In the Waitangi Tribunal

Wai 2800
Wai 158
Wai 2163

In the Matter	of the Treaty of Waitangi Act 1975
And	
In the Matter	of the Inquiry into the Remaining Historical Claims: Southern North Island and South Island Claims (Wai 2800)
And	
In the Matter	of a claim by Robert Kenneth McAnergney, as a member of the Murihiku negotiating team, and on behalf of the owners of lands in Southland arising from the provisions of the South Island Landless Natives Act 1906 (Wai 158)
And	
In the Matter	of a claim by Mahara Te Aika and Ben Te Aika, on behalf of the Tautuku Waikawa Lands Trust regarding the South Island Landless Natives Act lands (Wai 2163)

Joint Memorandum of Counsel on behalf of Wai 158 and Wai 2163 Responding to the Tribunal Direction of 12 June 2019 and the Crown Memorandum of 21 December 2018

Dated 10 July 2019

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May it please the Tribunal

Introduction

1. This Memorandum of Counsel is filed on behalf of the following Claimants:

    a. Wai 158, a claim by Robert Kenneth McAnergney, as a member of the Murihiku negotiating team, and on behalf of the owners of lands in Southland arising from the provisions of the South Island Landless Natives Act 1906; and,

    b. Wai 2163, a claim by Mahara Te Aika and Ben Te Aika, on behalf of the Tautuku Waikawa Lands Trust regarding the South Island Landless Natives Act lands.

Background

2. In accordance with the Tribunal's direction dated 12 June 2019[1] at paragraph 11, this memorandum of counsel responds to the Crown's proposal that some aspects of Wai 158 and Wai 2163 be deferred to the future, yet to be announced, economic development kaupapa inquiry.

3. On 21 December 2018[2] the Crown filed a memorandum of counsel categorising the eligibility of the various historical claims the Tribunal had identified in its preliminary Wai 2800 claims list[3].

4. The Crown identified six categories of claims on the Tribunal's preliminary Wai 2800 list, being:

    a. claims that are fully settled;

    b. claims that appear fully settled but where further clarification may be required from the claimants;

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[1] Wai 2800, #2.5.4, Memorandum-Directions of the Presiding Officer, dated 12 June 2019.

[2] Wai 2800, #3.1.3, Memorandum of Counsel for the Crown Responding to 1 October 2018 Directions of the Presiding Officer, 21 December 2018.

[3] Wai 2800, #2.5.2, Memorandum-Directions of the Presiding Officer, dated 1 October 2018.

c. claims that will be covered by settlements in progress and should therefore be excluded from Wai 2800;

d. claims the Crown considers are unsettled but would be best considered in the context of live district inquiries;

e. post-allocation SILNA land Wai claims; and,

f. claims that are raised through whakapapa to a group who did not exercise customary rights at 1840.

5. Wai 158 and Wai 2163 fall into (e), the Crown's category of post-allocation SILNA land Wai claims. The Crown has proposed that some aspects of the two claims raise forestry policy, which may be best considered in the context of the future economic development kaupapa inquiry.

6. The Ngāi Tahu Claims Settlement Act 1998 expressly excludes Wai 158 from settlement at section 10(1)(e), but states *"such exclusion does not apply to any part of Wai 158 that might relate to the original allocation of land under the South Island Landless Natives Act 1906…"*[4]

7. Counsel agree with the Crown that both Wai 158 and 2163 include allegations about Crown actions that occurred after the allocation of SILNA land and prior to the 1992 historical-contemporary cut-off and therefore, to the extent that they are not settled through section 10(1)(e) of the Ngāi Tahu Claims Settlement Act 1998, are eligible to participate within the scope of the Wai 2800 Inquiry. Counsel also agree that the subject of indigenous forestry policy is still a live issue within the Tribunal's jurisdiction.

8. Counsel do not however agree that those SILNA land claims (such as Wai 158 and Wai 2163) which relate to contemporary forestry policy

[4] Ngāi Tahu Claims Settlement Act 1998, s 10(1)(e).

would be most appropriately explored in the future economic development kaupapa inquiry.

9. For the reasons set out below, it is counsels' submission that the Wai 158 and Wai 2163 claims should fully participate and be heard in the Wai 2800 Inquiry rather than partly adjourned to the future economic development kaupapa inquiry.

Submissions for the full participation of Wai 158 and Wai 2163

Timeframe for Economic Development Kaupapa is Unknown

10. The Wai 158 claim was originally registered in 1990 and the Wai 2163 claim in 2008. The first opportunity for these two claims to be inquired into by the Waitangi Tribunal has now arisen in 2019, some 29 years after Wai 158 was filed. Mr McAnergney is now 79 and Ms Te Aika is now 85 and living under significant care in a rest home. No date has been set for the future economic development kaupapa inquiry to commence.

11. The Tribunal's direction of 27 March 2019[5] concerning the kaupapa inquiry programme notes that the economic development kaupapa on the revised inquiry programme is ninth in the priority list of 13 kaupapa inquiries (with three kaupapa inquiries currently underway)[6].

12. Counsel understand that the kaupapa inquiry programme by its nature is indefinite and it must be kept in mind that as new urgent Tribunal Inquiries arise the kaupapa programme will be further pushed out.

13. We note the age of the claimants and how long they have already waited. Even if the kaupapa inquiry commenced in ten years' time, Mr McAnergney would be 89 and Ms Te Aika would be 95. A further

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[5] Memorandum of the Chairperson Concerning the Kaupapa Inquiry Programme dated 27 March 2019.

[6] Appendix B: Waitangi Tribunal Kaupapa Inquiry Programme: https://www.waitangitribunal.govt.nz/assets/Documents/Publications/Appendix-B-Waitangi-Tribunal-Kaupapa-Inquiry-Programme.pdf

indefinite delay for their claims to be heard, on top of the time that has already passed since they filed their respective claims would have irreversible ramifications.

14. It is counsels' submission, therefore, that as Wai 158 and Wai 2163 have been found by both the Tribunal and Crown to be eligible to participate in the Wai 2800 Inquiry, and for Wai 158 and Wai 2163 to be heard in a timely and efficient manner, they should be fully inquired into by the Waitangi Tribunal in the Wai 2800 Inquiry rather than deferred to a later kaupapa inquiry.

Arbitrary Split of Claim Subject Matter

15. At paragraph 41 of the Crown memorandum, the Crown noted, in relation to Wai 158 and Wai 2163:

> *The Crown considers a claim consists of an allegation of a particular Crown act or omission that has caused prejudice, not the totality of acts or omissions that are associated with a Wai number. The Crown considers that Wai 158, Wai 709 and Wai 2163 have some elements best suited to be heard in the Economic Development kaupapa inquiry and some elements that may be eligible for inclusion in the Wai 2800 inquiry.*

16. Counsel respectfully submit that the Crown's interpretation of a Wai claim's framework is an arbitrary and one-dimensional understanding of the interconnected totality of acts or omissions by the Crown. The acts and omissions of the Crown within Wai 158 and Wai 2163 cause interwoven prejudice across matters ranging from pre-existing aboriginal authority, rights and interests and insubstantial economic base, inappropriate legal structures and decision making to inadequate Māori health and housing over generations and a deliberate educational policy of preparing Maori for low-paying jobs.

17. Counsel further submit that the Crown notes *"some elements"* within the claim are best suited for the economic development kaupapa, without any further specifics of what these elements are. It is unclear to Counsel and

the Wai 158 and Wai 2163 claimants what elements of the distinct claims the Crown is referring to.

A Culture Grounded in Trade

18. The Wai 158 and Wai 2163 Claimants say that Māori culture is a unique culture based on trade traditions, therefore to divide their claims based on specific economic grievances as compared to other prejudice suffered in respect of the SILNA regime and its subsequent effects would be an impossible and superficial distinction.

Limitation of Possible Redress

19. Deferring some elements of Wai 158 and Wai 2163 to a later inquiry will limit the possible redress the Wai 2800 Tribunal would be likely to recommend, as only part of the picture would be presented to the Tribunal. The Claimants are of the mind that the Crown's proposal really demonstrates an intention for selective redress rather than substantive and comprehensive redress.

Legal Interest

20. The Waitangi Tribunal has, through its registration process, received Wai 158 and Wai 2163, accepted that they meet the statutory threshold tests for Treaty claims and in so doing has identified that these claims raise potentially legitimate concerns regarding Crown actions and inactions that may amount to breaches of Te Tiriti.

21. Through that registration process, the Waitangi Tribunal has recognised the specific and particular interests relating to the land and taonga that are the subject of those claims that the named claimants, whānau, hapū and iwi represent.

22. Both the Tribunal and the Crown have acknowledged that Wai 158 and Wai 2163 are eligible to participate in the Wai 2800 Inquiry.

23. Therefore, once a claim is filed, accepted and registered, the named claimants have a legal interest in that claim and the progression of it, whether it is by way of Tribunal inquiry or negotiation.

24. Consequently, the named Claimants should therefore as of right have the choice of which inquiry to progress their claim if they are recognised to be eligible in more than one. Neither the Crown nor any other entity has the power or right to make this decision.

Natural Justice and the Right to Development

25. In the Mohaka ki Ahuriri Report, the Tribunal found that Māori have a right to develop as a people, and that this right extends to cultural, social, economic and political development.[7] Prior to this, the Tribunal acknowledged that Māori had a right to participate in the developing colonial society and economy.[8]

26. Internationally, Article 20 of the United Nations Declaration on the Rights of Indigenous Peoples ("**UNDRIP**") states:

> 1. *Indigenous peoples have the right to maintain and develop their political, economic, and social systems or institutions, to be secure in the enjoyment of their own means of subsistence and development, and to engage freely in all their traditional and other economic activities.*
>
> 2. *Indigenous peoples deprived of their means of subsistence and development are entitled to just and fair redress.*

Article 23 of UNDRIP states:

> *Indigenous peoples have the right to determine and develop priorities and strategies for exercising their right to development. In particular, indigenous peoples have the right to be actively*

[7] Waitangi Tribunal, (2004), *Mohaka ki Ahuriri,* at 26-27; also waitangi Tribunal, (2008), *He Maunga Rongo,* at 914.

[8] Waitangi Tribunal, (1988), Muriwhenua Fishing Claim, at 189.

involved in developing and determining health, housing and other economic and social programmes affecting them and, as far as possible, to administer such programmes through their own institutions.

27. The International Covenant on Economic, Social and Cultural Rights (**"ICESCR"**) is also of relevance[9]. Article 1 states:

"All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."

28. Article 3 of Te Tiriti guarantees Maori all the "Rights and Privileges of British Subjects."

29. Article 1 of the ICESCR reaffirms and builds on Article 3 of Te Tiriti. The SILNA regime was a breach of Te Tiriti and failing to remedy it is not only a breach of Te Tiriti but also a breach of New Zealand's international obligations under the ICESCR. The effect of the SILNA regime is that those affected Maori were left with no economic base, and therefore not able to exercise their rangatiratanga over those lands. This meant they have not been able to develop an economic base resulting in a breach of article 3 of Te Tiriti in that they are not enjoying the same rights and privileges as British subjects.

30. It is Counsel's submission that if some elements of Wai 158 and Wai 2163 are deferred to a future inquiry this will further exacerbate the continuing situation where the opportunity for Tribunal inquiry and recommendations to assist the economic development of the Wai 158 and Wai 2163 claimant community is obstructed. Furthermore, the Claimants will continue to be deprived of their means of subsistence and development, regarding which they are entitled to just and fair redress.

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[9] New Zealand ratified this Covenant on 28 December 1978 - https://www.justice.govt.nz/justice-sector-policy/constitutional-issues-and-human-rights/human-rights/international-human-rights/international-covenant-on-economic-social-and-cultural-rights/

31. With regard to natural justice, chapter 20 of the Tribunal's Ngai Tahu Report 1991 entitled "Landless Native Grants" is of relevance. The introduction to the chapter references the Crown's "failure to provide adequate reserves."[10] The conclusions state:

> *"In effect the Crown had taken 18 years to arrive at a completely unsatisfactory resolution to the problem of landless Ngai Tahu. In fact, the lack of resources… indicates the Crown's attitude towards the problem, which borders on indifference.*[11]
>
> *The Tribunal is unable to escape the conclusion that, to appease its conscience, the Crown wished to appear to be doing something when in fact it was perpetrating a cruel hoax… The tribunal finds the Crown's policy and the legislative implementation of the policy in relation to landless Ngai Tahu to be a serious breach of the Treaty principle requiring it to act in good faith. This breach is yet to be remedied."*[12]

32. The Tribunal noted the lack of remedy for this breach in 1991. Counsel respectfully submit that it is repugnant to the principles of natural justice that aspects of Wai 158 and Wai 2163 be further delayed.

33. Counsel further submit that the fact the Tribunal has found the lands allocated under SILNA were inadequate and not fit for purpose, shows the Crown denied SILNA landowners their right to development by ensuring since the outset of the regime, and thereafter, that the SILNA could not and did not provide adequately for the South Island "Landless Natives" a century ago and through to the present day. The Crown now wish to delay their ability to exercise and enjoy that right further. Counsel refers to the Ngai Tahu report:

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[10] Waitangi Tribunal, (1991), Ngai Tahu Volume III, at 20.1

[11] Waitangi Tribunal, (1991), Ngai Tahu Volume III, at 20.7.2

[12] Waitangi Tribunal, (1991), Ngai Tahu Volume III, at 20.7.4.This was a comment from the Crown's own witness, David Armstrong.

(1) "*Whereas it was apparently thought impossible for the Crown to re-acquire substantial areas of good quality land adjacent to the places where Ngai Tahu lived on their meagre reserves, it was perfectly feasible for the Crown to purchase over 450,000 acres to facilitate European settlement.*"[13]

34. In our submission, these inadequacies have led to numerous social and cultural issues, intertwined with economic ones, and that they cannot be separated into two separate strands heard in separate Tribunal inquiries.

Conclusion

35. For the reasons outlined above, Counsel respectfully submit that it is the strong desire of the Wai 158 and Wai 2163 Claimants to be heard fully within the Wai 2800 Inquiry.

36. We also reaffirm the Claimants' continued reservation of the right to amend the claim.

Dated at Wellington this 10th day of July 2019

Dr B D Gilling / G M Davidson / R L Brown
Counsel for the Wai 158 and Wai 2163 Claimants

[13] Waitangi Tribunal, (1991), Ngai Tahu Volume III, at 20.7.4.at 20.7.4.