

## **Māori interests in PACER Plus**

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The following seeks to summarise the range of known Māori interests in PACER Plus and the potential impact of PACER Plus on those interests. This paper is not exhaustive. The commentary may be expanded or refined as a result of further feedback.

### **Safeguarding the ability of the Crown to honour its obligations to Māori, including under the Treaty of Waitangi**

- This is a very important and ongoing matter that is quite properly a function of New Zealand's domestic legal, constitutional and political system.
- The specific obligations contained in PACER Plus have been designed so as not to impair the ability of governments to make legitimate public policy and to take measures to implement such policy. The general regulatory flexibility afforded to the Government helps to ensure that it can continue to take measures that are in the interests of Māori.
- The PACER Plus Exceptions Chapter provides exceptions that allow Parties to justify actions that would otherwise violate the obligations in the agreement. Those exceptions cover a range of areas including national security, public order, safety, health, environment, non-renewable resources, national treasures of artistic, historic or archaeological value, and situations involving serious balance of payments difficulties. Some are of relevance to Māori interests.
- New Zealand has also sought the inclusion of a Treaty of Waitangi exception that, combined with other provisions in the Agreement, protect the capacity of the Crown to implement domestic policies that fulfil its obligations to Māori, including under the Treaty of Waitangi, without being obliged to offer equivalent treatment to our PACER Plus partners. The Waitangi Tribunal recently found that the exception provided reasonable protection for Māori interests in the context of the Trans-Pacific Partnership Agreement.
- The absence of an Investor-State dispute settlement mechanism and an intellectual property chapter should reduce the potential for concern on the part of Māori about the efficacy of the exception. But attention is still needed as to what other provisions within PACER Plus also serve to protect Māori interests.

### **Māori export interests**

- Major exports to the region include steel, sheep meat, dairy, petrol, wood, medicines and yachts. PACER Plus may be of less commercial significance compared to traditional FTAs given the development focus and long-time frames for tariff elimination. Are there particular commercial interests? Is there interest in partnerships that would result in knowledge transfer and sharing? Fisheries is a known area of interest but the avenues of productive engagement would need to be well focused given the fisheries apparatus that already exists in the region.

### **Seasonal Pacific Island labour**

- The RSE scheme has proven important to the horticulture and viticulture industry, including Māori owned businesses. PACER Plus would support continuing the New

Zealand government's approach to continuing and expanding the scheme's employer demand driven approach. Labour market testing will continue to be a requirement. Conversely, are there any current (or future) impacts on local labour competition or on access to services that disproportionately affect local Māori?

### Labour mobility

- There are likely to be Māori interests in sectors where labour mobility initiatives may be developed, particularly construction and fisheries. Are Māori employers interested to participate in the first Pacific Labour Mobility Annual Meeting? There are initiatives already underway at regional level involving iwi, employers and potential employees that are consistent with the aims of PACER Plus with respect to labour mobility.

### Development partnerships

- An area of nascent interest is developmental partnerships that build, at least in the first instance, on RSE/labour mobility interaction. This involves cultivating relationships between the iwi and villages/tribes that are sending or employing workers that go beyond the commodification of their labour. There is interest in developing relationships that acknowledge their common whakapapa, foster culturally authentic interactions and lead to outcomes that deliver greater social equity in Pacific communities. Iwi development models may be of interest in the Pacific even though the experiences are not always directly transferable.

### Wider Māori interests

- The areas identified in the table below (in alphabetical order) are known to be of interest to Māori in the context of international trade<sup>1</sup>. The likely treatment of these areas in PACER Plus is indicated in the right hand column and is based on accumulated feedback from previous FTA negotiations and specific feedback received in relation to PACER Plus. Further feedback should be sought on the range of interests identified and the approaches being adopted.

Area of interest	Preliminary assessment of Maori interests in PACER Plus
Education	<p>PACER Plus is not intended to limit the ability of Parties to regulate for legitimate public policy purposes; that includes education.</p> <p>The unique element that may be of incidental interest to Māori is the supporting role of the recognition of qualifications to facilitate better outcomes from labour mobility. This involves looking at the potential for recognition of the competencies and non-NZ qualifications of FIC workers in order to meet employer and visa requirements.</p>

<sup>1</sup> This list is broadly similar to the areas identified by the Waitangi Tribunal:

“It will be clear from this and earlier chapters that Māori interests in trade and economic development, natural resources, the protection and transmission of Māori culture and traditional knowledge, indigenous rights, and environmental protection, are all profoundly affected by international instruments. In the current globalised commercial (and to some extent political) world, some effects on these interests will occur not because of Crown action but because of Crown obligation.” (See WAI 262, page 680.)

Employment	<p>PACER Plus will be complemented by a labour mobility arrangement. A central plank of this will be the Pacific Labour Mobility Annual Meeting which will provide a forum for cooperation. The annual regional meeting will have a practical focus, connecting Pacific Island governments and workers with opportunities in Australian and New Zealand labour markets. In order to reduce the risk of Pacific island workers being competition with local job seekers, including Māori, the RSE is labour market tested. Some Māori businesses in two regions have indicated that access to RSE labour is vital for their operations and help address local labour shortages.</p>
Flora and fauna in New Zealand	<p>See the section on intellectual and cultural property.</p>
Foreign investment	<p>New Zealand has sought to negotiate an investment chapter that is consistent with Forum Islands Countries (FICs) objective of increasing inward Foreign Direct Investment. Strong core disciplines on national treatment and most-favoured-nation treatment were realised, together with rules on customary international law on expropriation, minimum standards of treatment and other accompanying obligations. These disciplines would apply to both pre- and post-establishment measures.</p> <p>FICs have pursued a preference for a positive list approach for the investment market access. Although New Zealand's usual approach is to seek a negative list (which is generally seen as leading to higher quality outcomes), in this instance, a positive list is appropriate for the varying capacities and national circumstances of the FICs, and a more suitable approach to ensure a higher level of commitment by the Parties.</p> <p>There will not be Investor State Dispute Settlement (ISDS). ISDS is not considered appropriate in the context of PACER Plus. This was a source of concern to claimants in the recent Waitangi Tribunal claims about the TPP.</p> <p>New Zealand does not intend to offer any investment market access commitments that will limit the government's ability to change the investment screening regime as part of PACER Plus. We sought to agree commitments in relation to New Zealand's investment approval regime that, at most, bind in current thresholds.</p> <p>The investment chapter seeks to reduce key restrictions which may apply to New Zealand investors in the Pacific Islands, where the FICs also see benefit in doing so. A key success outcome in this regard is to ensure that MFN provisions are included in the investment chapter to ensure that New Zealand investors are not disadvantaged in relation to investors from the FICs. New Zealand seeks greater clarity about FIC investment regimes for the benefit of potential New Zealand investors.</p>
Genetic resources	<p>See the section on intellectual and cultural property.</p>
Human rights	<p>PACER Plus is not intended to limit the ability of Parties to regulate for legitimate public policy purposes or to comply with their human rights obligations. PACER Plus will exclude matters relating to public order, safety, health, environment through a set of provisions that are consistent</p>

	with the general exceptions commonly used in the WTO GATT and GATS Agreements and in previous FTAs.
Immigration	<p>PACER Plus would have limited impact on immigration. New Zealand's immigration policy framework will not be changed and even the anticipated increase in labour mobility will be accommodated within the existing regulatory framework. Closer economic ties with PACER Plus members may result in new patterns of movement of people but a number of PACER Plus members already have preferential access to New Zealand (Australia, Cook Islands, Niue and Samoa) so, overall, significant or unfamiliar changes are not anticipated.</p> <p>However, there is a prospect of increased interest in immigration from nationals of countries participating in the proposed labour mobility arrangement. The RSE has been designed to encourage circular migration (ties to home countries remain strong and FIC economic development is encouraged through remittances and skills transfer) but labour mobility involving skilled and semi-skilled labour increases the prospect for such workers meeting NZ's criteria for immigration in the medium to long term. A participant at a TPP hui-a-iwi in April 2016 noted that could put pressure on health and education services and on-housing in the regions, which could adversely affect Māori in those areas.</p>
Indigenous rights	<p>The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) covers a broad range of collective and individual rights and freedoms, including the right to self-determination, cultural rights and identity, rights to education, religious customs, health and language. Consequently, UNDRIP, has indigenous rights and interests at its core and deals with the breadth of indigenous rights and interests in a way that a specialised trade agreement like PACER Plus cannot.</p> <p>So to the extent that Māori rights and interests intersect with PACER Plus, New Zealand has sought inclusion of an exception that recognises the importance of the Treaty of Waitangi and, when combined with other provisions, ensures that nothing in the Agreement prevents the Crown from meeting its obligations to Māori.</p>
Intellectual and cultural property	<p>Questions around access to, ownership over and control of elements of intangible cultural heritage are under engaged and ongoing consideration throughout the region<sup>2</sup>. FIC regulatory attention appears to be most focused on copyright.</p> <p>PACER Plus will not have a chapter on intellectual property. However Parties will record their intent to act consistently with "applicable international agreements on intellectual property rights binding on the Party". This includes: TRIPS and the Paris, Berne and Rome conventions.</p>

<sup>2</sup> See for example:

[http://www.google.co.nz/url?sa=t&rct=j&q=&esrc=s&source=web&cd=2&cad=rja&uact=8&ved=0ahUKEwi-pezpht3MAhWBkZQKHVQBAqsQFggkMAE&url=http%3A%2F%2Fwww.wipo.int%2Fexport%2Fsites%2Fwww%2Ftk%2Fen%2Fresources%2Fpdf%2Ftalakai\\_report.pdf&usq=AFQjCNEKT4XaCPDVPkiUVVpgTV-HUQEuLg](http://www.google.co.nz/url?sa=t&rct=j&q=&esrc=s&source=web&cd=2&cad=rja&uact=8&ved=0ahUKEwi-pezpht3MAhWBkZQKHVQBAqsQFggkMAE&url=http%3A%2F%2Fwww.wipo.int%2Fexport%2Fsites%2Fwww%2Ftk%2Fen%2Fresources%2Fpdf%2Ftalakai_report.pdf&usq=AFQjCNEKT4XaCPDVPkiUVVpgTV-HUQEuLg)

	At this stage no changes are anticipated to New Zealand policy settings or legislation as a result of PACER Plus. Nor would PACER Plus limit any domestic changes that might be made in the future, including in relation to the protection of indigenous flora and fauna or treaty settlements.
Koiwi tangata and Mokokokai	Koiwi tangata and mokomokai are not matters for trade. They have deep cultural and ethical significance. PACER Plus is not intended to impinge on the regulatory freedom of Parties to deal with matters involving their care, excavation, repatriation, scientific or cultural research or recognition of how indigenous peoples consider they should be dealt with. Relevant domestic legislation includes the Protected Objects Act (2006), Antiquities Act (1975), Resource Management Act (1991) and the Historic Places Act (1993).
National language	PACER Plus is not intended to impact on te reo in New Zealand or the use of languages in the countries of other PACER Plus parties except to the degree that issues around intellectual and cultural property might arise (see above).
Use of natural physical resources	<p>New Zealand intends to bind in its current overseas investment regime, which includes a requirement for government approval before a foreign investment in sensitive land can proceed. Foreign investors must seek approval to buy sensitive land such as rural land over five hectares, the control and management of protected areas, biodiversity, the foreshore and internal waters. PACER Plus is not intended to impinge on the ability of the Crown to address outstanding Treaty claims to water and geothermal energy or from giving Maori more favourable treatment with respect to the sale of Crown land.</p> <p>FICs have signalled their intention to maintain their existing policy approach to land, whereby, generally, the nationals of other countries, including from New Zealand, may lease land but not own it.</p>

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