IN THE WAITANGI TRIBUNAL

Wai 814
Wai 1489

CONCERNING	the Treaty of Waitangi Act 1975
AND	the Tūranganui a Kiwa Inquiry
AND	an application for remedies by Alan Parekura Torohina Haronga Junior on behalf of the Proprietors of Mangatū Blocks Incorporated

MEMORANDUM-DIRECTIONS OF THE PRESIDING OFFICER REGARDING RENEWED WAI 87 APPLICATION TO PARTICIPATE AND BE HEARD AS AN INTERESTED PARTY

7 NOVEMBER 2018

Counsel

P Radich QC/K Feint for Te Aitanga ā Māhaki Trust (Wai 274, 283), and for the Proprietors of Mangatū Blocks Incorporated (Wai 1489)

B Lyall for Ngāriki Kaipūtahi o Mangatū (Wai 499) and Ngāriki Kaipūtahi Tribal Authority (Wai 874)

T Bennion/E Whiley for Ngāriki Kaipūtahi Whānau Trust (Wai 507)

A James/A Tapsell for Te Whānau a Kai (Wai 892)

J P Kahukiwa for Te Whānau a Te Rangiwhakataetaea Wi Haronga Ngāti Matepu (Wai 995)

C Linkhorn/K Stone/G Gillies/C Tyson for the Crown

Introduction

1. This memorandum-directions addresses the renewed submission dated 14 September 2018 by the Wai 87 claimants on behalf of Whakatōhea hapū seeking to file an application for resumption and participate as an interested party in this reconvened inquiry.

2. It follows on from three earlier directions on this particular matter dated 7 December 2017 (Wai 814, #2.556; Wai 1489, #2.5.70), 12 March 2018 (Wai 814, #2.569; Wai 1489, #2.5.73) and 26 April 2018 (Wai 814, #2.574; Wai 1489, #2.5.76).

First Wai 87 application to participate in the Mangatū Remedies inquiry declined

3. The first Wai 87 claimants' application in December 2017 to participate as an interested party was declined in memorandum-directions dated 26 April 2018 (Wai 814, #2.574; Wai 1489, #2.5.76) on the basis that:

    a) As the Wai 87 claimants have no claim in relation to the Crown forest licensed lands the subject of this inquiry, they do not have the relevant interest necessary to become an interested party in this remedies inquiry.

    b) As Wai 87 lacks a well-founded claim relating to the Crown forest licensed land, the claimants could not participate as applicants for binding recommendations either.

    c) The reasons given for the previous lack of participation by Wai 87 were not sufficient to excuse the lateness of this request and it had come far too late.

4. The following discusses the Wai 87 claimants' renewed application to participate in this inquiry as an interested party and the reasons for our decision.

Renewed submission for Wai 87 to participate

5. On 31 August 2018, counsel Tony Sinclair advised this Tribunal that an amended statement of claim for Wai 87 had been filed on 26 July 2018 relating to Whakatōhea customary occupation and use in the Mangatū blocks, including those that are the subject of this reconvened inquiry (Wai 814, #2.621; Wai 1489, #3.2.1). Counsel filed the following documents:

    a) An amended statement of claim for Wai 87 entitled 'The Sixth Amended Statement of Claim (Wai 87) Dated: 26 July 2018' (Wai 87, #1.1(h));

    b) A joint brief of evidence (Wai 814, #P55; Wai 1489, #A56); and

    c) Accompanying exhibits (Wai 814, #P55(a); Wai 1489, #A56(a)).

6. On 14 September 2018, counsel confirmed 'that Whakatōhea Wai 87 claimants have subsequent to filing the renewed application uncovered further evidence of Whakatōhea hapū eminent presence in the Mangatū' (Wai 814, #2.627; Wai 1489, #3.2.6 at [4]).

Amended Wai 87 statement of claim dated 26 July 2018

7. The amended claim dated 26 July 2018 specifically states that 'Whakatōhea held customary rights and interests in the Mangatū Blocks including the Crown forest lands' (Wai 87, #1.1(h) at [4f]). The nature of these rights included mahinga kai such as the use of 'kereru reserves' and harvesting of 'para' or kōkopu on lands in the 'Mangatū rohe'. It alleges that the Native Land Court title investigation of Mangatū block in 1881 failed to acknowledge Whakatōhea hapū and the customary rights and interests they exercised in the Mangatū blocks, in particular Mangatū 1 Block. The claim also refers to whakawhānaunga relationships with 'people of Mangatū' through marriages and shared tupuna. The claim states that individuals from Whakatōhea were named in the original Mangatū Block 1 title award in 1881 and then in the 1893 owner schedule. It emphasises that Wi Pere acknowledged his whakapapa to Ngāitama, a hapū of Whakatōhea as a shareholder in Whakapaupākihi block and that Wi Pere was also named as an original owner in Mangatū Block 1.

8. The amended claim states its matters fall under section 8HB as it concerns Crown forest land in 'Mangatū Block 1' and asks that the Tribunal set aside a share of Mangatū Block 1 to retain sufficient redress for Whakatōhea 'should a well-founded claim be held for Wai 87 claimants' (Wai 87, #1.1(h) at [13(d)]).

Joint Brief of Evidence of Wai 87 dated 26 July 2018 and appendices

9. The joint brief of evidence dated 26 July 2018 ('joint brief') compiled by 12 Wai 87 claimants headed by Adriana Edwards was received by the Tribunal on 31 August 2018 (Wai 814, #P55; Wai 1489, #A56). In this joint brief, the Wai 87 claimants respond to several matters referred to in memorandum-directions dated 26 April 2018 (Wai 814, #2.574; Wai 1489, #2.5.76).

<u>Lack of mention of Mangatū block in earlier Wai 87 statements of claim</u>

10. The joint brief responds to the point in paragraph 33(a) of memorandum-directions dated 26 April 2018 which says 'Mangatū Crown Forest licensed lands are not specifically mentioned in any of the Wai 87 statements of claim. Neither is the Mangatū block or any parts thereof.'

11. The Wai 87 claimants say that the original Wai 87 statement of claim did not specifically mention Mangatū by name as it was the start of an inquiry process and they expected to have a future opportunity to do this. Further, they say the Wai 87 statement of claim 'impliedly mentions overlapping interests' which in their mind included Mangatū, and the subsequent Wai 87 amendments consistently refer to overlapping interests (see [20]). The claimants state (at [104]):

> To answer the question why is Mangatu customary interests missing in Wai 87 statement of claim 1989 and subsequent ASOCs, it was not. The overlapping interests are mentioned right through the above paragraphs. It was written and drafted by our leaders, with limited benefit of guidance from legal counsel, Crown Officials, Tribunal or otherwise. In our minds Mangatu was one of several overlapping areas when we referred to loss of customary interests.

12. The Wai 87 claimants clarified the following in their joint brief (at [15]):

> We reiterate our claim to Mangatu is to ensure Whakatōhea hapū overlapping customary interests and occupational rights are professionally researched identified and then acknowledged. Our claim is not to undermine the established interests of other tribal groups in the Mangatu rohe.

13. In reference to the Wai 87 amendment (Wai 87, 1.1(h)), which now includes *take* specifically mentioning Mangatū 1 Block, Ms Edwards states that from 2011 onwards, she had asked counsel 'on several occasions' to amend the Wai 87 claim as she was aware this was necessary to progress the claim (see [112]). Ms Edwards adds that the original claim and the subsequent amendment in 2010 were unable to include the boundaries and overlapping shared interests that are stated in the most recent amendment because 'at that stage they were fully aware of the need for more comprehensive research' (see [113]).

Lack of participation in Tūranganui a Kiwa (Wai 814) inquiry

14. The joint brief responds to the point in paragraph 33(c) of memorandum-directions dated 26 April 2018 which says, 'Wai 87 did not participate in the Tūranganui a Kiwa (Wai 814) inquiry (Tūranga inquiry) and their current claims as to overlapping customary interests in the Mangatū, Motu and Waikohu Matawai blocks, which lay fully within the Tūranga inquiry district were not tested before or considered by the Tribunal.'

15. The claimants advised they assumed their claim would be amended after research had been carried out and then heard within a Whakatōhea historical inquiry and not heard through another iwi's historical inquiry. They state that Whakatōhea should have participated in the Tūranga inquiry and responded to the evidence filed by Tūranga hapū that mention Whakatōhea. They said they assumed the Tūranga inquiry would hear from Tūranga tribes about Crown breaches committed against them, not breaches which included Whakatōhea. They add that the 'question of why Whakatōhea did not engage in an inquiry being held in Tūranga would be more appropriately answerable by officials of the Crown and the Waitangi Tribunal'.

16. They also argue that for Whakatōhea a question of mana arises as to encroach uninvited on another tribal district inquiry at a time when they are presenting their evidence against the Crown. They emphasise that Whakatōhea were never formally advised or invited by any officials either from the Crown or the Waitangi Tribunal or from members of the Tūranga tribes, or indeed legal counsel at the time, even though the Tūranga inquiry involved lands in which Whakatōhea had overlapping interests. They added their knowledge of the Tribunal's inquiry process was limited and that they should have been advised on a proper pathway forward at the time of the Tūranga inquiry (see [94] – [99]).

Extent of participation in the Mangatū Remedies inquiry

17. The joint brief responds to the points in paragraph 33(d) and (e) of memorandum-directions dated 26 April 2018 which say, 'Wai 87 made no further representations for the whole of our first remedies inquiry beyond what they submitted in August 2011' and 'Wai 87 did not make any representation to this resumed inquiry during the first eight months of its resumption, in which the bulk of the evidential and hearing planning programme was completed'.

18. The claimants say that in August 2011, when the Mangatū Remedies inquiry came to their attention, they instructed legal counsel at the time to submit on Whakatōhea hapū interests. They emphasised that they were not familiar with the Tribunal's process as Whakatōhea had not been involved with the Waitangi Tribunal previously, and so were heavily reliant on counsel's advice and guidance, along with the Tribunal (see [120]).

19. The claimants say they were unaware until the memorandum-directions of 26 April 2018 recording that nothing further had been received from the Wai 87 claimants for the remaining term of the first Mangatū Remedies inquiry, and not until December 2017 for the reconvened inquiry (see [125]).

20. They argue this notice matter was in the hands of legal counsel and the Presiding Officer and they were never informed of the legal procedure. They said they 'were always willing and able to proceed' in the Mangatū Remedies inquiry, adding that they had been meeting regularly and had just amended the Wai 87 claim in 2010 (see [126]). They state (at [127]) '[o]ver the past seven years we requested whether we should file an amended statement of claim to include Mangatu. This of course is on top of everything else going on in Whakatōhea'. The joint brief states (at [133]) '[t]o reiterate we received no notification that we were to file further evidence until 2018. Due to circumstances beyond our control we now feel severely prejudiced.'

The Whakatōhea Overlapping Interests Report

21. The joint brief responds to the point in paragraph 33(f) of memorandum-directions dated 26 April 2018 which says, 'Wai 87 counsel referred twice (in August 2011 and December 2017) to initial research by Dr Tanya Allport indicating the 'overlapping customary interests' asserted by Wai 87, but have not produced this'.

22. The claimants clarify that this report was drafted in 2011 by Adriana Edwards with support of pakeke and the Whakatōhea Iwi Working Party (see [70], [124]). Dr Allport was given the draft report for a final edit and claimant counsel was given the research report. They say the draft report was available at the time of the first Mangatū Remedies inquiry but they were not notified of the filing requirements for parties between August and December 2011 (see [125]). The joint brief advises that this report has been revised in 2018 (see [71]) and is filed in the appendices to the joint brief (Wai 814, #P55(a); Wai 1489, #A56(a), pp24-52 exhibit J).

Whakatōhea Preliminary Boundary Maps

23. On the matter of maps produced to date for the Wai 87 claims to Mangatū areas, the joint brief emphasises that the maps are general in scope and should be regarded as preliminary (see [11], [59]). They express concern that the use of their preliminary maps, which they say have not been the subject of an inquiry or professional research and which were used only in an urgency inquiry (Wai 2662, #A106 & #A107), have been used as evidence that the Wai 87 claim area as pleaded does not appear to overlap with the Mangatū Forest areas. They argue the maps submitted indicated a Whakatōhea presence in those areas of Mangatū which need further research 'for full and proper verification'. They state that 'preliminary maps filed for an urgent inquiry would not be proof of the credibility of the maps used as conclusive historical evidence in another inquiry in which Wai 87 has not yet been accepted as a claimant'. They consider the use of their preliminary maps in that way was unfair to Whakatōhea.

Watching brief status

24. In response to the decision in paragraph 45 of memorandum-directions dated 26 April 2018 granting the Wai 87 claimants leave to hold a watching brief, the Wai 87 claimants state that 'Whakatōhea were never observers in Mangatū' and therefore they cannot accept such a status (see [23]). They assert their oral and traditional history shows they have customary rights and interests in Mangatū Block 1 and Mangatū rohe.

Reference to Alan Haronga's briefs of evidence that mention of Whakatōhea

25. The joint brief states that Whakatōhea whakapapa is present among those of Mangatū. Under the heading, 'Whakatōhea – Tūranganui-a-Kiwa' (see [72]), it refers to the evidence of Alan Haronga dated 16 September 2009 (Wai 1489, #A1, at [1]) where Mr Haronga mentions Whakatōhea affiliations. The ASOC filed also refers to Mr Haronga's stated affiliation at [5(l)].

Wai 87 submission on renewed application

26. Tony Sinclair, counsel for the Wai 87 claimants, submits the amended claim, and accompanying joint brief and appendices provide 'prima facie' sufficient evidence to show a strong presence of Whakatōhea hapū in the Mangatū blocks and proof that the hapū did occupy significant portions of the Mangatū rohe (Wai 814, #2.621; Wai 1489, #3.2.1 at [7(a)]). Counsel further submits this evidence shows that Whakatōhea were displaced and their occupation and use of the Mangatū blocks was ignored and marginalised by the Native Land Court (at [7(c)]).

27. In light of the appendices that have been filed, counsel argue that there is an urgent need for a research report to be undertaken by Waitangi Tribunal accredited researchers (at [7(d)]). Counsel reiterate that the evidence filed to date indicates the time and resources available and urge that no conclusions should be reached before a full comprehensive assessment and report is compiled (at [11]).

28. Counsel emphasise the prejudice caused by there not being a Whakatōhea Historical inquiry leading to problems in getting legal aid resulting in the Wai 87 claim sitting at 'the cross roads of two tribal inquiries' with the claimants unable to participate in either (at [13]). Counsel outline how problems in getting legal aid has impeded the Wai 87 claimants' ability to file a fully particularised amended statement of claim, supported by fully researched reports including maps regarding their take. Counsel say that others participating in the 'Turanganui-Mangatu' inquiry have not had to overcome such difficulties (at [14]).

Applicant and interested parties' submissions regarding Wai 87's renewed request to participate as an interested party

29. On 5 September 2018, parties were asked to respond to the renewed Wai 87 request to participate in this inquiry as an interested party (Wai 814, #2.623 & Wai 1489, #2.6.1). The Crown and all four applicant parties submitted responses on 20 September 2018. No submission was received from counsel John Kahukiwa for Te Rangiwhakataetaea-Wi Haronga-Ngāti Matepu (Wai 995).

Crown counsel

30. Craig Linkhorn for the Crown submitted the Crown does not oppose participation by the Wai 87 claimant in this inquiry as an interested party under s 8HD(1)(d) of the Treaty of Waitangi Act 1975 (Wai 814, #2.631; Wai 1489, #3.2.10).

31. The Crown noted the Wai 87 statement of claim was most recently updated in July 2018 and the Tribunal has yet to inquire into the claim, first filed in 1989. The Crown considers the claimant has taken steps to address the earlier ruling that a claim was required but does not consider that the test in s 8HD(1)(d) is so restrictive to require a claim to the land (involving Crown actions concerning that land and the claimant group). It submits rather, the test is focused on an interest apart from any interest in common with the public.

32. Crown counsel submit that the first part of the qualification to apply for interested party status is to be Māori. They state that in checking the context of the provision, the statute could have easily restricted this to registered claimants but did not. Their view is that while the existence of a claim may be a factor leading to a grant of interested party status, it is not required. They observe that a neighbouring group can claim interests in the area – 'something that is inherently an interest that is apart from any interest in common with the public'.

33. The Crown concludes that because the Wai 87 claim has yet to be inquired into and seeks the same relief that is sought in this inquiry, the Tribunal may need to consider whether or not to preserve its capacity to recommend resumption of forest land in favour of a claimant whose claim relating to the land has not yet been determined as well-founded.

Ngāriki Kaipūtahi (Wai 874, Wai 499)

34. Bryce Lyall for Ngāriki Kaipūtahi (Wai 874, Wai 499) noted the Wai 87 claimants filed a renewed application to participate in this reconvened inquiry on 31 August 2018 during the first week of hearings for the reconvened inquiry (Wai 814, #2.633; Wai 1489, #3.2.12).

35. Counsel states Ngāriki Kaipūtahi's position is that this Tribunal is required to make a determination whether to grant binding recommendations in favour of the applicants 'currently, and properly, before it'.

36. Counsel notes Wai 87 has not been heard, has no well-founded finding and considers Wai 87 has no ability to bring an application under section 8HB(1)(a)(i) of the Treaty of Waitangi Act 1975. Counsel submits Wai 87 can seek to participate through section 8HD1(d) and may be entitled to be heard as an interested party in the inquiry, although Ngāriki Kaipūtahi does not concede this point. Counsel says if Wai 87 can meet the bar to participate as an interested party, they could then provide evidence on the interests that they assert. And the Tribunal may take that evidence into account to inform its final decision on the applications before it but that is the only role Wai 87 can have at this stage of hearings.

37. Counsel submits there would be significant prejudice to those parties who participated in the Tūranga inquiry and have established well-founded claims if Wai 87 is allowed any further role. Counsel advise that Ngāriki Kaipūtahi were not aware that Wai 87 would again seek inclusion and may now be required to prepare evidence in response to this application. Counsel observes the applicants currently before this Tribunal will be prejudiced by any further delay.

Ngā Ariki Kaipūtahi (Wai 507)

38. Tom Bennion and Emma Whiley for Ngā Ariki Kaipūtahi (Wai 507) advised the Ngā Ariki Kaipūtahi claimants oppose the renewed request by Wai 87 on the basis that the new application goes no further than the previous rejected application (Wai 814, #2.635; Wai 1489, #3.2.14).

39. Counsel observe that in seeking to address the Tribunal reasons for rejecting the earlier application for lack of basic evidence (Wai 814, #2.574), the renewed application attaches an unsigned and unsworn statement of evidence from 12 persons. Counsel notes the renewed application invites the Tribunal to check if at least a prima facie claim has been made out sufficient to involve the applicants in this inquiry. Counsel submits there is a prior question whether, 'coming very late to a reconvened inquiry, and having been rejected once by the Tribunal, and claiming now to have gathered the very best evidence from twelve persons within the iwi and other kaumātua that can be mustered', more than prima facie evidence is needed 'to conclude that Whakatōhea persons be included in the current inquiry as applicants in their own right' (at [4]).

40. Counsel observes the evidence provided – Native Land Court minute book statements about Whakatōhea being involved in historical tribal battles in Mangatū – 'is already well known, but a "strong presence" as Whakatōhea in Mangatū is not in any way demonstrated' (at [6]).

41. Counsel submits the evidence provided ‘in no way supports’ the notion of occupation of ‘significant portions’ of the ‘Mangatū rohe’, commenting that the use of the term 'rohe' ‘fudges’ whether the alleged occupation relates to particular land areas – which was a reason why the Tribunal dismissed Wai 87’s earlier application (see [7]).

42. Counsel say no analysis is provided of the Native Land Court rulings relating to the Mangatū blocks to show how the Court ‘ignored and subsequently marginalised’ the alleged Whakatōhea occupants of ‘significant portions’ of the ‘Mangatū rohe’. Counsel point out that in its 2004 Tūranganui a Kiwa report, the Tribunal made clear that it was only in rare situations that evidence would be sufficient to find that a land court judgment was in error to the extent that the Crown ought to have intervened. Counsel argue that even for a more general claim, that the Native land legislation and the Native Land Court processes were not Treaty compliant, the impact of the Mangatū judgment on the interests in 'significant portions' of those lands is not addressed in the Wai 87 renewed application (see [8]).

43. Counsel consider the Wai 87 claimants’ submission that ‘sufficient evidence in the compiled appendices is indicative that a research report from professional Waitangi Tribunal accredited researchers is urgently required’ is simply an assertion. Counsel submit the Wai 87 claimants have provided ‘no more than information already available in reports and records before the Tribunal which were known during its Tūranga inquiry’ (see [9]). Counsel observe that the appendices to the joint brief ‘almost all are either’ further statements or assertions of recent origin about the extent of Whakatōhea interests; or historic documents already well known and about which new assertions about the extent of Whakatōhea whakapapa interests are being made; or are unrelated to, or unhelpful to the renewed application being made (see [10]). Counsel say none of this supports the assertion that further research is 'urgently required'. Instead, it indicates that ‘the best efforts over a number of months, reaching out to a number of people in the iwi, cannot find any fresh evidence, even of a prima facie nature, to support the assertions being made of substantial interests in the Mangatū blocks that were improperly dismissed, causing prejudice to the Whakatōhea people’ (see [12]).

44. Counsel submit the evidence ‘as to delay in bringing the application before the Tribunal does not advance matters beyond the previous ruling’. They refer to ‘general statements’ made about the Wai 87 claimants being unaware of the Tūranga inquiry, or assumptions made about what it covered, and ‘arguments that other parties (including the Tribunal) should be blamed’, but say there is no evidence of ‘any particular efforts’ by the Wai 87 claimants to be involved in the Tūranga inquiry or any formal injunction or statement that prevented these claimants being involved (see [13]).

45. Counsel refer again to the Tūranga inquiry’s emphasis on a public and transparent process to identify claimant mandates and boundary issues in the procedural lead up to hearings (see [14]). In summary, counsel submit, ‘if one puts aside assertions, and references to information already well known and understood at the time of Tūranga inquiry, the application goes no further than the previous application and should be rejected’ (see [15]).

Te Aitanga a Māhaki Trust and Mangatū Incorporation (Wai 274, Wai 283, and Wai 1489)

46. Karen Feint for Te Aitanga a Māhaki Trust (Wai 274, Wai 283) and Mangatū Incorporation (Wai 1489) states that Māhaki opposes the renewed application, and says that the Tribunal has no basis for changing its earlier decision declining leave for Wai 87 to participate as an interested party (Wai 814, #2.634 Wai 1489, #3.2.12). Counsel says that decision was made on the primary ground that it is far too late for Wai 87 to join the inquiry, and that reasoning is ‘even more applicable five months later’, with the hearings underway (see [2]).

47. Counsel observe it appears that Wai 87 has attempted to remedy the lack of a claim by filing a further amendment that now includes, for the first time, a claim to the Mangatū Crown forest land. Counsel point out that claim has not been heard, it is not well founded, and the rationale provided for not claiming Mangatū land earlier are unconvincing (see [3]).

48. Counsel submits the primary reason why it is not appropriate to revisit the earlier decision to decline interested party status is that granting leave to Wai 87 now would seriously prejudice Māhaki and the other claimants, who have been involved in this process for over 26 years. Counsel reiterate their earlier submission that the Wai 87 claimants ought to be 'estopped' from now raising the claim to the Mangatū Crown forest land 'given the serious prejudice that that would cause to Māhaki and the other claimants' (see [5]).

49. Counsel state Māhaki submit that the Tribunal ought to confirm its earlier decision declining leave to Wai 87 to participate in this inquiry because their application 'is far too late' (see [6]).

Te Whānau a Kai (Wai 892)

50. Amberly James and Adam Tapsell for Te Whānau a Kai (Wai 892) advise that the statement in paragraph 134 of the Wai 87 joint brief that 'Te Whānau a Kai are not opposed to at least hearing Whakatōhea Hapū claim of customary interests amounting to ahi kā in the Mangatū rohe' is 'potentially misleading' (Wai 814, #2.632; Wai 1489, #3.2.11 at [2.2]). Counsel state while Te Whānau a Kai did not oppose the participation of Whakatōhea in the current proceedings, they do not support their participation.

51. Counsel remind the Tribunal that Te Whānau a Kai's submission dated 1 February 2018 (Wai 814, #2.5.66) expressed that Te Whānau a Kai would abide the decision of the Tribunal regarding the Wai 87 application, and the ability of Whakatōhea to participate in this remedies inquiry. Counsel point out this position 'should not be construed as supporting or being opposed to the Whakatōhea Hapū claims to Mangatū', and the hearing of those claims. They advise Te Whānau a Kai 'was, and still is, prioritising the development and presentation of its own claim before this Tribunal over submissions (either in support or opposition) on the customary interests of other claimants' at [2.3]).

52. Counsel submit Te Whānau a Kai's position on the Wai 87 claimants' renewed application is similar and it is for the Tribunal to determine whether those claimants meet any of the necessary statutory tests to participate in these proceedings, which are already well underway (see [3.1]). They state, however, that Te Whānau a Kai do oppose any application that may result in further delays to these proceedings. They note that a 'significant amount of time' has passed since the initial application from Wai 87 and argue Whakatōhea have had 'ample opportunity' to file a revised application but have filed this renewed application on the last day of the first hearing week of the reconvened inquiry (see [3.2]).

53. Counsel state that all parties in this inquiry, in particular Te Whānau a Kai, have been 'forced to endure a large period of uncertainty and to exercise extreme patience' in waiting for settlement of their claims, many of which were reported on in 2004 (see [3.3]). They observe that current proceedings have progressed where it is possible that the Tribunal may complete hearing those claims by the end of 2018. Te Whānau a Kai is opposed to any proposal that would result in a further delay to these proceedings.

Discussion

54. The Tribunal Panel has carefully considered the submissions of the Wai 87 claimants and those in response from applicant counsel and counsel for the Crown. It is 14 years

since the Tribunal completed its report into the Tūranganui inquiry district. It is over seven years since the Supreme Court in *Haronga v Waitangi Tribunal* [2012] 2 NZLR 53-108 directed the Tribunal to urgently hear Mr Haronga's claim (Wai 1489) on behalf of the Mangatū Incorporation for return of part of the Mangatū forest. The Tribunal is yet to complete this urgent inquiry. The addition of another group of claimants as full participants at this late stage of the remedies inquiry will undoubtedly cause further delay and considerable prejudice to the claimants before us who have well-founded claims. It is in that context that the Tribunal must consider the application of the Wai 87 claimants to participate in this inquiry.

55. At this late stage, we consider that it was incumbent on the Wai 87 claimants to have provided compelling reasons for being included as interested parties in terms of:

    i. Their reasons for the belated application; and

    ii. The claimed interests in the Mangatū lands and the claimed breaches in respect of those interests.

56. The Wai 87 claimants' renewed application responds to several specific matters referred to in memorandum-directions dated 26 April 2018 (Wai 2.574; Wai 1489, #2.5.76):

    a) Lack of mention of Mangatū in earlier Wai 87 statements of claim

    b) Lack of participation in Tūranganui a Kiwa (Wai 814) inquiry

    c) Extent of participation in the Mangatū Remedies inquiry

    d) The Whakatōhea Overlapping Interests Report

    e) Whakatōhea preliminary boundary maps

    f) Alan Haronga's Whakatōhea affiliations

57. Matters a) to c) relate to reasons for the lateness of the application, while d) to f) relate to the nature of the Wai 87 interests. Eachmatter is addressed in turn below.

a) Lack of mention of Mangatū in earlier Wai 87 statements of claim

58. The Wai 87 claimants say that they expected to have an opportunity to include Mangatū in subsequent Wai 87 amendments to the original statement of claim and that it was always included, at least in their thoughts, as one of the overlapping interests. We note that the statement of claim filed with this application is the 7th iteration (Wai 87, #1.1(h)). Given the length of time available to the claimants since the original filing of the Wai 87 statement of claim and the interim amendments made to the claim, we consider that the claimants have had a number of opportunities before now to include specific reference to Mangatū. If a claim to Mangatū were an important concern of the claimants then specific mention would surely have been made in the prior claim documents. Rather we accept the statement made in the claimants' December 2017 application to participate in this inquiry that their central concerns are around Ōpōtiki. In this context, the inclusion of Mangatū in the statement of claim in response to the presiding officer's remark on its absence has the look of a late afterthought regarding a minor and perhaps tenuous part of the Whakatōhea claims. We find the explanation given by the Wai 87 claimants in this regard unconvincing.

b) Lack of participation in Tūranganui a Kiwa (Wai 814) inquiry

59. In the joint brief, the claimants say it was a question of mana that the Whakatōhea claimants not encroach on another tribal district inquiry. They expected to be able to advance their claims, including overlapping interest claims, in a Whakatōhea district inquiry. We acknowledge that the Tribunal process may be difficult for unrepresented or poorly represented claimants to navigate easily. We also acknowledge that there may be some distraction for the Whakatōhea claimants in light of the current disputes in Whakatōhea surrounding whether there will be a direct negotiated settlement with the Crown or not.

60. That said, the Tribunal published *The Claims Process of the Waitangi Tribunal: Information for Claimants* in 2000 (available on the Tribunal's website), which sets out information about the Tribunal process, including that the Tribunal groups claims in accordance with their relationship to a geographical area. Moreover, the Tūranganui a Kiwa inquiry had a very long and well-publicised interlocutory process (one of the longest in Tribunal history). Counsel also appeared (via a lawyer acting as agent) for the Wai 87 claim at the start-up judicial conference for this remedies inquiry in 2011. In such circumstances, it is difficult to accept that the Wai 87 claimants were unaware of the need to take an active part at an early stage in this inquiry.

61. Once a party has appeared at a judicial conference the Tribunal expects that party, through counsel, will make such submissions as considered necessary for the claim to be progressed and will comply with any directions issued. That expectation is standard and neither unusual nor surprising. Therefore, there was some onus on and opportunity for the Wai 87 claimants early on in this inquiry to raise, and follow up, with this Tribunal, questions of how the claim to Mangatū could be addressed. But, with all due respect to the claimants and their counsel, it has been left virtually to the last minute.

62. While the Tribunal does its best to keep abreast of changes to inquiry participants and the status of their claims, and to give appropriate directions when requested, there is not much it can do in a vacuum of communication from the claimants. Neither can the Tribunal give advice to claimants which is properly the province of their legal representatives.

c) Extent of participation in Mangatū Remedies inquiry

63. The joint brief argues that the Wai 87 claimants had not received notice of the Mangatū Remedies inquiry between August 2011 and December 2017. We completely reject this allegation. Both Ms Edwards and previous counsel for the claim are on the Tribunal's notification list for Wai 814 and this inquiry. All directions issued by the presiding officer are sent as a matter of routine to all persons on the notification list. That includes the direction dated 8 March 2017 (Wai 814, #2.505, Wai 1489, #2.5.59) noting that the Tribunal would reconvene to reconsider the applications before us for binding recommendations for the Mangatū claims, and inviting parties to make submissions on what the next steps for the reconvened inquiry should be. The last sentence in that direction is that the Registrar 'is to send this direction to all those on the notification list for Wai 814, the Tūranganui a Kiwa Inquiry.'

64. Thus the Wai 87 claimants should have been aware that this second round of the Mangatū Remedies inquiry was under way, and could have taken up the invitation to make submissions on next steps at an early stage of this second round.

65. The joint brief also states that the Wai 87 claimants requested whether they should file a statement of claim to include Mangatū. The Tribunal has not received any such request, and indeed it is over to the claimants to decide what their claims are and to state them in their statement of claim. As already indicated in the direction of 26 April

2018, nothing had been received from the Wai 87 claimants by the Tribunal since August 2011 until the application to be included as an interested party was filed in December 2017. We reiterate that both previous claimant counsel and Ms Edwards are on the notification list for this inquiry (as well as current counsel now, of course). One may speculate as to what may have happened to mail from the Tribunal but the simple fact is that we must deal with the situation that we find ourselves in – that is, a very late application which, if granted, will cause considerable prejudice to other claimants

d) The Whakatōhea Overlapping Interests Report

66. The Tribunal thought that the report of Dr Allport on overlapping interests would be in the nature of a technical report by an independent expert canvassing the published histories and Native Land Court minute books. The report could then be used to support the customary evidence and oral history that would ordinarily be provided by the claimants themselves. We now understand the report to be customary evidence, which can be grouped with the briefs of evidence filed in support of this application. No other independent accounts, historical or contemporary, have been provided to support the Wai 87 claim in the Mangatū blocks.

67. We take into account that the Wai 87 claimants would not have had funding to commission an independent report by a technical expert. That said, there is no doubt that an independent report would have provided the Tribunal with a certain level of comfort both in terms of the time period that might be required to provide appropriate evidence in support of the Wai 87 claim to interests in the Mangatū, and in terms of the nature and extent of those interests.

e) Whakatōhea preliminary boundary maps

68. The claimants criticised the Tribunal for relying (in memoranda-directions of 12 March and 26 April 2018) on 'preliminary' maps, based on what they submitted for the Whakatōhea Deed of Mandate urgent inquiry, to conclude that their claim area as pleaded does not appear to overlap with the Mangatū Crown Forest area. The area depicted in these maps showed the geographical location of the Whakatōhea 'area of claim' as pleaded in the Wai 87 #1.1(c) statement of claim dated 15 March 2010 relative to where the Mangatū Crown Forest licensed lands lie. As outlined in memorandum-directions of 26 April 2018, none of the areas depicted in the two subsequent maps provided in response by the Wai 87 claimants (on 29 March 2018 and 10 April 2018), contained Crown forest licenced land. It was also noted that neither map provided specified its authorship or the evidential sources for the overlapping customary interests depicted (see Wai 814, #2.574; Wai 1489, #2.5.76 [27 & 37]).

69. The description in the new evidence of the interests of Whakatōhea in Mangatū for this renewed application is that they had kererū reserves, hunting grounds in the area of Whatatutu and Te Karaka, and had areas of occupation in the 'Mangatu rohe'. Unfortunately, the 'Mangatu rohe' is a vague descriptor and the two accompanying maps (see #P55(a), appendices 'F' and G', pp18 - 19) indicating the locale of these kererū reserves are also vague as to geographical area. No better maps seem to be available.

f) Alan Haronga's Whakatōhea Affiliations

70. Ms Edwards also states in the joint brief of evidence dated 26 July 2018 that Whakatōhea whakapapa is present among those of Mangatū and references the evidence of Mr Haronga dated 16 September 2009. In this brief Mr Haronga names his iwi affiliations including Whakatōhea (see [1]). The brief does not refer to 'Whakatōhea'

thereafter. There are two other briefs by Mr Haronga on the Wai 814 record of inquiry which specifically reference Whakatōhea. These are:

i. #I17 (5 April 2012) – In this brief, also at paragraph 1, Mr Haronga names his iwi affiliations including Whakatōhea. At part B of this evidence, where Mr Haronga sets out the whakapapa and history of those that hold mana whenua over Mangatū lands, there is no reference to Whakatōhea.

ii. #P17 (28 May 2018) – In this brief, Mr Haronga again names his iwi affiliations including Whakatōhea in the first paragraph. At paragraph 39, Mr Haronga advises he is a direct descendant of Rangiwhakataetae who was shot and killed by Whakatōhea at the battle of Otuhawaiki pa. There is no other reference to Whakatōhea in this brief.

71. In all three briefs, it appears Mr Haronga refers to his Te Aitanga a Māhaki affiliations when discussing mana whenua in the Mangatū blocks rather than Whakatōhea.

Historical Accounts and Minute Book References

72. Turning to the sources supporting the Wai 87 claimants' renewed application claiming interests in the Mangatū lands and the claimed breaches in respect of those interests.

73. The specific claim in relation to the Mangatū is that the Native Land Court failed to acknowledge the Whakatōhea hapū customary rights and interests they exercised in the Mangatū blocks, but the claimants also state that some individuals named in the Mangatū Block 1 title award belonged to Whakatōhea whānau.

74. Wai 87 claimants also make reference to others participating in this inquiry, as having Whakatōhea connections, for instance Rutene Irwin. However, nowhere is it deposed that those participants are relying on their Whakatōhea whakapapa in making their claims. It appears that they have relied on other whakapapa lines in respect of their claims in the Mangatū blocks.

75. We note for instance that in the Native Land Court case of 1917 concerning the determination of relative interests in Mangatū, the whakapapa of small groups of related Mangatū whānau (organised by an owners' committee) were put before the Court. Whakapapa given for those named by the Wai 87 claimants as having Whakatōhea names were either from Wahia or from Ngā Ariki.

76. The Crown reports referred to in the amended statement of claim and the joint brief were prepared for the Whakatōhea settlement. They do not mention Whakatōhea interests in Mangatū.

77. Other published historical accounts point to a period of turmoil in the early decades of the 19th century.[1] Whakatōhea faced a succession of raids by Ngāti Maru of Hauraki, and were also caught up in Ngāpuhi expeditions down the east coast and into the Bay of Plenty. Whakatōhea had evidently moved into an area in the upper Waipaoa River and hostilities followed between them and Te Aitanga a Māhaki, other Tūranga iwi and Ngāti Kahungunu of Mahia and Wairoa in the 1820s and the first part of the 1830s. It appears that Whakatōhea returned to Ōpōtiki after surrendering at the siege of Kekeparaoa.

[1] R Walker, Ōpōtiki-Mai-Tawhiti: Capital of Whakatōhea, Auckland, 2007, A C Lyall, Whakatohea of Opotiki, Wellington, 1979, R Halbert, *HOROUTA The History of the Horouta Canoe, Gisborne and East Coast,* Auckland, 2012

78. The claimants also cite the shared relationship they have with Torere. They note hunting grounds of Whakatōhea which reached into the back of Motu, in Whitikau and 'further on'.

79. Whakatōhea made no claim in the Native Land Court when the Mangatū land went before the court in 1881. Although a claim was made by Hoera Katipo of Ngāi Tai, Henare Kingi of Ngāi Tai stated at the end of the Mangatū case that Hoera was never authorised by his people to appear and that Hoera was setting up a claim of his own. Henare Kingi went on to say that, although there was a conquest, those people making it went back to Torere, and their descendants did not return until the time of their parents, when they came there under the mana of Ngāriki and Wahia.

80. The joint brief also refers to the recollections of kaumatua Jack Takao, who grew up at Whatatutu. He is quoted as saying that the wharepuni lodged in the river silt by the Waipaua [Waipaoa] River belongs to Whakatōhea and the area where the marae was built used to be all Te Whakatōhea. From the description of the wharepuni it appears that Mr Takao is referring to the whare called "Te Ngawari". The Tribunal has already received evidence from Owen Lloyd of Ngā Ariki Kaipūtahi (Wai 814, #A50 and #C23) that the Te Ngawari wharenui was originally built by Pera Te Uatuku, and is an important taonga for Ngā Ariki Kaipūtahi. It was sited on the southern side of the Urukokomuka River on the Manukawhitikitiki block. Pera Te Uatuku later relocated one kilometre to the east across the river at Pakowhai where he established a new settlement and re-erected Te Ngawari. Pera Te Uatuku lived in the new location until he died in 1905. Mr Lloyd's evidence is that this was a Ngā Ariki Kaipūtahi settlement. The marae, though not the wharepuni, was later moved again because of flooding and silting. The settlement also moved to where it is currently situated at Whatatutu. The current day wharenui at Mangatū Marae is the fourth of that name, and is where Ngā Ariki Kaipūtahi presented their take to the Tūranga panel in February 2002. John Ruru also stated in his evidence (Wai 814, #A55) that Ngāriki and Ngāti Wahia are the kaitiaki hapū for the Mangatū Marae.

81. While we note that there appear to be whakapapa connections to Mangatū, as appears from six Whakatōhea whānau names cited by the claimants in the Mangatū 1 list of owners, there is no evidence of a community that was primarily or solely Whakatōhea living at or occupying Mangatū.

82. By contrast Whakatōhea were claimants in the Whitikau and Whakapaupākihi blocks also heard in 1881. The court in respect of these blocks commented on these very intricate cases. The assessors in the case wrote a unanimous report. Though the Whitikau and Whakapaupākihi cases were heard separately, the court gave a single judgment awarding Whitikau and part of Whakapaupākihi to Ngāi Tai, and the remainder of the block to Whakatōhea. The court commented that in its view neither of the blocks had been occupied for more than 60 years.

83. The claimants' reference (Wai 87, #1.1(h), at [5(j)]) to Wi Pere claiming the Whakapaupākihi block on behalf of Whakatōhea appears to be a misreading of the evidence. The later application for the Whakapaupākihi 1 block in 1884 was introduced in the court by Wi Pere under the Special Powers and Contracts Act 1883 following the sale of the land to the Crown, and the decision of the Crown to seek cancellation of the original certificate of title. It was arranged that 1200 acres of the land was to be returned to the owners. Wi Pere introduced the case by saying "I have not much to say in reference to this Block, because we came to an arrangement [with a Crown official] yesterday and I also informed applicants and others of the result to which they were all agreeable." The next speaker is Heneriata (or Keneriata – name unclear in the minutes) Tahua who stated a claim to the land on behalf of all of Whakatōhea. This is not Wi

Pere's evidence. To reinforce this, Wi Pere's name does not appear in the list of owners for any of the Whakapaupākihi blocks.

84. Whakatōhea hapū were also awarded blocks in the Oamaru block heard in 1888. This begs the question as to why, if Whakatōhea were applying to the court for land interests from 1881 onwards, they did not make a claim for the Mangatū.

85. The conclusion we draw from the evidence presented by the Wai 87 claimants, the published accounts of Whakatōhea incursion into the Tūranganui a Kiwa district, and the Native Land Court minute books is that the Wai 87claimants go too far in saying they have a prima facie case in relation to Mangatū. We also consider that their claim is far from being ready to proceed, and that there are some complicated, difficult issues to contend with in terms of establishing their interests in Mangatū, let alone that claims against the Crown in relation to their Mangatū interests (if any) are well-founded.

Decision

86. One cannot but have some sympathy for the claimants because in the 1990s they were caught up in the turmoil surrounding the unsuccessful attempt to reach a direct settlement between Whakatōhea and the Crown. That would have been a demoralising situation and may have led to the failure to engage properly with Tribunal processes, especially in relation to the Tūranganui a Kiwa inquiry in the early 2000s. They are now faced with the possibility that, if the decision is made that Whakatōhea is to re-enter direct negotiations, then their claims may never be heard by the Tribunal. That said we are not satisfied with the reasons given for the lateness of the applications for participation in this inquiry in 2017 and 2018.

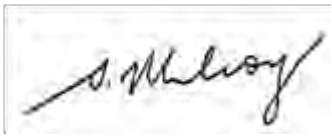
87. The basis for this renewed application rests with the evidence now presented relating to the nature of the claimants' interests in the Mangatū area and the amended statement of claim setting out the claimants' allegations of breach by the Crown in Mangatū 1 block. If we were to allow Wai 87 claimants to participate fully in this inquiry and to bring further evidence in support of their claim in relation to Mangatū, then it would inevitably extend our inquiry by months if not longer. The other parties who have well-founded claims and who have asked for 100% of the compensation available, would have to be given a chance to bring their own evidence to refute the Wai 87 claim. We would in effect be holding an inquiry in the nature of that which has already been held – the Tūranganui a Kiwa inquiry which reported in 2004. If the evidence regarding the Wai 87 claim were compelling then, in the interests of justice, we would have to allow them to participate fully in the inquiry. We do not find that threshold has been reached, nor that the evidence provided in this new application is sufficient to overcome the prejudice that such a very late application would have on the other claimants in front of us.

88. Accordingly, we reject this renewed application by the Wai 87 claimants for urgent research (which in truth amounts to an urgent inquiry) into their claim and full participation in this remedies inquiry as applicants for binding recommendations. However, their amended statement of claim and accompanying memoranda and evidence are entered on the Record of Inquiry, and they will continue to be able to hold a watching brief. They will have the ability to seek leave to make submissions and put questions in writing to witnesses, and will be expected to provide compelling reasons for any such requests. The Wai 87 claimants must ensure that any such requests are made within a feasible timeframe in line with the existing hearing programme and should specify the nature and extent of any submissions or questions.

89. In keeping with the direction for the Wai 995 claimants' participation who were granted interested party status earlier this year, the lateness of this renewed application by Wai 87 claimants will carry with it consequences in that they are required to adhere to the existing timeframes for the inquiry. These are even tighter at this stage of proceedings and no requests for extensions from the Wai 87 claimants are likely to be granted. They must simply make the best use of their resources to comply with the Tribunal's timetable and requirements.

The Registrar is to send this direction to all those on the notification list for Wai 814, the Tūranganui a Kiwa Inquiry.

DATED at Hamilton this 7th day of November 2018



Judge S Te A Milroy
Presiding Officer on behalf of the Tribunal panel
WAITANGI TRIBUNAL