concessions and similar decision-making

29. The impact on DOC's statutory decision-making processes needs to be addressed as soon as practicable. DOC has over 800 live concession applications under

consideration and is receiving new applications daily. The precedent established by *Ngāi Tai ki Tāmaki* will need to be considered where relevant. DOC is:

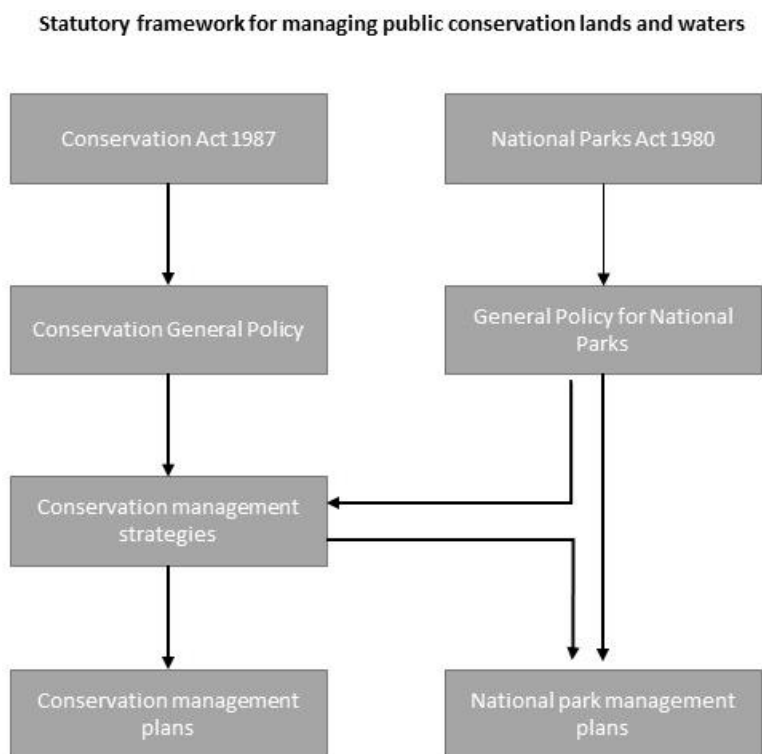
- 29.1. reconsidering afresh the two concession decisions at issue in the case;
- 29.2. assessing any impact on the current and near-future pipeline of concession applications and processes;
- 29.3. assessing any impact on other, similar decision-making areas (e.g. procurement); and,
- 29.4. potentially refining its decision-making framework to ensure all future decisions are compliant with the law as articulated in *Ngāi Tai ki Tāmaki*.

Statutory management planning

30. In its judgment the Supreme Court commented that it disagreed with a statement on section 4 included in the Conservation General Policy, which it considered effectively states that section 4 is trumped by other statutory provisions.⁵ It suggested that what is required instead is “a process under which the meeting of other statutory or non-statutory objectives is achieved, to the extent that this can be done consistently with section 4, in a way that best gives effect to the relevant Treaty principles.”
31. The error is replicated verbatim in the General Policy for National Parks and a number of other subservient conservation management strategies and management plans.
32. DOC works with a suite of legislation and documents that make up the planning framework for all public conservation land and waters in New Zealand (see figure 1 below). At the top of the planning hierarchy is legislation, with statements of general policy next, followed by conservation management strategies and then management plans. Lower level documents cannot be inconsistent with documents higher in the order. Statements of general policy provide integrated national direction.
33. The Conservation General Policy provides unified policy for the implementation of the Conservation Act with multiple other pieces of conservation legislation. It is approved by the Minister of Conservation.
34. The General Policy for National Parks provides consistent national direction for the administration of New Zealand’s national parks. It is approved by the New Zealand Conservation Authority.
35. In response to the error identified by the Supreme Court, DOC has paused work on review processes for the Āoraki/Mt Cook and Westland Tai Poutini National Park Management Plans. Other scheduled plan review processes are in the pre-planning stage.

⁵ The relevant extract from the Conservation General Policy (emphasis added): “The Conservation Act 1987, and all the Acts listed in its First Schedule, must be so interpreted and administered as to give effect to the principles of the Treaty of Waitangi (section 4, Conservation Act 1987). *Where, however, there is clearly an inconsistency between the provisions of any of these Acts and the principles of the Treaty, the provisions of the relevant Act will apply.*”

Figure 1



36. From the perspective of being able to effectively manage commercial opportunities on public conservation land and waters, officials consider that a long delay in the review of these plans and other planning processes would be problematic. Officials are currently developing options for rectifying the error along with potential interim solutions.
37. The processes for amending the Conservation General Policy and General Policy for National Parks are prescribed by statute and can require between six and thirty-six months' delivery time depending on the nature of the change. As the New Zealand Conservation Authority is responsible for the General Policy for National Parks, decisions around process and scope will need to be coordinated carefully. DOC will:
 - 37.1. undertake a technical amendment process to amend the Conservation General Policy and work with the New Zealand Conservation Authority to amend the General Policy for National Parks to rectify the error identified by the Supreme Court;
 - 37.2. amend any affected subservient plans and strategies accordingly; and,
 - 37.3. consider ways by which the statutory management planning framework could better support decision-makers in their consideration of section 4 issues.

Operational delivery of conservation outcomes

38. The *Ngāi Tai ki Tāmaki* decision confirms the fundamental importance of section 4 in the statutory scheme of the Conservation Act, to the enactments listed in Schedule 1 of the Act, and so to all DOC's work. The directive language in section 4 requires

DOC so far as possible to apply relevant statutory and other legal considerations in a manner that gives effect to the relevant principles of the Treaty of Waitangi.

39. The efficacy with which DOC currently meets the obligations of section 4 in its work requires further analysis, including substantive discussions with iwi/Māori and assessment alongside existing Treaty settlement commitments. Changes to operational systems and policy may be required to enable DOC to deliver its obligations more consistently across the country. These matters necessarily will need to be progressed to a longer timeframe.
40. As a start, DOC will:
 - 40.1. assess its efficacy and consistency in giving effect to Treaty of Waitangi principles across the enactments listed in Schedule 1 to the Conservation Act;
 - 40.2. assess how it practically can better enable Treaty partnership on the ground in its day-to-day delivery of conservation outcomes, including in the context of Treaty settlement relationship agreements; and,
 - 40.3. consider the need to change operational policies to better recognise Treaty of Waitangi principles.
41. DOC recently has launched a Treaty Partner Engagement System pilot process to better understand what whānau, hapū and iwi are looking for in terms of their relationship with DOC at place. Working with iwi and hapū to address Treaty of Waitangi historical grievances is another way that DOC has sought to give effect to section 4. Additional ways in which DOC has sought to enhance its delivery of section 4 obligations include:
 - 41.1. having regular conversations with whānau, hapū and iwi at place on policy matters so that processes are transparent; and,
 - 41.2. meeting with whānau, hapū and iwi early in policy design processes with the aim of moving towards a partnership approach (for example, DOC has held approximately twenty-five hui over the last seven months to discuss the development of a New Zealand Biodiversity Strategy and other initiatives).
42. DOC's standard operating procedures for processing concessions and other permission applications also require consultation with iwi/Māori. Recent improvements entail inclusion of a Treaty of Waitangi and section 4 analysis section in relevant decision support documents. DOC District Offices are working through place-specific engagement frameworks to support and enable iwi/Māori to engage in statutory processes. Future planned improvements include strengthening the feedback loop at the end of these processes to ensure iwi/Māori understand how their input to a process can shape outcomes.

Next steps

43. The policy and operational implications of the *Ngāi Tai ki Tāmaki* decision require time to work through. DOC will need to consult with iwi/Māori, stakeholders, and the wider public as it considers how to give effect to Treaty principles in conservation and progress opportunities to further its Treaty partnerships.
44. In due course I intend to reach out to iwi/Māori to invite engagement on the work to give effect to Treaty principles in conservation, including through a technical

amendment to and partial review of the Conservation General Policy. In the near term this will entail conversations at regional hui which are being planned for September – December 2019 at which other conservation issues will be discussed. Over the longer-term, it will include direct engagement with individual iwi (and hapū groups, where appropriate) focused on their distinct relationships with DOC.

45. Following the near-term engagement and further work by officials, I intend to report back to the Committee by March 2020 with an update on the development and delivery of the work programme.

Consultation

46. In the preparation of this paper, DOC consulted with the Crown Law Office, the Office of Māori Crown Relations: Te Arawhiti, the Treasury, Te Puni Kōkiri, the Ministry for the Environment, the Ministry of Business, Innovation and Enterprise, and the Ministry for Primary Industries, Te Uru Rākau, and Fisheries New Zealand. The Department of Prime Minister and Cabinet was informed.

Financial Implications

47. This paper has no financial implications.

Legislative Implications

48. This paper has no legislative implications.

Impact Analysis

49. Regulatory impact analysis requirements do not apply to the proposals in this paper.

Human Rights

50. The proposals in this paper are not inconsistent with the New Zealand Bill of Rights Act 1990 or the Human Rights Act 1993.

Publicity

51. No publicity is planned in respect of the proposals in this paper. However, there stands to be a moderate level of public interest in the implications of the *Ngāi Tai ki Tāmaki* decision. For the meantime, I intend to take a reactive response to any media enquiries.

Proactive Release

52. I intend to release this paper proactively within 30 business days.

Recommendations

The Minister of Conservation recommends that the Committee:

53. note the Supreme Court released its decision in *Ngāi Tai ki Tāmaki Tribal Trust v Minister of Conservation* [2018] NZSC 122 ('*Ngāi Tai ki Tāmaki*') on 14 December 2018.

54. note the *Ngāi Tai ki Tāmaki* judgment confirms and builds on previous jurisprudence regarding the allocation of commercial opportunities on public conservation lands and waters, rather than representing any “ground shift” in law;
55. note the *Ngāi Tai ki Tāmaki* judgment has implications beyond the two concession decisions at issue in the case. In particular it:
 - 55.1. raises matters to be considered in the Department of Conservation (DOC)’s handling of existing and future concession applications and processes and similar decisions;
 - 55.2. identifies errors in the Conservation General Policy and General Policy for National Parks that require amendment; and,
 - 55.3. requires further work around the way in which DOC gives effect to Treaty of Waitangi principles in its work.
56. note the development of a response to *Ngāi Tai ki Tāmaki* sits within the context of a wider opportunity for DOC to give better effect to Treaty principles in conservation and contribute to the delivery of the Government’s priority to build closer partnerships with Māori. It is also consistent with the Government’s recent decision to develop a whole-of-government approach to Wai 262 issues.
57. note that progressing this work will require a phased approach comprised of both near- and long-term initiatives, including in the first instance a programme of engagement with iwi/Māori as well as a technical amendment to and a partial review of the Conservation General Policy.
58. invite the Minister for Conservation to report back to the Cabinet Māori-Crown Relations: Te Arawhiti Committee by March 2020 to provide an update on the progress of DOC’s work to give effect to Treaty principles in conservation, including opportunities to build closer partnerships with Māori.

Authorised for lodgement

Hon Eugenie Sage

Minister of Conservation