

Te Rūnanga-ā-Iwi o Ngāti Kahu Land Claims Portfolio

Report for February 2019

1. **Waitangi Tribunal - judicial review**
2. **National Iwi Chairs Forum**

Summary

- The High Court in Wellington heard our application to judicially review the Waitangi Tribunal for not making binding recommendations. The judge reserved his decision.
- National Iwi Chairs Forum met at Waitangi 30 January to 1 February.

1. **Waitangi Tribunal - judicial review**

The hearing of our application for Judicial Review of the Waitangi Tribunal's decision to ignore the Court of Appeal's direction to make binding recommendations was heard on 21 February in the High Court in Wellington. The judge reserved his decision and undertook to release it as soon as possible.

I appeared as co-head claimant represented by Te Rūnanga-ā-Iwi o Ngāti Kahu. Our counsel were Royden Hindle assisted by Coral Linstead-Panoho. The Office of Treaty Settlements represented the government. Their counsel were Crown Law. Tina Latimer was present as an intervenor with her lawyer. None of the other complainants in the Tribunal appeared.

Royden made lengthy submissions on a number of points of law. Only matters of law can be considered in a judicial review. He emphasized the fact that Ngāti Kahu is seeking the binding recommendations to which we are legally entitled. Binding recommendations order the government to give our land back. We argued that the Tribunal was acting in violation of the law by not making those binding recommendations. Royden emphasized the directions of both the High Court and the Court of Appeal that the Tribunal make binding recommendations, and the fact that the Tribunal is ignoring those directions. He explained the very convoluted path the Tribunal has gone down at the request of the government in order to either delay or stop binding recommendations being made. He also explained that the government's references to mandate are irrelevant (because they have nothing to do with the law).

The judge, Hon. Justice Simon France, sought clarification on a number of facts and on points of law including those relating to binding recommendations, appointing and replacing members of the Tribunal panel and what the Court of Appeal and High Court directions required the Tribunal to do.

Crown Law noted that many lands involved in binding recommendations are now privately owned (purchasers know that the land can be taken back) and there would be serious consequences if binding recommendations were made. It insisted that all claims, including all post-1865 claims and the views of anyone and everyone who may be interested, whether they have a claim or not, must be heard and this must all be reported on and all competing claims must be resolved before binding recommendations can be considered.

The judge again sought clarification on a number of matters and Crown Law eventually admitted to the judge that what they are arguing is that the Tribunal panel recusing itself means that, after 33 years and without being resolved, Ngāti Kahu's claim has been abandoned and has to start again. The judge indicated that it is an understatement to say that an entire panel recusing itself (stepping down) is unusual – he knew of no other example of this happening – and asked why and how that could have been allowed to happen.

Tina Latimer's lawyer was allowed to speak but he didn't address any of the matters the court was dealing with, so the judge cut him off.

Royden then summarized our case. The judge reserved his decision but said he will try hard to get it out as soon as he can. He said he had a lot of information on which to base his decision. He repeated how unusual the whole panel recusing itself was and that the legal implications need to be looked at. However, the key issue is what the scope of the Tribunal's task actually is.

From my point of view there were a number of notable points. First, the judge was struggling with the huge amount of material he has to consider. This is inevitable for a claim that has been running for 33 years. We have to hope that he gets the key facts right. He was nevertheless clear about the directions from the High Court and Court of Appeal and the fact that binding recommendations are available to Ngāti Kahu as a matter of law. His puzzlement at the members of the Tribunal panel recusing themselves is because he assumes that as a judicial body, the Tribunal acts strictly in accordance with the law. We did not raise with him the fact that the Tribunal has, since at least 1997 and the release of the Muriwhenua Land Report, been interfered with politically (both Doug Graham and Margaret Wilson threatened to abolish them if they made binding recommendations). That is a very serious breach of the rule of law that many of us know about but have not had the resources to challenge through the courts. As a result, the government is able to successfully manipulate the Tribunal to carry out its political wishes – which is, of course, why the Tribunal finds itself repeatedly subject to judicial review in the High Court.

In respect of the government, it was interesting to watch the Crown Law trying to fudge the fact that it is being as obstructive as it possibly can. It will be interesting to see whether the judge believed them. However, there was a stark contrast between Crown Law's behavior in the Tribunal and its behavior in the High Court. Crown Law made no mention of its treaty claims settlement policy. Nor did it try to argue that we must negotiate a settlement rather than seeking binding recommendations or that it does not recognize the mandate Ngāti Kahu has given to the Rūnanga. Of course, it could not do any of these things because it risked being told off by the judge if it tried. That is because there is no law associated with the treaty claims settlement policy and process – it is simply the political path that the government has chosen to try to keep control of and extinguish our claims.

Attached to this report as **APPENDIX 3** is my paper that has been published on this. It is called ‘*Behind the Smoke and Mirrors of the Treaty Claims Settlements in New Zealand*’. I gave Andrew Little, Minister of Treaty Negotiations, a copy of this paper at the National Iwi Chairs Forum hui.)

2. National Iwi Chairs Forum – hui at the Copthorne Hotel, Waitangi 30 January – 1 February 2019

Ngāi Takoto hosted this National Iwi Chairs’ Forum at Waitangi. Their chair, Wallace Rivers, co-chaired it with Te Aupōuri’s senior government servant, Hugh Karena who largely determined what was allowed to be discussed. I have attached the formal resolutions of the hui at Appendix 1 at the end of this report.

The Pou Tikanga, that I chair, was supposed to run a workshop on how to apply the Tiriti Partnership Framework we approved in November (see below) to monitor the government’s performance.

Te Tiriti Partnership Framework

ARTICLES	Kāwanatanga Governance	Rangatiratanga Self-determination	Rite Tahī Non-discrimination
Agreements	Rangatira gave and the Crown accepted an authority to govern tauīwi and to act in a partnership with Rangatira, the primary partner	Rangatira kept and the Crown promised to protect their Tino Rangatiratanga including self-determination	The Crown gave whānau the guarantee of full participation , enjoying the same rights as British subjects
Obligations	Legislation policy and practices for tauīwi will be developed in partnership with Rangatira and be inclusive of tikanga	Tino Rangatiratanga, reo, tikanga, wairuatanga, marae, mātauranga will be protected and revitalised	Whānau will participate in their communities as equals, without discrimination

There was a lot of interest in the framework but Wallace Rivers (and Hugh Karena) ruled there was not enough time for the actual workshop to proceed. I reported with Lisa Tumahai of Ngāi Tahu and Vanessa Eparaima of Ngāti Raukawa Settlement Trust, on the meetings we have had with Nanaia on 4 December and then with Kelvin on 28 January about this framework.

Both meetings were very good, and our technicians and government officials were sent away to develop the framework. Some of the Iwi Chairs were skeptical about the level of government support there is for the framework. The Prime Minister, Jacinda Ardern, confirmed the next day that she fully supports Nanaia and Kelvin on this framework. I asked her later if she had read the Matike Mai Aotearoa report on constitutional transformation and she said she had. I advised her that it is how the country needs to move forward and that it is the government, not Māori, who must address racism. She undertook to reread the report.

I also reported to the Forum on the third United Nations Universal Periodic Review of New Zealand conducted by the United Nations Human Rights Council in January which was, once again, very critical of New Zealand's treatment of Māori. Our Independent Monitoring Mechanism is continuing to work with Nanaia to develop a National Plan of Action to implement the United Nations Declaration on the Rights of Indigenous Peoples to try to start addressing the government's shortcomings. Three members of the UN Expert Mechanism on the Rights of Indigenous Peoples (whose meetings we attend in Geneva each year) will visit us for a week in April to help us with that Plan of Action.

As part of Matike Mai Aotearoa's work, Bill Hamilton presented a paper on a national vision to underpin constitutional transformation. His suggestion for the country to consider is the vision that "All whānau, communities and individuals can achieve their potential".

For Pou Tangata, they asked to see the review of Whānau Ora that was about to be considered by Cabinet. Peeni Henare made it available. It finds that the Commissioning Agencies (Te Pou Matakana for the North Island and Te Pūtahitanga for Te Waipounamu) are doing a good job of strengthening whānau but need a lot more resources and support from government agencies. The review is highly critical of government departments who have been deliberately opting out of their responsibilities to Whānau Ora and expecting Whānau Ora workers on the ground to do their work for them. (The Auditor-General was similarly critical a few years ago.) The problem is deeply entrenched resistance and numerous barriers to any Māori-sourced approach in the government departments and the review highlights this.

Te Pou Tangata is also very concerned about the implications of the improperly conducted census last year. The census is used, among other things, to determine how government funding is distributed on many fronts. Many Māori did not take part in the census which will lead to us receiving even less government funding than the already minimal amount that Māori now receive. The Forum's Iwi Data Group is trying to sort this out with ministers.

Te Pou Taiao is still making no progress trying to get the government to talk about the fact that Māori own fresh water.

Te Pou Tāhua has identified a number of iwi who want to get on with building houses. The government was very receptive and Ngāti Kuri's chairperson (who has undertaken to build ten houses) tells me Nanaia is being really helpful in clearing the way for them to do this. Te Pou Tāhua is also pleased about the opportunities available and being taken up through the Provincial Growth Fund and the One Billion Trees programme.

Professor Margaret Mutu

22 February 2019

NATIONAL IWI CHAIRS FORUM RESOLUTIONS

At the National Iwi Chairs Forum (NICF) held 31 January 2019 hosted by Ngaai Takoto at the Copthorne, Waitangi, the NICF passed the following resolutions. As the Chair of you Iwi, please initial one of the three columns on the right to identify your Iwi's decision for each of the Pou or ILG's resolutions. When complete, please print your name, the name of your iwi, then sign and date this document.

	<i>Please initial appropriate column</i>		
	Agree	Against	Abstain
<p><i>SECRETARIAT</i></p> <p>It is recommended that the National Iwi Chairs Forum:</p> <ol style="list-style-type: none"> 1. Receives this NICF Secretariat Report; 2. Endorse Ngaa Rauru Kaitiaki as the NICF Secretariat for the term of 1 July 2019 – 30 June 2022; 3. Accept the financial report for the quarter ending 31 December 2018 <p>Moved: Ngāti Rangī Second: Te Āti Awa</p>	<p>MM</p> <p>MM</p> <p>MM</p>		
	Agree	Against	Abstain
<p><i>POU TIKANGA</i></p> <ol style="list-style-type: none"> 1. Notes that the Te Tiriti Partnership report is received; 2. Supports the work of the Tiriti Partnership Iwi Leaders Group. 3. Endorse the establishment of the Te Tiriti Partnership ILG. 4. Notes that the Matike Mai Aotearoa report is received; 5. That Iwi send nominations for members to the Independent Monitoring Mechanism to treatyeducation@gmail.com by 30 April 2019; 6. That Iwi indicate their wish to host workshops as part of the development of the 2019 report. 7. Note progress on work being done to develop a National Plan of Action; 8. That Iwi sponsor Rangatahi to attend EMRIP in July; 9. That NICF will lead a project to develop a Vision for Aotearoa in support of the Constitution Transformation work. <p>Moved: Te Aitanga a Mahaki Second: Ngāti Whātua</p>	<p>MM</p> <p>MM</p> <p>MM</p> <p>MM</p> <p>MM</p> <p>MM</p> <p>MM</p> <p>MM</p>		
	Agree	Against	Abstain
<p><i>POU TĀNGATA</i></p> <ol style="list-style-type: none"> 1. Note and Receive the Pou Tāngata report; 2. Note Pou Tāngata will review the 2018 Strategy and report back to the May NICF. <p>Moved: Te Aitanga a Mahaki Second: Ngāpuhi</p>	<p>MM</p> <p>MM</p>		

	Agree	Against	Abstain
<p><i>DATA</i></p> <ol style="list-style-type: none"> 1. Receive this report; 2. Confirm its continued support and mandate for the Data ILG; 3. Confirm support for the Data ILG to co-lead the co-design of the Māori Data Governance Framework for all of government data and data-systems, including establishing a group to represent Te Ao Māori in this process; 4. Confirm support for the Data ILG to engage with the Crown (Ministers and officials, including the Government Statisticians/Chief Data Steward) on matters pertaining to Data, Statistics and Information for Iwi. <p>Moved: Te Aitanga a Mahaki Second: Ngāpuhi</p>	<p>MM MM MM MM</p>		
	Agree	Against	Abstain
<p><i>NGĀ RANGATAHIA IWI</i></p> <ol style="list-style-type: none"> 1. Receive this support. <p>Moved: Te Aitanga a Mahaki Second: Ngāpuhi</p>			
	Agree	Against	Abstain
<p><i>POU TAIAO</i></p> <ol style="list-style-type: none"> 1. Considers whether a representative from the NICF agree to participate in this forum (Te Ao Māori Reference Group). 		MM	
<p><i>FRESHWATER</i></p> <ol style="list-style-type: none"> 1. Receive the Freshwater Iwi Leaders Group Report; 2. Note the contents of the Freshwater Iwi Leaders Group Report; 3. Note that the wānanga will be held in Pūkawa on 2&3 April 4. Note that a more comprehensive work programme will be provided at the next National Iwi Chairs Forum; 5. Agree that the Iwi Chairs share with the Freshwater ILG any work that each of the Iwi are doing in the regions to advance and address Iwi rights and interests in Freshwater. <p>Moved: Te Aitanga a Mahaki Second: Te Atiawa</p>	<p>MM MM MM MM MM</p>		
	Agree	Against	Abstain
<p><i>BIOSECURITY</i></p> <ol style="list-style-type: none"> 1. Note this report 2. Note progress has been made <p>Moved: Ngāti Hauiti Second: Ngāti Pāhauwera</p>	<p>MM MM</p>		

<p><i>CLIMATECHANGE</i></p> <ol style="list-style-type: none"> 1. That this report is received; 2. That the issues of climate and the work of the CCILG are afforded priority and urgency by NICF; 3. We urge that each Iwi establish a climate unit and nominate a designated person to liase with the CCILG; 4. That each Pou nominate a designated technician to liase with the CCILG; 5. That the NICF endorse the forecast work plan outline in section 5. <p>Moved: Ngāti Whatua Ōrakei Second: Ngāti Hauti</p>	<p>MM MM MM MM MM</p>		
	Agree	Against	Abstain
<p>POU TAHUA</p> <ol style="list-style-type: none"> 1. Note and receive this Pou Tahua report; 2. Endorse and support the activity of Pou Tahua Co-chairs. <p>Moved: Ngāti Pāhauwera Second: Te Aupōuri</p>	<p>MM</p>		
	Agree	Against	Abstain
<p>HOUSING</p> <ol style="list-style-type: none"> 1. That this report is received; 2. That the continuing 2019 housing work programme be endorsed; 3. That direct engagement with the Government and its housing policies is an ongoing priority. <p>Moved: Te Aitanga a Mahaki Second: Ngāti Manuhiri</p>	<p>MM MM MM</p>		
	Agree	Against	Abstain
<p>IWI ASSETS& MĀORILANDENTITIES</p> <ol style="list-style-type: none"> 1. Receive the report from the Iwi Assets & Māori Land Entities Symposium 2. Note the targets for the next Symposium to be held on 1 May 2019 in Otaki including a 60% success rate for Iwi and Maori land applications for regional development funding (1BT, PGF etc) amongst Symposium participants 3. Support home grown champions being resourced to ensure a greater uptake of 1BT, PGF and other regional grown investments 4. Support the recommendation of the participants of the Iwi Assets & Maori Land Entities Symposium in January 2019 to change the law to enable Lake Rotoaira Forest Trust and other interested groups to farm trout in their waters (Tiwana Tibble is available to provide a presentation on this specific issue) 5. Note that while individual Iwi asset & Maori land entities will work through the economic benefits of changing genetics/sterilisation of pest species (from mosquitos to lemmings to possums) the NICF needs to deal with the tikanga and ethical issues for consideration by individual Iwi. This is a matter best managed in the NICF by the Pou Taiao (biodiversity biosecurity). <p>Moved: Ngāpuhi Second: Ngāti Tūwharetoa</p>	<p>MM MM MM MM MM</p>		

CHAIR'S NAME: PROFESSOR MARGARET MUTU

CHAIR'S IWI: NGĀTI KAHU

SIGNED: *M. Mutu*

DATE: 22 FEBRUARY 2019
