

IN THE WAITANGI TRIBUNAL
KEI MUA I TE ROOPU WHAKAMANA I TE
TIRITI O WAITANGI

WAI 2764

WAI 2660

IN THE MATTER OF the Treaty of Waitangi Act 1975

AND

IN THE MATTER OF The Marine and Coastal Area
(Takutai Moana) Act Inquiry

AND

IN THE MATTER OF A claim filed by Gillean Kathleen
Caldwell and Ngātiwai Trust Board
on behalf of Ngātiwai whānau,
marae and hapū.

AMENDED STATEMENT OF CLAIM

Dated this 25th day of June 2024

RECEIVED

Waitangi Tribunal

26 June 2024

Ministry of Justice
WELLINGTON

MAY IT PLEASE THE TRIBUNAL

A. Introduction

1. This Amended Statement of Claim is filed on behalf of:
 - a. Gillean Kathleen Caldwell and the Ngātiwai Trust Board on behalf of Ngātiwai whānau, marae and hapū (Wai 2764) (“**the claimant**”).
2. The claimant is Māori and meets the requirements for bringing a claim as set out under section 6 of the Treaty of Waitangi Act 1975.
3. This Amended Statement of Claim supplements the Wai 2764 Amended Statement of Claim dated 4 July 2018. The claimant says they will be prejudicially affected by proposed amendments to the Marine and Coastal Area (Takutai Moana) Act 2011 (“**the MACA Act**”) regime and changes to the MACA funding policy.

B. The Claim

4. The claimant amends their 2018 claim and brings two new causes of action to the Tribunal which they say amount to further Crown breaches of Te Tiriti o Waitangi as follows;
 - a. The Crown has failed to design and deliver a funding policy and regime that enables MACA applicants to participate in MACA proceedings in breach of te Tiriti principles; and
 - b. The Crown has failed to consult Māori on the proposed amendments to section 58 of the Act in breach of the principles of te Tiriti of Waitangi.

C. The Claimants

5. Ngātiwai are the people of the water/sea and this is the basis for their name and identity. Ngātiwai rohe includes the many related hapū and persons affiliated to the kāinga and marae occupying the eastern coastline of the North Island between the Bay of Islands (Te Pēwhairangi) and Whangārei, and southward to Pākiri, Ōmaha and Mahurangi, and including the offshore islands Aotea (Great Barrier), Hauturu (Little Barrier), and other smaller island groups within its rohe moana.

6. Ngātiwai has consistently opposed the MACA regime and fought to uphold their rights in their rohe moana and takutai moana.

D. First Cause of Action: The Crown has failed to design and deliver a funding policy and regime that enables MACA applicants to participate in MACA proceedings in breach of te Tiriti principles

Particulars

7. Funding for the MACA regime is provided through Te Arawhiti.
8. This funding is available for iwi, hapū and whānau who have made an application under the MACA Act. The funding is intended to cover the 'actual and reasonable' costs directly related to preparing for and participating in court proceedings. Collaborative projects/activities are also covered in the funding policy.
9. The funding is received either through retrospective reimbursement or a proactive \$5,000 grant. With regards to reimbursement, the funding policy states that Te Arawhiti expect to be able to pay invoices 20 working days from the date that a request for payment is lodged.
10. On 22 April 2024 the Crown informed applicants via memorandum, that it cannot guarantee adequate funding to facilitate the court hearings scheduled for the 2024/2025 financial year.
11. The Claimants are participants in the Whangarei 1a and 1b proceedings which were scheduled for February – May 2024 and July – October 2024. His Honour Justice Harvey adjourned the first 4 weeks of the Stage 1b proceedings due to the uncertainty in funding. The Crown indicated that an updating Memorandum would be filed with the Court no later than 5 July 2024.
12. Te Arawhiti is currently carrying out a review of the entire funding scheme while several MACA High Court proceedings are on foot.

Tiriti o Waitangi principles applied

13. In accordance with the principle of Te Mātāpono o te Tino Rangatiratanga¹, there is an obligation on the Crown to seek out ways to honour hapū rangatiratanga. Furthermore, with te mātāpono o te houruatanga/the principle of partnership² the Crown cannot unilaterally decide what Māori interests are or and must find ways to consult and cooperate with Māori.³ Fundamentally, any reduction of legal rights in te takutai moana undermines access to justice and impedes the ability for Māori to exercise tino rangatiratanga.⁴
14. In accordance with te mātāpono o te matapopore moroki/the principle of active protection the obligation is on the Crown to help restore balance to the relationship between the Crown and Māori.⁵ This duty is heightened as long as the imbalance remains. The claimant pleads that there is an inherent imbalance and that they will be disproportionately impacted by the policy to reduce and/or halt all further funding. It is therefore incumbent on the Crown to act to the fullest extent practicable, to protect and involve Māori in decision-making over the takutai moana.

Prejudice

15. The claimants say that a denial of adequate funding is a breach of the ngā mātāpono/the treaty principles and rely on those set out in the Wai 1040, Te Paparahi o te Raki Stage 2 Report.
16. Further, the claimant says they are prejudiced in the following ways:
 - a. That they are barred from a fundamental right of access to justice to have their customary rights recognised.
 - b. That a lack of consultation on funding policy changes leaves them in limbo as to whether their case will proceed or not with no alternative funding stream available.

¹ *Tino Rangatiratanga me te Kāwanatanga – The Report on Stage 2 of the Te Paparahi o Te Raki Inquiry Part 1* (Waitangi Tribunal, 2023) p 69.

² *Tino Rangatiratanga me te Kāwanatanga – The Report on Stage 2 of the Te Paparahi o Te Raki Inquiry Part 1* (Waitangi Tribunal, 2023) p 76.

³ Waitangi Tribunal *The Marine and Coastal Area (Takutai Moana) Act 2011 Stage 2 Report* (Wai 2660, 2023) at 11.

⁴ Waitangi Tribunal *The Marine and Coastal Area (Takutai Moana) Act 2011 Inquiry Stage 2 Report* (Wai 2660, 2023) at 237.

⁵ *Tino Rangatiratanga me te Kāwanatanga – The Report on Stage 2 of the Te Paparahi o Te Raki Inquiry Part 1* (Waitangi Tribunal, 2023) p 66.

- c. That long delays in reimbursement to the applicants leave many out of pocket for extended periods of time causing stress and financial difficulty for applicants.
- d. That the delay in advising and informing applicants that there is insufficient funds to facilitate all the scheduled MACA High Court hearings for the 2024/2025 financial year has meant applicants are forced to compete against each other for hearing priority. This pits Māori against each other and undermines whanaungatanga.
- e. That inadequate funding will have the flow on effect of denying Māori customary marine title rights over the takutai moana undermining their ability to protect their taonga and tikanga under the MACA Act and other legislation.
- f. That the lack of funding will have a disproportionately negative impact on Māori, iwi, hapū and whānau.

E. Second Cause of Action: The Crown has failed to consult Māori on the proposed amendments to section 58 of the Act in breach of the principles of te Tiriti of Waitangi

- 17. The coalition agreement between the National party and New Zealand First party ("**Coalition Parties**") set out that it will 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 *Whakatohea Kotahitanga Waka (Edwards) & Ors v Te Kahui*⁶ ("**re Edwards**").
- 18. Section 58 sets out the test for achieving Customary Marine Title ("CMT") through recognition orders.
- 19. The coalition agreement came into effect on 24 November 2023 following the national election. An amendment to the MACA Act was not mentioned in the political manifestos of the Coalition Parties. The amendment will have the effect of narrowing the CMT test and extinguishing customary rights.

⁶ Coalition Agreement between the National Party and the New Zealand First Party (24 November 2023) at p 10.

20. The policy to amend will undermine the s 58 interpretation given by the Court of Appeal in re Edwards and the tikanga based approach to “shared exclusivity” that the majority held.
21. The claimant says this is in breach of te mātāpono o te matapopore moroki/the principle of active protection that ensures due access to the courts in appropriate cases. As referred to by the Waitangi Tribunal, without such access, there is ‘danger ... that Māori interests will become, as they have been before, overly susceptible to political convenience or administrative preference’.⁷

Prejudice

22. The claimants will be prejudiced by a proposed amendment to s 58 that limits the interpretation of the Court of Appeal and results in a provision that is contrary tikanga and fails to provide Māori with the fullest protection and care of the takutai moana.
23. The claimant is currently part-way through having their application heard. An amendment to s 58 now, without any consultation with the claimant or Māori, will prejudicially affect their case and disrupt all planning a steps taken to date to prepare for stage 1b.
24. The indicated amendment to s 58 of the Act will disproportionately impact Māori, iwi, hapū and whānau.

F. Relief Sought

25. The Claimant seeks a finding that that the claim is well founded.
26. The Claimant seeks the following relief:
 - a. A finding that the Crown’s failure to implement the Tribunal’s recommendations in the Stage One and Two MACA Reports and adequately fund the MACA regime, as well as amend s 58 of the MACA Act, are all breaches of te Tiriti and its principles.
27. That the Tribunal recommend that:

⁷ Waitangi Tribunal *Ko Aotearoa Tēnei : A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity* (Wai 262, 2011) at 22.

- a. The Crown provide adequate funding needed to progress all MACA applications and to do so in a reasonable time frame;
 - b. The Crown provide clarity around funding policies and consult with Māori before making any changes;
 - c. The Crown work with Māori to implement the recommendations in the Waitangi Tribunal MACA Stage Two report; and
 - d. The Crown halt the process towards amending s 58 of the MACA Act without proper consultation with Māori as equal partners.
28. Any other relief and recommendations that the Tribunal considers appropriate and relevant.

G. Leave to Amend

29. The claimants reserve their right to file further amendments to this claim as required.

DATED at Auckland this 25th day of June 2024



Signature: _____

Kelly Dixon / Toni Talamaivao

Counsel for the claimant