OFFICIAL

IN THE WAITANGI TRIBUNAL WAI 898

IN THE MATTER OF the Treaty of Waitangi Act 1975

AND

IN THE MATTER OF Te Rohe Pōtae District Inquiry

OPENING SUBMISSIONS OF THE CROWN RELATING TO WAR AND RAUPATU: HEARING WEEK FOUR

Dated 10 April 2013

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MAY IT PLEASE THE TRIBUNAL:

1. These opening submissions address the theme of hearing week 4: war and raupatu.

2. First, the submissions set out some introductory remarks as to the Crown's approach to war and raupatu issues in this hearing week. Second, they traverse the relevant concessions the Crown has made in this inquiry in respect of war and raupatu. Third, they address in a general way the war and raupatu issues that are contained in the Tribunal's statement of issues and relate to the evidence that Dr Vincent O'Malley is to present this week.[1]

Crown's approach to war and raupatu claims

3. The Crown has reached full and final settlements with Waikato-Tainui in relation to their claims concerning the Waikato war and raupatu.[2] The settlements occurred in two stages: land-based raupatu claims were settled first in 1995, and river-based raupatu claims were settled in 2009. For its part, the Crown is conscious of the need in this inquiry to navigate between a number of 'pressure points', including:

   3.1 the risk, through the current inquiry process, of unsettleing the basis on which the 1995 and 2009 Waikato-Tainui settlements were reached;

   3.2 the right of Rohe Pōtae claimants who have unsettled claims concerning war and raupatu to have the Tribunal inquire into and report on them; and

   3.3 the Crown's role in testing evidence before the Tribunal.

4. The Crown's focus in respect of the war and raupatu theme to be heard this week will be on the particular effects that war and raupatu had on Rohe Pōtae Māori. There are two reasons for this.

5. First, having conceded that the wars in Taranaki and the Waikato were an injustice and that the confiscations of land were wrongful and in breach of the Treaty and its principles, the Crown's primary interest is in assessing the prejudice that particular groups within the inquiry district suffered.

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1 Dr V O'Malley, "Te Rohe Potae War and Raupatu", December 2010, Wai 898, A22.

6. Second, the Tribunal will not now be hearing in this hearing week the related evidence of Dr O'Malley contained in his report on Crown and Rohe Pōtae Māori political engagement between 1840 and 1863,[3] which canvasses the years leading up to, and indeed the start of, conflict in Taranaki in 1863. In some ways, that is unfortunate as it disrupts the chronological sequence of the historical inquiry and may delay, at least for the time being, a more complete understanding of the wars and related events.

7. The Crown has not commissioned its own evidence in respect of war and raupatu matters. Again, this reflects the significant concessions the Crown has made, the fact that the topics have been heard – to some extent quite extensively – in previous inquiries, and the Crown's goal to avoid duplication of effort and instead to focus on gap-filling research where that is necessary.

8. Despite that, and while recognising the sensitivity of the subject matter, the Crown will, where it considers it appropriate to do so, test aspects of the evidence concerning war and raupatu that is put before the Tribunal. As the Crown stated in its opening submissions relating to Te Ohaki Tapu in hearing week 2, 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. In the Waitangi Tribunal forum, the Crown represents the public interest and it therefore has a legitimate role in testing evidence so that a strong historical foundation is established for the durable settlement of historical grievances.

Concessions of Treaty breach

9. Early in this inquiry, the Crown made the acknowledgement that:[4]

> The wars in Taranaki and the Waikato were an injustice and that the confiscations of land were wrongful and in breach of the Treaty of Waitangi and its principles.

10. In March 2012, the Crown repeated that concession in its statement of position and concessions and made further statements of Treaty breach as follows.

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2 There are potential Waikato raupatu claims to the West Coast Harbours and the Wairoa and Waiuku blocks that are excluded from these settlements: see ss 8(2)(a)(ii) and (2)(b) of the Waikato Raupatu Claims Settlement Act 1995.

3 "Te Rohe Potae Political Engagement, 1840-1863", December 2010, Wai 898, A23.

4 "Memorandum of the Crown Regarding Research and Concessions", 19 December 2008, Wai 898, #3.1.192, para 12.

Taranaki Raupatu

11. With respect to the Taranaki raupatu, the Crown recorded that it:

> concedes the confiscation of Ngāti Maniapoto interests in Taranaki in 1864 was an injustice, and breached the Treaty of Waitangi and its principles.[5]

12. The Crown advised further that it is willing to extend the concession relating to the Taranaki raupatu to Rohe Pōtae iwi other than Ngāti Maniapoto if it is satisfied that there is sufficient evidence to do so.[6]

Waikato War and raupatu

13. With respect to the Waikato war and raupatu in the 1860s, the Crown recorded that it:[7]

> has previously acknowledged that its representatives and advisers acted unjustly and in breach of the Treaty of Waitangi and its principles in its dealings with the Kingitanga, which included iwi and hapū of Te Rohe Pōtae, in sending its forces across the Mangatawhiri in July 1863, and occupying and subsequently confiscating land in the Waikato region, and [that these actions] resulted in iwi and hapū of Te Rohe Pōtae being unfairly labelled as rebels.
>
> The Crown advises that this concession will be addressed to iwi and hapū of the Rohe Pōtae independently of any reference to the Kingitanga if it is shown during the course of the inquiry that iwi and hapū of the Rohe Pōtae have rights in the Waikato raupatu district that are distinct from Waikato Tainui.

Acknowledgement regarding the Compensation Court

14. In its statement of position and concessions, the Crown has also acknowledged:[8]

> as it has in other inquiries, that the prejudice that raupatu created was compounded by inadequacies in the Compensation Court. The Crown also acknowledges that the process for investigating raupatu-based grievances was imposed on those who were subject to raupatu and that consultation concerning the process did not take place.

Nature of the concessions

15. The Crown recognises that the concessions it has made are at a high level. As it has previously noted, it has developed them in line with its usual policy of making 'broad brush' concessions.[9]

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5 "Crown Statement of Position and Concessions", 21 March 2012, Wai 898, #1.3.1, paras 20.2 and 138.

6 "Crown Memorandum Responding to Questions of Clarification from Claimant Counsel Regarding the Crown's Statement of Position and Concessions", 18 May 2012, Wai 898, #.1.514, para 7.3.

7 "Crown Statement of Position and Concessions", 21 March 2012, Wai 898, #1.3.1, paras 20.9 and 136-137. The original text has been reworded slightly for grammatical reasons.

8 "Crown Statement of Position and Concessions", 21 March 2012, Wai 898, #1.3.1, para 155.

16. However, during the course of this inquiry before the Waitangi Tribunal, the presentation and testing of evidence will lead to a better understanding of the effect and consequences for Rohe Pōtae Māori of such Treaty breaches by the Crown.

Tribunal issues

17. The balance of these submissions endeavours to address a number of the questions set out in the relevant chapter of the Tribunal's statement of issues.

Who may bring claims?

18. The first question in the Tribunal's statement of issues relates to jurisdiction: who among the claimants in this inquiry may bring claims in relation to the war and raupatu that took place in Taranaki and the Waikato in the 1860s? The question arises because of provisions in legislation that give effect to certain Treaty of Waitangi settlements,[10] including agreements that the Waitangi Tribunal (as well as the courts and any other judicial body or tribunal) shall no longer have the authority to inquire into such claims.

19. The Crown understands that the answer to the question is now settled as a matter of general principle. Where claimants come within the definition of Waikato in the Waikato Raupatu Claims Settlement Act 1995 or "Waikato-Tainui" in the Waikato-Tainui Claims (Waikato River) Settlement Act 2010 and are making a "raupatu claim", the Tribunal may only inquire into that claim where the claimants can establish that they are making it on the basis of some other non-Waikato or non-Waikato-Tainui affiliation.[11]

20. Further, the Tribunal may not inquire into any claims in this inquiry brought on the basis of Ngāti Tama descent, as the Ngāti Tama Claims Settlement Act 2003 removes its jurisdiction to do so.[12]

21. The Crown understands that there are claimants in this inquiry who come within the definition of Waikato in the Waikato Raupatu Claims Settlement Act 1995 or

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9 "Crown Memorandum Responding to Questions of Clarification from Claimant Counsel Regarding the Crown's Statement of Position and Concessions", 18 May 2012, Wai 898, #.1.514, para 9.

10 See the Waikato Raupatu Claims Settlement Act 1995, the Ngati Tama Claims Settlement Act 2003 and the Waikato-Tainui Claims (Waikato River) Settlement Act 2010.

11 "Decision of the Presiding Officer on Behalf of the Rohe Pōtae Tribunal Panel on Scope of Inquiry Issues", 6 September 2012, Wai 898, #2.5.132, paras 3.2-3.3.

12 "Decision of the Presiding Officer on Behalf of the Rohe Pōtae Tribunal Panel on Scope of Inquiry Issues", 6 September 2012, Wai 898, #2.5.13, para 3.5.

"Waikato-Tainui" in the Waikato-Tainui Claims (Waikato River) Settlement Act 2010 and are making a "raupatu claim".

22. Accordingly, it is respectfully submitted that it is important that the Tribunal test the evidence that these claimants present in support of any raupatu claims that are within the boundaries of the 1995 and 2009 raupatu settlements so as to be satisfied that any such claims are properly on the basis of some other non-Waikato or non-Waikato-Tainui affiliation.

The nature of Crown and Rohe Pōtae Māori involvement

23. Issue 2.3 in the Tribunal's statement of issues concerns the nature of Crown and Rohe Pōtae Māori involvement in war in Taranaki and the Waikato.

24. As it noted in its statement of position and concessions, the Crown's position is that the nature of Rohe Pōtae Māori involvement in the Taranaki war in 1860 to 1861 differs from its involvement in the Waikato wars in 1863 to 1864.

25. While the Crown recognises that Rohe Pōtae Māori had land interests in Taranaki, it submits that its actions there in 1860 to 1861 did not threaten Rohe Pōtae Māori directly and that members of Ngāti Maniapoto became involved as a result of a decision on their part to support Wiremu Kingi, who opposed the Crown purchase of the Pekapeka Block, and to take up arms against for that purpose. To that end, the Crown notes evidence on the record of inquiry that:[13]

> When the Crown sought to take forcible possession of the land in March 1860, members of Waikato and Ngāti Maniapoto subsequently fought in defence of Kingi's rights to Waitara.

26. With respect to the Waikato war, the initial phases of the engagement occurred some distance north of the Rohe Pōtae. However, some Rohe Pōtae Māori, including Ngāti Maniapoto, had strong ties to the land north of the Puniu river, which, as a result of the war, became the northern boundary of the Rohe Pōtae district. Accordingly, the Crown accepts that, once Crown troops had crossed the Maungatawhiri, in breach of the aukati, and the conflict in the Waikato began, Rohe Pōtae Māori considered themselves justified in taking up arms. The Crown today does not necessarily accept that all responses of Rohe Pōtae Māori to the invasion were defensive in nature and, certainly at the time of the war, it considered that Māori who resisted its authority with force and arms were in

13 Dr V O'Malley, "Te Rohe Potae Political Engagement, 1840-1863", December 2010, Wai 898, A23, p 114.

rebellion. However, having regard to its concession that the war was an injustice and a breach of the Treaty, and in the spirit of reconciliation, the Crown does not consider it would be a constructive exercise to focus on those instances in this forum.

27. As to the nature of its involvement in the Taranaki and Waikato wars, the Crown accepts that it commenced military action in each case, although only after a significant rise in tensions to which both the Crown and Māori contributed.

Peaceful resolution of conflict

28. Issue 2.4 of the Tribunal's statement of issues asks what were Crown and Rohe Pōtae Māori obligations to seek peaceful resolution of conflict in Taranaki and the Waikato. Issue 2.5 concerns the extent to which the Crown and Rohe Pōtae Māori attempted to negotiate a peaceful resolution of the conflicts.

29. The Crown noted in its statement of position and concessions that it accepts that the Treaty principle of partnership imposes on both Treaty partners – the Crown and Māori – a responsibility to seek to resolve issues between themselves peacefully. Although the Treaty does not displace the Crown's power to use coercive force in appropriate circumstances – in order to maintain the peace within society, for example – the Crown accepts that the use of non-peaceful means to resolve issues between itself and its citizens, or any group of its citizens, should occur in exceptional situations only, and generally only after it has exhausted all reasonable peaceful means.[14]

30. While the Crown concedes that it breached the Treaty and its principles in undertaking war in Taranaki and Waikato, there is evidence that it sought on occasions to reach terms with Māori in order to prevent hostilities, or to end hostilities once they were underway. The Crown also recognises that Rohe Pōtae Māori on occasions sought a peaceful end to the conflict on terms. Ultimately, neither party presented terms that were acceptable to the other, and a military outcome prevailed.

Effects of war and raupatu

31. Issues 2.6 and 2.7 of the Tribunal's statement of issues relate to the effects of the war and raupatu on Rohe Pōtae Māori.

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14 "Crown Statement of Position and Concessions", 21 March 2012, Wai 898, #1.3.1, para 140.

32. The Crown re-iterates that this is an important focus for inquiry. In its statement of position, it noted that:[15]

> In broad terms, the Crown accepts that the war and raupatu had significant immediate effects for Rohe Pōtae Māori. These included, but were not limited to, a serious deterioration in the relationship between Rohe Pōtae Māori and the Crown, the loss of innocent lives and injuries to others, the loss of property, including land and resources considered to be taonga, and significant social and economic disruption, in part as a result of the need to provide for Waikato 'refugees'.

33. Such effects underscore the Crown's concession that the wars were an injustice.

34. Nevertheless, and despite the high level of responsibility that the Crown accepts for the effects of war and raupatu, it re-states its concern that care must be taken not to treat the war and raupatu as the cause of all adverse outcomes that Rohe Pōtae Māori have experienced since the conflicts of the 1860s.

35. The Crown recognises that the killing of non-combatants is a particularly potent grievance for Rohe Pōtae Māori. The Crown records that it was not Crown policy to kill non-combatants and such killings appear to have occurred where non-combatants were located in sites of strategic importance that were under attack by Crown forces, and sometimes as the result of actions taken by individual soldiers in the heat of battle. There is also evidence of British and colonial troops acting deliberately to prevent non-combatants from being killed.[16] Sadly, their efforts did not always succeed. The Crown notes, too, that there is evidence that on occasions Māori also killed or wounded non-combatants in the course of the war. It raises this not in any way to justify the actions of its own soldiers but to show that a singular focus on Crown actions will inhibit a complete and balanced understanding of events.

Crown processes for investigating raupatu grievances

36. Issue 2.8 of the Tribunal's statement of issues concerns the adequacy of the Crown's processes for investigating raupatu grievances as they affected Rohe Pōtae Māori.

37. The Crown notes that there is a lack of evidence as to the way in which raupatu claims concerning land within the Parish extension and Te Akau D block were

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15 "Crown Statement of Position and Concessions", 21 March 2012, Wai 898, #1.3.1, para 162.

16 See, for example, James Cowan's account of events at Rangiaowhia on 21 February 1864, in respect of which he states that officers tried to prevent the shooting of the man who came out of the burning whare: *The New Zealand Wars* vol 1 (Government Printer, 1983), pp 355-356.

investigated and addressed. The Compensation Court sat on at least five occasions between 1866 and 1867 in respect of compensation blocks within the inquiry district and the raupatu claims of some claimants were dealt with through the Court,[17] and through of out-of-court settlements,[18] but the information available it is not sufficiently detailed to determine the level of engagement that all iwi and hapū of the Rohe Pōtae had with the Court.[19]

38. The Crown notes that the Compensation Court was not an inquiry into the nature and causes of conflict, or an investigation of raupatu grievances generally. Rather, it made awards of land or monetary compensation to those who were not excluded under the New Zealand Settlements Act 1863 because of their participation in the conflict.[20] Some provision for the return of land to former 'rebels' was made under the Confiscated Lands Act 1867. It was not until much later that an independent, formal inquiry into raupatu grievances was undertaken.

39. The Crown accepts that the terms of reference of the Royal Commission on Confiscated Native Lands and Other Grievances (the Sim Commission) were limited. The Commission was required to inquire into and report on:

39.1 whether, in all the circumstances, the confiscations exceeded in quantity what was fair and just, whether as penalty for rebellion and other acts of that nature, or to protect settlement as defined in the relevant legislation;

39.2 whether any land was of such a nature that it should have been excluded from confiscation for some special reason;

39.3 whether Māori were entitled to claim compensation in respect of confiscation and, if so, who was now entitled to claim and receive such compensation; and

39.4 whether reserves or other provision subsequently made for the support and maintenance of Māori were inadequate for the purpose.

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17 See "Table 2: Waikato Confiscated District Compensation Court Sittings" in Dr V O'Malley, "Te Rohe Potae War and Raupatu", December 2010, Wai 898, A22, pp 494-495.

18 Dr V O'Malley, "Te Rohe Potae War and Raupatu", December 2010, Wai 898, A22, p 565.

19 Dr V O'Malley, "Te Rohe Potae War and Raupatu", December 2010, Wai 898, A22, p 566.

20 Section 5 of the New Zealand Settlements Act 1863 and section 9 of the New Zealand Settlements Amendment and Continuance Act 1865.

40. These terms were subject to several qualifications, including qualifications that prevented it from inquiring into the legality of legislation through which confiscations were effected and claims founded on the Treaty.

41. The Sim Commission was not, therefore, engaged in a full inquiry into the war and its causes, and it was constrained, not just by its terms, but, to an extent, by the evidence placed before it.

42. The Crown accepts that the Commission had limited time and resources for its purposes, and therefore did not fully investigate all claims before it. It is possible that these constraints compounded further the prejudice claimants suffered as a result of land confiscations.

Crown mitigation of effects of war and raupatu

43. Issue 2.9 of the Tribunal's statement of issues asks to what extent the Crown attempted to address and mitigate the effects of war and raupatu on Rohe Pōtae Māori.

44. As already noted in these submissions, the Crown has accepted that, in broad terms, war and raupatu had significant immediate effects on Rohe Pōtae Māori. Further, it does not appear from evidence on the record of inquiry that the Crown gave particular consideration to the needs of Rohe Pōtae Māori following the end of hostilities. The Crown notes, however, that the establishment of the aukati following the war was a conscious decision by Rohe Pōtae Māori to restrict engagement with the Crown.

45. The Crown did take steps to mitigate the effects of war and raupatu on Rohe Pōtae Māori, including the establishment of the Compensation Court and processes for the investigation of raupatu claims under the New Zealand Settlements Act 1863 and its amendments, and mechanisms for the return of land to former rebels under the Confiscated Lands Act 1867. While the Crown recognises that these initiatives were imperfect, by 1871 278,891 acres of confiscated land had been returned from the Waikato confiscations to Māori deemed not to have been in rebellion and, in 1879, 37,042 acres of land were set aside for 'returned rebels'.[21] The Sim Commission gave the total area of the Waikato confiscation as 1,202,172 acres, of which a total of 314,364 acres were returned to Māori.

46. There is also evidence on the record of inquiry of the Crown providing assistance, such as medical aid, following the war.[22] However, it is important to note that the provision of State assistance in New Zealand during the 19th century was limited, and was generally inadequate by today's standards.

47. The Crown notes that the Tribunal is likely to hear further evidence about the extent to which it took steps to mitigate the effects of war and raupatu on Te Rohe Pōtae Māori as the inquiry progresses.

10 April 2013

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TO: The Registrar, Waitangi Tribunal
AND TO: Claimant Counsel

21 Dr V O'Malley, "Te Rohe Potae War and Raupatu", December 2010, Wai 898, A22, p 568.

22 Dr V O'Malley, "Te Rohe Potae War and Raupatu", December 2010, Wai 898, A22, pp 192-194.