

IN THE WAITANGI TRIBUNAL

KEI MUA I TE ROOPU WHAKAMANA I TE TIRITI O WAITANGI

WAI 2490

WAI 2489

IN THE MATTER OF

The Treaty of Waitangi
Act 1975

AND

IN THE MATTER OF

Ngapuhi Settlement Inquiry

AND

IN THE MATTER OF

A claim filed by Paki Pirihi on
behalf of Patuharakeke and a
claim filed by Ngawaka Pirihi
and others

CLOSING SUBMISSIONS ON BEHALF OF PATUHARAKEKE

Dated this 25th day of March 2015

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MAY IT PLEASE THE TRIBUNAL

Kupu Arataki – Introduction

1. These submissions are filed on behalf Patuharakeke under the claim number WAI 2489.
2. Patuharakeke is a hapu that has a rohe covering a coastal area from the southern side of the Whangarei Harbour to Mangawhai with interests as far inland as Tangiteroria. They whakapapa to Manaia maunga and have a marae Rangiora situated at Takahiwai.
3. Patuharakeke has longstanding grievances before the Waitangi Tribunal, dating back to 1998 when the original Statement of Claim was filed by Joanne Midwood. The grievances complained of relate mainly to the large scale impact of Crown confiscation and purchasing that took place in the 1850's resulting in a landholding today of only 5 acres (more or less) of land being held within Maori ownership, and limited to the Takahiwai area. The grievances have had a major impact on the structure of Patuharakeke as a tribal entity.
4. That gross attack in the 1850's by the Crown on the rangatiratanga of Patuharakeke is compounded today by the continuation of Crown policy to engage with the first group that comes forward seeking a mandate to settle Treaty claims under the auspices of a large natural grouping. A process that takes away the ability of hapu to determine how they wish to settle the grievances that they have carried alone.
5. The result of the large natural grouping policy for Patuharakeke rather than being inclusive has been exclusive. Until 4 August 2014 and at the invitation of Patuharakeke, the Crown had not engaged with Patuharakeke at any level. Letters and emails from counsel for Patuharakeke to OTS were never acknowledged or replied to. Under cross-examination, Ms Hickey could not

recall any of the correspondence sent from our firm to her office and could not recall sending a response.

6. By August 2014, the Crown had recognised the Tuhoronuku mandate and was in the throes of scrambling together some form of “hapu” representation resulting in the position of a Hapu Kaikorero Representative.
7. Patuharakeke maintains that it has not given a mandate for settlement for its Treaty claims to any other group proceeding with direct negotiation with the Crown.

Engagement with Ngapuhi

SOI 5.1: What communications and meetings did the Crown have with hapu and other groups about its process with Tuhoronuku?

SOI 5.2: To what extent did the Crown consider the position of hapu and its obligation to actively protect the ability of hapu to exercise rangatiratanga?

8. A core issue for Patuharakeke within this inquiry is the usurpation of hapu rangatiratanga and tied in with that is the lack of engagement by the Crown with Patuharakeke.
9. Patuharakeke have had to use the scant resources left available to them to fulfil its role as kaitiaki of the whenua and in doing so has made determinations and decisions in relation to various issues that affect the hapu and whenua in the rohe. At every turn the Crown has made it difficult for Patuharakeke to determine their own destiny.
10. In relation to the settlement of their claims, Patuharakeke is engaged in Te Paparahi o te Raki Inquiry (“**TPOTR Inquiry**”)(WAI 1040) in order for those claims to be heard, tested and reported on. From the beginning when discussions were at an early stage of looking at the potential of a Ngapuhi settlement, Patuharakeke remained engaged in the WAI 1040 Inquiry. For them it is the only way in which the specific grievances can be dealt with

11. It has always been Patuharakeke's position that only Patuharakeke know and understand the grievances complained of and it is submitted that the Crown understands that position. However, it has made a pre-determined decision to only engage with Tuhoronuku, this at the expense of Patuharakeke.
12. Patuharakeke has always been open and honest about its aspirations, invariably they are the same as the aspirations of many of the hapu in Ngapuhi that want to be able to determine their own affairs and destiny for the benefit of the people.
13. In summarising his evidence before the Tribunal, Dr Gudex made the following statement,

My children asked me what usurp means because it's not a term that's used a lot and so here is the definition, "To seize and hold the power or rights of another by force and without legal authority." And for those of you who think that that's a rather emotive term to use for this process, well it isn't because Patuharakeke and many other hapu did not give their consent, and the process that they went through to make decisions about their claims were based on tikanga.¹

14. The Crown's long history of seizing power and breaking down the tribal authority that lies within the hapu context began as far back as the 1850's for Patuharakeke. However, while it is not something new, the relationship must change and it is submitted that it will only change when the Crown upholds the constitutional guarantees found in Te Tiriti and He Whakaputanga.
15. It is submitted that the Crown in excluding and actively ignoring the hapu position in relation to Ngapuhi settlement matters is a breach of the fundamental right of hapu to exercise tino rangatiratanga and a breach of the principle of a hapu right to redress. The Crown, by virtue of its failure to engage with hapu at an early stage, well before any mandating process and continuing

¹ Wai 2490 #4.1.2, page 434 at line 9.

down a track to negotiating a settlement, has failed to protect the rangatiratanga of hapu.

16. Further, in the summary of evidence provided by Dr Gudex he set out the following,

Now if I could just move on to the only engagement that Patuharakeke has had with the Office of Treaty Settlement that was in August. Probably, without being too cynical, because of the letter that Patuharakeke wrote questioning about the land banking of the memorialised Mighty River Power land that Patuharakeke had heard OTS were in discussion with some of the mandated bodies that they were dealing with, and yet this was land that was confiscated from Patuharakeke. And the email from the Office of Treaty Settlement really summarised the Crown's view on how to handle, I guess, border hapu such as Patuharakeke.

Patuharakeke comes within the scope of three separate mandates, Nga Puhi, Ngati Wai and Ngati Whatua. The Crown accepts that Tuhoronuku has a mandate on behalf of Nga Puhi and we are likely to begin negotiations quite soon. The Ngati Wai Mandate has been advertised and we've asked for submissions on it as well. Ngati Whatua has a mandate already.

So Patuharakeke, these are the Office of Treaty Settlements' words, this is their consultation, "Will be settled as part of the negotiations with each of these mandated authorities." In other words you'll be split in three.

We've heard that Patuharakeke wishes to have its own settlement negotiation. We need to be completely clear that a separate negotiation with Patuharakeke is not within Crown policy. We will not be accepting –

This is consultation.

We will not be accepting a mandate presented by Patuharakeke to commence negotiations. The Crown prefers to settle with large natural groupings and Patuharakeke falls within three of those. Each of these groups will negotiate on behalf of Patuharakeke –

This is the Crown's words.

Our strong recommendation is that Patuharakeke engage with each of these groups to find out how its interests can be represented as we go forward in negotiations.

The only other thing I really want to say about that is that Patuharakeke does affiliate strongly to Ngati Wai, Nga Puhī and Ngati Whatua. It's always acknowledged that, but it also exists in a term that the Tribunal has used in a sphere of their own. And Ngati Hineuru were described as this in the Waitangi Tribunal Report in 2004 and they were described as: Existing in a buffer zone between regions and only a people who could claim relationships with all of those regions could survive there. Given the tendency in Maori society to punish the whole of the descent group for the offence of a pa provided they were not kin.

Ngati Hineuru were such a people. And Patuharakeke's contention is that they are such a people. That they've lived in this rohe for 250 years and the only reason they've survived is because of the relationships they've developed with the surrounding hapu.²

17. Clearly, the extent of any Crown consultation with Patuharakeke has been negligible, it has taken place well after the decision had been made to accept the Tuhoronuku mandate on 14 February 2014 and it is far from being proper consultation when you are given a take it or leave it situation.

² Wai 2490 #4.1.2, page 435.

18. The Crown while on the one hand giving the rhetoric that they want to hear hapu aspirations for settlement has never really listened to those aspirations, not in any meaningful way. When it has suited the Crown, it has chosen to put up barriers to those aspirations by using terms such as having a “large natural groupings policy” and/or “budgetary constraints” and the like, however, as Dr Gudex stated at the August 2014 hui at Takahiwai, ‘some of the constraints are self-imposed by the Crown.’³
19. The lack of engagement has invariably resulted in the inability of the Crown to consider alternative models to Tuhoronuku, despite the Crown’s knowledge of the opposition to the Tuhoronuku structure and the fact it has a store of information available from other hapu and iwi settlements that could have been considered.
20. For Patuharakeke, they are one of the only remaining hapu within a coastal strip between the Whangarei Harbour and the Kaipara area to have not been settled with. The likes of Ngati Manuhiri, Ngati Rehua, Te Uri o Hau and those of Te Roroa have all been settled directly with the Crown.
21. Various hapu and iwi with affiliations to Tamaki Makaurau including Te Kawerau a Maki and various Hauraki and some northern Tainui hapu have been able to settle in full or in part.
22. In questioning by Tribunal member Ms Moxon, Dr Gudex was asked whether Patuharakeke had looked into a partial settlement under Ngapuhi, Ngati Wai and Ngati Whatua. Essentially, the issue for Patuharakeke is one of confidence, and the lack of confidence it has in the structure and people involved in those structures to understand and do what is best for Patuharakeke.
23. There is no guarantee that Patuharakeke will gain anything more financially than what they would if they were to effect a hapu settlement either on its own or as part of a taiwhenua type model. Patuharakeke have not been able

³ OIA.008.0404 OTS Internal Record of Meeting with Patuharakeke.

to discuss settlement issues in detail with others from the Whangarei taiwhenua because of the various other issues that are being addressed. However, given the opportunity and in the right environment (for example where discussions between the Crown and Tuhoronuku have ceased) as set out by Dr Gudex, these sorts of settlement issues could be resolved based on whakawhanaungatanga.

Predetermination

SOI 1.1: To what extent, if any, was the Crown's approval of the Tuhoronuku Deed of Mandate pre-determined?

24. As set out in the opening submissions on behalf of Patuharakeke, it is alarming and deeply disturbing that the Crown has not learnt anything from its experience in the Tamaki Makaurau Settlement Inquiry or other urgent inquiries that have dealt with mandate and settlement issues.
25. For ease of reference, the Presiding Officer, Judge Wainwright's statement is significant,

In several urgent inquiries now, the Tribunal has seen at close quarters how the office goes about its work. It chooses one strong group in a district and works exclusively with it to agree on a settlement. Over a period of several years, a working relationship is built, and ultimately a settlement is secured. This achieves the objectives of the Crown and the settling group. But meanwhile, the other Māori groups in the district are left out. The Crown forms no relationship with them, and is interested in their Treaty claims and their connection with the district in question only to the extent that they bear on the settlement with the primary group. When face-to-face contact is finally made, it is too late. Meetings are held once

*there is a settlement on the table, and by then the parties' interests are polarised.*⁴

26. The above statement echoes the grievances that Patuharakeke have with the process that the Crown has adopted in its unilateral settlement strategy with the Tuhoronuku Independent Mandated Authority.
27. Hapu in opposition to the Tuhoronuku Deed of Mandate contend that there has been pre-determination on the part of the Crown. This may have been influenced by internal deadlines to settle Ngapuhi grievances. This “pre-determination” has been illustrated in significant flaws throughout the process.
28. An example of this is the fact that although the Crown had already established a “hapu list”, they were undertaking a process with Ngapuhi kuia and kaumatua to determine which hapu were “active” at the same time that they were running an election for Hapu Kaikorero.
29. A further example of such flaws is that contrary to Crown policy, the Crown provided pre-mandate funding to Tuhoronuku to alleviate their financial dependency on the Runanga. Crown policy clearly provides that “OTS claimant funding and CFRT funding is only accessible to Tūhoronuku from when a deed of mandate is recognised by the Crown. This is to protect against allegations that the Crown’s prejudiced mandate decision by predetermining who should represent Ngā Puhī in the negotiations.” Ms Hickey insisted during Hering Week 2 that this pre-mandate funding falls within a category of “exceptional funding” however “exceptional funding” has only previously been provided in very rare circumstances.

⁴ Tamaki Makaurau Settlement Process Report WAI 1362, 2007, p.1.

Settlement and relationships - whanaungatanga

SOI 11.1: To what extent, if any, have the Crown's actions or omissions impacted on whakawhanaungatanga/relationships within Ngapuhi? And to what extent is the Crown culpable for any negative impact?

The Treaty is about relationships. They lie at its very core. Primarily, and most obviously, the relationship at issue is between te iwi Maori and Crown. But it is also about relationships between Maori. That is because the Treaty confirms rangatiratanga, and being a rangatira is about relationships too: between rangatira and his people, and between different hapu and iwi that independently have and exercise rangatiratanga.⁵

30. Patuharakeke have always been very transparent with Tuhoronuku, Ngati Wai Trust Board and Te Runanga o Ngati Whatua. All three groups are aware of the settlement aspirations of Patuharakeke, which is to complete having the claims of Patuharakeke heard within the Waitangi Tribunal process and engage with the Crown directly in relation to settlement.
31. In evidence filed by Ani Pitman (#A72) only one meeting in June 2014 has ever been held between Tuhoronuku and Patuharakeke. That meeting was only really to discuss an application for an interim injunction to halt the sale of our whenua at Ruakaka and Poupouwhenua block by Mighty River Power ('MRP') at the old Power station site in April 2014. Further, Tuhoronuku had sought a meeting with PTB this year in April and May 2014 to discuss MRP land sales and their position and (negotiation) discussions held to date with the Crown over land-banking and receiving our lands into their settlement.
32. Apart from the June 2014 meeting, Ms Pitman states,

There has been no panui from Tuhoronuku to Patuharakeke about their mandating process. There is neither any Patuharakeke representation nor suitable hapu representation mechanism or process on Tuhoronuku to

⁵ Tamaki Makaurau Settlement Process Report, ch. 1.

*provide requisite security and certainty for Patuharakeke's current and future interests to be safeguarded or acknowledged.*⁶

33. On the ground, relationships between whanau are strained because of the level of anxiety that is created when your rangatiratanga as people and as a hapu is tested. For Patuharakeke, whakapapa cannot be denied, however, this process has meant that rather than dealing with these issues based on tikanga, the Crown's criteria means whanaungatanga is put to one side.

Hapu Withdrawal

SOI 9.1: To what extent, if any, are the provisions for the withdrawal of claims and/or hapu kaikorero in the Deed of Mandate fair?

34. Patuharakeke have been placed in the same position as other Ngapuhi hapu where are they making attempts to withdraw their claims from the Tuhoronuku Deed of Mandate. Patuharakeke have advised the Crown both in person and in writing that they do not give mandate to any other group to settle their claims, however their claims are still being included in the mandate. Patuharakeke did not consent to the inclusion of their claims in the Deed of Mandate, yet the Crown has advised that in order to withdraw they must go through a very robust process as there is no hapu withdrawal mechanism. This process is difficult to reconcile with Patuharakeke's tikanga and hapu autonomy that they have asserted from the outset.
35. Ms Hickey acknowledged during Hearing Week 2 in Wellington that the significant risk of hapu collectives being formed for a Tribunal hearing to formally seek to withdraw from the mandate had been realised in December 2010 and that the Minister was well aware of that risk. However, no steps were taken to try to combat this risk as the Mandate was not sought on a hapu basis. Further, the Crown have refused to provide funding assistance to those groups

⁶ Wai 2490 #A72, page 3

who seek to conduct a withdrawal process and Patuharakeke, like many others, does not have sufficient resources to carry out such a process.

36. There is precedent for a hapu based mandate with a hapu withdrawal mechanism. Tuwharetoa had a hapu-based mandate with a hapu withdrawal mechanism but alternatives to the model have not been discussed with hapu.
37. Mr Fyfe acknowledged that the process for withdrawing or changing Hapu Kaikorero is also more onerous than the process that Hapu Kaikorero had to go through to be elected in during Hearing Week 2.

Conclusion

38. It is submitted that Patuharakeke have settlement aspirations that cannot be met by Tuhoronuku.
39. Patuharakeke are aggrieved by the process that the Crown has undertaken in settling the claims of Patuharakeke without any proper engagement, consultation or transparency.
40. Various documents have only become available to Patuharakeke through a long, onerous and drawn out Official Information Act request process, many of which only came to light after counsel for the claimants sought further documents.
41. Patuharakeke have been continually told that they must settle under one or three other groups, however, Patuharakeke have no confidence that the specific grievances that they have suffered will be settled in an appropriate manner and in accordance with Patuharakeke tikanga.
42. The Crown has pre-determined who it will deal with because it is the most convenient, it has picked a winner and has backed Tuhoronuku with resourcing of over a million dollars.

43. The Crown has steam-rolled ahead with its settlement process and if the mandate of Tūhoronuku is not set aside it will leave an even greater trail of destruction than what it has already caused for the claimants involved in the WAI 1040 inquiry.

Relief sought

44. Counsel submit that based on the evidence presented to the Tribunal the following recommendation are sought, that:
- (a) the Crown withdraw its recognition of the Tūhoronuku Deed of Mandate as it relates to the claims of Paki Pirihi on behalf of Patuharakeke Te Iwi Trust Board (WAI 745) and the claims of Ngawaka Pirihi and others on behalf of the descendants of various Pukekauri blocks (WAI 1308);
 - (b) the Crown cease all discussions with Tūhoronuku as it relates to the claims of Paki Pirihi on behalf of Patuharakeke Te Iwi Trust Board (WAI 745) and the claims of Ngawaka Pirihi and others on behalf of the descendants of various Pukekauri blocks (WAI 1308);
 - (c) the Crown acknowledge that the claimants and hapū they represent are;
 - (i) not to be included within the Tūhoronuku Deed of Mandate;
 - (ii) not authorising Tūhoronuku to act as their agent or mandated negotiator;
 - (iii) prejudiced by the process for withdrawal as contained within the Tūhoronuku Deed of Mandate which is overly arduous, inappropriate and in breach of Te Tiriti and its principles and is not to be applied to these claims and claimants or their constituent hapū.

(d) failing the above, the claims of Paki Pirihi on behalf of Patuharakeke Te Iwi Trust Board (WAI 745) and the claims of Ngawaka Pirihi and others on behalf of the descendants of various Pukekauri blocks (WAI 1308) in Wai 1040 are to be withdrawn from the Tūhoronuku Deed of Mandate without having to follow the unnecessary, costly and time consuming process prescribed in the Tūhoronuku Deed of Mandate.

Dated this 25th day of March 2015 in Auckland.



Kelly Dixon/ Alisha Castle
Counsel for WAI 2489