OFFICIAL

BEFORE THE WAITANGI TRIBUNAL

WAI 1040

Wai 1507
Wai 1519
Wai 1666
Wai 2010
Wai 2149
Wai 2181

IN THE MATTER **of the Treaty of Waitangi Act 1975**

AND

IN THE MATTER **Te Parahi o Te Raki (Northland)**

MEMORANDUM OF COUNSEL REGARDING DRAFT CROWN STATEMENT OF POSITION AND CONCESSIONS

Dated: 17 May 2012

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MAY IT PLEASE THE TRIBUNAL

1. This memorandum responds to the Crown Memorandum Responding to Questions of Clarification Regarding Draft Crown Statement of Concessions and Position ("Crown Clarification Memo") (Wai 1040, #3.1.768).

2. This memorandum is filed on behalf of the following claimants:

   Wai 1507, Nga Uri o Tupoto and Ngati Toro claim (Pouri Harris)

   Wai 1519, Kaahurangi Joseph (Ngati Whatua) claim

   Wai 1666, Ani Taniwha claim

   Wai 2010, Te Tana and Others Lands Claim

   Wai 2149, Ngā Uri o Te Pona Waahi Tapu (Taniwha) Claim

   Wai 2181, Ngā Uri o Maki-nui Lands (Kapea and Beazley) Claim

3. This memorandum will not address the substantive issues surrounding the individual issues. It is considered more appropriate to address the substance of the issues after the Crown has finalised its Statement of Position and Concessions. Rather, we intend to address the process and general status of concessions and the impact of the Crown's responses on the need and readiness for hearings, and the timeliness of hearings.

4. The reservations and admissions by the Crown that further evidence is needed, further consideration is needed, and that some matters will require hearings all lead to the inescapable conclusion that full hearings on virtually all issues will be needed. Counsel views the Crown Clarification Memo as a genuine effort to respond to the wide number of issues that reflect the claims now pending in this inquiry. Because of the Crown's responses, it is evident to counsel that hearings will be required, both at the generic and specific level.

5. Claimant counsel promoting the effort to inquire further of the Crown had hoped to avoid a lengthy and expensive process of written exchange and resolve many of these questions in an exchange with Crown counsel, kanohi ki te

kanohi, but the Crown was disinclined to progress in that manner. This result has ensued.

6. Accordingly, the Crown Clarification Memo has raised several issues that claimants wished to have addressed before the Crown files its Final Statement of Position and Concessions and the Tribunal begins the preparation of its Statement of Generic Issues.

Issues of clarification

7. Although the Crown repeatedly claims that the requests posed to it were not really for clarification, it then asserts that they were seeking "the meaning of particular statements or admissions in the draft Crown statement of position and concessions" (Wai 1040, #3.1.768, ¶5.2.) It is difficult to appreciate how a request for the meaning of statements differs from a request for clarification.

8. Moreover, the Crown's next comment that it "anticipated that questions would be filed to resolve any uncertainty or ambiguity within the Crown's draft statement of position and concessions". The Crown expressed a view that, rather than clarification, it was asked to provide further details, and asked to provide explanation for positions it has stated it holds, among other things.

9. Unfortunately, and with respect, the Crown's Statement of Position and concessions is not a model of clarity. It was replete with "uncertainty" about the scope and detail of the concessions and "ambiguity" about the application of the concessions. Without engaging in a lengthy and apparently unproductive discussion about uses of the terms "accept" and "acknowledge", and statements that harm was done, but which fail to address the ultimate question of whether the Crown concedes that its conduct is a Treaty Breach, claimant counsel can hardly be blamed for seeking, by reasonable means, to determine just how far the Crown's carefully crafted statements extend.

10. As a result of the Crown's further reservations and numerous issues that must be put to proof, issues that need further research, and issues which the Crown must consider further, counsel has concluded that there is very little expectation of significantly reducing the hearing time based on issues being removed by

Crown concession. Even in areas where the Crown has made a clear, if limited, statement of concession, substantial hearing time reductions cannot be expected without undermining the context of claimants' claim presentation.

Negotiations Readiness

11. The Crown's announcement at the Judicial Conference that it was ready to proceed to negotiations and its repeat of that comment in its Crown Clarification Memo (Paragraph 16) was a bit incredible. This is because the announcement was unqualified yet the Crown Clarification Memo is replete with admissions that the Crown lacks information, needs further research, or must give more consideration to various issues that have been raised by the claimants.

12. A careful reading of the Crown Clarification Memorandum reveals a number of instances where the Crown needs further research or information. There are at least 15 instances where the Crown has stated it needs further research in order to respond to the issues stated. This makes it quite plain that the Crown is unable to effectively concede on these issues. A listing of several of the areas where the Crown states that it requires further research is attached to this memorandum as Exhibit A.

13. So despite its assertion that it can begin negotiations with only the material on the record of inquiry and its land loss data bank, the Crown has admitted that it will need further information to be prepared to even determine whether it can concede to Treaty breaches alleged on numerous issues.

14. In addition to needing further information, the Crown has asserted that it needs to consider some matters further. Non-exhaustive samples of this type of assertion are found at Exhibit B to the Memorandum.

15. And in addition to the admitted need for further information and research, and consideration of unconsidered matters, the Crown has repeatedly admitted that there are numerous issues where it will be necessary to proceed to hearings. Throughout the Crown Clarification Memo are comments that refer to the benefit and even need for hearings to determine whether claims are well-founded, or supported to the Crown's satisfaction.

16. A sampling of 20 issues where the Crown has concluded that a hearing is needed in order to determine the merits of the claim is set forth on Exhibit C to the Memorandum. These issues include the most general concessions, any number of issues involved in land acquisition and loss and the legal structures that permitted it, the Northern War and context, local government structure and operation, among many others.

17. An example of the lack of utility of "concessions" after hearing is found in the following Crown response:

> "Following the hearing of evidence, the Crown may be in a position to make concessions in respect of specific Public Works Act takings. That will depend, of course, on the evidence that is presented and heard during the Stage II inquiry."[1]

18. Of course, *after* hearing, it's a bit late for *concessions*.

19. All these explanations for the inability to concede further come in the same memorandum where the Crown "considers that there is sufficient evidence for Treaty settlement negotiations to commence." (Wai 1040 3.1.768, ¶16.) The Crown reconciles these two disparate positions—unready for hearing or concessions yet ready for settlement—by asserting that it will rely on the evidence already on the Wai 1040 record of inquiry and its own database of land loss. The Crown anticipates it would gain a "deeper understanding of historical grievances" through the direct negotiations process.

20. This statement is very revealing about the Crown settlement process and explains why the claimant community has strong opposition to mandate and settlement at this time. Claimants would prefer the transparent hearing process, where evidence is heard openly and presented by those who have and hold it. The hearing is preferable to a closed negotiation process where those who operate under a dubious mandate put forward arguments supporting claims that do not belong to them.

[1] Paragraph 171

Crown's proposal for hearings

21. Claimants perceive that they are playing a game of "cat and mouse" with the Crown over the conduct of the hearings. The Crown announced at the March Judicial Conference that it had some ideas about the Stage II hearing process, but it did not say what those ideas were.

22. Even so, in its directions, the Tribunal indicated that it thought here might be merit in considering the Crown's suggestions. In light of the fact that the Crown is not set to reveal its suggestions until it files its final statement on 30 May 2012, counsel will have not had the opportunity to see, evaluate and discuss and advise our clients about whatever may be in the Crown's suggestions and receive instructions about the suggestions. Accordingly, it is requested that the Tribunal provide a briefing schedule to allow comment on the Crown's suggestions and possible other suggestions before the Tribunal any decisions are made.

Timing of hearings

23. Claimants and counsel consider it likely to be a Treaty breach for the Crown to under-resource the Waitangi Tribunal, particularly in light of pressure upon claimants to resort to direct negotiations in lieu of hearings. It is, after all, Crown conduct that has led to the urgent hearing applications, and many of the urgent hearing applications burdening the Tribunal have nothing to do with the current settlement policy but are a result of Crown action seemingly repetitious of past conduct that was brought before the Tribunal and Courts of New Zealand. To then deliberately under-resource the Tribunal is a breach of the duty of fairness the advantaged Treaty partner owes to the disadvantaged partner.

24. While the Tribunal is not necessarily empowered to set hearings unilaterally without consideration for resources, it also stands to reason that it is the obligation of the Government to find resources to implement its policies. This inquiry has already been hostage to the Crown's unilateral refusal to timely pay its legal services providers, particularly those of the Treaty bar.

25. Rather than allow this matter to languish further, it is claimants' respectful request that the Tribunal set hearings for the first available hearing date after 15

January 2013, the day the New Year's business begins. In this way, the Wai 1040 inquiry should put itself at the head of the queue for hearing and funding.

Respectfully submitted

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Claimant counsel

Issues Where the Crown Needs Further Evidence

Exhibit A

1. What is "adequate" at any given time for Maori representation in Parliament is a matter for submission. Currently, there is no evidence on the record of inquiry on this issue. Dr Kawharu's report (Te Tiriti and its Northern Context, #A20), for instance, does not deal with the issue. The issue has not been addressed in any other Tribunal inquiry. The answer to the question will necessarily depend on the circumstances.[2]

2. In response to questions 56 and 57, similar references and commentary on the other regions in the inquiry follow the section on the Bay of Islands. Where possible the information is similar. Available sources do not always allow exactly the same comparisons to be made and the Crown would have to do further research to provide more information on other areas.[3]

3. Where land commissioners found that a claimant had not met a set of required criteria making the claim invalid or partially invalid the Crown could take the land as surplus in accordance with its surplus land policies on the understanding that customary interests had been extinguished. In some transactions there were clear problems with the purchase and the Commission could disallow a claim, in which case no "surplus" was taken by the Crown and the land remained customary Maori land. It is not clear, however, if the Crown consistently applied this policy in Te Paparahi o to Raki.[4]

4. On Māori opposition to the native land laws the Crown stated that "The Crown accepts there is evidence on the record concerning this issue (for instance, that of David Anderson Armstrong and Evald Subasic, #Al2). That information has not to date allowed the Crown to understand with any depth what opposition Maori in Te Paparahi o to Raki had to native land laws and how the Crown responded."[5]

5. When asked "What then were the Crown's reasons for continuing to purchase Maori land after 1871 if not for the purposes of colonisation?" the Crown responded that "The Crown is unable to answer this question at this time without undertaking further research. The Crown can say, however, that it was purchasing Māori land for the purposes of colonisation."[6]

[2] Wai 1040, #3.1.768. para 33, repeated at para 187
[3] Wai 1040, #3.1.768. para 40
[4] Wai 1040, #3.1.768. para 50
[5] Wai 1040, #3.1.768. para 104
[6] Wai 1040, #3.1.768. para 108, in response to question 115

6. "The Crown's view to date is that the Crown made adequate and equal provision for the rehabilitation of Maori Returned Servicemen. This is based upon the limited evidence available that official policy expressly required equal treatment of Maori and Pakeha Servicemen after both World Wars. There is little evidence on the Wai 1040 inquiry on this issue that concerns the actual experiences of Te Paparahi o to Raki Māori"[7]

7. "There is evidence that Maori returned servicemen in this inquiry district were offered financial assistance to establish themselves on units on Maori development schemes. There is also evidence that the Crown purchased land for Maori servicemen. That evidence, however, makes no comment on the specific issues raised by this question."[8]

8. "In response to questions 141 and 142, the Crown repeats its view that there is insufficient evidence on economic issues in order for it to articulate and concede the effect that land loss had on the social, cultural and economic wellbeing of Maori in the district."[9]

9. When clarification was sought from the Crown as to what extent Te Raki Māori have been provided with essential technological resources and infrastructure, for example, electricity and telecommunications? The Crown replied that it "does not know the answer to this broad question that would require considerable research to answer"[10]

10. In response to questions from Te Mata law the Crown said the following:

> Question:
>
> "The Crown states at paragraph 136 of the SOPAC that the change over time between kawanatanga and rangatiratanga was that Northland Māori were left in control of their own affairs until the 1860s,
>
> (a) Is the Crown able to inform the claimants of its position in response to issue 1.1 with regards to changes after the 1860s?"

[7] Wai 1040, #3.1.768. para 119
[8] Wai 1040, #3.1.768. para 120
[9] Wai 1040, #3.1.768. para 126
[10] Wai 1040, #3.1.768. para 132 in response the question 149

Answer:

"This question is too broad and, as paragraph 136 of the Crown's draft statement of position and concessions states, requires further investigation."[11]

Question:

"The SOPAC states that the Maori response to kawanatanga and the Crown's recognition of Maori authority require further investigation. The claimants note that these questions relate to the early post Tiriti period only.

(a) Is the Crown able to advise the claimants of its position with regards to the Maori response to kawanatanga in the early post Tiriti period based on the research to date?"

Answer:

"No. The issue requires further investigation."[12]

11. "The issues raised at issues 1.11(a)-(f) [of the Crown SOPAC] all require further research. The Crown wishes to reserve its position on those issues until further research has been filed and heard."[13]

12. With regard to returned servicemen the Crown states "221. The Crown considers that this is an area for further inquiry. The Crown is unaware of evidence on the record of inquiry that demonstrates that the returned servicemen rehabilitation policies following World War One were not applied equally."[14]

13. And again on returned servicemen: "The Crown considers that this is an area for further inquiry. The Crown is unaware of evidence on the record of inquiry that demonstrates that the returned servicemen rehabilitation policies following World War One were not applied equally."[15]

14. "The Crown considers that the effects of the land tenure system and development schemes on Maori society are an issue for inquiry. The Crown notes that some social support schemes targeting Maori in particular may have had the effect of ameliorating the effects of the land tenure system and development schemes on Maori society. For

[11] Wai 1040, #3.1.768. para 184
[12] Wai 1040, #3.1.768. para 185
[13] Wai 1040, #3.1.768. para 188
[14] Wai 1040, #3.1.768. para 221
[15] Wai 1040, #3.1.768. para 222

this reason, the Crown maintains its position that it will develop its response as further evidence on the socio economic status of Northland Maori becomes available."[16]

15. "The Crown considers that there is currently insufficient evidence at this time to make a concession of Treaty breach in relation to the administrative difficulties of the Native Department in the early 20th century."[17]

[16] Wai 1040, #3.1.768. para 230
[17] Wai 1040, #3.1.768. para 231

ISSUES THE CROWN MUST CONSIDER FURTHER

Exhibit B

17. *Does the Crown concede that with particular respect to lands that were deemed to be beyond those transferred based on adequate consideration, that customary rights were not terminated?*

256. The Crown is considering this issue further.[18]

—

47 Counsel seek further clarification in relation to whether the Crown adequately provided scrutinizing mechanisms of the delegation of its local authorities the power to take land compulsorily.

361. This question is not a question of clarification addressed to the meaning of any particular statement in the Crown's draft statement of position and concessions. In response, the Crown says that it has not considered in the context of the Wai 1040 inquiry whether the Crown sufficiently scrutinized any delegation of powers to local authorities to acquire land compulsorily.[19]

[18] Wai 1040, #3.1.768. para 17, 256
[19] Wai 1040, #3.1.768, para 41, 361.

ISSUES THAT REQUIRE HEARING

Exhibit C

1. "At this stage of this inquiry . . . the Crown has not been able to make further concessions because it requires further evidence or it requires the evidence on a given issue to be tested through the inquiry process."[20]

2. "Landlessness is usually assessed on a case by case basis"[21]

3. "During hearings the Crown's knowledge about hapū and iwi interests and the nature of land in the inquiry districts will develop."[22]

4. "What is "adequate" at any given time for Māori representation in Parliament is a matter for submission"[23]

5. When the Crown was asked about possible further concessions with regard to the Northern War it replied that "The Crown will consider whether it is in a position to make further concessions on these issues in light of the evidence that is heard before the Tribunal."[24]

6. "The Crown will consider making further acknowledgements about the impact of its naval blockade if evidence can be adduced which allows some type of reasonable quantification of its impact"[25]

7. In regard to the circumstances of the iwi and hapū affected by Crown purchases: "If claimants consider this a significant issue they can call evidence during the Stage II inquiry about this issue and the experiences of particular hapū and iwi"[26]

8. The impact of the ten-owner rule "on a regional level is a relevant subject" for an investigation by the Tribunal.[27]

[20] Wai 1040, #3.1.768. para 18
[21] Wai 1040, #3.1.768. para 20
[22] Wai 1040, #3.1.768. para 22
[23] Wai 1040, #3.1.768. para 33
[24] Wai 1040, #3.1.768. para 54
[25] Wai 1040, #3.1.768. para 83
[26] Wai 1040, #3.1.768. para 89
[27] Wai 1040, #3.1.768. para 93

9. "There are issues about the ability of Māori to attend court hearings, the choices available to Māori, the situation regarding minors and whether the situation was manipulated in any given factual setting. These issues could be explored through the Stage Two inquiry".[28]

10. . . . "[A]t this time the Crown has no further breach concessions to make with regard to monopoly powers, but notes, that it is possible that further concessions may be made during the hearing process depending upon the evidence."[29]

11. "If claimants have evidence of prejudice suffered in respect of the foreshore and seabed that may well be relevant to the Stage Two inquiry. The Crown will access that evidence when it is heard"[30]

12. With regard to the costs associated with gaining title to land through the land court the Crown states that it is "open to making concessions in this regard later in the inquiry. To do so, the Crown will need to be appraised of the relevant evidence"[31]

13. "Following the hearing of evidence, the Crown may be in a position to make concessions in respect of specific Public Works Act takings. That will depend, of course, on the evidence that is presented and heard during the Stage II inquiry."[32]

14. With regard to legislation which deals with water the Crown states that "how such legislation operated in the Te Paparahi o Te Raki inquiry district is a matter for inquiry"[33]

15. When addressing the Native Land Court system that allowed any individual to initiate a process drawing rights holders into a position to defend their land, and whether a pattern of such dealings would be sufficient to show a breach at a generic level, the Crown stated that: "a certain degree of analysis of cases

[28] Wai 1040, #3.1.768. para 103
[29] Wai 1040, #3.1.768. para 110
[30] Wai 1040, #3.1.768. para 143
[31] Wai 1040, #3.1.768. para 153
[32] Wai 1040, #3.1.768. para 171
[33] Wai 1040, #3.1.768. para 172

will make any patterns evident and this kind of evidence is likely to become evident during the regional hearings."[34]

16. The Crown, in responding to a question about confiscation of land for non-payment of rates, says that they "will address this issue in the context of evidence and/or submissions."[35]

17. "The Crown says that the extent of Crown involvement in supporting traditional Maori leadership structures prior to this time may be an area that the claimants and the Tribunal wish to explore further." [36]

18. "The Crown expects that evidence put forward during regional hearings will identify any grievances relating to Crown purchasing."[37]

19. "The point being made in paragraph 204 of the Crown's draft statement of position and concessions is that, as there are hundreds of separate pre-1840 transactions in the Te Paparahi o te Raid district, the question of their interpretation is better addressed in regional hearings."[38]

20. "The Crown repeats paragraph 613 of its draft statement of position and concessions which stated that whether or not legislation affecting the inquiry district appropriately provided for the Crown's Treaty obligations is a relevant matter for the tribunal's inquiry."[39]

[34] Wai 1040, #3.1.768. para 207
[35] Wai 1040, #3.1.768. para 267
[36] Wai 1040, #3.1.768. para 278
[37] Wai 1040, #3.1.768. para 292
[38] Wai 1040, #3.1.768. para 307
[39] Wai 1040, #3.1.768. para 370