

IN THE WAITANGI TRIBUNAL

**KEI MUA I TE ROOPU WHAKAMANA
I TE TIRITI O WAITANGI**

**WAI 2764
WAI 2660**

IN THE MATTER OF the Treaty of Waitangi Act 1975

AND

IN THE MATTER OF the Marine and Coastal Area (Takutai
Moana) Act 2011 Inquiry

AND

IN THE MATTER OF a claim by the Ngātiwai Trust Board on
behalf of Ngātiwai whānau, marae and
hapū

BRIEF OF EVIDENCE OF KRISTAN JOHN MACDONALD

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MAY IT PLEASE THE TRIBUNAL

Introduction

- 1 My name is Kristan John (“Kris”) MacDonald and I am currently the Chief Executive of the Ngātiwai Trust Board (“the **Board**”).
- 2 I am Te Whānau a Rangiwhakaahu, Ngāti Toki ki-te-moananui, Ngāti Rehua and Te Aki Tai, all hapu of Ngātiwai. I was a Trustee of Te Whānau a Rangiwhakaahu Marae at Matapouri on the Board from 2008 to 2017. I was appointed Chief Executive of the Board in March 2017.
- 3 I hold a Masters of Business Administration and other post-graduate business qualifications. I have worked in the area of Māori rights, interests and development for almost 30 years mainly in the areas of development, health and education.
- 4 I was brought up by my grandparents, uncles, aunties and parents at Matapouri and Whananāki. All of our whānau were involved in some way supporting the many kainga and whānau along the coast and on Aotea/Great Barrier Island, building our many marae and ensuring that our Ngātiwai tikanga remains strong for our future generations.
- 5 I understand that in accordance with the directions of the Presiding Officer Stage 1 of this WAI 2660 inquiry will address the issues in¹.

Question Two - Do the procedural arrangements and resources provided by the Crown under the MACA Act prejudicially affect Māori holders of customary marine and coastal area rights in Treaty terms when they seek recognition of their rights?

- 6 I have had the benefit of reading, and support the contents of the draft brief of evidence provided by Tania McPherson, Treaty Claims Manager which outlines the Board’s experience to date with the Crown Marine and Coastal Area (Takutai Moana) Act 2011 (“the MACA Act”) processes, and addresses the issues in Question Two.
- 7 In my brief of evidence I will specifically address the issue at 12 (e) of the Tribunal’s Statement of Issues

12. To what extent, if at all, do the procedural arrangements and resources put in place by the Crown prejudicially affect Māori, including in relation to

*.....
e) Funding for the resource consent notification scheme.*

¹ WAI 2660 2.5.024 Memorandum of Directions of Judge M P Armstrong, 3 August 2018 which issued Wai 2660, 1.4.001, Tribunal Statement of Issues, 3 August 2018

Background

- 8 We are the descendants of the water and this is the basis for our name and identity - Ngātiwai. Ngātiwai rohe includes the many related hapū and persons affiliated to the kāinga and marae occupying the eastern coastline of the North Island between the Bay of Islands (Te Pēwhairangi) and Whangārei, and southward to Pākiri, Ōmaha and Mahurangi, and including the off shore islands Aotea (Great Barrier), Hauturu (Little Barrier), and other smaller island groups within its rohe moana.
- 9 Ngātiwai's rohe moana extends to the 12 nautical mile outer limit of the territorial sea and the chain of islands extending along its coastline, including but not limited to the following islands
 - a) Motukōkāko off Te Rāwhiti
 - b) Rimuriki off Mimiwhangata
 - c) Tawhitirahi and Aorangi (The Poor Knights)
 - d) High Peak Rocks
 - e) Sugar Loaf Rocks
 - f) The Marotere Islands and Tāranga (The Hen and Chicken Islands)
 - g) Tūturu (Sail Rock)
 - h) Pokohinau and Motukino (The Mokohīnau Islands)
 - i) Te Hauturu o Toi (Little Barrier)
 - j) Aotea (Great Barrier) and surrounding islets and rocky outcrops
 - k) Te Kawa-tūmaro-o-Toi (Kawau Island)
 - l) Te Mau Tohorā-o-Manaia (Motuora Island)
- 10 Over the past decade the growing popularity of the east coast of Northland, including Tutukākā Coast and the Bay of Islands, as a tourist and holiday destination has seen a significant increase in resource consent applications, to the extent that the Board Resource Management Unit ("RMU") now processes several applications each week. **Attached and marked KM – 001** is an article that discusses increases in Northland house price rises.

Resource Management Unit

- 11 The Board was one of the first iwi to set up a Resource Management Unit ("RMU") after the Act was enacted in 1991.
- 12 Former Vice Chairperson of the Board, Hori Parata was central to setting up the RMU and developing the process by which resource consents were received, assessed and responded to.

- 13 The consents received are on a spectrum from being of little relevance to Ngātiwai; to regular consultation requiring inspection, assessment and cultural impact assessment; to large scale development consents requiring submissions, Environment Court hearings, and in some cases litigation.
- 14 Over time our RMU developed a well-regarded reputation with Councils, the Department of Conservation, other agencies, resource management planners, archaeologists, other hapū and iwi in our RMU work.
- 15 In 1998 the Board developed the Ngātiwai Whale Stranding Protocol with the Department of Conservation to ensure Ngātiwai could continue its tikanga in relation to stranded marine mammals² in the takutai moana – this protocol was updated in 2010.
- 16 In 2010 the Board also negotiated successfully with the Department of Conservation to obtain control and management over Mauitaha and Araara (Marotiri Islands - Hen and Chicken Islands) so as to allow the cultural harvest of kiore (*Rattus exulans*, the Polynesian rat). **Attached and marked KM-002** is a copy of the New Zealand Gazette Notice dated 27 May 2010 which appointed the Board to control and manage these islands³.

Managing Resource Consent Applications

- 17 The basis for passively managing consents was always to have an Iwi Management Plan lodged with local territorial authorities, therefore planners and developers needed to incorporate Ngātiwai's position in respect of all matters to do with Resource Management. These Plans require regular review and amendment.
- 18 Kaitiaki are our frontline workers who engage with the developers. They review consent applications for any potential cultural implications, communicate tribal history of the area, undertake research, undertake a site visit, and prepare a cultural impact assessment with recommendations. This may include midden probing, engaging archaeologists if need be, then completing a cultural impact assessment with recommendations for the Council, owner and the developer. Some assessments result in Ngātiwai declining the consent or working toward mitigation options
- 19 Kaitiaki are required to have a good tribal tikanga and historic knowledge of the area, have good relationship skills, have knowledge of construction, be analytical, work to deadlines and be

² Parata H, Donoghue M, "Protocol for management of whale strandings in Ngatiwai rohe including the recovery of bone by Ngatiwai and the provision of scientific samples : an agreement between the Ngatiwai Trust Board and the Department of Conservation, Northland and Auckland Conservancies" Department of Conservation, Ngātiwai Trust Board 1998; *Protocol for the Management of marine mammal strandings in the Ngātiwai rohe*, Department of Conservation, May 2010

³ "Appointment of the Ngatiwai Trust Board to Control and Manage Parts of the Hen and Chicken Islands Nature Reserve" (27 May 2010) 60 *New Zealand Gazette* 1729.

firm with owners and their developers. Kaitiaki need appropriate transport for building sites, safety training, high visibility clothing, work boots, and digital devices for photos and report writing. This equipment is expensive.

- 20 Funding this service is a challenge for Ngātiwai. Fees for kaitiaki work need to be negotiated up front with developers and we must quote for the estimated time, travel and overheads. During the course of a consent assessment, a decision may be made not to support the consent. In some cases, developers refuse to pay for our time and service. The work is also episodic and has lean margins, therefore our RMU often runs at a loss.
- 21 Ngātiwai simply do not have the capacity to cover all land based consents we receive and that we may have an interest in. This was the operating context for the Board before the implementation of the MACA with the related increase in resource consents.

MACA Consent Applications

- 22 Although similar to land based consents, processing MACA consents are new. There has been no guidance from the Crown or local Councils to iwi or other MACA applicants on how to manage these types of resource consent applications.
- 23 The operational costs for MACA are far more onerous for The Board. While a land consent may be reasonably straight forward, to operate and monitor in our rohe moana we need utility vehicles, various ranges of boats, boat trailers, water safety equipment, special training, and in some cases dive gear to inspect some of the proposed marine developments.
- 24 Extra training and qualifications are required such as skipper's tickets and diving qualifications and most consents of the nature described, require more than one kaitiaki to monitor. Monitoring the coastal activity is far more expensive than land based activity.

No Funding for the Resource Consent Notification Scheme

- 25 The Crown's policy is to not fund MACA applicants such as ourselves for RMA related work and costs, including responding to resource consent applications where applicants' views are sought under s 62(3) of the MACA Act. **Attached and marked KM-003** is a copy of the Funding for Groups in the Crown Engagement Application Pathway and **attached and marked KM-004** is a copy of the Funding for Groups in the High Court Application Pathway which specify this.
- 26 However the Crown (the Ministry of Justice) in its guidelines for local authorities requires resource consent applicants to consult with us,

regarding resource consent applications in our rohe.⁴ **Attached and marked KM-005** is a copy of these guidelines.

- 27 These guidelines specifically provide at page 7 that resource consent applicants must consult with a group such as ourselves who have lodged a CMT application:

Consultation requirements following lodgement of a CMT application - An application for CMT has effect from the time it is lodged. If a group has applied for, but not yet been granted, CMT over a particular area, then a resource consent applicant will have to notify the group and seek its views on the consent application prior to lodging the application. These views would be relevant to the development of the assessment of environmental effects in accordance with Schedule 4 of the RMA. The CMT applicant's views may be considered in the Council's decision.

- 28 **Attached and marked KM-006** is a 12 page list of MACA related consent applications received by the Board since the 3 April 2017 closing date for MACA Act applications. This list does not include any land based resource consents which the Board processes as per business as usual.

- 29 The Crown's lack of funding to enable us to be able to consider or effectively engage in the resource consent application process under the MACA has prejudicially effected Ngātiwai. We have not had the resource available to consider the increased number of resource consent applications forwarded to us as a result of the Crown's MACA guidelines for local authorities.

- 30 Our MACA applications have not been determined in either the High Court or Crown direct engagement route. However the Board does not have the resources to effectively assess these MACA Act related resource consents.

- 31 I am also concerned at the provision in the MACA Act which says that by not replying to these resource consents within 40 working days the Board would have been treated as having given permission for the resource consent (section 67 (3)-(4)):

(3) Unless the customary marine title group has already notified its decision to the applicant under subsection (2), it must do so not later than 40 working days after it receives a notice from the applicant that the applicant has been granted the relevant resource consent (whether or not the applicant had previously notified the customary marine title group of the application).

(4) The customary marine title group is to be treated as having given permission for the resource consent, for its duration, if notice of its

⁴ Page 7, Ministry of Justice "MACA Provisions for Protecting Customary Interests" available at <https://tearawhiti.govt.nz/assets/MACA-docs/3eca6447f1/MACA-provisions-for-protecting-customary-interests.pdf> downloaded 17 January 2019.

decision is not received by the applicant in accordance with subsection (3).

- 32 The Crown's imposition of these policies, processes and practices on us is prejudicial. These Crown actions have resulted in the administrative burden and costs associated with resource consents arising from the MACA Act being borne solely by us.
- 33 By being not able to meet the Crown imposed deadlines we are deemed to have given permission for resources consent in our rohe – without even being able to have our views put forward. This in itself is a breach of natural justice.

Conclusion

- 34 Ngātiwai has been highly prejudiced by this system as it is simply impossible to carry out our obligations properly having received 164 MACA Act related resource consent applications since early 2017, when the MACA Act places the burden entirely on iwi to respond to consent applications.
- 35 Ngātiwai is aggrieved by the whole MACA Act. It is clear to us that private landowners and boat owners are gaining unearned property rights and encroaching on the coast and sea purely because they want to develop their properties or need somewhere to moor their private boats. There is no authority or politician questioning this.
- 36 The Crown's procedural arrangements and its policy of not providing any resource or guidance to us in the processing of MACA Act related resource consent applications means continued alienation of our rohe moana. This is a breach of the Crown's duty to actively protect our taonga and to engage with us in good faith.

DATED at Whangarei this 17th day of January 2019



Kris MacDonald