OFFICIAL

IN THE WAITANGI TRIBUNAL **WAI 898**

IN THE MATTER of the Treaty of Waitangi Act 1975 (as amended)

AND

IN THE MATTER of the Te Rohe Potae District Inquiry (Wai 898)

GENERIC OPENING SUBMISSIONS: ISSUE 13: NATIVE TOWNSHIPS

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MAY IT PLEASE THE TRIBUNAL

Introduction

1. These submissions provide an outline of the generic case for the claimants relating to the native townships created in the Rohe Potae inquiry district.

2. The native townships fall into two categories:

   2.1 The native townships created under the Native Townships Act 1895 (Parawai, Te Puru and Karewa);

   2.2 The native townships created under the Native Land Amendment Act 1902 (Te Kuiti and Otorohanga).

3. Counsel does not have sufficient time to traverse all of the issues related to each native township. These submissions will merely orient the Tribunal in the key areas where the Claimants say that Treaty breaches arise in respect of the native townships generally.

4. Heather Bassett and Richard Kay will present the principal evidence on the Rohe Potae native townships.[1]

5. You have also heard and are yet to hear evidence from claimants on the native townships as well as specific submissions from their counsel on the circumstances of each native township.

The case for the claimants

6. The claimants say that the native township scheme, as promoted and carried out by the Crown, was not Treaty compliant in its design or implementation and prejudice has resulted.[2]

7. The native townships are a significant grievance for the Rohe Potae iwi and hapu affected even though they cover no more than 500 acres each. The issues here are not about the quantum of land involved. As

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[1] Wai 898 #A62, Bassett and Kay, 'The Impact of the Native Township Acts in Te Rohe Potae: Te Kuiti, Otorohanga, Karewa, Te Puru and Parawai Native Townships'.

[2] Wai 898 #1.5.13, Generic Pleadings – Native Townships, at [72]-[82]

the Tribunal is aware, two of the townships are still the main towns in this inquiry district and you have heard about the importance of the Karewa, Te Puru and Parawai townships to the coastal claimant groups.

Establishment of native townships

8. The objectives of the native townships scheme and therefore, it is argued, the Rohe Potae townships is clear. The title and preamble to the legislation states:

> "An Act to promote the Settlement and Opening-up of the Interior of the North Island.
>
> WHEREAS, for the purposes of promoting the settlement and opening-up of the interior of the North Island, it is essential that townships should be established at various centres: And whereas in many cases Native title cannot at present be extinguished in the ordinary way of purchase by the Crown, and other difficulties exist by reason whereof the progress of settlement is impeded"[3]

9. Bassett and Kay have provided evidence that the Native Townships Act 1895 was among a suite of legislative reforms aimed at assisting pakeha settlement.[4] It is also submitted that the Rohe Potae native townships formed part of the Crown's strategy to open up the Rohe Potae to settler development and I invite the Tribunal to consider the purpose of the native townships in that broader context including the Ohaaki Tapu, the 1883 petition, and the Main Trunk Railway.

10. The Tribunal will shortly hear the evidence of Bassett and Kay regarding the motives of the Crown relating to each of the townships. Their general conclusion is that the townships were pursued as a means to assist in settler development of an area or overcome owner reluctance to agree to outright sale to the Crown or settlers.[5] Te Puru and Karewa were slightly different in that they followed a request by the owners for assistance although they did not request a native

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[3] Native Townships Act 1895, preamble

[4] A62, Bassett & Kay, at 17-21

[5] Wai 898 #A62(b), Bassett & Kay, "The Impact of the Native Township Acts in Te Rohe Potae: Te Kuiti, Otorohanga, Karewa, Te Puru and Parawai Native Townships - Summary', at 1-4

township. The Crown in those cases was opportunistic.

11. The Crown will argue that its intentions were genuine and pure and Maori were meant to benefit. In response, Counsel argues that any benefits the politicians of the time considered might accrue to Maori were an afterthought and collateral to the main objectives. If the Crown was genuine about advancing settlement for all then the township scheme should have applied to Maori and non-Maori land. The fact that it relates exclusively to Maori land reveals the real intent which was to open up Maori lands for development that the Crown or settlers had not been able to acquire. What is also absent from the discussion is development for the benefit of iwi and hapu on terms that would have assisted with maintaining their social and cultural cohesion.

12. The Te Kuiti and Otorohanga native townships were created under later legislation. While the Maori Lands Administration Act 1900 did have a different preamble, in my submission this does not fundamentally alter the purpose of the townships as the surrounding evidence suggests. The relevance of the 1900[6], 1901[7] and 1902[8] Acts should not be overstated. It did allow the Maori Land Council to create native townships but the arrangements under the 1902 legislation were short lived and by 1913, the scheme applied as originally intended and the Maori owners were alienated.

13. The crux of the matter is that the exercise of kawanatanga was not unfettered and was limited by the Crown's obligation to respect the tino rangatiratanga of the Rohe Potae iwi and hapu to the fullest extent possible. It is submitted that the Crown could not fulfil its active protection role because it was advancing the interests of settlers or its own interest in opening up the Rohe Potae. The Treaty partnership and principle of reciprocity required mutuality which the native townships scheme lacked. Even the name given to the scheme

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[6] Maori Land Administration Act 1900

[7] Maori Land Administration Amendment Act 1901

[8] Native and Maori Land Laws Amendment Act 1902

and the townships was inappropriate. These were effectively settler townships managed by the Crown on Maori lands.

14. The Crown will argue that there was "enthusiasm" among Rohe Potae Maori for townships. The evidence shows a willingness on the part of some hapu and owners to facilitate business opportunities and lease their lands to settlers. However, there is no evidence of any support for Crown controlled native townships under the 1895 legislation. In fact, there is evidence of opposition to the native townships scheme and, in the case of Te Kuiti and Otorohanga, the owners rejected native townships until such time as the Maori Land Council could control the townships.[9]

Rohe Potae Maori did not consent to native townships

15. It is submitted that the principal issue in Treaty breach terms is not one of "consultation" (although that is relevant to assessing the Crown's overall breach) but ultimately: whether the Crown obtained the free and willing consent to the creation of each of the native townships? In dealing with the property of the owners, it is submitted that much more than consultation is required. It is submitted that consent is the minimum standard required by Treaty principles and the guarantee from the English version of the Treaty to Maori of exclusive and undisturbed possession of their lands.

16. The evidence before you is that in respect of Parawai[10] and Karewa[11], consent was not obtained and the owners had no recourse other than petitioning or corresponding with the Crown. The parties are hampered in respect of Te Puru in the absence of records to confirm the position of the owners at the time of creation[12].

17. Te Kuiti and Otorohanga are in a different category. The agreement of those owners to a native township must be viewed in the context of

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[9] A62, Bassett & Kay, sections 2.2-2.6

[10] At 52

[11] At 77

[12] At 82

the 1902 legislation and the extent to which they had some control over the selection of trustees and the townships. The unilateral changes to the administration arrangements by the Crown ought to be the focus in relation to those townships which are dealt with further below. In short, the consent by those owners was to a Maori controlled native township not a Crown administered native township.

Layout of the townships

18. The Parawai, Te Puru and Karewa townships were laid out under the 1895 Act. The Crown will focus your attention on the process available to the owners to review and have input into the layout. The response to that is quite simple:

    18.1 The Maori owners were limited to commenting on the layout of the native allotments;[13]

    18.2 The Crown did not turn its mind to the needs or aspirations of the Maori owners;

    18.3 The maximum figure of 20% for native allotments was arbitrary;[14]

    18.4 In Parawai, Te Puru and Karewa, the Crown did not provide 20% of the land for native reserves;[15] and

    18.5 Bassett and Kay highlight the deficiencies in the so-called consultation process employed by the Crown.[16]

19. This also exposes the true motivations of the native townships. If Maori were to be the principal and majority beneficiaries then there ought to have been a broader discussion on how the owners could benefit not just from rents on leased sections but by strategic involvement and placement in the township. However, that was not

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[13] Native Townships Act 1895, s9

[14] s6

[15] A62, Bassett & Kay, at 49, 75, 77, 85

[16] At 46-48,

the purpose here. The purpose was to provide for european settlement of Maori lands.

20. In the case of Te Kuiti and Otorohanga, the Maori Land Council was not shackled with the limits of the 1895 Act and appears to have done a better job in dealing with the layout of the townships and initial leasing.

21. An allied point is the levying of survey costs for the townships. The Crown will argue that land owners benefitting from the subdivision of lands should bear the full cost of survey of the township. There are two responses to that view: Where the native townships were imposed without the consent of the owners then it is arguable that the Crown ought to have borne or at least shared the burden; and there remains an issue as to who benefitted from the townships and fragmentation of lands. In respect of the native townships, the settlers and Crown are among the benefactors. Accordingly, it is arguable that the Maori owners alone should not have been saddled with all or any of the survey costs. This is particularly so given that the public amenities in the native townships were provided to the settlers and community free.

Management and administration of the native townships

22. The Claimants submit that the Crown had a duty to provide for Maori management and administration in the native townships. That duty arises out of the guarantee to Maori of their on-going tino rangatiratanga.

23. Bassett and Kay will take you through the evolution of the management and trustee arrangements from the Commissioner of Crown lands through to the Maori Trustee. For the most part, the owners were bystanders.

24. The performance of the managers and the lack of Crown oversight are issues for consideration. The Claimants say the performance of the

Commissioner of Crown lands was lacking and not responsive to owner preferences.[17] This is contrasted against the performance of the Maori Land Council.

25. In relation to the administration by the Maori Land Board and to an extent the Maori Trustee, the following issues arise:

25.1 Failing to obtain rent arrears; and

25.2 Failing to pay rents to owners;

25.3 Denying owners the right to use un-leased sections;

25.4 Failing to ensure formal leases were provided for sections;

25.5 Lands were neglected and not maintained;

25.6 The Parawai township was vested in the Maori Land Board from 1925 to 1971 and was never leased. It was eventually re-vested in the owners in 1971.[18]

26. The Crown will say that the leasing was dependent on the market for uptake of leases. That may be so, but it does not mean that the Crown could dither for decades while the owners were saddled with costs and no or little returns. In the case of the Parawai township, it was not re-vested in the owners until the 1970s.

Management structures

27. A significant feature for the Tribunal to consider is that the Crown made unilateral changes to the management arrangements. The major change was the shift from Maori Land Council to Maori Land Board in 1905.[19] The important point being that the Crown acted because it was dissatisfied with the pace of pakeha settlement.[20] While the Crown will say that the change is not significant, it is the first step

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[17] At 30, 57-58, 79-82

[18] At 239

[19] Maori Land Settlement Act 1905, ss2-3

[20] A62, Bassett & Kay, at 137

towards no Maori involvement in the management of their lands.

28. The Crown will argue that it was not under any obligation to consult Maori regarding legislative changes to the management structure. Given the circumstances, it is difficult to see how that can be so. The managers were the trustees of the lands which at all relevant times were private property. Given the circumstances of the creation of the native townships, it is not a stretch to say that Treaty guarantee of tino rangatiratanga required the Crown to work with the owners on the future trusteeship arrangements and, indeed, secure their agreement to any changes. This is especially so for the Rohe Potae townships where the coastal townships were imposed without the consent of the owners and the Te Kuiti and Otorohanga townships were established because of the management structure in place.

Agents of the Crown

29. The Crown will argue that the trustees, the Maori Land Council and Board and Maori Trustee, are not the Crown and therefore the Crown is not responsible for any failures or lack of performance.

30. The Maori Land Council had appointees of the Crown so that argument cannot wash in respect of the council.

31. It is also arguable that the Maori Land Board was part of the Crown given the connections with the Native Department through the registrar of the Native Land Court. The evidence also suggests that the Maori Land Board was effectively carrying out the policy dictated from the government of the time. [21]

32. In any event, the Crown delegated the role of trusteeship to these bodies without the consent of the owners. The Crown was a beneficiary of the native townships regime and dictated the management arrangements. It is submitted that its duty of active protection required the Crown to ensure that in the management of

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[21] At 247

the townships its obligations would be adhered to and the interests of the owners would be actively protected. It failed in this regard.

Alienation

33. It is not possible in this opening to traverse the complete history of the land transactions in each of the native townships. They each follow their own path in some respects.

34. There are two key generic issues for inquiry:

    34.1 Whether the Crown fulfilled its duty to ensure iwi and hapu retained sufficient lands? That involves an examination of the Crown facilitation of the alienation of lands; and

    34.2 Crown purchasing in the native townships.

35. The claimants argue that the Crown failed to provide any or any adequate measures to manage alienation of lands in the native townships or ensure sufficient lands were retained.

36. The Crown will attempt to lay the blame for alienations on the owners without any consciousness of the role it played in creating the circumstances for alienation including:

    36.1 The individualisation of the lands;

    36.2 The manipulation of the administration of the native townships;

    36.3 The introduction of the Native Townships Act 1910 which opened the townships up to speculation;

    36.4 The perpetual leasing of the land;

    36.5 The effective locking out of the owners from the land and its administration; and

    36.6 The standards and thresholds for validating alienations.

37. Those factors combined with the low rentals made the land more susceptible to alienation. It is argued that in those circumstances, the

Crown's duty to actively protect the interests of the owners, and indeed their wider iwi and hapu, were increased. Ultimately, the Crown failed in its responsibilities in this context. The guidelines laid down for the Maori Land Board were insufficient and ensured the Crown could not fulfil its duty to ensure that hapu retained sufficient lands for their present and future needs being focussed instead on individual owners and their existing position.

38. Then the Crown acted in complete contradiction to its Treaty obligations by reserving to itself the right to acquire townships lands, and then implementing a purchase programme in the native townships (to varying degrees). The Crown was acting as purchaser to assist in the transfer of the lands to lessees.[22] In that regard, the obligations of the Crown conflicted and it further highlights that the Crown was more concerned with settler outcomes than actively protecting its Treaty partner. The purchase of five out of every six sections in the Te Kuiti native townships is a particularly blatant example of the Crown's Treaty breach.[23]

Perpetual leases

39. The perpetual leasing of land is one of the repellent features of the native townships. It is the excruciating effective alienation of lands. The owners hold title but are not able to exercise ownership of the lands except as the lease terms allow.

40. The perpetual leases were known at the time to have been an error of interpretation in the legislation.[24] Yet the Crown then legislated to confirm the perpetual leases. That must, it is submitted, fall short of the active protection duty incumbent on the Crown.

41. The Crown argues it was not under a duty to consult on the lease terms. That position is untenable given the nature of the native

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[22] At 251 -249

[23] At 250

[24] At 248

townships and for the reasons stated above.

42. The Crown argues that perpetual leases incentivised investment. I invite the Tribunal to consider whether perpetual leases were in fact about encouraging investment in the land and whether they were in fact a means to achieve an effective alienation. The Tribunal should also consider whether there is any evidence that leases needed to be in perpetuity to attract lessees. If Maori benefit is the object then it is difficult to see how perpetual leasing is consistent with that. Investment can be attracted by the term of a lease but the term is in proportion to the investment. The original Act provided for two terms of 21 years. It is submitted that leases might be extended beyond that for significant and large commercial developments. The developments in the townships were not of that scale and it is submitted that perpetual leases cannot be justified. It is only justified if it was designed to give lessees an estate that was akin to ownership.

43. Even if incentivising initial leasing was a motive, this does not explain why the native townships came under the Maori Reserved Land Act 1955 or explain the failure or refusal of the Crown to act on the recommendations of the Sheehan Commission.[25]

44. The extent to which perpetual leasing was and is an issue for each native townships is a matter for the specific claims. In addition, I leave the later compensation arrangements for the specific claimants to address.

Compulsory acquisitions

45. The principal generic issue in these submissions is the taking by the Crown of the lands and public reserves in the native townships without consent and compensation. Counsel submits that the alienation of the lands in this manner is an easy Treaty breach to establish.

46. I leave the examination of the public works takings and the

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[25] At 289

compulsory acquisition of uneconomic shares to other counsel to advance on behalf of their claimants. There is however an issue that arises in terms of the propriety of the Crown acquiring or allowing the acquisition of township lands in circumstances where the township lands have been alienated and particularly where the Crown has purchased portions of the township.

Prejudice

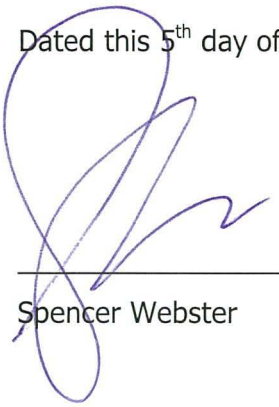
47. The native townships were successful for the Crown. They assisted the Crown objective of opening up the Rohe Potae to greater settlement and securing European tenure. The Crown has also benefitted from the purchase of the township lands.

48. For iwi and hapu, the native townships have been and remain an unmitigated failure. Lands have been alienated, the remaining owners are marginalised in the townships, some lands are subject to perpetual leases and even where Maori retained lands they have been tied up in this scheme for decades with no returns. Then the owners were put to the cost and burden of extracting the remaining lands from the native townships and Maori Reserved Land regimes.

49. The Crown will argue that it cannot be responsible for the outcomes in the native townships. A partnership, and indeed the Treaty partnership, requires a partner to be accountable for any breaches of the partnership terms. The native townships regime was a scheme it devised, dictated and manipulated to its own ends and for settler benefit. It is too late to now say that it will take no responsibility for the outcomes and its performance in relation to the native townships. It is argued that the fiduciary obligations of the Crown remained throughout the life of the native townships

50. In terms of who was prejudiced and the nature and extent of the prejudice, I leave that for the claimants to advance in their presentations. Specifically, I expect that the specific claimants will deal with the alienation of lands, the re-vesting of lands and such like.

Dated this 5th day of November 2013



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