
KEI MUA I TE AROARO O TE RŌPŪ WHAKAMANA
I TE TIRITI O WAITANGI

BEFORE THE WAITANGI TRIBUNAL

WAI 2750

IN THE MATTER OF the Treaty of Waitangi Act 1975

AND

IN THE MATTER OF a proposed Housing Policy and Services
Kaupapa Inquiry

CROWN RESPONSE TO NEW AND AMENDED STATEMENTS OF
CLAIM AND ACCOMPANYING SUBMISSIONS AS TO ELIGIBILITY

31 July 2018

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MAY IT PLEASE THE TRIBUNAL:**Introduction**

1. This Crown Response to New and Amended Statements of Claim and Accompanying Submissions as to Eligibility (Crown Response) is filed in response to memorandum-directions dated 18 June 2018 of the Chief Judge.¹
2. The content of this Crown Response is informed by information provided to counsel by a number of Crown agencies, namely the Ministry of Business, Innovation, and Employment (MBIE), the Ministry of Social Development (MSD), Te Puni Kōkiri (TPK), the State Services Commission (SSC) the Ministry of Justice (Crown/Māori Relations rōpū) and the Treasury. Briefs of evidence detailing the matters contained in Appendix 1 to this Crown Response will be adduced by the Crown if and when this proposed kaupapa inquiry commences.
3. The Crown acknowledges the sense of grievance evidenced by the content of the numerous statements of claim filed for inclusion in this proposed kaupapa inquiry albeit at this stage ahead of the filing of evidence relating to housing services and policy in New Zealand. It recognises the strength of those claimants who have been willing and able to tell of their experiences, as representatives of a wider community impacted by Crown policies in this important subject area.

Summary

4. Addressing issues associated with housing is a policy priority for the Crown. This is demonstrated by the significant steps taken in recent years, as well as currently, to address issues associated with the provision of housing, and services associated with housing, for those in need in New Zealand.
5. The Crown is committed to improving its overall engagement framework with Māori, not just in relation to housing issues but across the board. The Tribunal will be aware of the establishment of a new Ministerial role and the Crown/Māori Relations portfolio, the final scope of which is still being determined by the Crown following extensive public consultation, particularly with Māori. Counsel submit the fact of the establishment of that portfolio, in itself, demonstrates the Crown's commitment to build effective partnerships

¹ Wai 2750, #2.5.6.

between the Crown and Māori. The building of strong, active partnerships with Māori in the design and implementation of processes and outcomes where the impact of an issue or proposal will be significant for Māori is important to the Crown.

6. Successful policy development will require ongoing consultation and discussion with, as well as ongoing participation of, Māori, consistent with moving the Crown-Māori relationship toward true partnership.
7. Specifically in relation to housing, it has been widely publicised that the Crown is presently developing a range of initiatives to address housing issues facing New Zealanders, including the ramping up of efforts to:
 - 7.1 house the homeless,
 - 7.2 facilitate the building of affordable homes for first home buyers through KiwiBuild,
 - 7.3 modernise and build more public housing,
 - 7.4 reform tenancy laws,
 - 7.5 set minimum standards to make rentals warm and dry,
 - 7.6 adjust the tax settings to discourage housing/property market speculation,
 - 7.7 set up an Urban Development Authority to lead large scale urban development projects, and
 - 7.8 achieve equitable housing outcomes for Māori.
8. To assist this reform agenda, a dedicated Ministry for Housing and Urban Development (Housing Ministry) is being established.² The Order in Council establishing the Housing Ministry commences tomorrow, on 1 August 2018. The Housing Ministry itself will commence with initial functions from 1 October 2018.³

² State Sector (Ministry of Housing and Urban Development) Order 2018.

³ < <https://www.beehive.govt.nz/release/new-housing-and-urban-development-ministry> >

9. Counsel are instructed that the Housing Ministry will initially bring together some housing-related functions from the Ministry of Business, Innovation, and Employment (MBIE), the Ministry of Social Development (MSD), and the Treasury. The new Ministry will be the Government's lead adviser on housing and urban development, and will provide across-the-board advice on housing issues, including responding to homelessness and working to ensure affordable, warm, safe and dry rental housing in the private and public market is available to those in need together with the appropriate support for first home buyers.⁴ The Housing Ministry will also be the monitoring agency for Housing New Zealand Corporation (HNZC), registered Community Housing Providers (CHPs) and the Government's proposed new Urban Development Authority – Housing Commission (UDA).
10. Given the Crown's significant and ambitious programme of work in this area, and the Crown's clear commitment to engage with Māori,⁵ including representatives of iwi and hapū, in policy development, the Crown respectfully submits there ought to be a hiatus on the progression of this proposed kaupapa inquiry until a period of at least six months has elapsed from the commencement of operations of the Housing Ministry.⁶ The Crown submits:
- 10.1 the Tribunal can have a significant level of comfort that the Government is actively working on a number of initiatives that, taken together, address many of the concerns raised in the claims and that as a result there is no urgent need to commence an inquiry;
- 10.2 a short delay in commencement of the inquiry will ensure the Tribunal is better informed of current policy as well as policy outcomes; and
- 10.3 it will be more efficient, both in terms of allocation of scarce Tribunal resources as well as from a cost perspective, to delay appointment of a panel to inquire into claims relating to housing at this point.
11. If any interlocutory matters are to be progressed between now and 1 April 2019, we respectfully suggest this could be a good period in which to

⁴ < <https://www.beehive.govt.nz/release/new-housing-and-urban-development-ministry> >

⁵ See paragraphs 20 and 29 below.

⁶ The Crown suggests the commencement of the kaupapa inquiry be reassessed on or about 1 April 2019.

determine matters of eligibility of claims and also discuss the possibility of identifying a small number of claims which particularise the key issues identified by most claimants and which could be the principal claims for inquiry.⁷

Matters of priority for inquiry vs good reason to delay commencement of inquiry

12. As the Chief Judge set out in his memorandum-directions of 1 May 2015 establishing the kaupapa inquiry programme, the order of the kaupapa inquiries has been prioritised in terms of the removal of the Tribunal's ability to inquire into claims, the immediacy of the issue or potential remedy, the seriousness of the alleged breach or prejudice, and the importance of the take to claimants, Māoridom and the nation.⁸
13. The Crown acknowledges the immediacy of housing issues and, of course, the importance of these issues to Māori.⁹ As the Crown is committed to working with Māori to confront the very issues raised by claimants in their statements of claim, as discussed below, we submit it is premature to commence an inquiry into the claims immediately.
14. Rather, it is the Crown's submission that the Tribunal ought to defer further mahi on this kaupapa until the Government and the new Housing Ministry has had a reasonable period of time to establish operations and work programmes. Evidence which demonstrates the commitment of the Crown to partner with Māori in delivering better housing outcomes, as well as housing-related outcomes,¹⁰ for Māori will be important for the Tribunal to be provided with in any housing kaupapa inquiry.
15. The Crown's current policy direction is at a time of significant development and transition. Allowing time for the new Housing Ministry to commence operations, drawing together under one agency some of the core functions relating to housing and urban development policy, KiwiBuild, public housing

⁷ Further details of this latter suggestion could be explained at a judicial conference, if called.

⁸ Wai 2750, #2.5.1(a), at [5].

⁹ The Crown submits there is no issue of the removal of the Tribunal's ability to inquire into housing-related claims and, although historical grievances related to housing are appropriate to be inquired into by the Tribunal, the Crown submits any housing kaupapa inquiry ought to be forward-focussed rather than focusing on the alleged wrongs of the past.

¹⁰ Access to affordable healthy and secure housing is a foundation from which whānau and communities can achieve their wider aspirations around health, education, employment and economic security and enterprise. Creating better housing outcomes for Māori and the issues and barriers to providing these outcomes are a focus of the Government.

regulation and monitoring previously spread across a number of agencies, will ensure the Tribunal's inquiry is better informed of current policy as well as intended policy outcomes. The Housing Ministry is intended to provide the focus and leadership in the public service to drive the Government's reform agenda in partnership with the range of agencies with responsibility for housing and urban activity. This includes advising on the future Urban Development Authority. Only by delaying the commencement of the housing kaupapa inquiry will the Tribunal have the benefit of assessing the developing housing policy framework. A delay will also ensure the chief executive for the Ministry is established in their role and able to take leadership over this work.

16. Accordingly, the Crown submits the Tribunal ought to defer further mahi on this kaupapa for a period of six months from 1 October 2018.¹¹ The Crown suggests the commencement of the kaupapa inquiry be reassessed on or about 1 April 2019.
17. In the meantime, counsel recognise the importance of clearly describing how the Crown will proactively engage with Māori on housing issues. We seek to do this in our description of the various work programmes set out in the Appendix. It is important to note the newly formed Crown/Māori Relations rōpū will provide advice on effective engagement with Māori together with Te Puni Kōkiri.

Key issues raised in this proposed inquiry

18. As at 18 July 2018, the Crown had been served with at least 73 new or amended statements of claim filed in this proposed kaupapa inquiry.¹² Those 73 claims, combined, are contained in approximately 1,682 pages of pleadings.
19. Counsel for the Crown have reviewed all of the claims served on it and identified that the claims raise grievances in relation to housing issues which are a mix of historical and contemporary matters.¹³ Many of the 73 new and amended statements of claim received to date particularise recurring themes:

¹¹ 1 October 2018 is the date the Housing Ministry commences operations: < <https://www.beehive.govt.nz/release/new-housing-and-urban-development-ministry> >

¹² Claimants are all represented by counsel and there are 17 separate claimant counsel acting.

¹³ Given the volume of pleadings and the relatively short timeframe in which counsel for the Crown have had to engage with the materials, we are unable to provide a substantive response to each and every claim. In any

- 19.1 Land loss and consequential urbanisation contributing to past and current housing issues;
- 19.2 Fragmentation of the provision of housing services;
- 19.3 Failure by the Crown to consult or engage with Māori in the development of housing-related policies, resulting in, among other things, a failure to develop culturally appropriate housing or housing policies;
- 19.4 Native land laws have resulted in the partition and alienation of land which has resulted in alienation from traditional rohe and loss of ability of Māori to live in papakāinga on their traditional whenua;
- 19.5 Te Ture Whenua Māori Act 1993, together with overly burdensome legal and regulatory requirements for the construction of housing, makes it difficult to build on Māori freehold land;
- 19.6 Difficulties in obtaining finance to build on Māori freehold land and the failure to implement the Native [Māori] Housing Act 1935: schemes such as the Kainga Whenua Loan Scheme and Māori Development Partnership Programme have been ineffective;
- 19.7 Crown policies have contributed to low rates of home ownership by Māori and high costs of rentals;
- 19.8 Substandard quality and insufficient supply of housing in both urban and rural areas;
- 19.9 Homelessness and the provision of emergency housing;
- 19.10 Lack of access to housing services through insufficient or ineffective education campaigns to better advertise and explain housing schemes or options available to Māori;
- 19.11 Accommodation supplements and benefit entitlements are inadequate to resolve housing issues;

event, we submit that, in light of the Crown's submission that this proposed kaupapa inquiry ought to pause until at least six months has elapsed from the commencement of operations of the Housing Ministry, it would be an inefficient use of resources to seek to provide a substantive response to each and every claim filed.

- 19.12 Consequential effects of poor housing on health and well-being as well as impacts on employment and education;
- 19.13 Failure to protect other minorities (children/youth, kaumatua/kuia, victims of domestic violence, ex-prisoners and those with mental health issues).
20. A number of the Crown's current work programmes¹⁴ are aimed at addressing a number of the very issues raised by the claims. Indeed, within Government a number of Ministers¹⁵ who are taking a collegial and coordinated approach to Māori housing issues have identified the following work streams as priority areas for Māori Housing:
- 20.1 Maximising opportunities to partner with Māori in the delivery and development of housing;
- 20.2 Preventing and responding to homelessness;
- 20.3 Ensuring there is engagement with Māori across all housing work impacting Māori;
- 20.4 Facilitating home ownership for whānau Māori;
- 20.5 Ensuring housing design and quality reflects the needs and aspirations of Māori; and
- 20.6 Facilitating housing on Māori land.
21. This demonstrates the Crown's awareness and knowledge of many of the issues raised by claimants and the fact that steps are already being taken – some of which have been in play for some years – to address and rectify these issues.

Focus on contemporary issues rather than historical acts and omissions

22. It is the Crown's view that any kaupapa inquiry into housing services and policy should give priority to, and focus predominantly on, current issues rather than having an historical focus. That said, it is accepted that the

¹⁴ Discussed in **Appendix 1**.

¹⁵ These Ministers are the Minister of Housing and Urban Development Hon Phil Tywford, the Minister for Māori Development Hon Nanaia Mahuta and the Minister for Building and Construction and Associate Minister of Housing and Urban Development Hon Jenny Salesa.

historical acts and omissions of the Crown in relation to housing services and policy provide context for the grievances articulated in the claims.¹⁶

23. A contemporary-focused inquiry will ensure that any recommendations made by the Tribunal take account of current policy and practice and so can better assist and inform future Crown policy development and decision-making in relation to Māori and housing. It will also assist in avoiding any potential limitation on eligibility of claims, as discussed below.
24. In this memorandum we do not provide a background of housing policies from 1980 to 2011. Detailed information of this is provided in the Joint Brief of Evidence of Dianne Kay Grennell and Christopher John Bunny on behalf of Te Puni Kōkiri and the Ministry of Business, Innovation and Employment dated 7 November 2016 and filed in the Northland (Te Paparahi o te Raki) Inquiry.¹⁷

Alleged breaches of the Treaty of Waitangi

25. Counsel undertake to seek instructions from the Government on any possible early breach acknowledgements or concessions relating to historical acts or omissions of the Crown.
26. As has been stated by the Crown in other Tribunal inquiries,¹⁸ as with some other social services the Crown does not consider it owes a general Treaty or legal duty to provide housing, or housing assistance. Article three of the Treaty requires the Crown to provide Māori with the same access to housing services where housing services are provided to the population generally. While at times the Crown has assumed the role of providing such assistance as part of its wider governance responsibilities, this does not imply there is a duty to do so.

¹⁶ A comprehensive historical summary of social security benefits, war pensions, retirement pensions, taxation measures, family assistance, housing assistance, student support and labour market programmes from 1844 – 2018 is contained in the Social Assistance Chronology developed and maintained by the Ministry of Social Development. The Chronology covers the period from 1844 to the present day and lists policy changes, legislation and key documents such as reports from Commissions of Inquiry and Ministerial Inquiries, government convened working parties, public discussion documents and Government policy statements. It also details administrative and service delivery arrangements. See: <http://www.msd.govt.nz/about-msd-and-our-work/about-msd/history/social-developments-organisational-history.html>. The Crown adopts this Chronology as a reliable starting point for research into the historical development of social assistance programmes in New Zealand including in relation to housing services and policy.

¹⁷ Wai 1040, #X3 from [11-35].

¹⁸ See, for example Crown submissions filed in the Te Paparahi o te Raki Inquiry: Wai 1040, #3.3.409 at 63, see also Wai 898, #3.4.282 at 60.

The current work programme

27. Notwithstanding the Crown's general position regarding owing a general Treaty or legal duty to provide housing or housing assistance, addressing issues relating to the provision of housing and housing services is a key policy priority for the Crown. This is demonstrated by the work currently underway which is intended to address issues of the provision of housing and social services to those in need in New Zealand. This is not limited to Māori but extends to all New Zealanders. Detail of the Crown's various work-streams are set out in **Appendix 1**, annexed.
28. A number of the programmes identified in Appendix 1 go to address many of the issues identified by claimants in this inquiry. For example, the establishment of the Housing Ministry will address the fragmentation of advice to decision-makers at agency and system level while the KiwiBuild and Housing First programmes will contribute to addressing both significant housing shortages (particularly for people on lower incomes) and homelessness issues.
29. This work will require ongoing engagement with, and participation of, Māori and the Crown will continue to engage with whānau, hapū, iwi, marae and Māori entities on their housing aspirations. This engagement takes various forms, including (but not limited to):
- 29.1 Te Puni Kōkiri engagement with whānau, hapū, iwi and Māori on a range of housing issues such as papakāinga, repairs, building on Māori land, homelessness, and wider whānau and community aspirations;¹⁹
 - 29.2 engagement with communities such as Wharekauri (Chatham Islands), Rātana, Parihaka and Minginui;
 - 29.3 MBIE and TPK having regular engagement with the Independent Māori Statutory Board;
 - 29.4 MBIE-led housing developments in Auckland directly involve Auckland mana whenua in some capacity, in some as project-lead;²⁰

¹⁹ See Appendix 1 at [81].

²⁰ See Appendix 1 at [21.1].

- 29.5 planned engagement with iwi and Māori organisations on the parameters of the UDA to be implemented soon;²¹
- 29.6 public consultation on proposed reforms to the Residential Tenancies Act;²²
- 29.7 engagement with Māori organisations in relation to the Healthy Homes Guarantee Act Regulations;²³
- 29.8 working with transitional housing providers who identify as Māori such as Te Paea Memorial Marae;²⁴
- 29.9 active current dialogue with Accord partners where housing has been identified in accords as a priority area for engagement (eg Te Hiku Accord);²⁵
- 29.10 engagement with technicians to the iwi chairs forum by joint agencies and further engagement is planned;
- 29.11 joint engagement with Te Matapihi is continuing;²⁶
- 29.12 engagement with Māori on options to improve Kainga Whenua loans;²⁷
- 29.13 Te Puni Kōkiri is actively involved in planning and funding support for the National Māori Housing Conference in November.²⁸
30. The new Housing Ministry will build on the work that is underway by providing a clear point of engagement across a range of housing and urban issues. The mandate for the new Housing Ministry is to work with agencies to coordinate the social, economic and environmental aspects of housing and urban development.

²¹ See Appendix 1 at [24].

²² See Appendix 1 at [31].

²³ See Appendix 1 at [33].

²⁴ See Appendix 1 at [52].

²⁵ See Appendix 1 at [82].

²⁶ See Appendix 1 at [82].

²⁷ See Appendix 1 at [116].

²⁸ See Appendix 1 at [83.2].

Eligibility

31. Claims which have been heard or settled will be ineligible.²⁹ Given the large number of claims filed and the relatively scant information provided by claimants addressing eligibility issues, the Crown has been unable to thoroughly assess the eligibility of all claims. As noted in the Crown's memorandum filed on 12 March 2018,³⁰ there appear to be a number of claims that would seem to have been fully settled,³¹ or partially settled.³² There are also a number of claims that have been specifically included in deeds of settlement,³³ while others are presently the subject of settlement negotiations with the Crown.³⁴ Others have been, or are currently being, inquired into by other Tribunals.³⁵
32. In general, many claimants seeking to participate in a housing policy and services kaupapa inquiry have not provided detailed submissions on eligibility issues that may affect them. It appears many claimants take a broad view of questions of jurisdiction, which is understandable. For example, the Wai 861 claimants say their claim is a historical claim, amended to address contemporary housing issues, and has not previously been settled. The Crown notes however that this claim has been partially settled by a number of settlements.³⁶ The Wai 861 claim is but one example of claims that may require further analysis as to eligibility.
33. Crown counsel have undertaken further review of the eligibility table provided to the Tribunal and claimants in advance of the March 2018 judicial

²⁹ Memorandum-Directions of the Chairperson calling judicial conferences on starting kaupapa inquiries into claims concerning mana wāhine and housing policy and services, 16 November 2017, at [19].

³⁰ Wai 2750, #3.1.28.

³¹ By way of example, see Wai 377. The claimants say they are eligible to participate because their claims not relate to historical or other grievances which have: (i) previously been fully heard and reported on by the Tribunal; (ii) formed part of an historical te Tiriti o Waitangi / Treaty of Waitangi settlement with the Crown; or (iii) has already been fully consolidated by Tribunal direction into district or kaupapa inquiries that are currently under way. The Crown notes this claim has been fully settled by the Port Nicholson Block (Taranaki Whānui ki Te Upoko o Te Ika) Claims Settlement Act 2009, s 9(1)(b)(iv)).

³² Wai 861, Wai 996, Wai 1151, Wai 1661, Wai 1832, Wai 1992 all appear to have been partially settled. This is not addressed in the eligibility submissions filed by counsel for those claimants.

³³ Wai 2063 is an example.

³⁴ Wai 762, Wai 874, Wai 892, Wai 2206, Wai 87, Wai 120, Wai 144, Wai 375, Wai 1092, Wai 421, Wai 593, Wai 1040, Wai 1247, Wai 1383, Wai 1890, Wai 558, Wai 682, Wai 745, Wai 1308, Wai 779, Wai 966, Wai 1314, Wai 1509, Wai 1524, Wai 1531, Wai 1533, Wai 1537, Wai 1541, Wai 1673, Wai 1781, Wai 1837, Wai 1843, Wai 1940, Wai 2005, Wai 2057, Wai 2368, Wai 2376, Wai 2389.

³⁵ Wai 237, Wai 972, Wai 1018, Wai 1384, Wai 1503, Wai 1670, Wai 1681, Wai 1886, Wai 2217.

³⁶ Te Aupouri Claims Settlement Act 2015, s 14(3)(b)(viii); Ngāi Takoto Claims Settlement Act 2015, s 14(3)(b)(iii); Ngāti Kuri Claims Settlement Act 2015, s 14(3)(b)(viii); Te Rarawa Claims Settlement Act 2015, s 14(3)(b)(xi); Te Uri o Hau Claims Settlement Act 2002, s 15(1)(c)(vi); Ngāti Whātua o Kaipara Claims Settlement Act 2013, s 13(3)(b)(v)).

conference, in light of information provided by claimants in submissions filed together with amended or new statements of claim. The updated eligibility table appears as **Appendix 2**.

34. The Crown submits that in light of its review of whether claims or parts of claims might be ineligible, given the number of claims and the complexity of issues associated with eligibility, a sufficient period of time will need to be provided for each of the Crown, claimants and the Tribunal to properly analyse the extrinsic materials in order to provide submissions or, for the Tribunal, draw conclusions on eligibility.
35. The Crown maintains its previously stated position, as contained in submissions filed in the Veterans Inquiry (Wai 2500, #3.1.508 at [78]) that the standard historical claims definition in settlement legislation is clear that every historical claim (whether notified or not) brought by an individual who is captured by the claimant definition is settled under settlement legislation, regardless of whether or not those claims relate to broader iwi or “collective” issues, or events that occurred in a certain geographical area. Simply filing an amendment to a claim which has previously been settled under settlement legislation does not have the effect of enlivening that previously settled claim.
36. Notwithstanding the immediacy of housing-related issues facing many Māori (which the Crown and Māori are both cognisant of and about which the Crown is presently working hard to address), it is important that there be a process to deal with any contested questions of eligibility to participate in an inquiry.³⁷ Given the common themes or issues particularised in many of the claims, the Crown submits that the Tribunal will be able to inquire broadly into the key issues of relevance to most if not all claimants, despite some claims being ruled ineligible.
37. Moreover, undertaking a clear process for dealing with contested questions of eligibility early in this inquiry process will most likely serve to avoid expending resources on particular claims that are already settled or are otherwise beyond the Tribunal’s jurisdiction. It will also, importantly, avoid duplication of inquiry.

³⁷ Legislation prevents the Tribunal from inquiring into claims that have already been settled. See Treaty of Waitangi Act 1975, s 6(8)(a).

Forward inquiry programme

38. As discussed above, given the Crown's current focus of work in this area, the Crown respectfully submits there ought to be a hiatus on the progression of this proposed inquiry, to be reviewed on or about 1 April 2019.
39. It is respectfully suggested that there be a further judicial conference on or about 1 April 2019 for the parties to reconvene to hear from the Crown on policy development and progress and for parties to make submissions as to the progress and achievements of both the Housing Ministry and other Crown housing programmes by that time.

Conclusion

40. Counsel for the Crown respectfully suggest there may be utility in a further judicial conference being convened at the Tribunal's convenience for discussion to be had and views to be shared on the Crown's proposal.

31 July 2018



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TO: The Registrar, Waitangi Tribunal
AND TO: Claimant Counsel