

**IN THE WAITANGI TRIBUNAL
KEI MUA I TE ROOPU WHAKAMANA I TE TIRITI O WAITANGI**

**WAI 745
WAI 1308**

IN THE MATTER OF Te Tiriti o Waitangi Act 1975

AND

IN THE MATTER OF The Ngatiwai Deed of Mandate

AND

IN THE MATTER OF a claim filed by Paki Pirihi on behalf of Patuharakeke Te Iwi Trust Board and a claim filed by Ngawaka Pirihi and others on behalf of the owners of Pukekauri 1B1, 1B2, 1B3, 1B4 and 1B5 and Takahiwai 4C, 4D1, 4E, 7A, 7B2 and 7C

**APPLICATION BY THE CLAIMANTS OF WAI 745 AND WAI 1308
SEEKING AN URGENT HEARING INTO THE CROWN'S RECOGNITION OF
THE NGATIWAI DEED OF MANDATE
Dated the 4th day of December 2015**

TAMATEKAPUA LAW

PO Box 10081
Dominion Road
Auckland
Telephone: (09) 620 6240
Facsimile: (09) 620 6250

Counsel: K Dixon/A Castle

Introduction

1. This application is made by the following claimants:
 - a. Paki Pirihi on behalf of Patuharakeke Trust Board under the claim Wai 745; and
 - b. Ngawaka Pirihi and others on behalf of the owners of Pukekauri 1B1, 1B2, 1B3, 1B4 and 1B5 and Takahiwai 4C, 4D1, 4E, 7A, 7B2 and 7C under the claim Wai 1308.
2. The claimants oppose the Ngatiwai process in which has led to the Crown's recognition of the Ngatiwai Deed of Mandate.
3. The claimants plead that the Crown is in breach of its duties under Te Tiriti o Waitangi in recognising the Ngatiwai Deed of Mandate that seeks to settle the claimants historical claims, when the Crown was well aware that the claimants opposed the Ngatiwai Deed of Mandate and the processes that led to the recognition of the Deed of Mandate.
4. The claimants say that the Crown has failed in its duties to act fairly and in good faith by,
 - a. Failing to act impartially in its recognition of the Ngatiwai Deed of Mandate;
 - b. Failing to adequately address and or respond to the claimant's concerns over the application of the Crown's large natural grouping policy;
 - c. Failing to address or resolve concerns relating to the Ngati Wai mandating process, hui and the voting process; and

- d. Failing to have due regard to the opposition of the claimants to the Ngatiwai mandating process and inclusion in the Ngatiwai Deed of Mandate itself, when it made its decision to recognise the Ngatiwai Deed of Mandate.
 - a. Failing to carry out a fair process leading up to the recognition of the Ngatiwai Deed of Mandate and failing to ensure that the mandate was not pre-determined.
- 2. The claimants contend that they have been, and will be, prejudicially affected by the actions and policies of the Crown concerning the Ngatiwai Deed of Mandate, which they claim is inconsistent with one or more of the following principles of the Te Tiriti o Waitangi / Treaty of Waitangi;
 - a. The principle of reciprocity, whereby the cession to the Crown of kawanatanga was in exchange for the Crown's recognition of hapu rangatiratanga;
 - b. The duty of active protection, whereby the Crown is obliged to protect Maori rights under the Treaty in an active rather than a passive manner;
 - c. The principle of partnership, which carries an obligation on the Crown to act towards its Treaty partner in the utmost good faith;
 - d. The principle of equity, whereby the Crown is to apply the protection of citizenship equally to Maori and to non-Maori, and to safeguard Maori access to the courts to have their legal rights determined; and

- e. The principle of equal treatment, whereby the Crown is obliged to act fairly and impartially toward Maori, by not allowing one iwi an unfair advantage over another.

Grounds for urgency

- 3. The criteria for an urgent inquiry are as follow:
 - a. The applicant for an urgent inquiry must demonstrate that they are suffering, or are likely to suffer, significant irreversible prejudice as a result of current or pending Crown actions or policies;
 - b. There is no alternative remedy that, in the circumstances, it would be reasonable for the applicant to exercise; and
 - c. The applicant is ready to proceed urgently to a hearing.
- 4. Other relevant factors include whether:
 - a. The claim or claims challenge an important current or pending Crown action or policy;
 - b. An injunction has been issued by the Courts on the basis that the claim or claims for which urgency has been sought have been submitted to the Tribunal; and
 - c. Any other grounds justifying urgency have been made out.

Significant and irreversible prejudice

5. The claimants can demonstrate that they are suffering and will continue to suffer significant and irreversible prejudice as a result of the Crown's recognition of the Ngatiwai Deed of Mandate.
6. Key issues, among others with the Crown's mandate process which give rise to significant and irreversible prejudice, include:

Failure to act impartially

- a. The Crown's essential requirement for mandates to be accepted is that the process undergone to achieve them, was open, fair, and robust. It is submitted that the Crown has not upheld its own standards to ensure that an open, fair and robust process was followed by Ngatiwai;
- b. The Crown has not allowed the claimants to decide who will hold the mandate to settle the claimants Te Tiriti o Waitangi claims without Crown interference.

Failure to make amendments to the Deed of Mandate

- c. The Crown has failed to make the appropriate changes to the Deed of Mandate following the receipt of the claimant's submissions on 21 August 2014.

No Mandate from the Claimants

- d. The claimants have never indicated support for, or voted in favour of the Ngatiwai mandate process. A collective

mandate has never been given to any group other than the Patuharakeke Te Iwi Trust Board.

- e. It is submitted that the Crown and Ngatiwai have been made very aware that they are not able to demonstrate that Ngatiwai has the mandate to represent the claimants in settlement negotiations.

Interference with Waitangi Tribunal hearings

- f. The claimants, and others, have never been able to focus on preparations for their Waitangi Tribunal hearings without substantial interference from the Crown mandate processes such as that of Ngatiwai;
- g. It is submitted that the serious funding issues and under-resourcing of the Waitangi Tribunal Stage Two Inquiry is associated with the funding of Deed of Mandate processes such as that of Ngatiwai;
- h. The present settlement negotiations threaten the funding, jurisdiction and the rights of the claimants to a full Waitangi Tribunal Inquiry;

Redefinition of tribal relations

- i. The claimants are in a position where at least three settlement entities seek to settle the Wai 745 and Wai 1308 claims. All three settlement entities, Tuhoronuku, Te Runanga o Ngati Whatua and the Ngatiwai Trust Board have been given notice that they do not have a mandate

from the claimants of Wai 745 and Wai 1308 to settle their claims.

- j. It is submitted that tensions and divisions will be exacerbated should the Ngatiwai Trust Board negotiations process continues.

Inability to withdraw from the Ngatiwai Deed of Mandate

- k. The claimants are now forced to withdraw from the Ngatiwai Deed of Mandate.
- l. The withdrawal process provided for in the Deed of Mandate is significantly onerous on the claimants and will prove to be a costly process.
- m. The claimants are prejudiced as they are not in a financial position where they can fund a process by which they seek to withdraw from the Ngatiwai mandate. The Crown has not offered nor agreed to fund such process for claimants. A letter requesting such funding was sent to the Crown on 11 November 2015 by the Patuharakeke Trust Board.

Ngatiwai Trust Board Polling Process

- n. In October 2013 Elections NZ organised a Mandate Poll whereby registered members were given the opportunity to vote either yes or no to the following resolution,

"That the Ngatiwai Trust Board is mandated to represent Te Iwi o Ngatiwai in direct negotiations with the Crown for

the comprehensive settlement of all remaining historical treaty claims of Ngatiwai including registered and unregistered claims.”

- o. On 13 October 2013 the results show that of those who casted their vote 82% were supportive of the Ngati Wai Trust Board Mandate. However, of the 2,735 voting papers distributed on 772 votes were cast, comprising of only 28.2%. 5 of the 772 voting papers returned were blank.
- p. It is submitted that given the significantly low percentage of votes that were cast the Mandate Poll results are not reliable enough to demonstrate that there is majority support of the Ngatiwai Deed of Mandate.

No alternative remedies exist

- 7. There is no alternative remedy that is reasonable in the circumstances for the claimants.
- 8. The claimants have unsuccessfully attempted for a number of years to reach an agreement with the Crown to be recognised as being the only group to have the mandate to settle their claims.
- 9. The only avenue left for the claimants to pursue, is an urgent hearing in the Waitangi Tribunal.

Other grounds: Level of opposition

- 10. The level of opposition from the claimants and others whose claims are included in the Ngatiwai Deed of is significant.

11. The outcome of the public submission process on the Ngatiwai Deed of Mandate which closed on 6 September 2014 was:
- a. 233 written submissions were made within the advertised period;
 - b. 58% expressed opposition to the deed of mandate; and
 - c. 42% supported the mandate.
 - d. Further to the written submissions, one petition was submitted with 119 signatories in opposition to the mandate and eight video submissions were submitted in opposition to the mandate.

Readiness to proceed to hearing

12. The claimants are ready to proceed to a hearing and reserves the right to file further evidence if necessary.
13. The claimants support the hearing of all applications for urgency in respect of the Ngatiwai Deed of Mandate in a joint hearing.

Dated the 4th day of December 2015 in Auckland.



Kelly Dixon/Alisha Castle
Counsel for WAI 745 and WAI 1308