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IN THE WAITANGI TRIBUNAL **WAI 898**
TE ROHE PŌTAE INQUIRY DISTRICT

IN THE MATTER of the Treaty of Waitangi Act 1975

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IN THE MATTER of Te Rohe Pōtae Inquiry (Wai 898)

GENERIC OPENING SUBMISSIONS

PRE-TREATY TRANSACTIONS

Dated: 6 March 2013

RECEIVED
Waitangi Tribunal
5 Mar 2013
Ministry of Justice
WELLINGTON

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MAY IT PLEASE THE TRIBUNAL

1. These are generic opening submissions on the theme of pre-Treaty transactions within te Rohe Pōtae inquiry district.

2. This theme refers to those transactions between Māori and settlers made prior to the signing of the Te Tiriti/Treaty of Waitangi and which were later to be classed as land alienations ("pre-Treaty transactions"). These transactions mark the very early encounters between Māori and Pākehā in te Rohe Pōtae.

3. Following the signing of the Te Tiriti/Treaty of Waitangi (and various Crown proclamations) there was an issue as to whether and, if so, how would the Crown subsequently recognise such transactions made under customary Māori law and the written deeds that purported to reflect various of those transactions. The Tribunal should note that counsel is drawing a distinction between the Māori customary transaction and the written deed purporting to reflect that transaction.[1]

Statement of Issues and Crown concession

4. The Waitangi Tribunal's Statement of Issues raises a series of questions. I summarise the Waitangi Tribunal's issues into the following broad questions:

    a. What pre-Treaty transactions occurred in Te Rohe Pōtae?

    b. What was the nature of these transactions?

    c. What was the Crown's inquiry into the transactions and did this process cause prejudice to Māori?

    d. How did Māori respond to the Crown's inquiry into the pre-Treaty transactions?[2]

5. The Statement of Issues sets out the Crown's single and only concession in relation to pre-Treaty transactions:

[1] See Boulton, #A70, p40
[2] Statement of Issues, 6 September 2012, #1.4.003, pp 55-6

"*The Crown acknowledges that there may have been a failure of process in respect of the hearing of this [Charleton Old Land Claim OLC 1353] claim*". [3]

What pre-Treaty transactions occurred?

6. The evidence before this Tribunal will be that the pre-Treaty transactions were confined to the West Coast regions of Mokau, Kāwhia, Aotea and Whaingaroa and inland waterways such as Waipā and Mokau awa. The key settler parties were various missionaries and traders.

7. Following the signing of the Te Tiriti/Treaty of Waitangi and the assertion of colonial law by the Crown, a series of inquiries were held. The first inquiries were by Mr Godfrey and Mr Richmond under the New Zealand Land Claims Ordinance 1841. Four pre-Treaty transactions went before these commissioners. A further inquiry process was held by Sir Francis Dillon Bell under the Land Claims Settlement Extension Act 1858. Two pre-Treaty transactions were heard under this legislation.

8. In total the Tribunal will hear that there were 41 pre-Treaty transaction claims registered (it will be heard that of these 20 were speculative and were abandoned).[4] As noted above, only six claims went as far as a hearing.

What was the nature of these pre-Treaty transactions?

9. This Tribunal will hear that all of the pre-Treaty transactions were made in terms of Māori custom.

10. This Tribunal will also hear that the transactions did not absolutely alienate land to the settlers, rather they were allocations of use for the settler party so long as the parties were engaged in a reciprocal relationship. The reciprocal relationship incorporated the settler into the local people's lives and economies. It required

[3] Statement of Issues, 6 September 2012, #1.4.003, p 55
[4] #A70(b), para10

occupation and mutual benefit – usually in trade of goods or knowledge (such as religious thought or agricultural techniques). In some cases the settler married a local woman and merged whakapapa lines in their children.

11. This Tribunal will also hear that some of these pre-Treaty transactions were reduced to written deeds well after the customary transaction (probably in anticipation of British annexation).[5] All of the six cases that went into an inquiry had deeds recording the transactions. It is submitted that the Deeds, unlike the customary transaction, sought to make absolute alienations without condition.

12. There is a real question as to whether the deeds reflected the customary transaction upon which they were based. The evidence will be that the deeds purported to convey title while the customary transaction conveyed conditional occupation. Further, it is submitted that there was probably no obvious legal mechanism existing within British law that equated to the customary transaction,

> "*There was no equivalent to the English common law whereby people could hold land without concomitant duties to an associated community* […]".[6]

13. Still, there was no reason why the Crown could not have applied the customary transaction according to its customary tenets. There is Court precedent for such process.[7]

14. Among the deeds were those made by speculative purchasers who saw an opportunity to obtain land and had little or no relationship with the local people. Such speculative purchases did not proceed past the land claims commissioners.

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[5] Boulton, #A70, pp 39, 40, 86
[6] Waitangi Tribunal, *Muriwhenua Land Report*, 1997, pp 21,22
[7] See for example, *Baldick* v *Jackson* (1910) 30 NZLR 343 (SC); *The Case of Tanistry* (1608), Davis 28, 80 E.R. 516; *Amodu Tijani* v. *Southern Nigeria (Secretary)* [1921] 2 AC 359;

15. Also among the deeds were some made after the signing of the Te Tiriti/Treaty of Waitangi. These transactions were dealt with separately by the Crown. The Tribunal will hear that the Crown waived its power of pre-emption to sanction particular transactions. Crown grants then followed. The evidence in this hearing week will cover two examples where Crown grants were made in relation to post-Treaty deeds that purported to record pre-Treaty of Waitangi customary transactions. There was little if any inquiry into these deeds and whether they properly reflected the customary transaction. The Tribunal will hear of further examples of such post-Treaty deeds and Crown waiver of pre-emption in later hearings.

The Crown's inquiries

16. The evidence will be that Messrs Godfrey and Richmond had reasonably wide powers under the 1841 legislation that governed the inquiry, but in practice the inquiries were perfunctory and presumed an absolute alienation had occurred. Māori participation in the inquiries was limited. The evidence will be that the commissioners published notice of the hearings only about a week before they were held. The hearings were held in Auckland. Only two Māori witnesses appeared in the inquiries – the same two witnesses appeared in each claim.

17. By the later inquiries of Commissioner Bell, there was only a power was to determine whether a sale had occurred or not.

18. The Crown has made a guarded concession that there "*may have been*" a failure of process in relation to the Charleton claim. It is submitted that the evidence will indeed show that the process was flawed and failed in fact. This was a "derivative" claim by Charleton's estate. Charleton had claimed to have purchased an interest from JV Cowell who had inherited the land from his father John Cowell. John Cowell was the original person who dealt with Māori and who had claimed around 20,000 acres in a deed of

1840. Essentially, Commissioner Bell did not inquire into the nature of the original transaction upon which Charleton's claim was based. The original transaction appears to have been irrelevant to his inquiry. Rather, applying s15 of the Land Claims Extension Act 1858 Bell equated Charleton's occupation with legal title. Commissioner Bell ignored objections raised by Mata Kaore, the Māori wife of JV Cowell.

19. In practice it is submitted that the evidence will show that the Crown's inquiries ignored the actual pre-Treaty transaction made under Māori custom in favour of the tenor of the written deeds and presumed that the pre-Treaty transactions were absolute sales.[8] The nature of the customary transaction was irrelevant to the inquiries.

20. In the case of those transactions that were reduced to written Deeds after the signing of the Te Tiriti/Treaty of Waitangi, these could not be heard by the commissioners. In the end the Crown waived pre-emption and gave Crown grants for some of these post-Treaty transactions – all without any proper analysis.

The evidence to be heard

21. Counsel anticipates that evidence on pre-Treaty transactions (including those that were the subject of Crown pre-emption waivers) will be filed throughout the hearing weeks of this inquiry where relevant claimant groups present. It is likely that the tangata whenua evidence will be presented on this theme as the hearings progress through the western coastal regions.

22. There is evidence in this hearing week in relation to the pre-Treaty transactions with Kāwhia and in particular the Pouewe transaction. Ngāti Mahuta have presented and filed evidence on this transaction. When the Tribunal returns to the Kāwhia moana in a later hearing week the Tribunal can be sure it will hear further

[8] #A70(b), para19

evidence on these transactions from Ngāti Hikairo.[9] Counsel is also aware that certain groups will wish to present evidence in relation to pre-emption waivers relating to post-Treaty deeds for pre-Treaty transactions.

23. There will be independent technical evidence presented by Ms Leanne Boulton.[10] It is submitted that the core of her evidence will be:

    a. The pre-Treaty transactions were conducted with traders and missionaries largely along the western coastal regions and river systems; [11]

    b. The pre-Treaty transactions were conducted in terms of Māori custom and the evidence is that this custom required reciprocity between the parties and was not an absolute alienation; [12]

    c. The inquiries by the Land Claims Commissioners did not look at what was intended by Māori and provided in terms of Māori custom, but rather assumed that land had been absolutely alienated.[13]

DATED at Auckland this 6th day of March 2013

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Dominic G S Wilson

[99] The Pouewe transaction is also discussed in the Oral and Traditional history report for Ngāti Hikairo*, Te Maru-ō-Hikairo*, #A98
[10] Document #A70
[11] Document #A70(b), para 4
[12] Document #A70(b), paras 5-8
[13] Document #A70(b), paras 17, 19