

IN THE WAITANGI TRIBUNAL

WAI 2580
WAI TBC

IN THE MATTER OF

The Treaty of Waitangi Act 1975

AND

IN THE MATTER OF

The application for an urgent
Inquiry into the Marine and
Coastal Areas (Takutai Moana) Act
2011 on behalf of Ngāti Te Wehi

AND

IN THE MATTER OF

Ngāti Te Wehi Claimant Cluster
(Wai 1448, 1495, 1501, 1502, 1592,
1804, 1899, 1900, 2125, 2126,
2135, 2137 & 2183)

STATEMENT OF CLAIM
ON BEHALF OF NGĀTI TE WEHI
DATED 01ST MARCH 2017

RECEIVED

Waitangi Tribunal

01 Mar 2017

Ministry of Justice
WELLINGTON

Te Mata a Maui Law

PO Box 44331

Point Chevalier

AUCKLAND 1246

Tel: 0508-TEMATA (0508-836282)

Counsel Acting: David Martin Stone | Augencio Bagsic | Brooke Loader

David@tematalaw.co.nz | Gene@tematalaw.co.nz | Brooke@tematalaw.co.nz

MAY IT PLEASE THE TRIBUNAL

The claimants

1. This statement of claim is filed on behalf of the following claimants for Ngāti Te Wehi:
 - a. Nancy Awhitu and Rose Pairama, Wai 1448;
 - b. Pearl Comerford, Wai 1495;
 - c. Petunia Mahara, Ronald Miki Apiti, Philip Mahara and Boss Mahara, Wai 1501;
 - d. Steve Mahara and Raymond Mahara, Wai 1502;
 - e. Marge Apiti, Wai 1592;
 - f. Ian Shadrock, Wai 1804;
 - g. Elizabeth Mahara, Wai 1899;
 - h. Isobel Kerepa, Wai 1900;
 - i. John Mahara, Wai 2126;
 - j. Karoha Moke and Tom Herbert, Wai 2135;
 - k. Lorna Brennan and Bob Pairama, Wai 2137; and
 - l. Jack Mahara, Wai 2183 (“the claimants”).

Aotea

2. Throughout this claim Aotea means Aotea harbour and its waters, the surrounding lands, foreshore, seabed, coastline and environs, which is located on the West Coast of New Zealand between Whaingaroa (Raglan) and Kawhia harbours.

The Claim: the Marine and Coastal (Takutai Moana) Act 2011

3. This claim concerns the Marine and Coastal (Takutai Moana) Act 2011 (“the 2011 Act”) and how it prejudices Ngāti Te Wehi by abrogating from

them their mana, mana whenua, mana moana, kaitiakitanga, whanaungatanga and ancestral connection to Aotea.

Background: Ngāti Te Wehi and Aotea

4. At 1840 the claimants were tangata whenua at Aotea and today they still are.
5. As tangata whenua the claimants have enjoyed customary rights to Aotea and all resources located there for generations.
6. In Māori custom the foreshore, seabed and coastline were “owned” in much the same way as land – but the claimants prefer to use the term “kaitiakitanga”.
7. Ngāti Te Wehi is one of three kaitiaki of Aotea. The other two include Ngāti Patupo and Ngāti Mahanga.
8. Aotea is Ngāti Te Wehi’s greatest taonga.
9. Ngāti Te Wehi acknowledges Kawhia and their ancestral link to Kawhia where Ngāti Hikairo and Ngāti Mahuta reside. Kawhia is the birth place of their eponymous tupuna, Te Wehi. It is also the location of many wahi tapu sacred to Ngāti Te Wehi.
10. The claimants’ marae, urupa, and wahi tapu of which there are many, surround Aotea. Aotea is also the burial place of Ngāti Te Wehi’s ancestral waka, Aotea and they solely - are the kaitiaki of that waka. The claimants are linked to both Aotea and Tainui waka which is buried at Kawhia. Throughout all of Te Rohe Potae and Waikato, the location of the Aotea waka, combined with their whakapapa to Waikato, makes Ngāti Te Wehi unique: they have two waka.

11. Aotea has always been a place of considerable importance not just for Ngāti Te Wehi and the inland peoples of Tainui and Te Rohe Potae, but also for the Taranaki people who descend from the Aotea waka.
12. Aotea was without doubt a kaapata kai of considerable resources and therefore mana for Ngāti Te Wehi.
13. Ngāti Te Wehi presented evidence to the Crown that showed their shared customary interest in Aotea during the Wai 898 Te Rohe Potae Inquiry in Week 7 at Waipapa Marae, Kawhia.¹

Duty

14. The Crown and Māori are Treaty partners. There are duties and responsibilities that flow from that partnership including the expectation that each party will act in “good faith” when engaging in matters that will directly impact on each other, such as the 2011 Act. Flowing from the principle and expectation that the Crown will act in good faith, the Crown must also:
 - a. recognise and protect traditional iwi whakapapa, whanaungatanga, kaitiakitanga and tikanga; and
 - b. protect Ngāti Te Wehi interests over their taonga, such as Aotea.

Breach

15. When the Crown fails to act in “good faith”, then the Crown has breached that duty, and the Crown has done so through enacting the 2011 Act because it ignores the claimants’ mana, mana whenua, mana moana, kaitiakitanga, whanaungatanga and ancestral connection to Aotea, and by

¹ Held from 7 to 11 October 2013.

doing so the Crown has effectively abrogated the same from Ngāti Te Wehi.

16. The 2011 Act application process does not accord nor align with whakapapa, whanaungatanga, kaitiakitanga and tikanga, but rather focuses on a European concept of “exclusive use and occupation”. Further, the 2011 Act fails to acknowledge tribal overlapping interests to Aotea, and thereby prejudices those tribes who have such interests.

Particulars: the 2011 Act

17. The 2011 Act determines customary rights and interests to Aotea, to the detriment of Ngāti Te Wehi. The 2011 Act does so because part of a successful customary marine title application under the 2011 Act requires that Ngati Te Wehi evidence **exclusive** use and occupation of Aotea from 1840 to the present day without substantial interruption,² but they are unable to do so. They are unable to do so because Aotea is shared with other Māori, namely Ngāti Patupo and Ngāti Mahanga.
18. The 2011 Act therefore causes significant prejudice to Ngāti Te Wehi by focusing solely on exclusive use and occupation but ignoring the deep history, whanaunagatanga, tikanga, kawa and whakapapa that is shared between Ngāti Te Wehi, Ngāti Patupo and Ngāti Mahanga over Aotea. Further, the 2011 Act undermines and ignores all the evidence that Ngāti Te Wehi placed before the Wai 898 Te Rohe Potae Tribunal.

Customary Marine Title: An issue of mana

19. There is a level of mana associated with receiving a Crown derived customary marine title. It infers upon those who have received it, a recognition that they are in effect the mana whenua and therefore have all the corresponding rights that flow from being mana whenua: mana, mana

² Section 58(a)(b)(i) Marine and Coastal Area (Takutai Moana) Act 2011.

moana, kaitiakitanga, the ability to instigate the tikanga and kawa to the land (and water), the ability to dictate food gathering rights to that area, the right to bury your dead to that area and so on.

20. Conversely, if you do not receive a Crown derived customary marine title, you are effectively seen as *not* being the mana whenua and thereby have *none* of the rights that flow from being the mana whenua. That is the prejudice to Ngāti Te Wehi.
21. Ngāti Te Wehi have presented **extensive** evidence evincing their customary interest at Aotea during the Wai 898 Te Rohe Potae Inquiry (“the Ngāti Te Wehi evidence”), which is **Appendix “A”** of Ian Shadrock’s Brief of Evidence.
22. The Ngāti Te Wehi evidence demonstrates undisputed customary interests to Aotea spanning generations, yet the 2011 Act ignores all of it.

Particulars: Crown Parameters for Negotiations

23. The Office of Treaty Settlements has determined parameters for Treaty Settlement Negotiations over harbours and other parts of the coast in its publication, “Parameters for Treaty settlement negotiations over harbours and other parts of the coast” (“the Parameters document”).³
24. On the matter of determination of redress for Māori over harbours and the coast, the Minister Honourable Christopher Finlayson states:⁴

It is important to ensure that redress available through historical Treaty settlements does not undermine any rights under the Marine and Coastal [sic] Area (Takutai Moana) Act 2011. Treaty

³ Refer to Appendix Y of Brief of Evidence of Ian Shadrock: Office of Treaty Settlements, *Parameters for Treaty settlement negotiations over harbours and other parts of the coast* (May 2016) <https://www.govt.nz/organisations/office-of-treaty-settlements/news-and-updates/treaty-settlements-negotiations-natural-resources/> [accessed 24 February 2017]

⁴ Refer to Appendix Y of Brief of Evidence of Ian Shadrock: Letter from Hon Christopher Finlayson to Waikato-Tainui Te Kauhanganui Inc dated 9 May 2016.

settlement redress cannot be equal to, or greater than, the higher order rights for customary marine title holders.

25. The Parameters document states:

No redress will be offered that is equal to or greater than the following rights granted for customary marine title holders under sections [sic] subsections (a) – (f) of section 62 of the 2011 Act:

- a. A permission right under the Resource Management Act 1991;
- b. A conservation permission of right;
- c. Rights to protect wahi tapu and wahi tapu areas;
- d. Rights in relation to marine mammal washing permits and the New Zealand Coastal Policy Statement;
- e. Prima facie ownership of taonga tuturu; or
- f. Ownership of certain minerals.

26. If Ngāti Te Wehi are unable to obtain a customary marine title under the 2011 Act, then Ngāti Te Wehi will be unable to receive any of the above redress. The potential prejudice then to Ngāti Te Wehi is massively significant.

27. Ngāti Te Wehi engaged with the Crown during the Wai 898 Te Rohe Potae Inquiry in good faith with the intention of illustrating and asserting their rangatiratanga and kaitiakitanga over Aotea and sought findings and recommendations essentially acknowledging and recognising their customary marine interest.

28. In counsel's closing submissions, Ngāti Te Wehi sought the following relief:⁵

⁵ Refer to Appendix R Brief of Evidence of Ian Shadrock: Closing Submissions of Ngāti Te Wehi (Wai 898, #3.4.237) dated 20 October 2014 at 86.

Aotea Harbour and Fisheries

- g. A finding that the Crown has ignored Ngati Te Wehi's mana, mana whenua, mana moana, kaitiakitanga and rangatiratanga over their lands, waters and all other taonga.
 - h. A finding that the Crown and its departments failed to actively consult with Ngati Te Wehi in the formulation and implementation of policy concerning the environment and the moana.
 - i. A finding that the Crown failed to implement Ngati Te Wehi knowledge and tikanga into Crown policy and practice in respect of the environment.
 - j. A recommendation that the Crown recognise Ngati Te Wehi's mana, mana whenua, mana moana, kaitiakitanga, rangatiratanga so that they together can establish a pathway for Ngati Te Wehi and the Crown to work together in a manner that accords with, reflects and gives respect to Ngati Te Wehi tikanga, kaitiakitangai, wairua and mana.
29. The redress sought by Ngāti Te Wehi was intended to form the basis of settlement negotiations with the Crown, but the 2011 Act ignores all of these.
30. Further, Ngāti Te Wehi sought findings and recommendations that are equal to and above the redress provisions listed under subsections (a) to (f) of section 62 of the 2011 Act.
31. The Parameters document limits the redress that can be offered by the Crown in settlement negotiations to that prescribed by the 2011 Act.
32. Ngāti Te Wehi are barred from seeking full and adequate redress that was sought through the Wai 898 Te Rohe Potae Tribunal and through the Treaty negotiations process as they will be subjected to the limitations of the 2011 Act – thereby prejudicing them.

Remedies

33. The claimants seek the following:
- a. A finding that their claim is well-founded, and that the 2011 Act prejudices them.
 - b. A recommendation that the Crown halt the 2011 Act application process.
 - c. A recommendation that any changes to the current legislative regime be informed by the recommendations of the Wai 898 Te Rohe Potae Tribunal Report when it becomes available.
 - d. Findings that the current 2011 Act be repealed and that the Crown engages with iwi at a meaningful level to produce legislation that is not in contravention of the principles of the Treaty and that enables the rightful recognition of overlapping customary rights and interests over Aotea.

DATED at Auckland this 01st day of March 2017



David Martin Stone | Augencio Bagsic | Brooke Loader

TO: The Registrar, Waitangi Tribunal; Crown Law Office and those on the notification list for Wai 2577, Wai 2578, Wai 2579 and Wai 2580 Takutai Moana Inquiry.