Kei mua i Te Rōpū Whakamana i te Tiriti o Waitangi **Wai 2660**
Wai 2669

IN THE MATTER of The Treaty of Waitangi Act 1975

AND

IN THE MATTER of the Marine and Coastal Area (Takutai Moana) Act 2011

AND

IN THE MATTER of a Claim by Marie Tautari, Allan Peters, Rowan Tautari and David Hugh Peters (deceased) for and on behalf of Te Whakapiko; hapū of Ngāti Manaia

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Amended Statement of Claim for Te Whakapiko

13 June 2024

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Tēnā, e te Rōpū Whakamana i te Tiriti o Waitangi

Te Tono o Te Whakapiko

1. This claim was brought by David Hugh Peters, Marie Tautari, Allan Peters and Rowan Tautari(the Claimants) on behalf of Te Whakapiko(the Hapū); hapū of Ngāti Manaia.[1]

2. Te Whakapiko have occupied and continue to occupy the whenua and rohe of Whananaki since prior to the signing of Te Tiriti o Waitangi and have never relinquished their mana over the whenua and the rohe, which includes the coastal areas of Whananaki and extend out into the ocean.

3. The hapū have been prejudicially affected by the Acts, regulations, policies, practices and omissions of the Crown which were enacted, promulgated, formulated, undertaken, done or omitted in breach of the principles of Te Tiriti o Waitangi, specifically the Marine and Coastal Area (Takutai Moana) Act 2011(the Act).

4. The named Claimants and the members of Te Whakapiko are Māori and satisfy section 6(1) of the Treaty of Waitangi Act 1975.

5. The Tribunal has issued two reports on this Act. The most recent report was released on the 4th of October 2023. There has been no response to the report by the Crown to address the findings and recommendations in the report, to the contrary the Crown has now set out proposals which would amount to further breaches of Te Tiriti o Waitangi and cause further prejudice to Te Whakapiko and to Māori.

Amendments to the Claim

6. Te Whakapiko wish to amend their claim[2] and bring two new issues to the Tribunal which they say amount to the Crown breaches of Te Tiriti o Waitangi;

    a. The delivery of funding by Te Arawhiti to progress applications has been contrary to their own policies and is now subject to review and change without consultation with Te Whakapiko and Māori; and

    b. Proposed amendments to the Act.

[1] We note the passing of one of the original named claimants: David Peters, moe mai ra e te rangatira.
[2] Wai 2669, 1.1.1, and Wai 2660 #1.1.1 and Amended statement of claim Wai 2660 #1.1.18(a) filed 9 July 2018.

Claim Issue One: Failure to properly deliver Applicant funding

7. The Crown has established a system to provide funding to Applicants in the High Court and Crown Engagement pathways seeking to have their customary interests in the takutai moana recognised.

8. That funding is established and operates through a funding scheme (the Funding Scheme) managed by Te Arawhiti.

9. Te Arawhiti have now announced a review and change to the funding policy and the Crown has announced that the funding available through the scheme will be severely limited.

10. The impact on Te Whakapiko and all Māori Applicants is that there will be insufficient funding to progress their applications to gather research and evidence and to then participate in the hearings of those Applications in the High Court.

Claim Issue Two: Amendments to the Act

11. The Crown has indicated that it intends to amend s 58 of the Act in order to "reverse measures taken in recent years which have eroded the principle of equal citizenship".[3]

12. More specifically, the Crown has indicated that it intends to "amend the test for CMT to better align with Parliament's original intent – that there is a very high bar to the test (so that consequently, it is expected there would be relatively few areas of coastland subject to CMT."[4]

13. These proposed amendments would significantly compromise the availability of customary marine title (CMT) under the Act and deny Te Whakapiko the recognition of their customary interests and would be a breach of Te Tiriti o Waitangi me ngā Mātāpono .

Te Tiriti o Waitangi

14. The relevant articles of Te Tiriti are Article Two and Article Three.

15. Article Two preserves to Te Whakapiko and all hapū their "tino rangatiratanga o o rātou wenua o rātou kāinga me o rātou taonga katoa."

16. The customary interests of Te Whakapiko in their rohe moana are a taonga and the use and management of those are a key feature of their tino rangatiratanga.

17. Article Three requires Te Whakapiko and all Māori to be treated with

[3] Coalition Agreement between the National Party and the New Zealand First Party dated 24 November 2023 (10).
[4] Lil Anderson, Te Arawhiti Briefing dated 17 February 2024 (14) at page 4.

royal protection and to be treated “rite tahi ki ana mea ki ngā tangata o Ingarani.”

18. With the proposed changes to the Funding Scheme and the Act Te Whakapiko say that their ability to seek recognition of their customary rights in their rohe moana under the Act are fundamentally compromised and that this is a breach of Articles Two and Three.

19. There is impact to their tikanga and ability to practice that tikanga in their rohe moana. There is also impact on the ability to have those customary rights recognised under the Act.

Ngā Mātāpono o Te Tiriti o Waitangi

20. Further to the express articles of Te Tiriti o Waitangi are the relevant principles of;

    a. Tino Rangatiratanga;

    b. Matapopore Moroki / Active Protection; and

    c. Tikanga Whakatika / Redress.

A - Te Mātāpono o Tino Rangatiratanga

21. It is now well established that, contrary to colonial myths long held onto in Aotearoa, there was never a cession of sovereignty, but that Te Tiriti acted to preserve Māori authority, that Māori retained tino rangatiratanga for their domain while the Crown acquired authority for its own sphere.[5]

22. The takutai moana is an area where these spheres and domains overlap, and where the Crown needs to negotiate with Māori and with Te Whakapiko to find ways to manage and share power.

23. Te Whakapiko as a hapū of Te Raki rely on this finding.

24. A feature of the principle of Tino Rangatiratanga is the duty of the Crown to consult on matters that may impact on or are of concern to Māori.

25. The Central North Island Tribunal described the guarantee of tino rangatiratanga as “full authority over their own affairs’ including ‘self-government by appropriate and agreed institutions” and carrying with it a “*right to be consulted and give consent to Crown policies and laws affecting the things of fundamental importance to them”*. Such guarantees “could only be overridden in exceptional circumstances”.[6]

[5] Waitangi Tribunal, Tino Rangatiratanga me te Kāwanatanga (Wai 1040, 2022) at 75-76.
[6] Waitangi Tribunal, *He Maunga Rongo*, vol 1, p 191, referenced with support in Waitangi Tribunal, *He Manu Whatu Āhuru, Vol 1*, at 151.

B – Te Mātāpono Matapopore Moroki / Active Protection

26. The Tribunal in its first report on this Act set out that active protection was one of the two most relevant principles applicable.[7]

27. The Tribunal in its second report on this Act identified and endorsed the approach of the Tribunal which assessed the Foreshore and Seabed Act which said:

> *"The foreshore and sea were and are taonga for many hapū and iwi… The Crown's duty under the Treaty therefore, was actively to protect and give effect to property rights, Māori self-regulation, tikanga Māori and the claimants' relationship with their taonga; in other words, te tino rangatiratanga."*[8]

28. The Crown has a duty to actively protect its Treaty partner and has breached that duty by failing to consult with Māori either on the change to the Funding Scheme or the Act.

C - Te Mātāpono o Tikanga Whakatika / Redress

29. This principle requires the Crown where it has breached Te Tiriti and caused prejudice to Māori to provide redress in a way that is "well informed, culturally appropriate and timely."[9]

The Breaches of Te Tiriti o Waitangi me ngā Mātāpono

A - The Takutai Moana Funding Scheme

30. Access to funding to progress in the Crown Engagement or High Court pathway is through Te Arawhiti. Te Whakapiko has chosen only the High Court pathway.

31. The Crown deliberately chose to establish a new system for funding, rather than utilise an established funding scheme for legal proceedings like Legal Aid Services.

32. Under that Funding Scheme Te Whakapiko should be able to access reimbursement for actual and reasonable costs for preparing for and

[7] Waitangi Tribunal *The Marine and Coastal Area (Takutai Moana) Act 2011 Inquiry Stage 1* 2020, pp17-22.
[8] Waitangi Tribunal, Report on the Crown's Foreshore and Seabed Policy, p 28, quoted in Waitangi Tribunal *The Marine and Coastal Area (Takutai Moana) Act 2011 Inquiry Stage 2* 2023, p 14.
[9] Waitangi Tribunal *The Kōpūtara Priority Report* (Wai 2200, 2024) at 18.

progressing its Application through the High Court.

33. Denial of funding for proceedings in the High Court is effectively a denial of the customary rights of Te Whakapiko as the cost of High Court proceedings are significant, but that is the process which the Crown has established for the recognition of the customary rights which Te Whakapiko have maintained in their rohe moana.

34. The Crown has breached the duties which it owes to Te Whakapiko and to all Māori.

35. The Crown has the duty to recognise the significance of taonga Māori, owed by article 2 of Te Tiriti o Waitangi, in this case the rohe of takutai moana of Te Whakapiko.

36. In breach of Te Tiriti me ngā Mātāpono the Crown has;

    a. Provided insufficient budget to Te Arawhiti in order to fund applicants in the High Court pathway;

    b. Failed to disclose to Applicants (and their counsel) that they knew the budget was insufficient to cover current proceedings in the High Court;

    c. Changed the policy or changed their own internal interpretation of the policy without notifying the Applicants of this;

    d. Delayed reimbursement without explanation;

    e. Reduced reimbursements requested without a reasonable explanation;

    f. Permitted Applicants to commit to significant expenses in reliance on the Funding Scheme, including the costs of project managers, historians and hapū hui and evidence gathering events;

    g. Failed to act with reasonable prudence to notify the Applicants of issues that were becoming apparent; and

    h. Failing to consult with Te Whakapiko and Māori on proposed changes to the Funding Scheme.

37. As a result there are now multiple hearings scheduled to progress, and many applicants like Te Whakapiko preparing for hearings and in a position to seek to have their applications heard, that Te Arawhiti now say cannot be funded.

38. Te Arawhiti also indicate that they will be advising which hearings are

to be funded and which are not.

B – Proposed Amendments to Section 58 of the Act

39. The Crown has now indicated that there will be an amendment to section 58 of the Act.

40. Section 58 is the test for the recognition of CMT.

41. Justice Miller of the Court of Appeal in *Whakatōhea* observed that:

> *"CMT is the most extensive form of statutory right provided for under MACA. CMT is a (non-alienable) interest in land.*[10] *It is a territorial right, not merely a usage right. A group which holds CMT over a specified area does not have the right to exclude people from that area: public rights of access, navigation and fishing are … expressly carved out and protected by ss 26–28. But the group has certain rights set out in ss 60 and 62 of MACA including permission rights under the Resource Management Act (RMA permission right),*[11] *and certain conservation statutes;*[12] *a right to protect wāhi tapu and wāhi tapu areas;*[13] *prima facie ownership of newly found taonga tūturu;*[14] *ownership of certain minerals;*[15] *and the right to create a planning document for the area.*[16] *The group may use, benefit from or develop a customary marine title area, but is not exempt from obtaining any relevant resource consent, permit, or approval that is required under another enactment for the use and development of that customary marine title area."*[17]

42. It is clear that this is the most substantial recognition order available under the Act and yet, Stage Two of the Report on this Act noted that

> *"although the permission rights are the strongest statutory rights recognised under the Act, their impact is severely undermined by the exceptions of accommodated activities and deemed accommodated activities. Several of the*

[10] Takutai Moana Act, s 60(1).

[11] Sections 66–70.

[12] Sections 71–75.

[13] Sections 78–81.

[14] Section 82.

[15] Section 83.

[16] Sections 85–93.

[17] *Whakatōhea Kotahitanga Waka (Edwards) v Te Kāhui and Whakatōhea Māori Trust Board* [2023] NZCA 504 [*Whakatōhea*] at [134] per Miller J and see also [391] per Cooper P and Goddard J.

exceptions cannot be justified…Overall, we find that the Act's provisions for recognising – but then restricting – the permission rights of customary marine title are flawed and amount to a breach of the Treaty principle of partnership. They do not strike a fair and reasonable balance between the interests of Māori to protect their customary interests and other private right holders to engage in resource management and conservation activities."[18]

43. The Crown has indicated that it intends to amend s 58 of the Act in order to "reverse measures taken in recent years which have eroded the principle of equal citizenship".[19]

44. More specifically, the Crown has indicated that it intends to "amend the test for CMT to better align with Parliament's original intent – that there is a very high bar to the test (so that consequently, it is expected there would be relatively few areas of coastland subject to CMT."[20]

45. It is clear that the Crown desires to set a narrower or more difficult test for CMT for the High Court through an amendment to the legislation.

Relief Sought

46. Te Whakapiko seek findings that;

    a. this claim is well founded; and

    b. the Crown's failure to implement the recommendations of the Tribunal, failure to properly operate the Funding Scheme; and proposal to amend s 58 of the Act amount to breaches of Te Tiriti o Waitangi me ngā Mātāpono.

47. Te Whakapiko seek recommendations that the Crown;

a. properly fund (and reimburse) Te Whakapiko for their reasonable and actual costs of progressing their Application under the Act;

b. ensure that Te Whakapiko's Applicant costs and reimbursement requests are paid without unreasonable delay;

c. make undertakings that those reimbursements will be available as those costs arise for Te Whakapiko; and

d. engage with Te Whakapiko and Māori to implement the recommendations of the Waitangi Tribunal from the 2023 to strike the

[18] Waitangi Tribunal *The Marine and Coastal Area (Takutai Moana) Act 2011 Inquiry Stage 2*, pp 169-170.
[19] Coalition Agreement between the National Party and the New Zealand First Party dated 24 November 2023 (10).
[20] Lil Anderson, Te Arawhiti Briefing dated 17 February 2024 (14) at page 4.

appropriate balance between Māori interests and other public and private interests; and

e. cease plans to amend s 58 in such a way as to make the test more difficult or hard for Māori Applicants to meet.

Conclusion

48. The Claimants are ready to proceed to hearing.

49. The Claimants reserve the right to amend or further particularise this statement of claim.

Dated at Mangere this 13th day of June 2024

Cameron Hockly
Counsel for Te Whakapiko

This Statement of Claim is filed by Cameron Hockly on instructions from these claimants.

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