WAITANGI TRIBUNAL

Wai 2800

CONCERNING	the Treaty of Waitangi Act 1975
AND	the Inquiry into Remaining Historical Claims: Southern North Island and South Island Claims

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FURTHER MEMORANDUM-DIRECTIONS OF CHIEF JUDGE W W ISAAC CONCERNING ELIGIBILITY

13 March 2020

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1. This memorandum-directions addresses further submissions received from Crown and claimant counsel in relation to the eligibility of the following claims to participate in Wai 2800, the Inquiry into Remaining Historical Claims: Southern North Island and South Island Claims:

    (a) Wai 1490, the Ngāti Whanokirangi Hapū Lands and Resources Claim;

    (b) Wai 2176, the Descendants of Aperahama Hutoitoi (Heaslip) Claim;

    (c) Wai 2228, the Ngāti Awa of Taranaki (Moore and Taylor) Claim; and

    (d) Wai 113, the Ngāti Raukawa Lands Claim.

Wai 1490, the Ngāti Whanokirangi Hapū Lands and Resources Claim

2. As this claim was not included in the Tribunal's preliminary list of claims assessed as eligible or ineligible to participate in this inquiry, the Crown has not yet had the opportunity to file submissions on the eligibility of Wai 1490 to participate. Accordingly, I directed the Crown to file any submissions it wished to make on this matter by 17 January 2020.

3. In response, the Crown filed submissions arguing that the Wai 1490 claim should be excluded from the present inquiry because it is included in the Muaūpoko Tribal Authority Deed of Mandate and the claimants are a hapū of Muaūpoko. Crown counsel cited my memorandum-directions launching the inquiry in which I stated (Wai 2800, #2.5.1 at [16]):

> The eligibility of claims to participate in the standing panel process is subject to exclusion to the extent that the claims:
>
> (a) …
>
> (b) are included in the mandates of groups that have agreed or subsequently agree terms of negotiation with the Crown for the settlement of their historical Treaty claims, by listing in the mandate of the claim or the iwi or hapū on whose behalf the claim is brought...

4. I also discussed the exclusion of claims included in current or upcoming settlement negotiations with the Crown in my 22 September 2015 memorandum concerning remaining historical claims (at [26]-[27]).

> The Tribunal will, as a general rule, not hear claims under this inquiry programme that are formally and publicly notified as represented by a mandated group which has been recognised by the Crown and is negotiating the settlement of its historical Treaty claims.
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> This exclusion applies both to negotiations currently under way and those that commence in the future. It will extend to claims which are publicly notified by a mandated group recognised by the Crown while they are in preparation for hearing under the remaining historical claims programme.

5. Accordingly, I agree with Crown counsel's argument that Wai 1490 is not eligible to participate in the Wai 2800 inquiry.

Wai 2176, the Descendants of Aperahama Hutoitoi (Heaslip) Claim

6. Wai 2176 is on the list of claims Tribunal staff assessed as possibly eligible to participate in the Wai 2800 inquiry (Wai 2800, #2.5.2, Appendix B). The Crown submitted that Wai

2176 appeared to be fully settled by the Ngāi Tahu Claims Settlement Act 1998 but that a lack of information in the statement of claim raised some ambiguity (Wai 2800, #3.1.3). On 16 December 2019, the Tribunal received a memorandum of counsel for Wai 2176 dated 9 September 2019, responding to the Crown's submissions (Wai 2800, #3.1.15). The Crown filed further submissions in reply on 17 January 2019, as directed.

Background

7. This claim concerns interests in three of the 21 manu, or birding, areas on the Tītī Island of Taukihepa, namely Taketu, Te Puketakohe and Heretatua, and rights to the Tītī Islands generally. I summarised much of the relevant historical context to this claim in my 2015 determination of an application under s 45 of Te Ture Whenua Māori Act 1993: *Wright v Ngamoki-Cameron – Heretatua (manu on the Tītī Island of Taukihepa)* [2015] Chief Judge's MB 108 (2015 CJ 108). I stated (at [7]-[10]):

> Heretatua is a manu within the Tītī island of Taukihepa. The manu on Taukihepa are all part of one single land mass, being the island of Taukihepa. However, it should be noted that it became clear during the course of proceedings that many are also sometimes referred to as "islands", although they are not islands in the common meaning of the word, but rather birding areas which have been established by whānau groups over time.
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> In an 1864 Deed all of the large and small islands adjacent to Rakiura/Stewart Island were sold and conveyed to the Crown (the 1864 Deed). The Crown then reserved a number of these islands for the sole use and benefit of Māori. The list of reserved lands in the 1864 Deed includes Taukiepa, Taketu, Te Puketakohe and Hereatua. The islands and the people for whom they were reserved were listed in an enclosure to a report on the sale by HT Clarke, the commissioner for the purchase of Stewart Island. Clarke's list of islands includes "Taukiepa (Long Island) embracing the following names: - Taketu, Heretatua, and Te Puketakohe". Aperahama Hutoitoi is on this list as being entitled to that island.
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> By Order in Council dated 10 August 1909, the Native Land Court was given extended jurisdiction under s 15 of the Native Land Court Act 1894 to determine the persons and their successors entitled to rights on the Tītī Islands, being "those islands adjacent to Stewart Island, and known as … Taukiepa … Taketu, Heretatua [and] Te Pukeotakohe …" among others. The Order in Council therefore included both islands and manu.
>
> On 21 February 1910, Chief Judge Jackson Palmer made an order pursuant to s 15 determining the persons entitled to rights in the Tītī Islands and setting out in a schedule a list of those persons entitled under the name of the island to which their interest related. Aperahama Hutoitoi did not appear on the list as a person entitled, nor was Heretatua listed as an island.

8. The Wai 2176 claim alleges that the Crown has breached the Treaty by:

   (a) allowing the omission of the interests of the claimant's tūpuna, Aperahama Hutoitoi, and the manu Heretatua from the Native Land Court's 1910 order setting out those entitled to interests in the Tītī Islands;

   (b) omitting Taketu, Heretatua and Te Puketakohe from the list of Tītī Islands named in s 6(10) of the Māori Purposes Act 1983, which excluded the Māori Land Court's jurisdiction to determine a list of owners for Heretatua (which it had not yet done) and from determining successions to Taketu and Te Puketakohe and thereby extinguished the property rights in Taketu, Heretatua and Te Puketakohe; and

(c) enacting s 6 of the Māori Purposes Act 1983, which vested the Tītī Islands in the owners as Māori freehold land, thereby extinguishing customary title and removing the Crown's obligation as trustee to protect the customs of the Tītī Islands.

9. Claimant counsel submit that the core of the claim is the allegations that the Crown has prejudicially affected the claimant and her whānau by imposing a land tenure system and individualistion of title which did not provide sufficient recognition of their customary rights, including shared, overlapping and usufructuary rights. Counsel submit that the claim is eligible to participate because it is a discrete whānau claim which was not heard as part of the Tribunal's Ngāi Tahu Inquiry (Wai 27) and is not resolved or addressed by the Ngāi Tahu Claims Settlement Act 1998 (the Settlement Act). They emphasise that the Wai 2176 claim is not listed in the Settlement Act and that the Settlement Act was enacted a decade before the claim was filed.

Crown argument

10. The Crown submits that the Wai 2176 claim is fully settled by the Settlement Act. Claimant counsel have stated that the claimants "are of Kāti Mamoe and more particularly, the Kāti Mamoe hapū of Kāti Huirapa" (Wai 2800, #3.1.15 at [18]). Kāti Mamoe is included in the definition of Ngāi Tahu as set out in s 9 of the Settlement Act:

> For the purposes of this Act and any other enactment, unless the context otherwise requires, Ngāi Tahu and Ngāi Tahu Whānui each means the collective of individuals who descend from the primary hapū of Waitaha, Ngāti Mamoe, and Ngāi Tahu, namely Kāti Kurī, Kāti Irakehu, Kāti Huirapa, Ngāi Tuahuriri, and Kai Te Ruakihikihi.

11. Under the Settlement Act, all "Ngāi Tahu claims" are settled (s 461(1)). "Ngāi Tahu claims" is defined as "all claims made at any time by any Ngāi Tahu claimant" founded on matters including the principles of the Treaty of Waitangi and relating to loss occurring before 21 September 1992, "whether or not the claims have been researched, registered, or notified" (s 10(1)(a)). Significantly, the meaning of "Ngāi Tahu claimant" is defined as including, among other things, "1 or more individuals, whānau, marae, hapū, or Papatipu Rūnanga of Ngāi Tahu" (s 8).

Discussion

12. I have previously considered some of the matters raised in this claim in the Māori Land Court. Elizabeth Sarah Wright filed an application under s 45 of the Te Ture Whenua Māori Act 1993, which I decided in 2007: *Wright – Aperahama Hutoitoi* [2007] Chief Judge's MB 123 (2007 CJ 123). My decision held that Aperahama Hutoitoi should have been included in the 1910 order which listed who was entitled to Taukihepa and the 1910 order was accordingly amended to include Aperahama Hutoitoi in the list of those entitled to "Taukihepa or Long Island". However, it also held that there were no grounds for recognising Heretatua as a separate manu. The matter came before my attention again in *Wright v Ngamoki-Cameron*, in which I determined that while the Māori Land Court has jurisdiction to determine land rights and interests to defined parcels of land, the Tīti (Muttonbird) Island Regulations provide the owners with powers, the Rakiura Tītī Committee, to determine the allotment of manu and birding rights. Unless partitioning occurs and separate title is allocated, the manu within the islands are not defined parcels of land such that the Court can deal with the rights and interests in them individually.

13. A number of paragraphs in claimant counsels' submissions are devoted to arguing that my determination in *Wright v Ngamoki-Cameron* is incorrect as a matter of law. It is not appropriate for the Tribunal to be used as a forum to relitigate matters already determined in the Māori Land Court.

14. I turn now to the question of whether the Ngāi Tahu Claims Settlement Act 1998 settles the historical aspects of this claim. It is not necessary for the Wai 2176 claim to be explicitly included in the Settlement Act for it to be settled, nor is the fact that the claim was filed some time after the enactement of the Settlement Act a barrier. I note that in her memorandum-directions registering the Wai 2176 claim the then Chairperson acknowledged the likelihood that the historical aspects of this claim had already been settled: (Wai 2176, #2.1.1):

> the Tribunal's provisional view is that all historical issues raised in this claim relating to land in the Ngāi Tahu claim area have already been settled by the Ngāi Tahu Claims Settlement Act 1998 and the Tribunal cannot inquire into these.

15. I have already, as part of the Military Veterans Kaupapa Inquiry (Wai 2500), considered the effect of settlement legislation on historical claims. I refer in particular to my memorandum-directions of 15 July 2015 (Wai 2500, #2.5.15), in which I set this out in detail. In those directions, I did not accept Crown counsels' submission that settlement legislation prevents any non-descent-based claim of a Māori or group of Māori who whakapapa to the settling group. However, it is clear that settlement legislation does prevent the Tribunal from inquiring into historical claims based on rights arising from the claimant's membership in a settling group.

16. In this case, the claimant whānau's interests in the Tītī Islands derive from their membership in Kāti Mamoe, which exercised customary rights in relation to the islands, as acknowledged in the 1864 Deed. Kāti Mamoe is included as a hapū of Ngāi Tahu and the historical claims of Kāti Mamoe are settled by the Settlement Act. The Wai 2176 claim is therefore settled to the extent that it contains historical allegations and is not eligible to participate in the Wai 2800 inquiry.

Wai 2228, the Ngāti Awa of Taranaki (Moore and Taylor) Claim

17. The Tribunal has also received submissions from counsel for Wai 2228, the Ngāti Awa of Taranaki (Moore and Taylor) Claim. In my memorandum-directions of 12 June 2019 (Wai 2800, #2.5.4), I directed counsel to file submissions indicating which aspects of the Wai 2228 claim he considers are not settled by the various pieces of settlement legislation settling the historical claims of Te Ātiawa in Taranaki, Port Nicholson and Te Tau Ihu. Counsel submits that he did not receive that memorandum-directions and seeks leave to respond out of time.

18. Counsel for Wai 2228 submits that the basis of the claim are actions that occurred in Waitara and the North Taranaki area and that the substance of the claimant's grievance is their false identification as rebels and the loss of identify of their hapū and iwi. He argues that Te Ātiawa is a Crown construct created for the purpose of disempowering Wiremu Kingi Te Rangitaake and other purported rebels and to give loyalist whānau and hapū, renamed as Te Ātiawa, access to land. Counsel submits that these matters were not fully investigated as part of the Tribunal's Taranaki inquiry and are not addressed in the Te

Ātiawa Deed of Settlement. Counsel includes quotes from the claimants in which they argue that they did not agree to the Te Atiawa Iwi Authority settling their claim and that the Te Ātiawa Settlement Act 2016 is full of falsehoods and is a mechanism continuing the suppression of Ngatiawa.

19. As I stated in my memorandum-directions of 11 December 2019 (Wai 2800, #2.5.5), the historical claims of Te Ātiawa in relation to Taranaki are settled by the Te Ātiawa Claims Settlement Act 2016. That Act defines Te Ātiawa as follows (s 13(1)):

> In this Act, Te Atiawa–
>
> (a) means the collective group composed of individuals who are descended from 1 or more Te Atiawa tupuna; and
>
> (b) includes those individuals; and
>
> (c) includes every whānau, hapū or group to the extent that it composed of those individuals, including the following groups:
>
> (i) Manukorihi:
>
> (ii) Ngati Rahiri:
>
> (iii) Ngati Tawhirikura:
>
> (iv) Ngati Tuparikino:
>
> (v) Ngati te Whiti:
>
> (vi) Otaraua:
>
> (vii) Pukerangiora:
>
> (viii) Puketapu.

20. Te Atiawa tupuna is then defined as an individual who (s 13(2)):

> (a) exercised customary rights by virtue of being descended from –
>
> (i) Te Awanui-a-Rangi; or
>
> (ii) A recognised tupuna of a group listed in subsection (1)(c)(i) to (viii); and
>
> (b) exercised the customary rights predominantly in relation to the area of interest at any time after 6 February 1840.

21. The relevant area of interest is set out in a map at Appendix 1 to the Te Atiawa Deed of Settlement. It includes Waitara and the North Taranaki area.

22. Section 15 of the Act settles all the claims of Treaty breach arising from or relating to Crown acts or omissions before 21 September 1992 of the group the Act defines as Te Atiawa. Section 15(4) makes it clear that the Tribunal no longer has jurisdiction into those claims. Section 16 then adds the Act to the list of enactments to which the jurisdiction of the Tribunal is subject, at sch 3 to the Treaty of Waitangi Act 1975. As the Wai 2228 claim falls within the scope of claims settled by the Te Ātiawa Claims Settlement Act, the Tribunal no longer has jurisdiction to inquire into it, despite the claimants' arguments that

they did not consent to the settlement of their claim. Accordingly, it cannot be included in the Wai 2800 inquiry.

Wai 113, the Ngāti Raukawa Lands Claim

23. In my memorandum-directions of 11 December 2019 (Wai 2800, #2.5.5), I considered a request from counsel for Korey Gibson, a claimant to Wai 113. Counsel submitted that Mr Gibson represents Ngāti Huia, which has interests in Te Tau Ihu that have not yet been inquired into or settled, and so the claim should be included in the Wai 2800 inquiry (Wai 2800, #3.1.12). However, I noted the presence of ongoing named claimant issues and observed that the allegations in the Wai 113 claim at this time do not appear to extend further south than Waikanae.

24. On 3 February 2020, counsel filed a further memorandum, submitting that the named claimant issue has been resolved, so Mr Gibson's claim should now be included in this inquiry.

25. I have once again considered the Wai 113 statement of claim and the six registered amendments to it, and it is not apparent to me that any allegations in the claim relate to Te Tau Ihu. The claim does not appear to fall within the scope of the Wai 2800 inquiry.

The Registrar is to send this direction to all those on the notification list for Wai 2800, the Inquiry into Remaining Historical Claims: Southern North Island and South Island Claims.

DATED at Gisborne this 13th day of March 2020

Chief Judge W W Isaac
Presiding Officer
WAITANGI TRIBUNAL