Hon. Max Bradford

NGAI TAHU (POUNAMU VESTING)

ANALYSIS

A BILL INTITULED

An Act to give effect to certain provisions of the Deed of 'On Account' Settlement, signed on 14 June 1996 by the Crown and Te Runanga o Ngai Tahu as representative of Ngai Tahu, by vesting, in Te Runanga o Ngai Tahu, pounamu in the Takiwa of Ngai Tahu Whanui and in those parts of the territorial sea of New Zealand that are adjacent to the Takiwa of Ngai Tahu Whanui

WHEREAS—

A. Ngai Tahu has made claims against the Crown under the Treaty of Waitangi Act 1975, and those claims have been the subject of 2 reports of the Waitangi Tribunal, the 1991 Ngai Tahu Report and the 1995 Ancillary Claims Report:

B. Since 1991 there have been a number of attempts by Ngai Tahu and the Crown to reach a negotiated settlement of Ngai Tahu's claims and to remove the sense of grievance felt by Ngai Tahu:

C. The Crown and Ngai Tahu, wishing to recommence negotiations towards a comprehensive settlement of all claims made by or on behalf of Ngai Tahu or hapu, whanau or individuals within the Ngai Tahu Whanui against the Crown pursuant to the Treaty of Waitangi Act 1975, have agreed to negotiate in good faith to achieve a settlement of all Ngai Tahu's historical claims under the Treaty of Waitangi and Ngai Tahu has agreed to an indefinite adjournment of certain litigation relating to the claims to allow those negotiations to take place:

D. As a sign of good faith and as a demonstration of the Crown's goodwill, and in recognition of the long process of negotiation that has already taken place between the parties, the Crown has agreed to renew and modify an offer it made to Ngai Tahu in 1994 to provide certain redress to Ngai Tahu on an 'on account' basis, and Ngai Tahu has accepted that modified offer:

E. Accordingly, on 14 June 1996, the Crown and Te Runanga o Ngai Tahu as representative of Ngai Tahu signed a Deed of 'On Account' Settlement, in which the Crown agreed that it would present for the consideration of Parliament legislation to provide for—

(a) The vesting in Te Runanga o Ngai Tahu of the Crown's rights to pounamu in the Takiwa of Ngai Tahu and the adjacent territorial sea; and

(b) The continuation of all current mining privileges relating to that pounamu until they expire; and

(c) The payment by the Crown to Te Runanga o Ngai Tahu of any royalties received by the Crown in respect of any such mining privileges; and

(d) A regime for access to land in which the pounamu is situated in the same manner as is provided for in the Crown Minerals Act 1991 for persons holding a permit in respect of a mineral under that Act:

New (Majority)

F. To give effect to a recommendation of the Waitangi Tribunal, Te Runanga o Ngai Tahu intends to execute a deed vesting in the Mawhera Incorporation all pounamu within the catchment area of the Arahura river:

BE IT THEREFORE ENACTED by the Parliament of New Zealand as follows:

1. Short Title and commencement—(1) This Act may be cited as the Ngai Tahu (Pounamu Vesting) Act **1996**.

(2) This Act comes into force on the date that is 28 days after the date on which this Act receives the Royal assent.

2. Interpretation—In this Act, unless the context otherwise requires,—

"Existing privilege" has the meaning given to that term by section 106 of the Crown Minerals Act 1991:

"Minister" means the Minister of Energy:

"Pounamu" means—

(a) Bowenite:

(b) Nephrite〈, including semi-nephrite〉:

(c) Serpentine occurring in its natural condition in the land described in the Schedule:

"Takiwa of Ngai Tahu Whanui" has the meaning given to that term by section 5 of Te Runanga o Ngai Tahu Act 1996:

"Te Runanga o Ngai Tahu" means the body corporate known as Te Runanga o Ngai Tahu established by section 6 of Te Runanga o Ngai Tahu Act 1996.

3. Ownership by Ngai Tahu of certain minerals—Notwithstanding any other enactment, all pounamu occurring in its natural condition in—

(a) The Takiwa of Ngai Tahu Whanui; and

(b) Those parts of the territorial sea of New Zealand (as defined by section 3 of the Territorial Sea, Contiguous Zone, and Exclusive Economic Zone Act 1977) that are adjacent to the Takiwa of Ngai Tahu Whanui and the seabed and subsoil beneath those parts of the territorial sea—

that, immediately before the commencement of this Act, is the property of the Crown, ceases, on the commencement of this Act, to be the property of the Crown and vests in and becomes the property of Te Runanga o Ngai Tahu.

4. Existing privileges for pounamu—(1) Nothing in **section 3** affects an existing privilege or the rights or obligations of any holder of an existing privilege and Part II of the Crown Minerals Act 1991 continues to apply in relation to that privilege as if this Act had not been passed.

(2) Notwithstanding anything in the Crown Minerals Act 1991, all royalties paid to the Crown after the commencement of this Act by the holder of any existing privilege in respect of

pounamu must be paid by the Crown to Te Runanga o Ngai Tahu.

5. Applications for mining privileges and permits for pounamu—Notwithstanding anything in the Crown Minerals Act 1991, the Minister of Energy must not grant any—

(a) Permit pursuant to an application made under section 23 of that Act before the commencement of this Act; or

(b) Mining privilege pursuant to an application to which section 112 of that Act applies—

in respect of any pounamu to which **section 3** applies.

Amendments to Crown Minerals Act 1991

6. Sections to be read with Crown Minerals Act 1991—This section and the **next succeeding 2 sections** are part of the Crown Minerals Act 1991* ("the principal Act").

*1991, No. 70
Amendments: 1991, No. 102; 1993, No. 139

7. Minerals reserved to Crown—Section 11 of the principal Act is amended by inserting, after subsection (1), the following subsection:

"(1A) Nothing in subsection (1) applies to pounamu to which **section 3** of the Ngai Tahu (Pounamu Vesting) Act **1996** applies."

8. New sections inserted—The principal Act is amended by inserting, after section 61, the following sections:

"61A. **Access to Crown land where mineral not property of the Crown**—(1) A person must not prospect, explore, or mine in any Crown land in respect of any mineral that is not the property of the Crown otherwise than in accordance with an access arrangement entered into under **section 61B**.

Struck Out (Majority)

"(2) Nothing in sections 54 to 61 and 62 to 89 of this Act applies in respect of any such access arrangement.

New (Majority)

"(2) Nothing in sections 54 to 59, 61, 62 to 75, 78 to 82, and 89 applies in respect of any such access arrangement.

New (Majority)

"(3) For the purposes of **section 61B**, in sections 60, 76, and 83 to 88—

"(a) The term "permit" includes any form of authorisation by the owner of the mineral to prospect, explore, or mine any mineral that is not the property of Crown:

"(b) The term "permit holder" includes the holder of an authorisation under **paragraph (a)**."

"61B. **Access arrangements in respect of Crown land where mineral not property of the Crown**—(1) The appropriate Minister may, by agreement, enter into an access arrangement in respect of Crown land for the purpose of granting access to any mineral that is not the property of the Crown.

"(2) In considering whether to agree to an access arrangement in respect of Crown land for that purpose, the appropriate Minister must have regard to—

"(a) The objectives of any Act under which the land is administered; and

"(b) Any purpose for which the land is held by the Crown; and

"(c) Any policy statement or management plan of the Crown in relation to the land; and

"(d) The safeguards against any potential adverse effects of carrying out the proposed programme of work in relation to the mineral; and

"(e) The interests of the owner of the mineral, or of any person to whom the owner of the mineral has granted any rights in relation to the mineral, in obtaining access to that mineral; and

"(f) Such other matters as the appropriate Minister considers relevant.

"(3) Where the owner of the mineral or any person to whom the owner of the mineral has granted any rights in relation to the mineral, as the case may be, has secured the right, under the Resource Management Act 1991, to exclusive occupation of Crown land in the coastal marine area (as defined in section 2 (1) of that Act), it is not necessary for the owner of the mineral or that person to enter into an access arrangement in respect of that land."

Struck Out (Majority)

Section 2

SCHEDULE

DESCRIPTION OF LAND IN WHICH SERPENTINE INCLUDED

The areas marked "A", "B", and "C" respectively on Survey Office Plan 12405 lodged in the office of the Chief Surveyor of the Westland Land District.

The areas marked "A" and "B" respectively on Survey Office Plan 12406 lodged in the office of the Chief Surveyor of the Westland Land District which plan is also lodged in the office of the Chief Surveyor of the Otago Land District as Survey Office Plan 24429 and in the office of the Chief Surveyor of the Southland Land District as Survey Office Plan 12164.

New (Majority)

Section 2

SCHEDULE

DESCRIPTION OF LAND IN WHICH SERPENTINE INCLUDED

The areas marked "A" and "B" respectively on Survey Office Plan 12458 lodged in the office of the Chief Surveyor of the Westland Land District which plan is also lodged in the office of the Chief Surveyor of the Otago Land District as Survey Office Plan 24619 and in the office of the Chief Surveyor of the Southland Land District as Survey Office Plan 12218.

The area marked "C" on Survey Office Plan 12457 lodged in the office of the Chief Surveyor of the Westland Land District.

WELLINGTON, NEW ZEALAND: Published under the authority of the New Zealand Government—1997

30379 —97/NS

NGAI TAHU (POUNAMU VESTING) BILL

AS REPORTED FROM THE MĀORI AFFAIRS COMMITTEE

COMMENTARY

Recommendation

The Māori Affairs Committee has examined the Ngai Tahu (Pounamu Vesting) Bill and recommends that the bill be passed with the amendments shown.

Conduct of the examination

The Ngai Tahu (Pounamu Vesting) Bill was introduced and referred to the Māori Affairs Committee on 27 August 1996. We called for submissions and set a closing date of 19 May 1997. We extended the closing date for submissions until 30 June 1997 and advertised widely in newspapers as well as on radio and television. We considered 27 submissions in total. Submissions were received from individuals and a range of groups including hapu and iwi, local authorities, jade industry interests and environmental groups. As well as hearings in Wellington, the committee convened in Hokitika to accommodate the large number of submissions received from the West Coast. We received advice from the Ministry of Commerce.

This commentary sets out the details of our consideration of the bill and the major issues addressed by us.

Introduction

The Ngai Tahu (Pounamu Vesting) Bill (the bill) is a significant piece of legislation as it is the first part of the Ngai Tahu Settlement that has been negotiated between the Crown and Te Runanga o Ngai Tahu. In examining the bill we have been mindful of the substantial amount of work and negotiation that has preceded our consideration. We acknowledge the physical and spiritual importance of pounamu (greenstone) as taonga and its significance to the Ngai Tahu people.

Background

The bill will give effect to certain provisions in a Deed of "On Account" Settlement made between the Crown and Te Runanga o Ngai Tahu. It gives

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recognition to the Waitangi Tribunal finding that Ngai Tahu are the kaitiaki or guardians of pounamu. The bill does not affect privately owned pounamu. It applies only to pounamu which is owned by the Crown. The bill's provisions are summarised below.

Deed of "On Account" Settlement

The Deed of "On Account" Settlement (the Deed) was entered into on 14 June 1996 by the Crown and Te Runanga o Ngai Tahu. The Deed followed a renewed offer made by the Crown in 1994 to provide certain redress to Ngai Tahu. The bill will enable certain provisions of the Deed to become a reality, foremost of which is the vesting in Te Runanga o Ngai Tahu of Crown-owned pounamu that lies in the takiwa of Ngai Tahu whanui and also in the territorial sea adjacent to it.

Location and definition of pounamu

Pounamu is found in the beds of rivers and on the coast of the West Coast, in Central Otago and Fiordland. It is usually found as boulders where it has been washed down rivers from source rocks in the Southern Alps.

An agreed definition of pounamu was reached between the Crown and Te Runanga o Ngai Tahu. Pounamu is defined in the bill as being nephrite and bowenite. In addition, serpentine in three specific areas is being included in the definition of pounamu because in these places nephrite and bowenite are located together with serpentine and it is impossible to access one without affecting the other. These areas are identified in the schedule of the bill.

Crown Minerals Act 1991

At present anyone who wishes to extract or mine a Crown mineral must obtain a permit from the Minister of Energy in accordance with the Crown Minerals Act 1991. This bill amends the Crown Minerals Act 1991 and transfers ownership of Crown-owned pounamu to Ngai Tahu.

The Crown currently owns almost all pounamu and therefore, as a Crown mineral, pounamu is currently subject to the Crown Minerals Act 1991. This Act replaced the Mining Act 1971, the Coal Mines Act 1979, the Petroleum Act 1937 and the Iron Steel Industry Act 1959.

Licences and permits

As a result of the Waitangi Tribunal report on the Ngai Tahu claim the Crown placed a moratorium on granting licences or permits for the extraction of pounamu. There are seven existing mining licences. No further licences have been granted since the moratorium was in effect and there are seven outstanding applications for licences or permits. The bill prohibits the Crown from granting any further licences or permits for pounamu. Therefore those applications cannot be granted. Anyone wishing to extract or mine pounamu in the future will need to deal directly with Te Runanga O Ngai Tahu.

Issues

Overall there was a broad range of views expressed in submissions and in evidence. A number of other issues were raised and we comment in more detail on these below.

Access to private minerals in Crown land

There was some concern expressed in submissions from environmental groups about clause 8, which extends the provisions of the Crown Minerals Act 1991 governing access to Crown minerals in Crown land to also cover access to private

minerals in Crown land. Some submitters sought to have the clause dropped from the bill or rewritten to provide that access to private minerals in Crown land should be subject to the concession provisions of the Conservation Act 1987.

We support clause 8 as it provides a means whereby owners of private minerals in Crown land can seek access on equal footing to those seeking access to Crown minerals in Crown land.

We disagree with any suggestion that these provisions provide Ngai Tahu with any special or exclusive rights.

Clause 8 provides a process by which access in respect of private minerals in Crown land can be sought. Clause 8 does not apply just to Te Runanga o Ngai Tahu, it applies to all private mineral owners who wish to seek access to their minerals through Crown land.

The reason for making clause 8 a general provision, rather than just applying to Ngai Tahu and pounamu, is that there are other instances where private minerals may exist in Crown land. Clause 8 addresses the requirements of the Ngai Tahu Settlement that the access provisions of the Crown Minerals Act 1991 will apply to pounamu in Crown land. It also provides a consistent framework within which the relevant Minister can consider any application for an access arrangement in respect of prospecting, exploring or mining on Crown land.

The concession provisions of the Conservation Act 1987 are designed for the situation where a commercial benefit is obtained from using the conservation estate. This is different from the situation where access is being sought through conservation land and compensation for effects may be required. The access provisions of the Crown Minerals Act 1991 provide for this.

If the concession provisions of the Conservation Act 1987 were applied it would result in a significant change to the intention of the bill. The bill is designed to ensure that access to pounamu and any other private minerals in Crown land should be consistent with the general provisions relating to access to Crown minerals in Crown land as set out in the Crown Minerals Act 1991.

Existing licences and compensation

There were strong representations made by the jade mining industry and individual miners who, in summary, argued that existing applicants and licensees should be compensated for any economic losses sustained as a result of the bill, and that as the Crown and Ngai Tahu benefit from information supplied by the miners who discovered pounamu, there should be recompense for them. It was further submitted that pounamu outside of the Arahura Catchment is a national resource and that it should not be vested in Ngai Tahu, that vesting pounamu in Te Runanga o Ngai Tahu would mean that existing permit holders would not have any future mining rights, and that their existing right to receive priority would not be considered by Te Runanga o Ngai Tahu.

We acknowledge these concerns but note that existing licences are unaffected by the bill and will continue until they expire. Furthermore there is no right of renewal of a licence under the current law. We have determined that it is quite appropriate that those seeking to extract pounamu in the future on the expiry of their existing rights, should be required to apply to Te Runanga o Ngai Tahu. The Crown is transferring ownership of pounamu to Te Runanga o Ngai Tahu and it is proper that Te Runanga o Ngai Tahu have full control over the resource, as the Crown does as the current owner.

We note that there are currently seven existing mining licences granted under the Mining Act 1971 for pounamu and that these will continue until they expire. We further note that the Crown will manage these licences and that any royalties collected by the Crown from these licences will be paid to Te Runanga o Ngai Tahu.

We also note that the Crown has offered to reimburse applicants whose licences and permits will not be granted for some of the costs incurred in making their applications, in particular, costs resulting from statutory requirements.

Representation, mandate and vesting

We were diligent in our consideration of all of the issues which arose during our examination of the bill, and ensured representation issues received careful consideration, as we were aware of the distinct importance of these matters. Our decision to extend the closing date for submissions and to travel to Hokitika was made to ensure that these issues were fully aired.

There were strong representations made to us concerning the vesting of the pounamu, recognition of other iwi and hapu including those which collectively make up Ngai Tahu and Te Runanga o Ngai Tahu. The principal concerns which were expressed in relation to these issues can be summarised as follows:

- that pounamu in the Arahura Catchment should be vested in the hapu of Poutini Ngai Tahu and not Te Runanga o Ngai Tahu or the Mawhera Incorporation;
- that pounamu in the Arahura Catchment should be vested in the Mawhera Incorporation;
- that pounamu in the Arahura Catchment should remain vested in Te Runanga o Ngai Tahu and not revested in the Mawhera Incorporation as it does not represent all the descendants of the original owners of the Arahura Block;
- that the recommendations of the Waitangi Tribunal should be followed and the pounamu vested in Ngai Tahu, the Mawhera Incorporation or in some other nominated organisation;
- that the mana of Waitaha with regard to pounamu should be recognised in the bill; and
- that the bill be amended to specify that ownership of pounamu in the Arahura Catchment will be transferred to the Mawhera Incorporation.

With regard to the last point, in its submission to us Te Runanga o Ngai Tahu advised that it intends to enter into a Deed with the Mawhera Incorporation transferring ownership of pounamu in the Arahura Catchment to the Mawhera Incorporation.

In addressing these particular issues it was prudent that we considered background matters, especially those concerning negotiations between Ngai Tahu and the Crown. Ngai Tahu and the Crown have been engaged in negotiations concerning all Ngai Tahu's Treaty claims since 1991.

In considering the representation, mandate and vesting issues we were faced with three central arguments. The first was whether or not Te Runanga o Ngai Tahu had the authority or mandate of iwi to negotiate a Treaty settlement on behalf of Ngai Tahu whanui. The second matter was whether all pounamu in the takiwa of Ngai Tahu should be vested in Te Runanga o Ngai Tahu or whether pounamu in the Arahura Catchment should be vested in the Mawhera Incorporation, the hapu

or another appropriate structure. The third contention was that the bill should acknowledge Poutini Ngai Tahu or Waitaha as kaitiaki of pounamu and that this taonga should be vested in them instead of in Te Runanga o Ngai Tahu.

In considering whether or not Te Runanga o Ngai Tahu had the authority to negotiate on behalf of Ngai Tahu whanui, it was necessary that we had regard to Te Runanga o Ngai Tahu Act 1996 which established Te Runanga o Ngai Tahu as the statutory tribal representative body of Ngai Tahu. We note that this legislation provides that Te Runanga o Ngai Tahu shall be recognised for all purposes as the representative body of Ngai Tahu whanui. Furthermore, the charter which governs Te Runanga o Ngai Tahu sets out the objects for the establishment of Te Runanga o Ngai Tahu which include the ability to receive assets transferred by the Crown in settlement of claims and to administer these assets as kaitiaki of Ngai Tahu whanui. We acknowledge the mana of hapu and iwi.

Vesting of pounamu

It was the majority view that we recommend that pounamu be vested in Te Runanga o Ngai Tahu. We cannot ignore the vast amount of work and effort that has preceded us in reaching this point and which has brought about the establishment of Te Runanga o Ngai Tahu and in particular, the Deed of "On Account" Settlement. The deed negotiated between the Crown and Ngai Tahu as part of the settlement of the Ngai Tahu claim provides that pounamu owned by the Crown will be vested in Te Runanga o Ngai Tahu. The purpose of the bill is to give effect to the deed. Our previous conclusions regarding the statutory role of Te Runanga o Ngai Tahu support our recommendation.

The Mawhera Incorporation was established by an order of the Maori Land Court in 1976 and, like Te Runanga o Ngai Tahu, is recognised at law as being a legal entity. The Incorporation consists of shareholders who are descendants of the original owners of the Arahura Block which was purchased by the Crown in 1860. We note that the Incorporation has together with Te Runanga o Ngai Tahu pursued specific Treaty grievances including the revesting of pounamu in the Arahura Catchment back into the Incorporation.

While the bill provides for ownership of Crown-owned pounamu to be vested in Te Runanga o Ngai Tahu, we acknowledge that Te Runanga o Ngai Tahu intends to execute an agreement with the Incorporation which will vest pounamu in the Arahura Catchment in the Mawhera Incorporation. We support this step being taken by Te Runanga o Ngai Tahu and note that it is also consistent with a recommendation made by the Waitangi Tribunal. In recognition of this intention we recommend that a paragraph be included in the preamble of the bill recording this.

Other issues

To remove any doubt as to the definition of pounamu and to clarify it further, we have recommended that the definition be amended so as to include semi-nephrite. While semi-nephrite is a lesser grade of pounamu we acknowledge that it was known to have been extensively utilised by Māori and regarded as pounamu.

We were asked in one submission to consider amending the bill so that the boundary of the area in which pounamu was to be vested in Te Runanga o Ngai Tahu should be extended from the 12 mile Territorial Sea limit out to the 200 mile Exclusive Economic Zone limit. However, we declined to do so as the issue has implications under the United Nations Convention on the Law of the Sea 1982 and further we understand that this issue is being discussed within the context of wider Ngai Tahu Treaty negotiations.

We recommend that the schedule to the bill be substituted to incorporate new Survey Office Plan numbers following completion of more detailed definition of the boundaries of the areas where pounamu occurs in situ with serpentine.

Minority view

We wish to reflect the differing views of our members in this commentary as provided for in Standing Orders.

There was some concern expressed during the hearing of evidence on the ability of Te Runanga o Ngai Tahu to deal with the management of the pounamu on behalf of hapu. These concerns were also shared by some of our members particularly with regard to consultation over management of this taonga. However, the majority of the committee believe that this is a matter which is more appropriately addressed by Ngai Tahu.

There was a further view expressed by some submitters that it would be more appropriate for the Crown to vest ownership of pounamu in hapu rather than in Te Runanga o Ngai Tahu. This was because some saw Te Runanga o Ngai Tahu as being a corporate entity established by legislation and not in keeping with tikanga Māori. This view was also shared by some of our members who note that, while a hapu may not be a legal entity, a hapu would be a more appropriate body within which to vest the ownership or guardianship of pounamu.

The majority of the committee however, concluded that it was outside the scope of the bill to consider the issue of the legal status of hapu.

KEY TO SYMBOLS USED IN REPRINTED BILL

AS REPORTED FROM A SELECT COMMITTEE

Struck Out (Majority)

Subject to this Act,	Text struck out by a majority

New (Majority)

Subject to this Act,	Text inserted by a majority

〈Subject to this Act,〉	Words inserted by a majority