

WAITANGI TRIBUNAL

Wai 2883

CONCERNING

the Treaty of Waitangi Act 1975

AND

an application for urgent hearing by Bonnie Jade Kake, Nicki Wakefield, Benjamin Pittman, Riripeti Mira Norris and Vaughan Potter, on behalf of the hapū of Ngātihau, Te Parawhau and Whangārei

**DECISION OF THE DEPUTY CHAIRPERSON
ON APPLICATION FOR AN URGENT HEARING**

27 June 2019

Introduction

1. This decision concerns an application for an urgent inquiry, filed by Bonnie Kake, Nicki Wakefield, Benjamin Pittman, Riripeti Norris and Vaughan Potter, into Wai 2883, the Whangārei Hapū Local Government Representation Claim. The claim concerns the relationship and representation of the hapū of Whāngarei with the Whangārei District Council and the Northland Regional Council. The applicants bring this application specifically on behalf of the hapū of Ngāti Hau and Te Parawhau and on behalf of all the hapū based in and around the Whangārei rohe and Whangārei Harbour (the hapū of Whangārei).

The claim

2. The claim concerns the representation of the hapū of Whangārei in:
 - (a) the Whanaungatanga Kī Taurangi partnership agreement between the Northland Mayoral Forum and Te Kahu a Taonui; and
 - (b) the statutory structure of Mana Whakahono a Rohe established by the Resource Management Act 1991.
3. The applicants submit that local authorities are engaging with Te Rūnanga o Ngāpuhi as representatives of the tangata whenua in the Whangārei area rather than engaging directly with the applicants as representatives of the hapū of Whangārei. The applicants allege that the Crown has failed to ensure that local authorities are engaging with the appropriate representatives when they engage with Māori. The applicants submit that hapū are entitled to represent themselves and be directly involved in the appointment to, operation of and decisions made by any group or entity that deals with issues that relate to their hapū.
4. The applicants allege that the hapū of Whangārei have been and continue to suffer prejudice as the Crown has failed to:
 - (a) advise the Northland Regional Council and Whangārei District Council of the rights of the hapū of Whangārei under Te Tiriti;
 - (b) pass on to the Northland Regional Council and Whangārei District Council the obligations that it has as a partner to Te Tiriti to ensure that the hapū of Whangārei retain and exercise tino rangatiratanga in relation to their taonga; and
 - (c) draft the Resource Management Act 1991 so as to include a Mana Whakahono a Rohe system which acknowledges that for Ngāpuhi and the rohe of Whangārei hapū, rangatiratanga representative structures are to be at the hapū level.

Background

Whanaungatanga Kī Taurangi

5. Whanaungatanga Kī Taurangi is the relationship agreement between the Northland Mayoral Forum and Te Kahu o Taonui which is Te Tai Tokerau Iwi Chairs Forum. The purpose of the agreement is to encourage and support a long-term relationship between

the Northland Mayoral Forum and Te Kahu o Taonui in a manner that respects the indigenous heritage of the region.

6. The Northland Mayoral Forum is comprised of the District Council Mayors and Regional Council Chairpersons from the Far North District, Kaipara District, Whangārei District and Northland Region. Te Kahu o Taonui is comprised of the rūnanga or iwi authorities for Ngāti Kuri, Te Aupouri, Ngāi Takoto, Te Rarawa, Ngāti Kahu, Ngāpuhi, Whaingāroa, Ngāti Whātua and Ngātiwai. The Chairs of the rūnanga or iwi authorities are supported by their respective Chief Executives.
7. On 31 January 2019, Whanaungatanga Kī Taurangi was signed by a majority of the parties to the agreement, through their representative chairpersons and mayors. The Whangārei District Council has not signed the agreement yet, however the Northland Regional Council are a signatory.

Mana Whakahono a Rohe

8. The Mana Whakahono a Rohe provisions in the Resource Management Act 1991 (ss 58L-58U) were introduced to provide a mechanism for iwi authorities and local authorities to formulate ways in which tangata whenua may participate in resource management processes and decision-making. These agreements are also to assist local authorities to comply with their statutory duties to “take into account the principles of the Treaty of Waitangi” (RMA s 8).

Procedural History

9. On 26 April 2019, the Tribunal received a statement of claim and application for an urgent hearing from Bonnie Kake, Nicki Wakefield, Benjamin Pittman, Riripeti Norris and Vaughan Potter (Wai 2883, #1.1.1 & 3.1.2). The statement of claim was registered as Wai 2883, the Whangārei Hapū Local Government Claim on 30 April 2019 (Wai 2883, #2.1.1). These submissions were also supported by briefs of evidence by Bonnie Kake, Benjamin Pittman and Vaughan Potter.
10. On 14 May 2019, the Tribunal received a memorandum of counsel on behalf of the claimant for Wai 2368, the Mohinui/Waiomio Development Scheme and other lands (Kaitiaki) Claim, seeking leave to be included as an interest party to this urgency application (Wai 2883, #3.1.4). On 17 May 2019, I granted the Wai 2368 claimants interested party status (Wai 2883, #2.5.2).
11. On 14 May 2019, the Crown filed submissions in response, opposing the application for urgency (Wai 2883, #3.1.3).
12. On 28 of May 2019, the applicants filed submissions in reply to those of the Crown (Wai 2883, #3.1.6).

Parties’ Submissions

Applicants’ Submissions

13. The applicants submit that the hapū of Whāngareī are suffering and will continue to suffer prejudice as a result of the lack of representation of the hapū of Whangārei in both

the Whanaungatanga Kī Taurangi agreement and the statutory structure of Mana Whakahono a Rohe (Wai 2883, #3.1.2).

14. The applicants submit that the Whanaungatanga Kī Taurangi agreement currently provides no direct representation of the hapū of Whangārei. The hapū of Whangārei were not directly involved in the development of the agreement and the interests of the hapū of Whangārei as part of the agreement are now represented at an iwi level by Te Rūnanga o Ngāpuhi, as the voice of Ngāpuhi on Te Kahu o Taonui. The applicants submit that without adequate representation, the hapū of Whangārei are excluded from conversations and decision making relating to the development of their rohe and the utilisation of their taonga.
15. The applicants submit that there is a lack of representation of the hapū of Whangārei within Te Rūnanga o Ngāpuhi, and therefore in the Whanaungatanga Kī Taurangi agreement. Further, the applicants submit that Te Rūnanga o Ngāpuhi has no system in place to ensure hapū input is included in the Whanaungatanga Kī Taurangi agreement.
16. According to the applicants the Mana Whakahono a Rohe provisions, under the Resource Management Act 1991, could exclude the hapū of Whangārei as representatives on issues that directly relate to the management of the taonga, the Harbour, the whenua and the use of water within their rohe. While the legislation requires councils to engage with iwi representatives, the applicants submit that there is no requirement for councils to ensure adequate representation at a hapū level.
17. The applicants submit that the Resource Management Act 1991 requires immediate amendment to ensure that the hapū of Whangārei are able to directly engage in a Mana Whakahono a Rohe agreement. The applicants further submit that the Mana Whakahono a Rohe provisions are newly implemented and it is critical to amend those provisions to allow hapū representation from the outset of any agreement. According to the applicants, the hapū of Whangārei have members with unique knowledge and historical connections with the rohe that is essential to any potential Mana Whakahono a Rohe agreement in the Whangārei rohe.
18. The applicants draw comparisons between the Wai 2883 claim and claims relating to Treaty settlement mandates such as Wai 2561, the Ngātiwai Mandate Inquiry, and Wai 2490, the Ngāpuhi Mandate Inquiry. Counsel for the applicants submit that the key issues in claims of this nature include defining the group being represented and showing whether that group clearly expressed their support for that representation. The applicants submit that the issue of representation in settlement mandates is comparable to the key issues in the present claim, namely the representation of the hapū of Whangārei.
19. The applicants submit that there is no alternative remedy available as the duty of active protection requires the Crown to intervene to ensure the right to representation and rangatiratanga of the hapū of Whangārei are preserved. The applicants submit that the Crown has a duty to advise local authorities to ensure the principles and duties of Te Tiriti are followed by the local authorities. The applicants further submit that only the Crown has the ability to amend the Resource Management Act 1991 to ensure that the Mana Whakahono a Rohe provisions are amended to include hapū representation and to amend the Local Government Act 2002 to prevent local authorities from failing to

ensure hapū representation on issues that relate to their taonga. Counsel for the applicants submit that this legislation must be amended to ensure representation of hapū is an option available to hapū and not a decision to be determined by local authority.

20. Counsel for the applicants submit they are ready to proceed to hearing urgently.
21. The claimants for Wai 2368, the Mohinui/Waiomio Development Scheme and other lands (Karaitiana) claim, filed submission expressing their support for and seeking leave to be included in these urgency proceedings as an interested party (Wai 2883, #3.1.4).

Crown's Submissions

22. The Crown opposes the application for an urgent inquiry on the basis that this is not an "exceptional" case which requires the diversion of resources for a standalone urgent inquiry (Wai 2883, #3.1.3).
23. The Crown recognises that the applicants are likely to seek relief through local government legislation as they relate to hapū participation in local government and hapū rangatiratanga. Section 4 of the Local Government Act 2002 recognises the Crown's responsibility to take appropriate account of the principles of Te Tiriti and to maintain and improve opportunities for Māori to contribute to local government decision-making processes. Under section 81 of the Local Government Act, a local authority must:
 - (a) establish and maintain processes to provide opportunities for Māori to contribute to the decision-making processes of the local authority;
 - (b) consider ways in which it may foster the development of Māori capacity to contribute to the decision-making processes of the local authority; and
 - (c) provide relevant information to Māori for the purposes of the matters above.
24. Section 82 of the Local Government Act sets out consultation principles. Section 82(2) provides that a local authority must ensure it has processes for consulting with Māori.
25. The Crown submits that the Wai 2883 claim should not be inquired into urgently because the application does not meet the Tribunal's requirements for urgency. Specifically, the Crown submits there is no significant and irreversible prejudice caused or likely to be caused by any current or pending Crown act or policy.
26. The Crown rebuts the applicants' argument that the Whanaungatanga Kī Taurangi and Mana Whakahono a Rohe agreements permanently alter the rights of hapū in local government and resource management, submitting that the Crown's approach to resource management reform is iterative and not intended to foreclose further development in resource management arrangements.
27. The Crown further submits that the broad issues raised in the claim have recently been inquired into in considerable detail in the Wai 1040, Te Paparahi o Te Raki Inquiry and the Wai 2358, Freshwater and Geothermal Services Inquiry. Hearings for these inquiries have concluded and the inquiries are now in the report writing stage. The Crown submits that the Tribunal panels for both inquiries should be given the opportunity to consider and report on those issues and to make recommendations as they see fit without a concurrent urgent inquiry into the same issues.
28. According to the Crown, the allegations made by the applicants concern the underlying constitutional settings of the Crown's Treaty obligations to ensure the principles of the

Treaty are upheld at the local government level. The Crown submits that it would be more appropriate for issues of this nature to be heard as part of the proposed Constitution, Self-Government and Electoral System kaupapa inquiry. The Crown submits that local government and iwi/hapū representation are "indicative issues" to be inquired into as part of the the Constitution, Self-Government and Electoral System kaupapa inquiry. The Crown submits that the proposed Constitution, Self-Government and Electoral System kaupapa inquiry is an alternative remedy to an urgent inquiry that is reasonably available to the applicants.

29. The Crown submits that granting an urgent hearing where a kaupapa inquiry is highly relevant and foreseeable would be inappropriate. The Crown submits that there is nothing to distinguish this claim from other claims regarding hapū participation in local government and that there should be a reluctance to partition claims for urgent inquiry that raise broader national issues and fall clearly within a kaupapa inquiry.
30. Further, the Crown submits that the Tribunal does not hold the authority to quash the Whanaungatanga Kī Taurangi agreement and that perhaps a more appropriate form of relief would be through High Court proceedings.

Applicants' Reply

31. In response, the applicants submit that this application is focussed on current or pending Crown acts or policies (Wai 2883, #3.1.6). The applicants liken this claim to Wai 2870, the Māori Prisoners' Voting Rights Urgent Inquiry, as both Wai 2870 and this application address current legislation that will prejudicially affect the applicants if not addressed immediately under an urgent hearing.
32. According to the applicants, Crown submissions reveal the existence of Crown policy whereby local authorities are not subject to the same Treaty obligations as the Crown despite the fact local authorities are created by Crown legislation and they are also delegated some of the powers and responsibilities of the Crown.
33. The applicants submit that the pending Constitution, Self-Government and Electoral System kaupapa inquiry is not an alternative remedy but a delayed remedy. Further, counsel submits that this delayed remedy will allow for further and substantial prejudice to the hapū of Whangārei. The applicants also submit that pursuing High Court proceedings is not a reasonable alternative remedy because the applicants are not in a financial position to undertake such proceedings.
34. The applicants submit that the Wai 1040 and Wai 2358 inquiries will not comprehensively cover the issues in this claim. The Wai 1040 Tribunal panel heard evidence on the Mana Whakahono a Rohe agreement in October 2016 which was before the amendments to the provisions governing the agreements took place in 2017. The applicants submit that the Wai 2358 and Wai 1040 inquires only touched briefly on the Mana Whakahono a Rohe agreements and the evidence put before the Tribunal is unlikely to be substantial enough to lead to conclusive findings.
35. The applicants submit that granting an urgent hearing on the specific issues pleaded in this application could potentially intervene before the prejudice to hapū of Whangārei amounts to significant and irreversible, as Whanaungatanga Kī Taurangi remains unsigned by Whangārei District Council and no Mana Whakahono a Rohe agreement

have been signed by Northland Regional Council and the iwi authorities (Wai 2883, #3.1.6).

36. The applicants submit that a memorandum of counsel was filed on behalf of Wai 2368, the Mohinui/Waiomio Development Scheme and other lands (Karaitiana) Claim, in support for Wai 2883 and the claimant's application for an urgent hearing (Wai 2883, #3.1.4). He submits, in response to the Crown's suggestion that the issues covered in this claim may be a national issue that other hapū may share, that only one interested party has sought leave to participate and this highlights the tightly focus area of the issues in this claim.

Urgency Criteria

37. The Tribunal's *Guide to Practice and Procedure* states the following with regards to applications for an urgent hearing:

In deciding an urgency application, the Tribunal has a regard to a number of factors. Of particular importance is whether:

- The claimants can demonstrate that they are suffering, or are likely to suffer, significant and irreversible prejudice as a result of current or pending Crown actions or policies;
- There is no alternative remedy that, in the circumstances, it would be reasonable for the claimants to exercise; and
- The claimants can demonstrate that they are ready to proceed urgently to a hearing.

Other factors that the Tribunal may consider include whether:

- The claim or claims challenge an important current or pending Crown action or policy;
- An injunction has been issued by the courts on the basis that the claimants have submitted to the Tribunal the claim or claims for which urgency has been sought; and
- Any other grounds justifying urgency have been made out.

Prior to making its determination on an urgency application, the Tribunal may consider whether the parties or the take or both are amenable to alternative resolution methods, such as informal hui or formal mediation under clause 9A of schedule 2 to the Treaty of Waitangi Act 1975.

Discussion

38. It is clear to me that the applicants have failed to establish the matters that would justify a grant of urgency.
39. They can point to no action or decision that is about to be made at the local body level. Much less can they identify such an action or decision as would cause prejudice and so completely fail to put before me a prejudice that would be significant and irreversible.
40. There is also a failure to meet the "no alternative remedy" test. There are two Tribunal matters in their writing phase at the moment which may well impact on the issues in this

claim and there is also a Kaupapa inquiry on the horizon which will deal with matters such as this.

41. This claim is best dealt with within a Kaupapa inquiry which will have the ability to view a wider picture and make recommendations over a range of related issues.

Decision

42. The application must fail by a clear margin and is dismissed.

The Registrar is to send a copy of this direction to counsel for the applicant, Crown counsel and those on the notification list for Wai 2883, the Whangārei Hapū Local Government Representation Claim.

DATED at Wellington this 27th day of June 2019



Judge P J Savage
Deputy Chairperson

WAITANGI TRIBUNAL