

**In the Waitangi Tribunal**  
**Remaining Historical Claims: South Island Claims**

**Wai 2800**  
**Wai 2176**

**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 Theona Heaslip on behalf of herself and the descendants of Aperahama Hutoitoi and William Fisher (Wai 2176)

---

**Memorandum of Counsel on behalf of Wai 2176**

**Dated 9 September 2019**

---



---

**Morrison Kent**  
Lawyers  
Wellington and Rotorua

Wellington Office  
Persons Acting : Dr B D Gilling / G M Davidson  
Telephone : (04) 472-0020  
Facsimile : (04) 472-0517  
Box : 10-035  
DX : SP20203

**May it please the Tribunal**

1. This memorandum of counsel is filed on behalf of Wai 2176, a claim by Theona Heaslip, for and on behalf of herself and the descendants of Aperahama Hutoitoi and William Fisher ('the Claimants').<sup>1</sup>
2. The Claimants have not been directed by the Tribunal to respond to the memorandum-directions dated 21 June 2019<sup>2</sup> or to respond to the Crown's Memorandum of Counsel<sup>3</sup> dated 21 December 2018.
3. The Claimants would, however, like to respond to the Crown's references to the eligibility of Wai 2176 to participate in the Wai 2800 Inquiry.
4. Counsel have been instructed by the Claimants to assist them with preparing a particularised statement of claim for the Wai 2800 Inquiry. This memorandum of counsel will respond specifically to the Crown's categorisation of Wai 2176 in its memorandum of 21 December 2018.

**Background**

5. Wai 2176 is a claim in relation to three of the twenty-one Titi Islands, referred to in the Deed of Cession of Stewart Island<sup>4</sup>, being Taketu, Heretatua and Te Pukeotakohe which are situated on Taukihepa.
6. On 1 October 2018, memorandum-directions<sup>5</sup> were issued assessing the potential eligibility of historical claims able to participate in the Wai 2800 Inquiry. The Wai 2176 claim was assessed by the Waitangi Tribunal as eligible to participate in this inquiry on a preliminary basis.

---

<sup>1</sup> Wai 2176 #1.1.1, Statement of Claim by Theona Heaslip on behalf of the descendants of Aperahama Hutoitoi and William Fisher, 28 August 2008.

<sup>2</sup> Wai 2800, #2.5.4, Memorandum-Directions of the Presiding Officer, dated 12 June 2019.

<sup>3</sup> Memorandum of Counsel for the Crown responding to 1 October 2018 Directions of the Presiding Officer, dated 21 December 2018.

<sup>4</sup> Deed of Cession of Stewart Island (Rakiura), dated 29 June 1864.

<sup>5</sup> Wai 2800 #2.5.2, Memorandum-Directions of the Presiding Officer, Appendix A, 1 October 2018.

7. On 17 December 2018, Counsel filed a memorandum of counsel supporting this assessment of Wai 2176 as an eligible claim and advising the Tribunal:<sup>6</sup>

*...the Wai 2176 Claimants intend to actively participate in the Wai 2800 Inquiry and will be particularising their statement of claim once interlocutory timeframes have been set.*

*Counsel submit the Claimants wish to note at the outset they would like their claim to be heard at Te Rau Aroha Marae, Bluff.*

8. On 21 December 2018, the Crown filed a memorandum of counsel responding to the Tribunal's preliminary list of eligible claims. The Crown's memorandum categorised Wai 2176 as a claim "potentially ineligible" to participate in the Wai 2800 Inquiry. The Crown's reasoning is set out and then responded to below.

**Crown reasoning for categorising Wai 2176 as a "potentially ineligible" claim to participate in the Wai 2800 Inquiry.**

9. The Crown places Wai 2176 under its second category, being *claims that appear fully settled but where further clarification may be required from the claimants.*<sup>7</sup>
10. The Crown states that the claims in this category:<sup>8</sup>

*...are most likely settled, but where a lack of information in the statement of claim raises some ambiguity. These claims do not give an iwi or hapu affiliation or they name an ancestor or hapu that is unknown to the Crown.*

---

<sup>6</sup> Not yet given a ROI number.

<sup>7</sup> Memorandum of Counsel for the Crown responding to 1 October 2018 Directions of the Presiding Officer, dated 21 December 2018, pages 3 - 4.

<sup>8</sup> Memorandum of Counsel for the Crown responding to 1 October 2018 Directions of the Presiding Officer, dated 21 December 2018, paragraph 7.

11. The Crown notes that historians employed by Te Arawhiti have analysed claims wishing to participate in the Wai 2800 Inquiry and have made an “*informed guess*” as to the status of these claims.<sup>9</sup>

12. The Crown goes on to suggest:

*...that the Tribunal seek further information from the claimants in order to make an effective assessment of whether it has jurisdiction to inquire into these claims.*<sup>10</sup>

13. Finally, the Crown suggests that Wai 2176 is most likely settled by the Ngai Tahu Claims Settlement Act 1998<sup>11</sup>, “*but considers further clarification may be required from the Claimants for Wai 2176*”.<sup>12</sup>

#### **Wai 2176 response to the Crown categorisation**

14. Counsel will respond to the Crown’s question as to the Claimants’ iwi or hapu affiliation. Counsel will then discuss whether Wai 2176 has been settled by the Ngai Tahu Claims Settlement Act 1998. Lastly, counsel will make further submissions as to why Wai 2176 should continue to be regarded as an eligible claim in this Waitangi Tribunal Inquiry.

15. Counsel have also included paragraphs as to why recourse to the Māori Land Court and/or High Court is not possible for the Claimants’ grievance.

---

<sup>9</sup> Memorandum of Counsel for the Crown responding to 1 October 2018 Directions of the Presiding Officer, dated 21 December 2018, paragraph 7.

<sup>10</sup> Memorandum of Counsel for the Crown responding to 1 October 2018 Directions of the Presiding Officer, dated 21 December 2018, paragraph 8.

<sup>11</sup> Memorandum of Counsel for the Crown responding to 1 October 2018 Directions of the Presiding Officer, dated 21 December 2018, see table on page 4.

<sup>12</sup> Memorandum of Counsel for the Crown responding to 1 October 2018 Directions of the Presiding Officer, dated 21 December 2018, paragraph 7.49

*Iwi or Hapu affiliation and whakapapa information in relation to Wai 2176*

16. The Wai 2176 named claimant is Mrs Theona Heaslip. Mrs Heaslip's claim is on behalf of herself and the direct descendants of Aperahama Hutoitoi and William Fisher.
17. Aperahama Hutoitoi is the grandfather of Hera Tura. Hera Tura married William Fisher (Hera is also known as Sarah Fisher).
18. Aperahama Hutoitoi and the Fisher whānau are of Kāti Mamoe and more particularly, the Kāti Mamoe hapū of Kāti Huirapa. Kāti Huirapa trace their descent in Western Southland/Murihiku of Te Wai Pounamu to the arrival of Te Wera in the late 1700's.
19. The Fisher whānau of Kāti Huirapa have a right through their Rakiura ancestor Aperahama Hutoitoi to the Titi Island Heretataua; and through their Rakiura ancestor William Fisher to the Titi Island Te Pukeotakohe which are situated on Taukihepa.<sup>13</sup>
20. The Coulston whanau of Kati Hinetewai and Kati Huirapa through their Rakiura ancestor Teoti Mauhe have a right to the Titi Island Taketu.
21. The Claimants note in passing that whether a tupuna or hapū is known to the Crown cannot be any valid basis for determining the existence of that group or otherwise.

*Whether Wai 2176 is settled by the Ngai Tahu Claims Settlement Act 1998*

22. The initial point to be made is that Wai 2176 is not one of the claims explicitly listed as having been settled at section 10(d) of the Ngāi Tahu Claims Settlement Act 1998. Therefore, any assertion that Wai 2176 is settled must be on the basis of implication only and done so a decade prior to the claim being filed.

---

<sup>13</sup> Please refer to attached whakapapa – Heretataua, Te Pukeotakohe and Taketu.

23. The core of the Wai 2176 claim is based on the grievance that the Crown has acted inconsistently with the principles of Te Tiriti and prejudicially affected the claimants by establishing the Native Land Court system which failed to recognise, protect or facilitate their ancestral right to access and bird Taketu, Heretatua and Te Pukeotakohe situated on Taukihepa.
24. The Wai 2176 claim focuses on the Crown land tenure system forced upon Aperahama Hutoitoi, William Fisher and their descendants and the individualisation of title which did not provide sufficient recognition of their customary rights, including shared, overlapping and usufructuary rights. Counsel further submit that the Crown has failed to recognise the extent of the detrimental and prejudicial impacts and effects that the Native Land Court system has inflicted upon the descendants of Aperahama Hutoitoi and William Fisher.
25. Inherent within the concept of individualisation of title is the basic fallacy that ownership by a group is equivalent to, and can be broken down into, segments for the inclusive ownership and use by each of the individuals within that group. Counsel submit that, over generations, this leads to impoverishment and cultural estrangement/distance, which have flow on effects such as ill health and an insecure economic base.
26. It is Counsel's submission that the Wai 2176 claim is a discrete whānau claim which was not heard or reported on by the Wai 27 Waitangi Tribunal. The Ngai Tahu Claims Settlement Act 1998 does not resolve or even address the Claimants' grievance. In the following section, counsel briefly describe the core claim grievance and why the Claimants do not have recourse for their grievance in the Māori Land Court or High Court.
27. The Claimants would like to emphasis that they are not engaging in the Tribunal process to seek monetary compensation, rather they wish to participate in Wai 2800 so as to reinstate the mana and integrity of the 1864 Deed of Cession and their whanau whakapapa to Taketu, Heretatua and Te Pukeotakohe situated on Taukihepa.

## Wai 2176 Core Grievance and Summary of Relevant Case Law

28. In June 1864 the Deed of Cession of Rakiura was signed. Twenty-one Titi Islands were reserved under this Deed for the sole use and benefit of the tribes of Ngai Tahu and Ngati Mamoe.
29. Three of those reserved Islands were named as Heretatua, Te Pukeotakohe and Taketu.
30. Accompanying the Deed was an annexed list which records the names of those chiefs for whom the Titi Islands were reserved. Aperahama Hutoitoi and William Fisher were recorded as chiefs whose whanau rights were reserved for Taukihepa, embracing the following Islands: Taketu, Heretatua and Te Pukeotakohe. It is significant that although neither Aperahama Hutoitoi and William Fisher were signatories to the actual Deed, their interest was recorded.
31. Counsel observes that, at this point, Ngai Tahu and Ngati Mamoe were recognised in the Deed as distinct iwi with separate identity, rights and rangatiratanga, even if they were connected.
32. On 10 August 1909, an Order in Council was made pursuant to section 24 of the Land Transfer Act 1908, empowering the Native Land Court "*to inquire and determine who are the persons entitled to the rights set out on the premises...*". Those premises were the twenty-one Titi Islands named in the schedule thereto, amongst which were Heretatua, Te Pukeotakohe and Taketu.
33. Court records show that on 7 February 1910 Sarah Fisher (Teera Piha) submitted a claim to Heretatua through Aperahama Hutoitoi, which was endorsed, "All admitted under Moffett's List".<sup>14</sup>

---

<sup>14</sup> See Application Block Order file Southland District 53 - Long Island, South Cape, Taketu, Heretatua & Application & Correspondence relating to Te Pukeotakohe, 1910 - 1920: evidence given to establish the 1910 beneficial grantee list".

34. On 16 February 1910, at South Island Minute Book page 106 under the heading Taukihepa No17 (4 divisions), Mr Moffet's Supplied List it is minuted, "All objected to except Matarina Topi, the Fisher Family, Hone Kahu"
35. On 21 February 1910, at South Island Minute Book page 137, the court was held open and deemed adjourned for Mr Moffett to complete his list. It would appear this work was not completed, which fact has prejudicially affected the claimants.
36. On 17 December 1915, at South Island Minute book page 204, the court admitted the descendants of Teoti Mauhe to the Titi Island - Taketu.
37. On 11 December 1917 at South Island Minute book page 160, the court admitted the descendants of William Fisher to the Titi Island - Te Pukeotakohe.
38. The Order in Council dated 10 August 1909 also provided for the Court to consult with the "natives" found to be entitled, on behalf of the Governor, as to what regulations should be provided as per section 24 of the Land Act 1908.
39. Regulations were gazetted on 30 May 1912 under the Land Act 1908 after consultation with the main kaika at Bluff, Riverton and Colac Bay. The schedule thereto applied those regulations explicitly to Heretatua, Te Pukeotakohe and Taketu, as well as the other eighteen Titi Islands.
40. These regulations, although somewhat amended, are enforced today as the Titi (Mutton Bird) Regulations 1978 ("the 1978 Regulations"). Regulation 1(3) states:

*These regulations shall apply to the Titi Islands and other islands adjacent to Stewart Island mentioned in the Deed of Cession of Stewart Island dated 29 June 1864.*
41. By virtue of the Deed of Cession, this is an explicit reference to Heretatua, Te Pukeotakohe and Taketu as three of the Titi Islands.



42. The 1978 Regulations describes a beneficiary of the beneficial Titi Islands as a:

*Rakiura Māori who holds a succession order from the Māori Land Court entitling him to any beneficial interest in any beneficial island.*

43. The 1978 Regulations go on to state:

*Rakiura Māori means a person who is a member of the Ngaitahu Tribe or Ngatimamoe Tribe and is a descendant of the original Maori owners of Stewart Island.*

44. Once again, as recently as 1978 Ngai Tahu and Ngati Mamoe were accepted as separate iwi with elements of shared history.

45. Despite Heretatua and Te Pukeotakohe being reserved for the “sole use and benefit of the natives” under the 1864 Deed of Cession of Stewart Island, the Maori Land Court in a decision made on 17 March 2015, following an application by the claimants seeking to correct the historical omissions of the Court, affectively extinguished Heretatua and Te Pukeotakohe as property, customary or otherwise and subsequently removed the list of beneficiaries to Pukeotakohe from its web-site, apparently-dispossessing the descendants of Aperahama Hutoitoi and William Fisher of their ancestral right to access and bird the islands as a result.

46. Therefore, while the Court maintained it can determine entitlement to rights and interests in Taukihepa as a whole, the manu within Taukihepa, unless partitioning occurs and separate title is created, are not defined parcels of land under Te Ture Whenua Maori Act such that the Court can deal with rights and interests in them individually.

47. Counsel respectfully submits that, in the opinion above, the Chief Judge has erred. In terms of the Deed of Cession to Stewart Island, the Titi (Muttonbird) Regulations 1978 cannot give any more weight existentially

to Taukihepa than it can to Heretatua or Pukeotakohe, as is succinctly stated at regulation 1(3).

48. Indeed, one of the two principle purposes of section 48(d) of the Conservation Act 1987 is:

*securing to the Maori the Titi Islands and other islands adjacent to Stewart Island mentioned in the deed.*

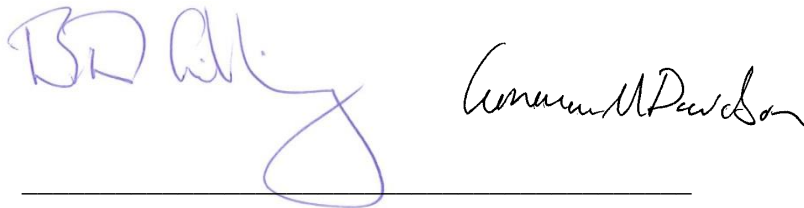
49. Moreover, as yet the trust envisaged by the Maori Purposes Act 1983, section 6(7) has not been constituted, meaning Taukihepa itself does not as yet have a title which can be divided lest compared existentially with any other property entity.
50. Counsel further submit that, the true reason the Maori Land Court has some difficulty dealing with Heretatua, Te Pukeotakohe and Taketu is the omission of those islands from section 6 of the Maori Purposes Act 1983, which fact speaks to an obligation of care and trust shared by both the Crown and the Court which has not been honoured.

### **Conclusion**

51. Wai 2176 is a claim specifically on behalf of a whānau who were dispossessed by Crown created and supported processes, which the Claimants' tupuna did not agree to, yet which they could not avoid.
52. The Crown, through the Native Land Court system, failed to actively protect the Hutoittoi/Fisher whanau interests in Heretatua and Te Pukeotakohe. In fact, the Court system actually omitted and failed to rectify the omission of the Hutoittoi/Fisher whanau interest. This provided the opportunity for and caused other named owners to act in an individualistic manner contrary to the wishes or intentions of the wider Titi Islands community and enabled subsequent succession of interests where no allowances were made for wider community interests.
53. Counsel respectfully submit that the Wai 2176 claim as described above is a discrete historical claim into a specific failing of the Crown into a

specific failing of the Crown instated and up-held Native Land Court system. It has not been inquired into previously and is not resolved by the Ngai Tahu Settlement Act. The Claimants do not have recourse for their grievance through the jurisdiction of the Māori Land Court or the High Court. Therefore, counsel submit Wai 2176 remains unsettled, lacks any other avenue to seek redress and should therefore be eligible to participate in the Wai 2800 Inquiry.

**Dated** at Wellington this 9<sup>th</sup> day of August 2019



---

**Dr B D Gilling / G M Davidson**  
**Counsel for the Wai 2176 Claimants**