
IN THE WAITANGI TRIBUNAL

WAI 1040

IN THE MATTER OF

THE TREATY OF WAITANGI ACT 1975

AND

IN THE MATTER OF

TE PAPARAHI O TE RAKI
(NORTHLAND INQUIRY)

OPENING STATEMENT OF THE CROWN

11 March 2013

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CROWN LAW

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MAY IT PLEASE THE TRIBUNAL:**Introduction**

1. This week marks the beginning of the Stage Two inquiry.
2. In truth, this is not the first week of inquiry, but the sixth. Stage One consisted of five weeks of hearing evidence (from May-October 2010) and a week in which closing submissions were heard (February 2011). A vast number of witnesses gave evidence and a vast number of counsel representing the claimants made submissions. The Crown called evidence and made submissions as well. Site visits were held throughout the rohe.
3. The inquiry has also included a large number of judicial conferences. The Stage One hearings were preceded by many of those conferences. It is in fact difficult to place a beginning point to the inquiry.
4. The Wai 24 statement of claim (the first claim noted in the Tribunal's list of consolidated claims)¹ was filed on 13 September 1985, more than 27 years ago and just months before the amendment to the Treaty of Waitangi Act 1975 that allowed for claims to be made prior to 1975.²
5. This generation of Māori has lived with the claims and has awaited their investigation by the Waitangi Tribunal. And previous generations have lived with the claims too; it is just that previous generations have not had the ability to bring their claims before a commission of inquiry.
6. There is a solid base already that provides a substantial foundation to the Stage Two inquiry. A significant body of evidence is on the record of inquiry. There has been an inquiry into He Whakaputanga/the Declaration of Independence and the signing of Te Tiriti/the Treaty. The Tribunal's Stage One report is awaited. Significantly, the Crown has already conceded that it breached the principles of Te Tiriti/the Treaty. The making of those concessions has been described by the Tribunal as a "watershed".³

¹ See #2.5.106, appendix A. The Wai 24 claim is the Rates on Māori Land claim.

² The amendment to the Treaty of Waitangi Act 1975 came into force on 6 January 1975.

³ See Wai 1040, #2.5.166, paragraph 2, where the Presiding Officer stated: "I must acknowledge, at the outset, that the concessions the Crown has made - and this was recognised by a number of claimants and

The focus of this inquiry

7. From a legal point of view, this is an inquiry into claims under section 6 of the Treaty of Waitangi Act 1975. The Act permits claims that acts and/or omissions of the Crown since 6 February 1840 were inconsistent with the principles of Te Tiriti/the Treaty and were prejudicial to Māori. After inquiry – that is, after having commissioned and heard evidence and after having heard submissions – the task of the Tribunal is to consider making findings that the claims are well-founded. For a claim to be well-founded, the Tribunal must be satisfied that the relevant Crown action or omission was inconsistent with Tiriti/Treaty principles and was prejudicial to Māori.
8. The focus of the inquiry must therefore be on the claims. Helpfully, the Tribunal has listed the claims that have been consolidated and aggregated for the purposes of inquiry.⁴ The inquiry is into those claims. In turn, this places a focus on:
 - 8.1 Crown action and omission since 6 February 1840;
 - 8.2 whether those acts or omissions were consistent with the principles of Te Tiriti/the Treaty; and
 - 8.3 whether those acts and omissions caused prejudice to the claimants.
9. There is an unprecedented number of claims that are to be inquired into by this Tribunal panel. This is the largest ever Waitangi Tribunal inquiry: demographically (in terms of the number of claimants and claimant groups), geographically (in terms of the area of land covered) and thematically (in terms of the number of claims to be considered).
10. Pragmatically, the Tribunal has managed the inquiry by specifying certain issues. The Tribunal's statement of those issues resulted from a consolidated statement of issues from claimants and the Crown's response to that statement, which included a number of concessions. In investigating

claimant counsel - mark a watershed in terms of Crown concessions. The Tribunal has probably never seen such significant concessions in any other inquiry."

⁴ #2.5.106.

the issues, the Tribunal ought to bear in mind that the focus must remain on the claims and the matters set out at paragraph 8 above.

Relevance of Crown concessions to this inquiry

11. In making some headway into an inquiry that focuses on the Crown's actions and omissions, the Crown's concessions do provide a starting point.
12. The Crown concessions are:

Landlessness

- 12.1 The Crown concedes that iwi in the Mahurangi and Gulf Islands region were virtually landless by 1865 and the Crown's failure to ensure they retained sufficient land for their present and future needs was a breach of Te Tiriti o Waitangi/the Treaty of Waitangi and its principles.
- 12.2 The Crown also concedes that iwi living in the Whangarei and Whangaroa subregions of the Te Paparahi o Te Raki Tribunal inquiry are now virtually landless and the Crown's failure to ensure that they retained sufficient land for their present and future needs was a breach of Te Tiriti o Waitangi/the Treaty of Waitangi and its principles.

Pre-Treaty transactions

- 12.3 The Crown concedes that it took Māori "surplus lands" in the Bay of Islands, Hokianga, Whangarei, Mahurangi, and Gulf Islands districts that were claimed by settlers as a result of pre-Treaty transactions, rather than returning these lands to Maori, and this has long been a source of grievance in the region. The Crown concedes that its policy of taking surplus land from pre-Treaty purchases breached the Treaty of Waitangi and its principles when it failed to require proper surveys and to require an assessment of the adequacy of lands that Māori held. This resulted in some hapu losing vital kainga and cultivation areas. The Crown also concedes that this failure was compounded by flaws in the way the Crown implemented the policy, including failing to investigate transactions for which 'scrip' was given, and in some cases taking

decades to settle title or assert its own claim to these lands, in further breach of the Te Tiriti o Waitangi/the Treaty of Waitangi and its principles.

Pre-emption waiver transactions, 1843-1844

12.4 The Crown concedes that it took Te Raki Māori “surplus lands” in the Bay of Islands, Hokianga, and Mahurangi and Gulf Islands districts that were claimed by settlers as a result of pre-emption waiver transactions, rather than returning these lands to Māori, and this has long been a source of grievance in the region. The Crown concedes that its policy of taking surplus land from pre-emption waiver purchases breached Te Tiriti o Waitangi/the Treaty of Waitangi and its principles when it failed to ensure any assessment of whether affected Māori retained adequate lands for their needs. The Crown also concedes that this failure was compounded by flaws in the way the Crown implemented the policy, including failing to investigate transactions for which ‘scrip’ was given, and in some cases taking decades to settle title or assert its own claim to these lands, in further breach of Te Tiriti o Waitangi/the Treaty of Waitangi and its principles.

Northern War, 1844-1846

12.5 The Crown concedes that making a cession of land a condition for peace in July 1845 breached Te Tiriti o Waitangi/the Treaty of Waitangi and its principles. As a result the war continued to the prejudice of those affected by it.

Treaty breach relating to Pomare

12.6 The Crown concedes that the effective confiscation of Pomare’s land interests at Wahapu in 1845 breached Te Tiriti o Waitangi/the Treaty of Waitangi and its principles.

Crown purchasing, 1840 to 1865

Omaha and Mahurangi purchase

12.7 Where groups are found to have rights in the area and were prejudiced by the transaction the Crown would concede the following:

12.7.1 The Crown concedes that in purchasing the extensive area called “Mahurangi and Omaha” in 1841 it breached Te Tiriti o Waitangi/the Treaty of Waitangi and its principles by failing to conduct any investigation of customary rights when it purchased these lands. The Crown acquired these lands without the knowledge and consent of all Māori owners and failed to provide adequate compensation and reserves for the future use and benefit of all Māori owners when it later learned of their interests in the purchase area.

Failure to identify owners

12.8 The Crown concedes that where it failed to carry out an adequate inquiry into the nature and extent of customary rights in lands it purchased in the Te Raki district between 1840 and 1865 it breached the Treaty of Waitangi.

Reserves

12.9 The Crown concedes that where it did not reserve sufficient land for the present and future needs of the iwi and hapu of Te Paparahi o Te Raki when purchasing land from them before 1865, it failed to uphold its duty under Te Tiriti/the Treaty of Waitangi and its principles to actively protect the interests of the iwi and hapu of Te Paparahi o Te Raki from whom it purchased land.

Impact of Native land laws on tribal structures

Individualisation of title undermined tribal structures

12.10 The Crown concedes that the operation and impact of the native land laws, in particular the award of land to individuals and enabling individuals to deal with land without reference to iwi or hapu, made those lands more susceptible to partition, fragmentation and alienation. This undermined traditional tribal structures which were based on collective tribal and hapu custodianship of the land. The Crown failed to protect those collective tribal structures which had a prejudicial effect on the iwi

and hapu of Te Paparahi o Te Raki and was a breach of Te Tiriti o Waitangi/the Treaty of Waitangi and its principles.

Ten-owner rule

12.11 The Crown concedes that the 10-owner rule had the potential to cause prejudice to Māori in circumstances where:

12.11.1 some right-holders were omitted from titles and disposed of their interests as a result;

12.11.2 the named owners acted individually in a manner contrary to the wishes or intentions of the wider community; and

12.11.3 there was a subsequent succession of interests where there was no allowance for wider community interests.

12.12 The Crown concedes that in these circumstances the ten-owner rule did not operate in a manner that reflected the Crown's obligation to actively protect the interests of Māori in land they may otherwise have wished to retain in communal ownership and that this was a breach of Te Tiriti o Waitangi/the Treaty of Waitangi and its principles;

Lack of collective title

12.13 The Crown concedes that its failure to provide a legal means for the collective administration of Māori land until 1894 was a breach of Te Tiriti o Waitangi/the Treaty of Waitangi and its principles by failing to actively protect Māori interests in land they may otherwise have wished to retain in communal ownership.

Crown purchasing, 1865-1900

12.14 The Crown concedes that it did not have a system in place to ensure that it did not purchase land that was needed to ensure the iwi and hapu of Northland could continue to maintain themselves. That was a failure to actively protect Māori and breached Te Tiriti o Waitangi/the Treaty of Waitangi.

*Twentieth century land administration**Vested lands*

12.15 The Crown concedes that:

12.15.1 the compulsory vesting of land in the Tokerau Māori Land Board between 1907 and 1909 without owner consent breached the Treaty of Waitangi and its principles and effectively alienated Te Paparahi o Te Raki owners from those lands for over 50 years; and

12.15.2 when Te Paparahi o Te Raki hapu did regain control of their land it often had large debts and owners were liable for compensating lessees for improvements.

Te Karae

12.16 The Crown concedes that:

12.16.1 it compulsorily vested Te Karae blocks in the Tokerau Māori Land Board in 1907 so they could be leased for development but remain in Māori ownership;

12.16.2 it purchased a large proportion of Te Karae to help lessees freehold land they were otherwise prohibited from purchasing directly; and

12.16.3 its purchase of a large proportion of Te Karae in these circumstances breached Te Tiriti o Waitangi/the Treaty of Waitangi and its principles.

*Twentieth century Crown purchasing tactics**Misuse of monopoly powers*

12.17 In circumstances where proclamations were continually rolled over, the owners had manifested no wish to enter negotiations, and owners lost opportunities as a result, it cannot be said the Crown acted consistently with its duty to purchase reasonably and regulate processes appropriately. The Crown concedes that the unreasonable and unfair use of this power was a breach of Te Tiriti o Waitangi/the Treaty of Waitangi.

Crown's acquisition of uneconomic interests

12.18 The Crown concedes that the Crown promoted legislation that empowered the Māori Trustee between 1953 and 1974 to compulsorily acquire a number of Māori land interests in the Te Paparahi o Te Raki inquiry district which the Crown deemed uneconomic. The Crown concedes that where this occurred it caused Māori to lose their tūrangawaewae, and this form of compulsory acquisition was a breach of Te Tiriti o Waitangi/the Treaty of Waitangi and its principles.

13. The Crown hopes to make further concessions in response to the Tribunal's inquiries once hearings are underway. It also hopes that the Tribunal's inquiry will show how particular groups were affected by Crown breaches of Te Tiriti/the Treaty, where that occurred.

Role of the Crown in Stage Two

14. The Crown's role in this inquiry is not to stand in the shoes of an orthodox defendant and oppose the claims. It is, rather, to test the evidence presented where appropriate and to add to the research in order to assist the Tribunal in its inquiry. It is the Tribunal, of course, and not the Crown who must determine whether the claims are well-founded.
15. The Crown seeks from this inquiry an honest account of history that builds upon logical inferences from all the relevant empirical data. In seeking to honour the Treaty principle of mutual respect, the Crown does not see its role as simply one of listening. Rather, mutual respect requires the Crown to engage, to debate and to test the various concerns raised by the claimants. This may mean vigorous cross-examination of witnesses. We trust that the Tribunal and claimants appreciate the intention behind that manner of engagement. The Crown fully expects claimants and their counsel, as well as the Tribunal, to test the evidence the Crown will file, and to grapple with the interpretation of history that it presents.
16. By testing the evidence, the Crown seeks to assist the Tribunal with its task of drawing together the various accounts of history and of understanding different ways of thinking about the past. The Crown's goal is not to be

adversarial but to assist the Tribunal perform its function in a context where different world views have been – and in some instances may still be – at play, and where there are inherent difficulties in grappling with historical issues.

17. It is a legitimate and important aspect of the Crown's role before the Tribunal to focus on the issue of historical interpretation. As is well known, the Crown appears before the Tribunal as representative of the public interest. There is a legitimate public interest in the integrity of the Tribunal's inquiry process. There is also a public interest in the durability of historical explanation. There must be a solid foundation for the settlement of historical grievances. That foundation must be capable of withstanding the historical analysis to which the claims process will inevitably be subject.
18. The Crown itself seeks to develop the best possible understanding of the history of its relations with Northland Māori. When the evidence of Crown, claimant and Tribunal witnesses is tested, the end result will be more robust.
19. The Crown considers that the research and critical thinking that takes place in the Tribunal forum about the history and relationships of the Crown and Northland Māori will stand the Crown and Northland Māori in good stead for progressing settlements of their Treaty claims.

Crown evidence

20. To assist the Tribunal in crafting an accurate historical account of the Northland district, the Crown will contribute to the evidence on the Tribunal's record. As a general proposition, the Crown does not intend to call evidence on those matters for which it has made concessions. The Crown also observes that there is a significant amount of evidence on the Northland record of inquiry. The Crown is commissioning evidence on what it considers to be the key issue in the Stage Two inquiry – Issue 1 (Tino Rangatiratanga, Kawanatanga and Autonomy: Political Engagement between Maori and the Crown). It is clear that claimants also consider Issue 1 to be the issue of most significance. Dr Donald Loveridge will prepare a report on this issue – likely focussing on paragraphs d-h, t and y

of issue 1 of the statement of issues. It is likely that Dr Loveridge's report would be ready for filing by the end of 2013 and ready for presentation in the last week of the first rotation.

Nature of a generic and local issues inquiry

21. The Crown understands that Stage Two hearings will address both generic and local issues, with evidence being contributed by tangata whenua and technical witnesses at both these levels. Therefore, the Stage Two report will be partly based upon material that, by and large, is in the nature of "overview" research. That research is not intended to cover specific grievances, or only does so insofar as these may be shown to be representative illustrations of the broad events, policies or processes said to have resulted in Treaty breaches.
22. A lot of useful research has been done to this point that will be valuable before the Tribunal. However, the research to date does have limitations. The Crown says that where the evidence gives examples of grievances, rather than canvassing all grievances, the Tribunal needs to be cautious in considering the representativeness of those examples. Representativeness is particularly challenging in an inquiry across so many districts. It will be helpful if the Tribunal distinguishes between Crown actions and policies that were truly representative of its actions and policies generally and particular actions and/or policies that applied in some specific, but not general, way.
23. Where the Tribunal makes conclusions at a generic level about Crown policy or conduct in Northland it should do so on the basis of a firm body of representative examples and evidence.
24. Representativeness must be tested and assessed, and not presumed. Where such assessment is not possible, it may not be possible to reach clear conclusions.
25. Because of the variety of Māori experiences in Northland, it may be extremely difficult to make generalised conclusions that are applicable to the entire inquiry district. In order to make accurate and properly founded conclusions about Crown acts or omissions and any prejudice to Māori, it

may be necessary for the Tribunal to confine its conclusions to the sub-district level rather than making conclusions that apply to the entire district. All will depend on the evidence and the inquiry that unfolds.

Crown engagement in hearings and preparation for negotiations

26. As the Tribunal is aware, Tuhoronuku have sought a mandate from the people of Ngapuhi to negotiate a comprehensive settlement of Ngapuhi historical Treaty claims with the Crown. There has been a considerable period of engagement between Tuhoronuku, Te Kotahitanga and claimants throughout the mandating process. Tuhoronuku presented a Deed of Mandate to the Crown in 2012. Following further discussions between and with Tuhoronuku and Te Kotahitanga, Ministers indicated in late 2012 that they are considering taking the next step in the mandate process – advertising the mandate and seeking submissions on it.
27. It is possible that process could start in April 2013. Ministers would consider any submissions received and review the entire mandate process. At that stage they would be in a position to decide whether to recognise a mandate or not in mid-2013. If a mandate were recognised elections for mandated representatives would be held thereafter and negotiations could then commence.
28. Claimants have made it clear they consider Stage Two hearings are an important part of the settlement process. The Crown shares that view and is committed to engaging in these hearings. The Crown has already accepted there are well founded claims and made substantial admissions of Treaty breach. Where the evidence warrants, it will consider further breach concessions.
29. The Crown has also long signalled that it is open to entering Treaty settlement negotiations alongside Tribunal hearings. If a mandate is recognised and negotiations do commence, it would provide a unique opportunity to align the hearing and negotiations processes.

30. The Crown looks forward to the commencement of the Stage Two hearings and continuing this journey with the Northland claimants.

11 March 2013


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TO: The Registrar, Waitangi Tribunal
AND TO: Claimants and their counsel