OFFICIAL



**IN THE WAITANGI TRIBUNAL** **Wai 3300**
**Wai**

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|---|---|
| **IN THE MATTER OF** | the Treaty of Waitangi Act 1975 |
| **AND** | |
| **IN THE MATTER OF** | the Constitutional Kaupapa Inquiry |
| **BY** | Pita Paul, on behalf of himself, his Whānau, and Hapū, and various Marae throughout Aotearoa |

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**STATEMENT OF CLAIM**

**22 April 2024**

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Waitangi Tribunal
***22 Apr 24***
Ministry of Justice
WELLINGTON

# THE CLAIMANTS BY THEIR COUNSEL SAY:

## I: THE CLAIMANTS

**1.** This Statement of Claim ("SoC") is filed on behalf of Pita Paul on behalf of himself, his whānau, his hapū, and various Marae throughout Aotearoa ("the Claimants").

**2.** Mr. Paul is the Managing Director of Waiwhenua Associates Ltd, and a consultant for Marae Utilities Infrastructure Consultants.

**3.** Mr. Paul's grandmother had land taken from her by the Crown in Whakatane, to build a railway line which was completed in 1929. Her land made up approximately five acres of a 100-acre area alongside the Whakatane River. This railway line is no longer in use, but instead of being given back to Mr. Paul's whanau, it remained under the ownership of the NZ Rail, and was leased out to third parties.

**4.** In 2017, the Local Authority decided to upgrade a railway bridge on the land of which Mr. Paul retains an interest in. Rail NZ did not recognise Mr. Paul's interest in the land. As the railway line is no longer in use, it should have been given back to Mr. Paul and his whānau. This has not been done, thus breaching te Tiriti o Waitangi/the Treaty of Waitangi ("te Tiriti/the Treaty").

**5.** Mr. Paul and his whānau have suffered grave injustices and as a result of the Crown's imposed constitutional and legal systems, he is not able to get his grievances resolved fairly.

## II: THE CLAIM

**6.** The Claimants are Māori for the purposes of section 6(1) of the Treaty of Waitangi Act 1975 ("the ToW Act").

**7.** The Claimants claim that they have been, continue to be, and are likely to be prejudicially affected by the various actions of the Crown in breach of te Tiriti/the Treaty.

**8.** The Claimants rely upon the findings made in Stage 1 of Te Paparahi o Te Raki Inquiry ("the Ngāpuhi Inquiry"), which include:

> In February 1840, the rangatira who signed te Tiriti did not cede their sovereignty. That is, they did not cede their authority to make and enforce law over their people or their territories. Rather, they agreed to share power and authority with the Governor. They agreed to a relationship: one in which they and Hobson were to be equal - equal while having different roles and different spheres of influence. In essence, rangatira retained their authority over their hapū and territories, while Hobson was given authority to control Pākehā.[1]

**9.** In this SoC, the word "Partnership" is used to mean the Partnership envisaged under te Tiriti/the Treaty, which was elucidated by the Tribunal in Stage One of the Ngāphui Inquiry, as comprising three distinct spheres of authority, namely:

**a.** the British Crown governing its subjects over land legitimately acquired by it or them ("British Authority");

**b.** Māori Tino Rangatiratanga over Māori peoples, lands and other Taonga ("Māori Authority"); and

**c.** a partnership, to be discussed and agreed where Māori and English peoples intermingled ("Shared Authority").

**10.** The essence of this Claim is that the Crown, by way of its legislation, policies and practices in relation to the establishment, structural framework, administration, and operation of all aspects of, the New Zealand Crown, has breached te Tiriti/the Treaty by:

[1] Waitangi Tribunal *He Whakaputanga me te Tiriti The Declaration and the Treaty: The Report on Stage 1 of the Paparahi o Te Raki Inquiry* (Wai 1040, 2014), at 527.

**a.** usurping Māori tino rangatiratanga since after the signing of te Tiriti, when the Crown had no legal right to do so;

**b.** failing to respect, recognise and protect the right of Māori to exercise Tino Rangatiratanga, in accordance with Tikanga Māori, over their own territories and communities;

**c.** imposing on Māori, without their consent or acquiescence, unfamiliar and unwelcome legal, political and constitutional systems;

**d.** failing to actively protect and ensure Tiriti/Treaty compliant outcomes for Māori, in particular by removing any ability for Māori to pursue their Tiriti/Treaty rights through independent, international courts, and/or Tikanga Māori based courts;

**e.** failing to protect Tiriti/Treaty rights by way of entrenchment;

**f.** failing to ensure there is adequate Māori representation in Parliament; and

**g.** overall, failing to protect Māori rights from the effects of the tyranny of the majority, by placing reliance on the doctrine of Parliamentary Sovereignty.

## III: BACKGROUND

### *Historical Background*

**11.** The Claimants say that, since time immemorial, Māori have collectively exercised Tino Rangatiratanga over their own communities, regulating their own society in accordance with an extensive body of regulatory laws called Tikanga Māori.

**12.** In 1835, 52 northern rangatira signed He Whakaputanga o te Rangatiratanga on Nu Tireni – the Declaration of Independence of the United Tribes of New Zealand ("He Whakaputanga"). He Whakaputanga

declared to the world, the independence of the United Tribes, stating that their sovereign power rested with the rangatira.

**13.** In 1840, certain rangatira signed te Tiriti/the Treaty, which guaranteed Māori Tino Rangatiratanga over their Taonga. The Crown has not, since 1840, legitimately acquired, in any way, the authority/Tino Rangatiratanga which Māori have exercised, and are entitled to continue to exercise, over their own territories and peoples.

**14.** Nevertheless, after the execution of te Tiriti/the Treaty, the British Crown usurped the authority of Māori under te Tiriti/the Treaty, and attempted to enforce its regime of governance over all Māori in Aotearoa New Zealand and over all of their Taonga. Lands and other resources, as well as control over communities, were illegally taken. Any signs of Māori resistance were met with aggression and acts of war and violence, and the Māori people were stripped of their language and culture.

**15.** Their body of laws, Tikanga Māori, was forcibly subjugated under the dominant Westminster framework of laws and governance which had been introduced by the British Crown. The Westminster framework was then utilised as a mechanism to facilitate the alienation of Māori lands and other Taonga, and to further subdue any resistance.

**16.** Māori did not cede their Tino Rangatiratanga to the Crown. The Crown's imposition of Kāwanatanga over them was a grave breach of te Tiriti/the Treaty. In imposing its laws over them, the Crown forced Māori to abandon their own constitutional and legal systems, social structures, and their own holistic ways of living, and instead imposed its own constitutional, legal, social, cultural, and economic norms. Doing so resulted in widespread social, cultural, health and economic devastation for the Claimants.

**17.** In 1975, the Crown, in recognition of the fact that it had breached te Tiriti/the Treaty and, in doing so, had been responsible for causing great and widespread harm to Māori, established the Waitangi Tribunal and entered into Tiriti/Treaty settlement discussions and negotiations with

various Māori hapū and iwi groups. This constituted an attempt to recognise its breaches of te Tiriti/the Treaty, and the wrongs it had perpetrated over the Māori people, including its illegitimate acquisitions of Taonga which had hitherto been the responsibility of Māori.

**18.** From 1840, it was wrongly assumed that English Laws were applicable in New Zealand, and those laws were applied accordingly. However, this was put in question in *McLiver v Macky* in 1856, when the New Zealand Supreme Court, the equivalent of today's High Court, decided that the Wills Act 1837 from the UK did not apply in New Zealand.[2] This prompted the passing of the English Laws Act in 1858, declaring that, retrospectively, all English Laws "so far as applicable to the circumstances of the Colony" had been in force in New Zealand since 14 January 1840.[3]

**19.** This was then consolidated with a number of other pieces of legislation in the English Laws Act 1908,[4] before being repealed and replaced by the Imperial Laws Application Act 1988, providing for specific pieces of English Legislation set out in schedules were to apply.[5] None of this was done with Māori agreement, and there was not even a façade of Māori involvement in any of the English laws that were then deemed to apply to Māori.

**20.** As opposed to British Legislation, which had been assumed to apply and then directly legislated to apply once challenged through the Courts, te Tiriti/the Treaty has been, and continues to be, treated as subordinate to other legislation, including imposed English legislation. New Zealand follows a dualist system, whereby international law can only be enforced to the extent that it is incorporated into domestic legislation. Essentially, this means that te Tiriti/the Treaty, signed by the Crown and Māori rangatira, has been treated, at best, as a constitutional, yet non-binding,

[2] http://www.nzlii.org/nz/journals/VUWLawRw/2010/21.pdf.
[3] https://teara.govt.nz/en/photograph/25612/english-laws-act-1858.
[4] https://constitutionwatch.com.au/english-laws-act-1908/.
[5] https://www.legislation.govt.nz/act/public/1988/0112/latest/whole.html#DLM135074.

agreement that should be stuck to where practicable, and at worst a "simple nullity".[6]

**21.** New Zealand today has what is often referred to as an "unwritten constitution", in that it is made up of a wide variety of documents but not consolidated in one, entrenched and supreme piece of legislation. Instead various documents are referred to as comprising the New Zealand constitution, such as the Legislature Act 1908, the Constitution Act 1986, the New Zealand Bill of Rights Act 1990, the Electoral Act 1993, the Parliamentary Privilege Act 2014.[7] Furthermore, te Tiriti/the Treaty, significant Court judgements, prerogative instruments and powers, the law and custom of Parliament, and constitutional conventions are outlined in the Cabinet Manuel as all comprising part of New Zealand's unwritten constitution.[8]

**22.** As there is no specific list of what law is "constitutional", there is not a definitive answer as to whether any piece of legislation forms part of New Zealand's "unwritten constitution". Furthermore, the main function of a "constitution" is not met due to it being "unwritten" and not entrenched. For example, there is no ability for the New Zealand courts to find any piece of legislation illegal by virtue of it being "unconstitutional" and strike it out. Nor are the overwhelming majority of pieces of the "unwritten constitution" entrenched. Without entrenchment, many of the constitutional fundamentals in New Zealand, such as the te Tiriti/the Treaty or the New Zealand Bill of Rights Act 1990, could be repealed or overridden with a simple majority by any incoming government.

**23.** The Crown's reliance on the doctrine of Parliamentary Sovereignty has meant that it is the will of the majority which prevails. The fact that the Māori population is only 16% of New Zealand, proves extremely detrimental to their Tiriti/Treaty rights.

[6] https://nzhistory.govt.nz/the-chief-justice-declares-that-the-treaty-of-waitangi-is-worthless-and-a-simple-nullity.
[7] https://academic.oup.com/icon/article/14/1/137/2526780.
[8] See forward of Cabinet Manual 2023.

**24.** The Claimants allege that the current Crown laws, policies and conduct are in breach of te Tiriti/the Treaty.

## IV: JURISDICTION

**25.** This claim falls within one or more of the matters referred to in section 6(1) of the ToW Act, namely:

- **a.** the Claimants are Māori;
- **b.** the Claimants have been and continue to be, or are likely to be, prejudicially affected by the various ordinances, Acts, regulations, orders, proclamations, notices and other statutory instruments, or by the various policies, practices, acts or omissions proposed to be done or omitted or adopted by, or on behalf of the Crown, their agents or their successors; and
- **c.** the prejudice to the Claimants is in breach of te Tiriti/the Treaty.

**26.** This claim raises contemporary issues in relation to acts and omissions of the Crown, which are ongoing, and occurring after 21 September 1992. However, these issues cannot be viewed in a vacuum, and the historical context is vitally important. This SoC has provided a brief historical background to give context to the relevant issues and also to the historical, and ongoing, prejudice faced by the Claimants.

## V: BREACHES OF TE TIRITI/ THE TREATY

**27.** The relevant provisions of te Tiriti/the Treaty, and the Principles, that have been breached by the Crown, in relation to the constitutional issues, are:

- **a.** Tino Ranagtiratanga, and Articles One and Two of te Tiriti/ Treaty, whereby the Crown has usurped Māori rights of autonomy and self-governance which are enshrined and protected in te Tiriti/Treaty;

**b.** Partnership, and the duty to act reasonably, honourably, and in good faith, by establishing and imposing a constitutional and legal system that usurped the authority of Māori, and subsumed them within a foreign constitutional, legal and political system, without any protection whatsoever from the effects of that system;

**c.** Reciprocity, by failing to honour the commitments and promises made under te Tiriti/the Treaty to guarantee Māori Tino Rangatiratanga over their own peoples and territories;

**d.** Active protection, by failing to protect Māori Tino Rangatiratanga, and failing to protect Māori from the devastating effects which the Crown's imposed constitutional and legal system had on them.

## VI: PREJUDICE TO THE CLAIMANTS

**28.** The breaches of te Tiriti/the Treaty identified above have caused, are causing, and will continue to cause significant and irreversible prejudice to all Māori, including the Claimants, as follows:

**a.** being deprived of their fundamental right to self-govern and ensure their tino rangatiratanga over their own territories and peoples;

**b.** and as a result, systematically worse outcomes across every field, including justice, education, and health, with lower average incomes and socio-economic status, and lower life expectancies; and

**c.** no legal protection for Māori rights, as guaranteed under te Tiriti/the Treaty.

## VII: RELIEF SOUGHT

**29.** The Claimants seek recommendations for any or all of the following relief:

**a.** a finding that:

**i.** at or shortly prior to 1840, Māori, whānau, hapū and iwi, collectively exercised mana and Tino Rangatiratanga over their Taonga, including their communities under their own legal system called Tikanga Māori, and maintained their own constitutional structures;

**ii.** under Articles One and Two of te Tiriti/the Treaty, Māori were guaranteed the full, exclusive and undisturbed possession, and the authority, and Tino Rangatiratanga over their Taonga, including over their territories and their peoples; and

**iii.** Tino Rangitiratanga, as practised by whānau, hapū and iwi, over their own communities, was never ceded under Articles One and Two of the Tiriti/Treaty to the British Crown; and

**b.** an acknowledgement from the Crown that Māori should not have been treated as they were, recognising:

**i.** that under te Tiriti/the Treaty the British Crown was not ceded the authority to govern over Māori peoples and their territories;

**ii.** the systemic failure of the Crown to recognise and protect Tino Rangatiratanga;

**iii.** the consequences on Māori of the majoritarian system, and the Crown's abject failure to adequately protect them from the devastating effects of the system which the Crown had imposed on them;

**iv.** the intentional lack of legal recognition that binding te Tiriti/the Treaty rights have been given under New Zealand's legal system, and the consequent inability of Māori to enforce those rights;

**v.** all of the other abuses as set out in the evidence to be filed in support of this SoC; and

**c.** a formal apology by the Crown for the harm and trauma caused to all of the Claimants, their whānau, hapū, iwi, and urban communities, and which acknowledges that the full responsibility for the prejudice which has befallen Māori arises from the Crown's legal and constitutional system;

**d.** the provision of funding to a new group established collaboratively by the Claimants, Māori organisations and the Crown ("the Constitutional Review Committee"). The Constitutional Review Committee is expected to engage collaboratively with other Māori groups with an interest, and devise a new constitutional system, consistent with the exercise of Tino Rangatiratanga and Tikanga Māori, and propose new legislation, administration and policies to ensure Māori Tino Rangatiratanga is secured;

**e.** compensation for those detrimentally affected by the Crown's acts and omissions in relation to the Crown's imposed constitutional system, for all the harm and losses suffered, either directly or indirectly, and including the immediate and ongoing detriment to the social, psychological, cultural, economic and spiritual wellbeing of Māori, and their whānau, hapū, iwi, and urban communities;

**f.** all costs incurred as a result of bringing this Claim; and

**g.** such other remedies as are warranted.

## VIII: RIGHT TO AMEND CLAIM

**30.** The Claimants reserve the right to further particularise this SoC and to amend or add further to it as appropriate.

**Dated: 22 April 2024**

**Janet Mason**
**Counsel Acting**

**To:** The Registrar, Waitangi Tribunal

**And to:** Counsel for the Crown on behalf of the Crown Law Office

This document is filed by Janet Mason of Phoenix Law Ltd, Counsel for the Claimants.

The address for service of the Claimants is at the offices of Phoenix Law Ltd, 200 Willis Street, Wellington.

Documents for Service on the Claimant may be left at the above address or may be:

- Posted to PO Box 27400, Wellington; or
- Sent by electronic mail to mason@phoenixlaw.expert and thompson@phoenixlaw.expert