WAI 3058

Affidavit of Anne Carter

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RECEIVED
Waitangi Tribunal
11 Nov 21
Ministry of Justice
WELLINGTON

NRM-101340-1-1423-V2

Hon Andrew Little

Minister of Health
Minister Responsible for the GCSB
Minister Responsible for the NZSIS
Minister for Treaty of Waitangi Negotiations
Minister Responsible for Pike River Re-entry
Lead Coordination Minister for the Government's Response to the Royal Commission's Report into the Terrorist Attack on the Christchurch Mosques

EXHIBIT NOTE

This is the exhibit marked "**AC1**" referred to in the affidavit of **ANNE JESSIE TE AROHA CARTER** and sworn/~~affirmed~~ at Wellington this 10th day of November 2021 before me:

Michaela Stack

A Deputy Registrar/A ~~Solicitor of the High Court~~ of New Zealand

22 October 2021

Kingi Smiler
Wai 85
Wairarapa Moana Incorporation

By email: *info@wairarapamoana.org.nz*

Deputy Registrar
of the High Court
at Wellington

Tēnā koe

I am writing to update you on the status of the Ngāti Kahungunu ki Wairarapa Tāmaki nui-ā-Rua settlement following my letter of 21 July 2021.

As you know, the Ngāti Kahungunu ki Wairarapa Tāmaki nui-ā-Rua Settlement Trust and the Crown agreed to redress additional to the redress in the deed of settlement initialled by the Settlement Trust and the Crown in 2018. The initialled deed was approved by 73% of the members of Ngāti Kahungunu ki Wairarapa Tāmaki nui-ā-Rua who voted. As part of its recent trustee election process the Settlement Trust also initiated a vote on the enhanced settlement package in which 68% of those who voted supported the settlement.

As you will also be aware, the Supreme Court has recently granted leave to you and the Wai 429 claimants to appeal the decision of the High Court in the *Mercury* case directly to that Court, bypassing the Court of Appeal.

The Settlement Trust has since had its first meeting following its trustee elections and Annual General Meeting for 2021. I am advised the Settlement Trust, as the mandated representative for the settlement of the historical Treaty claims of Ngāti Kahungunu ki Wairarapa Tāmaki nui-ā-Rua, has asked the Crown to proceed to sign a deed of settlement and introduce settlement legislation The settlement of claims, like all settlements, is contingent upon Parliamentary approval.

In considering whether to proceed, I am mindful:

a. of the broader interests of Ngāti Kahungunu ki Wairarapa Tāmaki nui-ā-Rua in achieving a settlement and redress for their long-standing grievances. There has already been a long delay in reaching a Ngāti Kahungunu ki Wairarapa Tāmaki nui-ā-Rua settlement as a result of the resumption litigation and further delay to the provision of redress pending resolution of the proceedings (which is not confined to the Supreme Court) will cause considerable prejudice and cost to the iwi along with Rangitāne o Wairarapa;

b. of the basis of the appeal to the Supreme Court which, as I understand it, does not bear upon the essential finding of the Waitangi Tribunal that the Wai 85 and 429 claimants are not and could not be appropriate recipients of the resumable land;

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c. Raukawa (supported by Ngāti Tūwharetoa) find their involvement in the resumption litigation to uphold their rangatiratanga at Pouākani to be an ongoing burden; and

d. no reasons accompanied the Supreme Court's decision to assume jurisdiction from the Court of Appeal nor has there been any direction to pause the settlement and the introduction of legislation, which leaves me able only to consider the foregoing points which formed the basis of my previous decision to proceed to settlement, and which I set out more fulsomely in my letter to you of 21 July 2021.

My view is taking into account all the circumstances of this case and the interests involved, the balance remains in favour of ending further delay and bringing the benefits of comprehensive Treaty of Waitangi settlement redress to all of Ngāti Kahungunu ki Wairarapa Tāmaki nui-ā-Rua.

Taking all these matters into account, I intend to proceed to sign the deed and propose the settlement with Ngāti Kahungunu ki Wairarapa Tāmaki nui-ā-Rua to Parliament. A deed signing date will be publicly notified but is likely to be within the next month.

Nāku noa, nā

Hon Andrew Little
Minister for Treaty of Waitangi Negotiations

cc: Matanuku Mahuika, Kāhui Legal, matanuku@kahuilegal.co.nz;
Haami Te Whaiti, Ngāti Kahungunu ki Wairarapa Tāmaki nui-ā-Rua Settlement Trust, admin@kkwtnr.org.nz

KĀHUI LEGAL

25 October 2021

EXHIBIT NOTE

This is the exhibit marked "**AC2**" referred to in the affidavit of **ANNE JESSIE TE AROHA CARTER** and sworn/~~affirmed~~ at Wellington this 10th day of November 2021 before me:

Michaela Stack

A Deputy Registrar/A ~~Solicitor of the High~~ Court of New Zealand

Deputy Registrar of the High Court at Wellington

Hon Andrew Little
Minister for Treaty of Waitangi Negotiations
Parliament Buildings
WELLINGTON

Tena koe e te Minita

CROWN SETTLEMENT OF WAI 85 WAIRARAPA MOANA CLAIM

1. We refer to your letter of 22 October 2021 to Mr Kingi Smiler.

2. We have been instructed by the Wairarapa Moana Incorporation (**Incorporation**) to reply to your letter on their behalf.

3. The Incorporation is disappointed but unsurprised by the Crown's determination to sign the Ngati Kahungunu ki Wairarapa Tamaki Nui a Rua Deed of Settlement (**Deed**) and legislate to settle the Wai 85 claim.

4. In respect of the Crown's decision to sign Deed and the justifications given in your letter for that decision we note, for the record, the following:

   (a) The 68% vote in favour of the revised settlement offer will be the lowest vote in favour of a settlement. When considered alongside the 31% participation rate the outcome of the vote falls outside the Crown's parameters for approving a ratification vote.

   (b) The evidence before the Waitangi Tribunal is that only 14% of the Incorporation's owners have registered with the Settlement Trust. This means that in addition to the low level of support the number of Incorporation owners who participated in the vote will have been low.

   (c) The Crown is aware that a number of resolutions have been passed by the Incorporation supporting the resumption application. In 2018 the Incorporation's owners also voted overwhelmingly against a resolution promoted by supporters of the Settlement Trust to oppose the resumption application.

   (d) It is incorrect and misleading to suggest that because the Incorporation has not sought to review the Waitangi Tribunal's preliminary determination that it has accepted the preliminary findings as to the appropriateness of resumption in respect of the Wai 85 claim. The Incorporation has been clear, and the Crown knows, that it does not accept aspects of the preliminary determination. Instead the Incorporation had committed to working through the agreed iterative process proposed by the Crown in order to address its concerns. A right of review would still be available at the conclusion of this process and on the making of final recommendations by the Waitangi Tribunal.

(e) From the point of view of the Incorporation the key matter to emerge from the preliminary determination was the indication from the Waitangi Tribunal that it was willing to recommend resumption. This means that there is a real prospect that the Incorporation's owners and wider Wairarapa hapu and whanau associated with the lands at Pouakani could obtain redress which is substantially greater than the redress being offered by the Crown through the Deed.

(f) The absence of reasons in the Supreme Court decision to grant leave to leap frog the Court of Appeal does not mean that the fact of leave should be dismissed in the way that you have dismissed it. Section 77 of the Senior Courts Act 2016 provides that reasons must only be given by the Supreme Court when leave is declined. When leave is granted reasons are not typically given in order to avoid pre-empting the hearing of the substantive appeal.

(g) The decision by the Supreme Court to grant leave to leap frog the Court of Appeal is significant and should not be dismissed in the way that the Crown is seeking to dismiss it. The threshold that must be satisfied to leap frog the Court of Appeal is high. Section 75 of the Senior Courts Act 2016 requires that an application must be in the public interest and accompanied by exceptional circumstances. The fact that the Supreme Court granted leave means that the Court was satisfied that these requirements had been met.

(h) The Crown has consistently promoted the position of Ngati Raukawa and Ngati Tuwharetoa, with whom the Crown has already concluded settlements in respect of their Treaty of Waitangi claims. However, the Crown also owes Treaty obligations to the Incorporation and its owners, whose claims have been found to be well-founded by the Waitangi Tribunal, and whose views and interests the Crown is choosing to ignore.

(i) The Crown position in respect of Ngati Raukawa and Ngati Tuwharetoa has also ignored the support given to the Incorporation's resumption application by the Pouakani Trust. The Pouakani Trust represents the hapu that hold mana whenua at Pouakani. It is therefore the case that although the Raukawa Settlement Trust and Tuwharetoa Settlement Trust oppose resumption, the Trust representing the hapu at Pouakani support it.

(j) It is no surprise that the Crown is choosing to support the position of Ngati Raukawa and Ngati Tuwharetoa because their position aligns with the desire of the Crown to avoid the cost of making good on the Incorporation's resumption application if that application succeeds. The Crown has been silent on the benefit to it of settling Wai 85. However, by signing the Deed and legislating to settle Wai 85, the Crown will avoid a liability which, based on the $800 million valuation of the Pouakani lands, is close to $700 million. There is therefore a considerable Crown interest in concluding the Deed and forcing the settlement of Wai 85.

5. The Crown's ability to legislate is both a right and privilege that, in Treaty terms, can be said to derive from Maori agreement to the Crown exercise of kawanatanga in Article 1. This requires that the legislative power be exercised consistent with Treaty principle. That includes the Crown acting honourably and in good faith. By legislating to settle Wai 85, in the circumstances we have described, and against the clear opposition of the Incorporation and its owners, the Crown is patently failing to meet that standard.

6. There are also broader principles that are relevant and that the Crown appears to be ignoring. These were described by the Waitangi Tribunal at page 14 of its *Report on the Crown's Foreshore and Seabed Policy* when discussing the then Crown foreshore and seabed policy. That policy included the proposal to legislate so as to prevent Maori from having customary title claims to the foreshore and seabed heard by the Courts. In respect of the policy the Waitangi Tribunal said:

> "...The policy clearly breaches the principles of the Treaty of Waitangi. But beyond the Treaty the policy fails in terms of the wider norms of domestic and international law that underpins good government in a modern democratic state. These include the rule of law, and the principles of fairness and non-discrimination".

7. These same breaches and failures apply equally here.

8. The Incorporation is hopeful that the Crown will reconsider its position in respect of Wai 85 and remove it from the settlement. The Incorporation believes there are ways this can be achieved while allowing the settlement, or at least a substantial part of it, to proceed. However, this requires a willingness on the part of the Crown to engage and to entertain such a solution. To date the Crown has been unwilling to do either of these things.

Naku noa, na

Matanuku Mahuika
Tumu Whakarae

Mr Kingi Smiler, Wairarapa ki Pouakani Incorporation, kingilyn@actrix.co.nz
Mr Haami Te Whaiti, Ngati Kahungunu ki Wairarapa Tamaki nui-a-rua Settlement Trust, admin@kkwtnr.org.nz

WAIRARAPA MOANA
nurturing our taonga

WAIRARAPA MOANA INCORPORATION

EXHIBIT NOTE

This is the exhibit marked "**AC3**" referred to in the affidavit of **ANNE JESSIE TE AROHA CARTER** and sworn/affirmed at Wellington this 10th day of November 2021 before me:

Michaela Stack

A Deputy Registrar/A Solicitor of the High Court of New Zealand

Deputy Registrar
of the High Court
at Wellington

27 October 2021

Rt Hon Jacinda Ardern
Prime Minister
Parliament Buildings
WELLINGTON

By email: j.ardern@ministers.govt.nz

Tēnā koe e te Pirimia

CROWN SETTLEMENT OF WAI 85 WAIRARAPA MOANA CLAIM

Wairarapa Moana Incorporation write to express our disappointment at the way in which the Government is progressing at pace to extinguish our treaty claim Wai 85, without the consent of the Incorporation, its 3700 owners, whānau and hapū. We wish to record our concerns:

- The Incorporations owners, whānau and hapū have consistently mandated the Committee of Management to settle their Wai 85 claim and have supported the resumption application before the Waitangi Tribunal.
- The undue haste with which the Government is pushing ahead with the signing of the Deed of Settlement and the introduction of legislation despite the clearly stated objections of Wairarapa Moana Incorporation, its owners, whānau and hapū and Ngāi Tūmapūhia-ā-rangi hapū.
- The evidence before the Waitangi Tribunal is that only 14% of the Incorporation's owners have registered with the Ngāti Kahungunu ki Wairarapa Tāmaki Nui-ā-Rua Settlement Trust. Therefore, they do not represent the Wai 85 claimants.
- The decision by the Government to ignore the granting of leave by the Supreme Court, to hear the Incorporation's appeal direct.
- Actions designed simply to avoid the cost of making good on the resumption application, if it were to succeed, an estimated liability of $700 million.
- It is not fair, reasonable, and just. It is not "tika."

In 2004 the then Labour led Government legislated away the right of Māori to have customary title claims to the foreshore and seabed heard by the Courts.

The Waitangi Tribunal determined that particular action to be a breach of the Treaty of Waitangi and a failure in terms of the norms of domestic and international law that underpins good government in a modern democratic state.

We regard the current actions by the Government in relation to Wai 85, to be in the same vein.

Other Iwi, hapū, Māori also join with us in their concern about the arbitrary approach by the Government to legislate away rights.

Wairarapa Moana Incorporation do not wish to hold up the settlement of the rest of Ngāti Kahungunu ki Wairarapa Tāmaki Nui-a-Rua historical claims. We just want Wai 85 removed from the Deed of Settlement.

Wairarapa Moana Incorporation represent the descendants of the original owners of Wairarapa Moana. Throughout our history, the rangatira of Wairarapa Moana have had a proud tradition of connections and relationships with the Prime Minister of Aotearoa New Zealand. From Richard Seddon, in 1896 with the "gifting" of the lakes through to Peter Fraser in the 1940s.

In fact, it was the intervention of Peter Fraser in the 1940s who ensured Crown Officials met with our rangatira, to discuss the occupation without notice of our lands at Pouākani and plans for the taking of land under the Public Works Act for the Waikato hydro scheme.

He saw the injustice for himself and was prepared to act.

Justice Cooke, High Court, in his judgement in March 2021 described the Crown's treatment of Wairarapa Māori as "a remarkable story of injustice"...."a trail of tears."

We ask you as our Prime Minister, to see the injustice and to act.

We understand that there are very significant calls on your time, especially at present. We also acknowledge that we have been corresponding directly with Minister Little through our legal counsel. We enclose recent correspondence for your information.

However, given the significance of what the Crown is proposing to do, we would be grateful to have the opportunity to urgently discuss this matter with you.

Nāku noa, nā

Kingi Winiata Smiler
Chairman, Wairarapa Moana Incorporation

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EMAIL info@wairarapamoana.org.nz

KĀHUI LEGAL

EXHIBIT NOTE

This is the exhibit marked "**AC4**" referred to in the affidavit of **ANNE JESSIE TE AROHA CARTER** and sworn/~~affirmed~~ at Wellington this 10th day of November 2021 before me:

Michaela Stack

A Deputy Registrar/A ~~Solicitor of the High~~ Court of New Zealand

Deputy Registrar of the High Court at Wellington

2 November 2021

Hon Andrew Little
Minister for Treaty of Waitangi Negotiations
Parliament Buildings
WELLINGTON

Tena koe e te Minita

CROWN SETTLEMENT OF WAI 85 WAIRARAPA MOANA CLAIM

1. As you are aware we act for Wairarapa Moana Incorporation (**Incorporation**).

2. The Incorporation remains strongly of the view that it is the only party with the mandate to negotiate the settlement of the Wai 85 claim. The Wai 85 claim should therefore have been excluded from the Ngati Kahungunu ki Wairarapa Tamaki Nui a Rua Deed of Settlement (**Deed**), which the Crown signed on 29 October 2021.

3. Although the Incorporation considers that the Crown should have excluded Wai 85 from the Deed, it is willing to undertake that, in return for Wai 85 being excluded, it will refund to the Crown 50% of the value of any successful resumption application up a maximum of $20 million.

4. The $20 million amount is the sum the Incorporation estimates was allocated to the settlement in respect of the claims relating to the lands at Pouakani. If the Crown considers that a different amount is appropriate then the Incorporation would be willing to reconsider the amount specified in its undertaking.

5. The Incorporation would also withdraw its urgent claim to the Waitangi Tribunal, which has been set down for hearing on 11-12 November 2021.

6. The offer contained in this letter is made as a good faith gesture. It is not an offer that the Incorporation is required to make given its view that it has the mandate to progress Wai 85 and that reference to Wai 85 should not have been included in the Deed. The offer will remain open up to the commencement of the Waitangi Tribunal hearing on 11 November 2021.

Naku noa, na

Matanuku Mahuika
Tumu Whakarae

Mr Kingi Smiler, Wairarapa ki Pouakani Incorporation, kingilyn@actrix.co.nz
Mr Haami Te Whaiti, Ngati Kahungunu ki Wairarapa Tamaki nui-a-rua Settlement Trust, admin@kkwtnr.org.nz