BEFORE THE WAITANGI TRIBUNAL WAI 898

IN THE MATTER OF the Treaty of Waitangi Act 1975

and

IN THE MATTER OF the Rohe Pōtae District Inquiry

MEMORANDUM OF COUNSEL FOR THE CROWN

17 April 2018

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MAY IT PLEASE THE TRIBUNAL:

Introduction

1. Counsel for the Crown files this memorandum following a request from the Tribunal's registry that the Crown respond to the filing of an affidavit dated 29 March 2018 of Angeline Greensill and to whether or not it should be admitted to the Wai 898 record of inquiry.

Background

2. The Tribunal convened a judicial conference on 26 February 2018 to hear submissions on a request by the Crown and the Maniapoto Māori Trust Board for early reporting on certain topics.[1]

3. Following the judicial conference, the Presiding Officer, Her Honour Deputy Chief Judge Fox, directed claimant counsel to file full and comprehensive submissions in response to the Tribunal's plan for reporting and to state, with reasons, what topics or issues should or should not be given priority.

4. On 14 March 2018, counsel for Wai 125 filed a memorandum[2] with the following appendices:

   4.1 a copy of an application dated 3 April 2017 to the High Court by Ms Greensill, for and on behalf of Tainui hapū o Tainui waka represented by the Tainui Environmental Management Committee, for recognition orders under te Takutai Moana Act 2011;[3] and

   4.2 a copy of contact details for the Tainui Environmental Management Committee, apparently printed from Te Kāhui Māngai, a directory of iwi and Māori organisations compiled under the auspices of Te Puni Kōkiri.

5. The Tribunal's registry subsequently requested counsel for Wai 125 to file further submissions explaining the relevance of these two appendices. Claimant counsel then filed a memorandum dated 29 March 2018 that was

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1 Wai 898, #3.5.14.

2 Wai 898, #3.5.52.

3 Wai 898, 3.5.52(a).

accompanied by an unsworn affidavit, dated 29 March 2018, of Ms Greensill. It is this (unsworn) affidavit in respect of which the Crown has been asked to respond.

The Crown's response

6. Provided Ms Greensill's affidavit were sworn in the proper way, the Crown would not oppose it being placed on the Wai 898 record of inquiry. The Crown will abide the Tribunal's decision on that point.

7. However, addressing the content of the affidavit, the Crown does not consider it is appropriate for claimants to seek priority reporting, as the Wai 125 claimants do, for the purpose of litigation the claimants are pursuing in another forum – in this case, for the purpose of supporting an application to the High Court for recognition orders under te Takutai Moana Act 2011.

8. Under s 5(a) of the Treaty of Waitangi Act 1975, the Tribunal's function is to inquire into and make recommendations upon claims submitted to it under s 6 of that Act. There is no direct correlation between that function, or any of the Tribunal's other functions enumerated under s 5, and applications to the High Court for recognition under te Takutai Moana Act. By contrast, there is an obvious correlation between the Tribunal's s 5 inquiry function and the settlement of the claims it inquires into through direct negotiations between the Crown and mandated claimant representatives.

9. Furthermore, it is highly unlikely that the High Court would determine Ms Greensill's application before the Tribunal reported in accordance with its proposed plan. There are approximately 200 applications to the High Court under te Takutai Moana Act. For initial case management purposes, these have been grouped into 19 case management groups. Ms Greensill's application falls into Case Management Group P, which includes 16 applications. Seven other applicants have sought to appear in relation to Ms Greensill's application.

10. The High Court is conducting its first case management conferences for the takutai moana applications to it between 28 May and 25 June this year. It is reasonable to anticipate that further case management conferences

will follow and that a significant adjournment may be required while efforts to resolve issues relating to overlapping applications are undertaken and evidence to be adduced in support of applications that will be heard together is prepared.

11. In any case, in the unlikely event that the High Court held a substantive hearing into Ms Greensill's takutai moana application before the Tribunal completed its report in the Wai 898 inquiry, it would be open to her to put to the High Court the evidence presented to the Waitangi Tribunal in support of the Wai 125 claim, to the extent it is relevant to the tests that apply under te Takutai Moana Act.[4]

17 April 2018

G L Melvin
Counsel for the Crown

TO: The Registrar, Waitangi Tribunal
AND TO: Claimant counsel

[4] Those tests are found in s 51 of te Takutai Moana Act 2011 in respect of protected customary rights and in s 58 in respect of customary marine title.