



Arbitration and iwi disputes: Te Rūnanga o Ngāi Tahu v Attorney-General

By Polly Pope

A High Court decision has highlighted the use of arbitration in disputes involving iwi, in the context of ongoing disputes between Te Rūnanga o Ngāi Tahu and the Crown relating to adjustments to Ngāi Tahu's entitlements under its Deed of Settlement with the Crown.

The Deed of Settlement relates to certain historical Treaty of Waitangi claims and contains a mechanism to maintain the relativity of Ngāi Tahu's settlement to the total value of redress provided in all historical Treaty claims. Ngāi Tahu brought High Court proceedings seeking interest on amounts that, following arbitration between Ngāi Tahu and the Crown, have been found to be owing under that relativity mechanism.

The Crown sought to have aspects of Ngāi Tahu's claim for interest as damages dismissed at an early stage. The Crown did not succeed.

Although the issues in dispute turned on the interpretation of a bespoke arbitration agreement

negotiated between the Crown and Ngāi Tahu, at least three points of interest arise from the decision of Associate Judge Paulsen. First, the decision, broadly speaking, upholds the autonomy of parties (and here, iwi) to design and agree on a dispute resolution process that involves both arbitration and the courts. Secondly, the Associate Judge effectively questioned whether "technical arguments" advanced by the Crown were consistent with Treaty principles. Finally, the decision casts some further light on the use of arbitration to resolve disputes involving iwi.

The relativity mechanism

The relativity mechanism in the Ngāi Tahu Deed of Settlement provides for the Crown to make further five-yearly payments to Ngāi Tahu in the event the aggregate value or redress paid or otherwise transferred by the Crown in respect of historical Treaty claims exceeds \$1 billion, in 1994 dollars. The relativity mechanism is intended to maintain the relative value of Ngāi Tahu's settlement as a fixed percentage of the real value of all Treaty settlements until 2044.

Ngāi Tahu made its first claim under the relativity mechanism in 2012. Ngāi Tahu and the Crown agreed that the Crown would pay the amount the Crown had calculated was payable, but that the parties would enter into a dispute resolution process to determine any further amount payable. The Crown and Ngāi Tahu entered into an arbitration agreement on 8 August 2013.

The arbitration agreement provided that the arbitrator had no power to award interest unless agreed. However, the arbitration agreement recorded that in the event that any further

amount is payable to Ngāi Tahu in light of a determination by the arbitrator, then the parties would at that time discuss whether the question of interest should be referred to the arbitrator or High Court. Failing agreement, the parties acknowledged that Ngāi Tahu could seek to have the question of interest determined by the High Court.

The arbitration

Ngāi Tahu originally pleaded over 280 individual settlement redress items that the iwi says should be included in the calculation of the Crown's aggregate Treaty settlement redress, for the purpose of determining Ngāi Tahu's entitlement under the relativity mechanism. Arbitration hearings commenced in December 2013 and to date the arbitrator, Sir Andrew Tipping, has issued six awards determining whether particular disputed items should or should not be taken into account.

Ngāi Tahu's claim for "interest as damages" in High Court proceedings

In the High Court proceedings, Ngāi Tahu is seeking interest as damages for breach of contract, or at statutory rates under the Judicature Act 1909 and the Interest on Money Claims Act 2016. The Crown applied to have Ngāi Tahu's claim for interest as damages either dismissed for lack of jurisdiction or struck out.

A claim for "interest as damages" is a claim for compensation for the deprivation of the use of money. The value of the loss is quantified by the interest that could have been earned by investing the money, or avoided by retiring debt (*Clarkson v Whangamata Metal Supplies Ltd* [2007] NZCA 590). The result of this preliminary decision simply means that Ngāi Tahu's claim for interest as damages can proceed – it has not yet been decided by the Court.

Themes emerging from the judgment

The Crown's application rested upon a series of technical arguments. Each was dismissed by Associate Judge Paulsen, who in doing so effectively recognised the ability of parties to limit the scope of an agreement to arbitrate, and to preserve the ability of a party to pursue

a particular claim through the courts. Much of the judgment turns on the interpretation of a particular clause of the arbitration agreement between the Crown and Ngāi Tahu.

Notably, however, the Associate Judge held that it is plainly arguable that the parties effectively contracted out of the ordinary six-year limitation period for pursuing a money claim under the Limitation Act 2011. By the arbitration agreement, the parties effectively agreed to preserve the right of Ngāi Tahu to claim interest. It did not matter that the arbitration agreement did not expressly make reference to the Limitation Act.

Were the Crown's arguments consistent with Treaty principles?

In closing, the Associate Judge noted that it appeared that technical arguments advanced by the Crown challenging Ngāi Tahu's ability to have its claim substantively determined by the High Court did not reflect the basis upon which Ngāi Tahu and the Crown proceeded as active Treaty partners in the negotiation of the arbitration agreement. The Associate Judge was careful to remark that he was not required to and did not make a judgment about that point. Had the Associate Judge been in doubt as to the result of the application, the Associate Judge noted he may well have called upon counsel to address that aspect further.

The use of arbitration in disputes involving iwi

This decision highlights the use of arbitration in disputes involving iwi. Arbitrations are generally confidential and private in New Zealand, unless the courts become involved (for instance, in the context of an application for leave to appeal a decision of an arbitrator). However, it is generally ascertained that arbitration is used to resolve a range of disputes involving iwi in New Zealand. As Associate Professor Amokura Kawharu (now President of the Law Commission) highlighted at the Arbitrators and Mediators' Institute of New Zealand's 2021 annual conference, arbitration may provide a model for Māori dispute resolution, by providing for Māori procedural and substantive norms and Māori leadership. The principles of party autonomy and the resolution of disputes outside of the state court system may suggest that arbitration provides a way for Māori to exercise tino rangatiratanga.

However, the choice of arbitration to resolve disputes within and between iwi has arguably not always been fostered by the High Court. The earlier decision of *Ngawaka and Ors v Ngāti Rehua-Ngātiwai ki Aotea Trust Board and Ors* [2021] NZHC 291 cast doubt upon the arbitrability of matters of whakapapa.

No such doubt arose in the Ngāi Tahu case: concerning as it does the interpretation of a deed of settlement with the Crown, the underlying dispute is clearly amenable to arbitration. These facts show that arbitration is chosen by parties to a dispute to resolve some of the highest value, and widest ranging, disputes in New Zealand. In the context of the Ngāi Tahu Deed of Settlement, arbitration has provided a mechanism for a series of decisions resolving an apparently large volume of issues, of significant importance to the parties, by a decision maker selected by the parties.

The *Ngāti Rehua-Ngātiwai ki Aotea Trust Board* decision remains controversial and is unlikely to be the final word on the ability of Māori to choose arbitration as a means to resolve matters of tikanga.

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