I TE RŌPŪ WHAKAMANA I TE TIRITI O WAITANGI

WAI 3400
WAI 2707

I RARO O TE MANA O	te ture o te Tiriti o Waitangi 1975
I TE TAKE O	te ruku tātari ohotata mō te ture mō te Takutai Moana (Wai 3400)
Ā	
I TE TAKE O	tētahi kerēme nā Ngāi Te Hapū me Kataraina Keepa, Umuhuri Matehaere, Graham Hoete rātou ko Nepia Ranapia mā Ngā Hapū o Te Moutere o Motiti (Wai 2707)

He Tauākī Whakaraupapa Tāpiri mā Ngāi Te Hapū
Further Statement of Claim for Ngāi Te Hapū
I tēnei rā, i te 2 o Ākuhata 2024

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Waitangi Tribunal
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TAUĀKĪ WHAKARAUPAPA TĀPITI / FURTHER STATEMENT OF CLAIM

TE KERĒME / THE CLAIM

1. This further Statement of Claim is filed on behalf of ngā karanga hapū o Ngāi Te Hapū and by Kataraina Keepa, Umuhuri Matehaere, Graham Hoete and Nepia Ranapia in their capacity as kuia and kaumātua of Motiti Island (Wai 2707) (**"the Claimants" / "Ngāi Te Hapū"**). This claim supplements the Wai 2707 statement of claim dated 18 December 2017 in the Wai 2660 Marine and Coastal Area (Takutai Moana) Inquiry.

2. This claim relates to the Coalition Government's proposed changes to the Marine and Coastal Area (Takutai Moana) Act 2011 (**"the MACA Act"**) and the associated funding scheme.

3. The Claimants are Māori and meet the requirements for bringing a claim as set out under section 6 of the Treaty of Waitangi Act 1975.

4. The Claimants have already been granted leave to participate as an interested party in the Wai 3400 Urgent Inquiry and now seek leave to participate as a full applicant.

NGĀ KAIKERĒME / THE CLAIMANTS

5. Te Moutere o Motiti is situated in Te Moana a Toi (Bay of Plenty), approximately 12km off the Papamoa coast and around 24km northeast of Mauao. The island is around 720 ha. Te Moutere o Motiti is unique in being the only offshore island that has been continuously occupied by Māori.

6. Ngāi Te Hapū are descendants of their eponymous tupuna, Te Hapū, the principal tupuna in their whakapapa to Motiti Island.

7. The karanga hapū of Ngāi Te Hapū derive from Te Hapū's children and successors and include Ngāti Makerewai, Ngāti Takahanga, Ngāti

Kauaewera, and Ngāti Pau. These karanga hapū of Ngāi Te Hapū only exist on Motiti.

8. Ngāi Te Hapū are ocean people. They call their rohe the "Motiti rohe moana", as it encompasses not only the island, but the surrounding ocean. The Motiti rohe moana is defined by the customary sea territory known as Te Paepaeroa o te Moutere o Motiti. The traditional sea boundary links the outer reefs, ngā tauranga tai kukume o te hukarere o ngā Aturere (the reefs connected by the tides of the pathway of the yellow fin tuna), including Te Tau o Taiti (Otaiti, or Astrolabe Reef), Te Porotiti, Te Papa, Okarapu, Motuhaku (Schooner Rocks), Tokoroa and Motunau (Plate Island).

9. As an island people, Ngāi Te Hapū have traditionally held and asserted mana moana, tino rangatiratanga and customary title over the Motiti rohe moana since prior to the signing of Te Tiriti o Waitangi. Their associated rights, privileges and responsibilities have always been exercised according to their tikanga.

10. Ngāi Te Hapū have traditionally relied on the bounty of the sea as a core part of their subsistence lifestyle. Kaimoana was a treasured and abundant food source, used to feed tangata whenua and manuhiri, in the exercise of manaakitanga, and to trade for necessary goods with mainland iwi.

11. Ngāi Te Hapū say that they have maintained tino rangatiratanga over the Motiti rohe moana and puna wai on Motiti since time immemorial through their whakapapa, kawa and tikanga and consider the moana and puna wai as taonga.

12. Ngāi Te Hapū have never knowingly or willingly consented to the relinquishment of their right to exercise rangatiratanga over the Motiti rohe moana.

THE CIRCUMSTANCES OF THIS CLAIM

13. The Claimants participated as full claimants in the substantive Wai 2660 Marine and Coastal Area (Takutai Moana) Act 2011 Kaupapa Inquiry convened by the Waitangi Tribunal.

14. Ngāi Te Hapū (CIV-2015-485-767) is an applicant in the High Court seeking CMT orders under the MACA Act over their rohe moana. They participated in the Ngā Potiki Stage 2 hearing held from September to November 2021. A determination from Powell J has yet to be made.

15. The entirety of the Ngāi Te Hapū application area fell within the Ngā Potiki Stage 2 application area, and as such their MACA claim under the MACA Act has been heard in full. However, Ngāi Te Hapū have outstanding invoices that remain unpaid for post-hearing matters incurred in the 2023/2024 year and have yet to complete post-determination work once a judgment is issued.

16. The funding limits now in place that fail to support applicant participation in the legal process required under the MACA Act, and the proposed amendments to the statutory tests that applied at the time Ngāi Te Hapū filed their application in 2015 will have a direct prejudicial effect on the hapū, their ability to exercise their tikanga in their rohe moana and their customary marine interests.

TE TIRITI O WAITANGI ME ŌNA MĀTĀPONO

17. The Claimants assert that it is the text of te Tiriti o Waitangi (the reo Māori Tiriti signed by their tupuna) that is the appropriate starting point for the Crown-Māori relationship in Aotearoa.

18. Alongside their kōrero tuku iho, the Claimants hold steadfast to the fact that te Tiriti acknowledged their mana and tino rangatiratanga over everything including all taonga, moana, awa within their rohe. The

Claimants understanding is that te Tiriti confirmed what had already been recognised in He Whakaputanga in 1835.

19. Over time the Treaty jurisprudence and laws have developed an emphasis on 'principles of the Treaty of Waitangi'. This does not alter the position of Ngāi Te Hapū or their understanding of te Tiriti and its application today.

20. The Claimants say that the main Treaty principles / Crown duties engaged in this context are:

    (a) Partnership, in particular, the interaction between tino rangatiratanga and kāwanatanga;

    (b) The good governance obligations on the Crown that arise from partnership including:

        (i) The principle of mutual recognition and respect;

        (ii) The duty of active protection;

        (iii) The duty to act reasonably and in good faith; and

        (iv) The duty to consult / meaningfully engage with Māori on issues pertinent to them.

    (c) The principle of redress.

FIRST CAUSE OF ACTION: THE CROWN'S PROPOSED AMENDMENTS TO THE MARINE AND COASTAL AREA (TAKUTAI MOANA) ACT 2011 CONSTITUTE A BREACH OF TE TIRITI O WAITANGI

21. The claimants say that the Crown's approach and process to unilaterally decide to amend the MACA Act, without meaningful engagement with Māori, is inconsistent with Te Tiriti o Waitangi.

22. The Claimants further say that the Crown's actions, policies and processes adopted to amend the MACA Act contravenes the Crown's obligations under Te Tiriti, He Whakaputanga, the New Zealand Bill of Rights Act (**"NZBORA"**) and the United Nations Declaration on the Rights of Indigenous Peoples (**"UNDRIP"**).

Particulars

23. On 24 November 2023, the Coalition Agreement between the National Party and the New Zealand First Party stated it would "reverse measures taken in recent ears which have eroded the principle of equal citizenship" including the intention to amend section 58 of the MACA Act "to make clear Parliament's original intent, in light of the judgment of the Court of Appeal in *Whakatōhea Kotahitanga Waka (Edwards) & Ors v Te Kahui and Whakatōhea Māori Trust Board & Ors* [2023] NZCA 504."[1]

24. On 25 July 2024, the Minister for Treaty of Waitangi Negotiations, Hon Paul Goldsmith, sent a letter to High Court applicants advising that the Crown proposed to amend the MACA Act.

25. On 26 July, the Crown confirmed that a Bill is currently being drafted and it is anticipated it will be introduced to Parliament by mid-September. The proposed amendments include:

    (a) Insertion of a declaratory statement overturning the reasoning of the Court of Appeal and High Court in *Re Edwards Whakatōhea*, and all High Court decisions since the High Court in *Re Edwards Whakatōhea*, where the decision relates to the test for CMT;

    (b) Adding text to section 58 to provide a statutory definition of the terms 'exclusive use and occupation' and 'substantial interruption';

[1] https://www.nzfirst.nz/coalition-agreement, at p10.

(c) Amending the burden of proof section (s 106) to add statutory language requiring applicant groups to prove exclusive use and occupation from 1840 to the present day; and

(d) Amending the Preamble, and sections 4 (Purpose), 7 (Treaty of Waitangi) and 58 to clarify the relationship between these sections in a way that allows s 58 to operate more in line with its literal wording.

26. The Crown also advised that Cabinet has decided that the proposed amendments, if passed into law, will apply retrospectively from 25 July 2024. This means that:

(a) any CMT applications not yet determined by 25 July 2024, including those that have been heard or part-heard but not determined by that date – would need to be re-heard and decided under the amended s 58 test; and

(b) any CMT determinations that have been made prior to 25 July 2024, including those under appeal, will not be impacted.

27. The live application for CMT orders by Ngāi Te Hapū falls into the first category, where their case has been heard in full (in 2021) but not yet determined as at 25 July 2024.

28. The Claimants say it is a breach of te Tiriti and a breach of natural justice if the Crown's proposed changes have a retrospective effect. The Claimants spent years preparing for that High Court proceeding and diligently attended six weeks of hearing from September to November 2021. Sadly, many of those who presented evidence in support of the application, or attended in support of the Claimants, have since passed away.

29. To legislate amendments that require Ngāi Te Hapū and other Māori in a similar position to go back to Court to prove their own customary

interests in their own rohe moana / takutai moana, to meet an even higher, near impossible, threshold, without adequate funding support, is a direct, racist attack against Māori.

30. The Crown has given applicants an opportunity to provide "feedback" on the proposed amendments by 15 August 2024. The lack of engagement with Māori is an afront to the te Tiriti relationship, is unconstitutional and falsely assumes Parliamentary sovereignty overrides the guarantees affirmed in te Tiriti and He Whakaputanga.

31. The Claimants say that the Crown's assertion that these amendments are necessary to 'restore Parliament's original intent' is flawed and disingenuous.

32. The Claimants say that these proposed amendments seek to narrow the scope of the statutory language as much as possible to limit the ability of any recognition of CMT for Māori.

33. Further, the Claimants say the Crown's guise of providing 'clarity' through these amendments is in reality, a deliberate, calculated re-writing of laws to suit their political agenda at the expense of the Crown's te Tiriti obligations and consequently, the Crown-Māori relationship.

SECOND CAUSE OF ACTION: THE CHANGE IN APPROACH BY TE ARAWHITI TO THE FINANCIAL ASSISTANCE SCHEME CONSTITUTES A BREACH OF TE TIRITI O WAITANGI

34. Ngāi Te Hapū repeat paragraphs 13 to 33 above and further says that:

    (a) the Crown has breached te Tiriti by unilaterally making decisions about the funding scheme, without meaningful engagement with Ngāi Te Hapū and Māori in general;

(b) the Crown's actions, policies and omissions relating to the funding scheme contravenes the Crown's obligations under Te Tiriti, He Whakaputanga, the NZBORA and the UNDRIP.

Particulars

35. Te Arawhiti administers the funding scheme available to reimburse costs incurred by applicants seeking recognition orders under the MACA Act.

36. The Te Arawhiti policy under that funding scheme is to pay the actual and reasonable costs associated with High Court MACA proceedings.

37. On 1 July 2024, Cabinet approved changes to the financial assistance scheme. Those changes came into effect on that same date and will apply for the entire 2024/2025 financial year.

38. Cabinet agreed that:

(a) All applicants will be required to have a budgeted workplan agreed by Te Arawhiti before funding is provided;

(b) Funding levels for pre-hearing and hearing costs will be aligned with legal aid rates;

(c) The Crown contribution to court costs will be capped for all hearings in the 2024/2025 financial year at $140,000.00 per applicant for substantive hearings, $25,000.00 per applicant for follow up hearings, and $30,000.00 per applicant for appeals.

39. The implications that flow from this include:

(a) There is no clarity on outstanding invoices that remain unpaid from the previous financial year;

(b) If the proposed amendments are enacted, Ngāi Te Hapū will be required to return to the High Court to re-plead their case,

without adequate funding, which they will not be able to sustain (financially or emotionally);

(c) Given the block nature of hearing time required for a MACA hearing, and the pressure on the courts' scheduling, it may be years before a re-hearing can be fixed in the High Court.

(d) Difficulties will arise in terms of having a fair trial if, for example, Ngāi Te Hapū is to proceed self-represented and without counsel, particularly if other parties unaffected by withdrawal of Crown funding do have legal representation.

40. Ngāi Te Hapū have outstanding invoices that remain unpaid from work completed in the 2023/2024 year, and have yet to complete work required once a determination is issued.

PREJUDICE

41. Ngāi Te Hapū repeat paragraphs 13 to 40 above and further say that as a result of the Crown's actions, policies and practices to amend the MACA Act and the associated funding scheme being inconsistent with Te Tiriti o Waitangi, Ngāi Te Hapū have suffered and are likely to suffer significant prejudice as follows:

(a) The Claimants will be significantly disadvantaged and prejudiced by the retrospective effect of the proposed amendments to apply from 25 July 2024 when they have an undetermined application that was completed almost three years ago;

(b) The Claimants suffer from, and will continue to suffer from, the continued attack on the ability to exercise their mana and rangatiratanga within the Motiti rohe moana, which is being undermined and usurped by the Crown;

(c) The Claimants have been, and continue to be, denied the right to exercise their mana and rangatiratanga in the governance decisions in respect of the Motiti rohe moana that directly affect their livelihood;

(d) The fact that the Claimants are being required to participate in another High Court process under the MACA Act, which is highly intensive and legalistic, without adequate funding support for legal counsel and witnesses (both expert and tangata whenua witnesses), expose Ngāi Te Hapū to substantial risk;

(e) The statutory tests under the MACA Act are already prejudicial, and the proposed changes will be even more oppressive and unconstitutional.

RELIEF

42. Ngāi Te Hapū seek findings that:

(a) This claim is well founded;

(b) The Crown has breached Te Tiriti o Waitangi and its principles through its actions to propose amendments to the MACA Act;

(c) The Crown has breached Te Tiriti o Waitangi and its principles through its actions to unilaterally change the associated funding scheme;

(d) The Crown has denied the claimants the right, as a Te Tiriti partner, to actively engage in decisions that directly affect them.

43. The Claimants seek recommendations that:

(a) The Crown accept responsibility for their conduct and provides a genuine apology to the Claimants;

(b) The Crown immediately fund all reasonable and actual costs to progress applications under the MACA Act, including reimbursement requests that remain outstanding;

(c) The Crown immediately cease work on the proposed amendments to the MACA Act towards introduction of an Amendment Bill;

(d) The Crown conducts meaningful engagement with Māori, without delay, to implement the findings of the Wai 2660 Waitangi Tribunal report to ensure harmony between the tino rangatiratanga and kāwanatanga spheres; and

(e) Any other recommendations the Tribunal sees fit to make.

44. The Claimants reserve the right to amend this statement of claim.

I TĒNEI RĀ, i Tāmaki Makaurau, i te 2 o Ākuhata 2024

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Ihipera Peters / Aroha Herewini / Amber Evans

Ngā rōia mō ngā Kaikerēme Wai 2707

This further Statement of Claim is filed by **IHIPERA PETERS** and **AROHA HEREWINI**, Counsel for the Claimants. Telephone (09) 9484774

Documents for service on the above-named claimants may be left at the address for service or may be:

(a) Posted to the Claimants at PO Box 133102, Auckland 1102; or
(b) Transmitted to the Claimants by email at ihipera.peters@kaupare.co.nz and aroha.herewini@kaupare.co.nz