IN THE WAITANGI TRIBUNAL

Wai 1940
Wai 2800

IN THE MATTER OF the Treaty of Waitangi Act 1975

AND

IN THE MATTER OF the Inquiry into the Remaining Historical Claims: Southern North Island and South Island Claims (Wai 2800)

AND

IN THE MATTER OF a claim by Jane Mihingarangi Ruka Te Korako, on behalf of the Grandmother Council of the Waitaha Nation, including the three hapū of Ngāti Kurawaka, Ngāti Rakaiwaka and Ngāti Pakauwaka

---

MEMORANDUM OF COUNSEL SEEKING PARTICIPATION IN WAI 2800

12 December 2022

Phoenix Law
Barristers and Solicitors
200 Willis Street
PO Box 27400
Marion Square
Wellington 6141
Phone: (04) 384 1304
Email: mason@phoenixlaw.expert
Counsel Acting: Janet Mason

RECEIVED
Waitangi Tribunal
13 Dec 22
Ministry of Justice
WELLINGTON

MAY IT PLEASE THE TRIBUNAL:

1. This Memorandum of Counsel ("MoC"):

a. is filed on behalf of:

i. Jane Mihingarangi Ruka Te Korako, on behalf of the Grandmother Council of the Waitaha Nation, including the three hapū of Ngāti Kurawaka, Ngāti Rakaiwaka and Ngāti Pakauwaka ("the Claimants"); and

b. respectfully requests participation in the Wai 2800 Inquiry into Remaining Historical Claims: Southern North Island and South Island Claims ("the SI Inquiry").

2. The Claimants represent various tribal groupings belonging to the Iwi of Waitaha.

3. Previous Memorandum-Directions ("MDs") have determined that the Tribunal's jurisdiction to enquire into Waitaha's historical claims has been ousted ("the Previous Decision") by sections 9, 10 and 461 of the Ngāi Tahu Claims Settlement Act 1998 ("NTS Act").[1]

4. The Claimants are of the view that the NTS Act has not extinguished their claims, and therefore the Tribunal has the jurisdiction to hear their claims ("the Jurisdictional Issue"). In addition, under section 461(a) of the NTS Act, the Tribunal has the jurisdiction in relation to matters related to the interpretation or implementation of the NTS Act and the associated Ngāi Tahu Deed of Settlement.

5. At the outset, the Claimants wish to state that this is not a claim against the iwi of Ngāi Tahu, but against the Crown. Waitaha acknowledges and respects the

[1] See Wai 2800, #2.5.4 at paragraphs 5 and 6; and Wai 2800, #2.5.5 at paragraphs 7-12.

rights of Ngāi Tahu to conduct their affairs as a distinct iwi. Waitaha wish to themselves be recognised as a distinct peoples, and an Iwi in their own right, a position which the Crown has denied.

6. The Claimants are of the view that their rights to ancestral land and resources are unextinguishable as outlined in the United Nation Declaration on the Rights of Indigenous Peoples ("UNDRIP") under Articles 18, 19, 27, 28 and 40.

7. The Claimants respectfully request to participate in the SI Inquiry as follows:

a. to have all of their historical and contemporary claims heard ("Option A"). This would require the Tribunal to agree to hear the Claimants' evidence and submissions on the Jurisdictional Issue, and to make a decision in their favour; ***or***

b. to have only their historical language and culture claims heard ("Option B"); ***and/or***

c. to have their contemporary claims heard, including language and culture ("Option C").

8. The Claimants' preference is Option A. However, to be able to pursue Option A, the Tribunal would need to make a determination that its jurisdiction to hear the Waitaha historical claims has not been ousted under ss 9, 10 and 461 of the NTS Act.

9. The Claimants respectfully apply to have the Previous Decision reconsidered upon the following grounds:

a. the Claimants did not have an opportunity to provide evidence, and engage via legal submissions, in relation to the Jurisdictional Issue and the Previous Decision;

b. the Tribunal's determination in relation to the Previous Decision was not made on the basis of comprehensive evidence and legal submissions. The Claimants have relevant information and evidence

which the Tribunal did not have the benefit of, prior to reaching their conclusion in the Previous Decision; and

c. the consequences of the extinguishment of the Claimants' rights are severe, and constitute significant and irreversible prejudice. Their historical claims, and therefore their te Tiriti o Waitangi/Treaty of Waitangi ("Tiriti/Treaty") rights will have been permanently extinguished, which is a breach of the Claimants' ancestral ahi kā birth rights, and their constitutional rights under te Tiriti/Treaty, and UNDRIP. These rights cannot legally be extinguished.

10. The remainder of this MoC addresses each of the three grounds set out immediately above in turn. A short conclusion then follows.

A: NO OPPORTUNITY TO PARTICIPATE

11. The SI Inquiry was initiated in 2018, to inquire into certain claims that are not included in the recognised mandates of groups in Tiriti/Treaty settlement negotiations, and have remaining historical grievances that have not previously been heard or settled, and are not being heard in current Tribunal inquiries.[2]

12. A preliminary interlocutory phase was held to clarify the eligibility of claims and claimants' interest in participating in the Inquiry. This aimed:

a. to clarify the extent to which partly settled historical claims remained within the Tribunal's jurisdiction;

b. establish whether claims included in current settlement negotiations had any remaining historical grievances not covered;

c. identify the districts in which eligible claims with remaining historical grievances were located;

[2] Wai 2800, #2.5.1, at [1].

d. ascertain whether or not claimants with eligible claims were likely to wish to participate in a standing panel process and on what grievances; and

e. evaluate whether any such grievances might more appropriately be redirected to a kaupapa inquiry.[3]

13. In MDs dated 1 October 2018 ("the 1 Oct MDs"), the Tribunal released a list of historical claims that staff had assessed as possibly eligible to participate in the SI Inquiry, attached as Appendix A to the 1 Oct MDs ("the Eligible Claims List"), along with a preliminary list of claims that Tribunal staff had determined were not eligible to participate, attached as Appendix B to the 1 Oct MDs("the Ineligible Claims List"). The Tribunal directed that any party who considered the assessment of their claim to be incorrect, to file submissions explaining how their claim was within the scope of the SI Inquiry by no later than midday, Friday 28 December 2018.[4]

14. As the Wai 1940 Claim was not included in either the Eligible Claims List or the Ineligible Claims List, it appears that Wai 1940 has been missed out altogether. This seems extraordinary, given that the entity established by the Claimants is called the Waitaha Grandmother Council.

15. The Claimants were not aware of the 1 Oct MDS, and did not have any opportunity to make submissions to support the inclusion of their claim on the Eligible Claims List.

16. The Claimants have a wealth of evidence and argument which they wish to present to the Tribunal about why they consider their claims were not extinguished under the NTS Act. Unfortunately, because they did not know about the SI Inquiry until recently, they were unable to make submissions to the Tribunal on eligibility. It is contrary to fundamental natural justice rights that the Claimants not be provided with an opportunity to put their case in such an

[3] Wai 2800, #2.5.1, at [4].
[4] Wai 2800, #2.5.2.

important matter, a matter which encompasses their very existence as a distinct peoples.

17. It is therefore respectfully requested that the Claimants be given the opportunity to put evidence and submissions before the Tribunal on the Jurisdictional Issue.

18. Counsel submits that it is in the interests of natural justice to grant the Claimants an opportunity to put their case and to advance evidence in relation to the Jurisdictional Issue. They have not had an opportunity to participate in the SI Inquiry for reasons outside of their control, and ought not be penalised for not responding to the 1 Oct MDs earlier.

B: JURISDICTIONAL ISSUE NOT PROPERLY INQUIRED INTO

19. The background to the passage of the NTS Act is relevant to the Jurisdictional Issue, and is set out in brief at **Annex A**.

20. The issue to be determined is whether it is within the jurisdiction of the Tribunal to inquire into the historical claims of the Claimants, given ss 9, 10, and 461 of the NTS Act.

21. Section 2 of the TRoNT Act states:

> In this Act, unless the context otherwise requires, Ngāi Tahu Whanui means the collective of the individuals who descend from the primary hapu of Waitaha, Ngāti Māmoe, and Ngāi Tahu, namely, Kāti Kuri, Kāti Irakehu, Kāti Huirapa, Ngāi Tuahuriri, and Kai Te Ruahikihiki.

22. Section 9 of the NTS Act states:

> For the purposes of this Act and any other enactment, unless the context otherwise requires, Ngāi Tahu and Ngāi Tahu Whānui each means the collective of individuals who descend from the primary hapū of Waitaha, Ngāti Māmoe, and Ngāi Tahu, namely Kāti Kurī, Kāti Irakehu, Kāti Huirapa, Ngāi Tuahuriri, and Kāti Te Ruahikihiki.

23. Section 10(1)(d) of the NTS Act states:

> [Ngāi Tahu claims] includes the claims to the Waitangi Tribunal designated Wai 189, Wai 322, Wai 324, Wai 348, Wai 380, Wai 482, Wai 498, Wai 597, Wai 618, and Wai 622.

24. If Parliament intends to extinguish a group's rights, it must do so expressly, without a shadow of a doubt.

25. The High Court in *Re Reeder*[5] recently considered the law of extinguishment in respect of section 58(4) of the Marine and Coastal Area Act 2011, and stated:

> [128] The principles applicable to the extinguishment of customary rights are not in dispute. The starting point is as set out by the then Chief Justice, Dame Sian Elias, *in Marlborough Sounds*:
>
> > More recently, the effect of the radical title acquired by the Crown with sovereignty has been considered by this Court in *Te Runanga O Muriwhenua v Attorney-General* [1990] 2 NZLR 641 and *Te Runanganui o Te Ika Whenua Inc Society v Attorney-General* [1994] 2 NZLR 20. The position was restated by Cooke P for the Court in *Te Ika Whenua* at 23-24: "On the acquisition of the territory, whether by settlement, cession or annexation, the colonising power acquires a radical or underlying title which goes with sovereignty. Where the colonising power has been the United Kingdom, that title vests in the Crown. But, at least in the absence of special circumstances displacing the principle, the radical title is subject to the existing native rights. They are usually, although not invariably, communal or collective***. *It has been authoritatively said that they cannot be extinguished (at least in times of peace) otherwise than by the free consent of the native occupiers, and then only to the Crown and in strict compliance with the provisions of any relevant statutes.*** It was so stated by Chapman J in *R v Symonds* (1847) NZPCC 387, 390, in a passage later expressly adopted by the Privy Council, in a judgment delivered by Lord Davey, in *Nireaha Tamaki v Baker* (1901) NZPCC 371, 384.

[5] *Re Reeder (Ngā Potiki Stage 1 – Te Tāhuna o Rangataua)* [2021] NZHC 2726.

> [129] In the same case, Keith and Anderson JJ went on to review the relevant authorities, including those considered by Elias CJ. The following principles are apparent from their joint judgment:
>
> > ***(a) An approach that is protective of customary interests is to be taken;***
> > ***(b) Construction must be liberal instead of strict, with doubtful expressions resolved in favour of the indigenous group;***
> > (c) Further "the onus of proving extinguishment lies on the Crown and the necessary purpose must be clear and plain"; and
> > ***(d) Lawful extinguishment of customary interests, must not be "by a side wind" but any intention to extinguish customary interests through a statutory scheme must be clear and plain.***
>
> [130] Therefore, the approach that must be taken is as Blanchard J stated in *Faulkner v Tauranga District Council*: Customary or aboriginal (Crown recognised) title is a burden on the Crown's feudal title***. It is well settled that customary title can be extinguished by the Crown only by means of a deliberate Act authorised by law and unambiguously directed towards that end.*** Unless there is legislative authority or provisions such as were found in ss.85 and 86 of the Native Land Act 1909, the Executive cannot, for example, extinguish customary title by granting the land to someone other than the customary owners. If it does so the grantee's interest is taken subject to the customary title: *Nireaha Tamaki v Baker* (1901) NZPCC 371; [1901] AC 561. ***Customary title does not disappear by a side wind. Where action taken by the Crown which arguably might extinguish aboriginal title is not plainly so intended the Court will find that the aboriginal title has survived*** [emphasis added]**.**

26. If section 9 of the NTS Act is interpreted to mean that Waitaha ***is*** a part of Ngāi Tahu, then it means that the NTS Act has extinguished Waitaha's rights to any Tiriti/Treaty claim.

27. The wording of s 9 is, however, ambiguous. The phrasing of "Ngāi Tahu and Ngāi Tahu Whānui each ***means the collective of individuals*** who descend from the primary hapū of Waitaha, Ngāti Mamoe, and Ngāi Tahu, ***namely: Kāti Kurī, Kāti Irakehu, Kāti Huirapa, Ngāi Tuahuriri, and Kai Te Ruahikihiki****"* appears

to exhaustively list the hapū who make up the collective of individuals, who are the Ngāi Tahu Whānui.

28. The primary hapū that are specified within s 9(1), are; Kāti Kurī, Kāti Irakehu, Kāti Huirapa, Ngāi Tuahuriri, and Kai Te Ruahikihiki. Therefore, there can be no other primary hapū.

29. However, none of these hapū belong to the iwi of Waitaha.

30. Which group(s) then are settled? The answer is as follows:

> **a.** the collective of individuals;
> **b.** who descend from the primary hapū of Waitaha, Ngāti Māmoe and Ngāi Tahu;
> **c.** ***namely;*** Kāti Kurī, Kāti Irakehu, Kāti Huirapa, Ngāi Tuahuriri, and Kai Te Ruahikihiki.

31. The resolution of the Jurisdictional Issue turns on the word "namely". The term "namely" is used when one is setting out an exclusive group. In this case the groups in paragraph 31.c set out exclusively the constituent elements of 31.a. and b. "Namely" means exactly the same thing as specifically, and is followed by the complete set of things that belong to the groups in 31.a and b. Google's English Dictionary, provided by Oxford Languages, defines "namely" as:

> that is to say; ***to be specific (used to introduce detailed information or a specific example).***[6]

32. The Cambridge Dictionary defines "namely" as follows:

> used when you want to give more detail or be more exact about something you have just said.[7]

[6] Google's English Dictionary, provided by Oxford Languages, Oxford University, https://www.google.com/ (Search result: "Namely Definition") accessed 18 Aug 2022.
[7] *Cambridge Advanced Learner's Dictionary & Thesaurus*, Cambridge University Press, definition of namely.

33. What this means is that the constituents in 31.c. are the only items that belong to 31.a and b, and because 31.c. contains no Waitaha hapū, Waitaha cannot possibly be included in 31.a.

34. I turn to an analogy to draw this point out. Let us say I was referring to what a person had for lunch. I could say, what was lunch made of? It was made of:

a. a collection of food items;
b. made up of proteins, carbohydrates, and fruit;
c. namely, bread, ham, cheese, olives, crackers, and lettuce.

35. Because I have used the term "namely" then the items which follow in 35.c are exclusively what was eaten for lunch. The reference to "fruit" in 35.b is rendered nugatory. There is no fruit in the exclusive list of food items at 35.c, so lunch does not include any fruit, despite this being mentioned at 35.b.

36. The Claimants submit that due to the ambiguity of s 9(1) of the NTS Act, Waitaha's claims cannot be said to have been extinguished.

37. The Claimants contend that "Ngāi Tahu Whānui", does not include Waitaha, because the definition of "Ngāi Tahu Whānui" comprises only the five hapū listed, because it states "***namely*** Kāti Kurī, Kāti Irakehu, Kāti Huirapa, Ngāi Tuahuriri, and Kai Te Ruahikihiki".

38. Waitaha peoples are the oldest inhabitants of Te Waipounamu, and indeed of Aotearoa. Despite attempts by the Crown to subsume them into Ngāi Tahu Whānui, they continue to maintain that they are a distinct group, with distinct rights that have not been extinguished.

C: PREJUDICE

39. The Crown's attempt to include Waitaha in the NTS Act has failed to protect Waitaha kawa, tikanga and reo, and failed to protect Waitaha's distinct identity

as a peoples'. The Crown has knowingly and actively stigmatised Waitaha by not recognising them as distinct Peoples' and an Iwi in their own right.

40. If the Tribunal decides that it does not have jurisdiction to consider Waitaha's historical claims, the Claimants will suffer:

- **a.** the effects of the extinguishment of their distinct identity;
- **b.** loss of relationship with their wāhi tapu;
- **c.** loss of tino rangatiratanga over their taonga;
- **d.** a lack of social development leading to a disadvantageous socio-economic position;
- **e.** damage to the social structures of Waitaha; and
- **f.** damage to the histories, traditions, language and culture unique to Waitaha.

D: CONCLUSION

41. To reiterate paragraph 9 above, the Claimants' preference is Option A, namely, for the Tribunal to inquire into all of their historical and contemporary claims.

42. The Claimants respectfully request that the Tribunal reconsider the Previous Decision. The Claimants unfortunately were not legally represented and did not have an opportunity to participate in the Previous Decision of the Tribunal. It is not in keeping with their rights of natural justice that they be denied an opportunity to put their case. They fear they will not have another chance to participate in an Inquiry like this one again for a very long time, if ever.

43. The Claimants therefore request that the Tribunal issue timetabling directions for a short interlocutory hearing on the Jurisdictional Issue as follows:

- **a.** Claimant evidence to be filed by 10 February 2023;
- **b.** evidence from the Crown, and any other parties who wish to participate to be filed by 3 March 2023;

c. Claimant reply evidence to be filed by 24 March 2023;

d. a hearing of 1 – 2 days in April or May 2023, depending on witnesses;

e. opening submissions to be filed 5 days before the hearing date;

f. closing submissions to be 5 days after the hearing date; and

g. reply submissions to be filed 5 days after the closing submissions.

44. In the event that the Tribunal does decide that it has no jurisdiction to hear all of the Waitaha historical claims, the Claimants submit that they wish to have their historical and contemporary language and culture claims, and all of their contemporary claims heard in the SI Inquiries as these claims were not extinguished in the NTS Act. Section 10 of the NTS Act states that claims, "insofar as they relate to language and culture" are excluded from the list of those considered settled by the NTS Act.

Dated 12 December 2022

_____

Janet Mason

Counsel Acting