

In the High Court of New Zealand
Wellington Registry
I Te Kōti Matua o Aotearoa
Te Rohe o Te Whanganui-ā-Tara

CIV-2022-485-

under: the Judicial Review Procedure Act 2016 and the
Declaratory Judgments Act 1908

between: **Te Rūnanga o Ngāi Tahu**, the tribal council
recognised for all purposes as the representative of
Ngāi Tahu Whānui pursuant to section 15(1) Te
Rūnanga o Ngāi Tahu Act 1996
Plaintiff

and: **Te Ohu Kai Moana Trustee Ltd**, the corporate
trustee of Te Ohu Kaimoana Trust, a company with its
registered office at 158 The Terrace, Wellington
First Defendant

and: **Minister for Oceans and Fisheries**, a Minister of the
Crown having responsibility for the Māori Fisheries Act
2004, of Wellington
Second Defendant

Statement of Claim

Dated: 1 November 2022

Reference: J W J Graham (justin.graham@chapmantripp.com)
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STATEMENT OF CLAIM: APPLICATION FOR JUDICIAL REVIEW AND DECLARATORY JUDGMENT

The plaintiff by its solicitor says:

Parties

- 1 The plaintiff, Te Rūnanga o Ngāi Tahu, is the tribal council recognised for all purposes as the representative of Ngāi Tahu Whānui pursuant to section 15(1) Te Rūnanga o Ngāi Tahu Act 1996 (**TRoNT Act**). The current Kaiwhakahaere of Te Rūnanga o Ngāi Tahu is Lisa Tumahai.
- 2 The first defendant is Te Ohu Kai Moana Trustee Ltd (**TOKM Trustee Ltd**), a company with its registered office at 158 The Terrace, Wellington. It is the corporate trustee of Te Ohu Kaimoana Trust (**TOKM Trust**), a trust incorporated pursuant to s 33(2) of the Māori Fisheries Act 2004 (**MFA**).
- 3 The second defendant is the Minister for Oceans and Fisheries, a Minister of the Crown responsible for the MFA.

Ngāi Tahu

- 4 Under the Ngāi Tahu Claims Settlement Act 1998, Ngāi Tahu and Ngāi Tahu Whānui mean the collective of individuals descended from the primary hapū of Waitaha, Ngāti Mamoe, and Ngāi Tahu, namely, Kāti Kuri, Kāti Irakehu, Kāti Huirapa, Ngāi Tūāhuriri and Kāi Te Ruahikihiki.
- 5 The takiwā of Ngāi Tahu Whānui is defined by s 5 of TRoNT Act.
- 6 TRoNT Act provides that Te Rūnanga o Ngāi Tahu shall be recognised for all purposes as the representative of Ngāi Tahu Whānui.

Fisheries Settlement

- 7 Māori customary fishing rights are a taonga secured and guaranteed by Article II of the Treaty of Waitangi / Te Tiriti o Waitangi 1840.
- 8 Over many years, Māori claimed the Crown had breached Treaty fishing rights through a series of actions, including the introduction of the Quota Management System (**QMS**) in 1986.

Interim settlement

- 9 In 1989 the Crown and Māori negotiators agreed on an interim settlement of claims relating to commercial fishing rights.
- 10 The interim settlement was given effect though the Māori Fisheries Act 1989.

- 11 The Māori Fisheries Act 1989 created the Māori Fisheries Commission which progressively received 10 per cent of all fish species that were in the QMS and approximately \$10 million to hold and manage on behalf of all Māori.
- Final settlement*
- 12 On 23 September 1992, the Crown and Māori signed a final Deed of Settlement in respect of commercial fishing claims (the **Fisheries Settlement**, also known as the Sealord Deal).
- 13 The Fisheries Settlement was given effect through the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992 (**1992 Settlement Act**).
- 14 The Fisheries Settlement provided that the Māori Fisheries Commission would be reconstituted as the Treaty of Waitangi Fisheries Commission.
- 15 The Treaty of Waitangi Fisheries Commission was given ownership of pre-settlement assets awarded under the Māori Fisheries Act 1989 and post-settlement assets awarded under the 1992 Settlement Act.
- 16 The Treaty of Waitangi Fisheries Commission was required to manage these assets on behalf of all Māori, and to facilitate the allocation of these assets to iwi.
- 17 Deciding on an agreed allocation model took over a decade, and involved extensive consultation with individual Māori, iwi and other interested parties.
- 18 The final allocation model recommended by the Treaty of Waitangi Fisheries Commission achieved the support of 93.1 per cent of iwi, representing 96 per cent of iwi-affiliated Māori.
- 19 Parliament gave effect to the Treaty of Waitangi Fisheries Commission's allocation model through the enactment of the MFA.
- 20 The MFA:
 - 20.1 established a framework for the allocation and transfer of fisheries settlement assets to iwi and a governance framework for managing the assets for current and future generations of Māori.
 - 20.2 established TOKM Trust, and its corporate trustee, TOKM Trustee Ltd, and dissolved the Treaty of Waitangi Fisheries Commission.

Allocation under the MFA

- 21 The intention of the Fisheries Settlement was that funds were to be distributed on a population basis.
- 22 The MFA establishes a scheme where cash and cash-generating assets, and 75% of deep-water quota, are allocated on a notional population basis.

Particulars:

- 22.1 Section 10 states the notional iwi population binds all iwi.
- 22.2 Section 137(1)(f) states all cash and cash generating assets are to be allocated on a population basis.
- 22.3 Section 138(2)(b) states that surplus cash in TOKM Trustee Ltd are to be allocated on a population basis.
- 22.4 Section 139(a) states the income shares of Aotearoa Fisheries Ltd are to be allocated on a population basis.
- 22.5 Section 141(c) states TOKM Trustee Ltd must allocate the 75 per cent parcel of deep-water quota on a population basis.
- 22.6 Section 43 states that surplus loan funds are to be distributed on a population basis.
- 22.7 Sections 36(f)(ii), 84(1)(g) and 96(1)(g) state that upon termination of the trusts, trust assets are to be distributed on a population basis.
- 22.8 Section 124(1) states a reviewer must not recommend a change to the requirement in the MFA trust deeds that funds are to be distributed on a population basis if the relevant trusts are wound up.
- 22.9 Section 115 states mandated iwi organisations must fund reviews conducted under s 114(3)(b) in the proportion that each mandated iwi organisation represents of the notional iwi population.

Independent review of Te Ohu Kai Moana Trustee Ltd

- 23 An independent review of the role and structure of TOKM Trustee Ltd was conducted in 2014 and 2015 pursuant to s 114 of the MFA.
- 24 The independent review culminated in a report released in February 2015 (**February 2015 Report**).
- 25 The February 2015 Report concluded that TOKM Trustee Ltd had achieved its purpose under the MFA, and recommended that TOKM

Trustee Ltd be wound up with all assets to be transferred to iwi in accordance with the MFA.

- 26 On or about 4 June 2015, at a special general meeting of TOKM Trustee Ltd, iwi resolved that TOKM Trustee Ltd be significantly restructured and an amended funding model be considered by iwi at a hui-a-tau on 31 March 2016.
- 27 On or about 31 March 2016, at that hui-a-tau, iwi resolved to establish an iwi working group (**IWG**) to undertake an independent review of TOKM Trustee Ltd's funding operations and provide a recommendation on the ongoing funding of TOKM Trustee Ltd.
- 28 In July 2016, the IWG received an independent report to assist it in its recommendations (**July 2016 Report**).
- 29 The July 2016 Report concluded that as at March 2016, TOKM Trustee Ltd held \$73 million in "Available Funds", being the investment portfolio and cash, representing the net position of the funds attributable to TOKM Trustee Ltd since its establishment in 2004.
- 30 The July 2016 Report recommended that \$24 million of the "Available Funds" be distributed as surplus to TOKM Trustee Ltd's requirements.
- 31 TOKM Trustee Ltd currently holds funds on behalf of Ngāi Tahu and 57 other iwi.
- 32 On or about 30 August 2016, seven non-binding resolutions drawn from the July 2016 Report were put to a further special general meeting (the **SGM**) of TOKM Trustee Ltd. One of these was a resolution that "any surplus funds be distributed to iwi in proportion to population as set out in column 3 of Schedule 3 of the [MFA]" (the **Surplus Funds Resolution**).
- 33 During that SGM, the Surplus Funds Resolution was amended from the floor to provide that surplus funds should be distributed equally among iwi (the **Amended Surplus Funds Resolution**).
- 34 The Amended Surplus Funds Resolution was then voted on at the SGM.
- 35 The Amended Surplus Funds Resolution received 28 votes in support from mandated iwi organisations and 23 votes in opposition.
- 36 The 23 mandated iwi organisations that voted in opposition to the Amended Surplus Funds Resolution represent over 75 per cent of the notional iwi population.

37 Under cl 21.1 of TOKM Trustee Ltd’s constitution, the Amended Surplus Funds Resolution was a non-binding resolution.

Proposed amendments to the Māori Fisheries Act

38 Following the SGM, TOKM Trustee Ltd presented a report to the Minister of Fisheries in 2016 (the **Māori Fisheries Report**), presenting 25 resolutions as voted for by mandated iwi organisations, including the Amended Surplus Funds Resolution.

39 In August 2017, TOKM Trustee Ltd presented a second report to the Minister for Primary Industries (**August 2017 Report**), to assist with drafting of the legislative amendments in line with resolutions made at the SGM.

40 The August 2017 Report noted that the Amended Surplus Funds Resolution:

40.1 passed with a majority of five iwi: 28 for and 23 against;

40.2 generated the most contention amongst iwi; and

40.3 conflicts with the allocation model of the MFA.

41 The August 2017 Report nonetheless proposed an amendment option that gave effect to the Amended Surplus Funds Resolution.

42 The August 2017 Report requested that the Minister promote legislation to give effect to the resolutions passed at the SGM.

43 In 2022, the Minister for Oceans and Fisheries released an exposure draft of the Māori Fisheries Amendment Bill (the **Exposure Draft**).

44 The Exposure Draft gives effect to the Amended Surplus Funds Resolution by allowing distribution of surplus funds to all iwi on an equal basis.

Ngāi Tahu rights

45 Ngāi Tahu, as an iwi, is a beneficiary of the Fisheries Settlement, and accordingly has certain rights arising from:

45.1 the Fisheries Settlement;

45.2 the 1992 Settlement Act; and

45.3 the MFA.

46 Ngāi Tahu also has rights arising by virtue of the Treaty, in particular Article II.

- 47 As a beneficiary of the Fisheries Settlement, Ngāi Tahu is a beneficiary of the TOKM Trust, and so is also owed certain fiduciary obligations by TOKM Trustee Ltd as its trustee.
- 48 These rights include:
- 48.1 a right to fair process and natural justice when amendments to the Fisheries Settlement and/or MFA are proposed;
- 48.2 a right to be fully consulted on any proposed legislative amendment, particularly where that proposal may have the effect of lessening Ngāi Tahu's entitlements under the Fisheries Settlement and/or MFA;
- 48.3 a legitimate expectation that any surplus funds are to be distributed on a population basis, by the proportions set out in Schedule 3 of the MFA.

**FIRST CAUSE OF ACTION – JUDICIAL REVIEW OF TE OHU
KAI MOANA TRUSTEE LTD**

First ground of review – procedural unfairness

- 49 In convening and chairing the SGM, TOKM Trustee Ltd was required to act in accordance with:
- 49.1 the terms of TOKM Trust Deed;
- 49.2 the terms of TOKM Trustee Ltd Constitution; and
- 49.3 the principles of natural justice.
- 50 The Amended Surplus Funds Resolution was passed in a manner contrary to the principles of natural justice.

Particulars:

- 50.1 the Amended Surplus Funds Resolution represents a significant and fundamental departure from:
- (a) the terms of the Surplus Funds Resolution originally recommended by the IWG and notified to mandated iwi organisations in advance of the SGM; and
- (b) the terms of the Fisheries Settlement, 1992 Settlement Act, and MFA.
- 50.2 because the Amended Surplus Funds Resolution was amended from the floor, there was:

- (a) no notice that the Amended Surplus Funds Resolution would be put to iwi;
- (b) inadequate opportunity for iwi to discuss the Amended Surplus Funds Resolution; and
- (c) inadequate information available to iwi as to the financial consequences of the Amended Surplus Funds Resolution.

50.3 not all iwi were present at the meeting or voted on the Amended Surplus Funds Resolution.

51 In order to comply with the principles of natural justice, TOKM Trustee Ltd was required to:

- 51.1 call a further meeting to hold a further vote on the Amended Surplus Funds Resolution; and
- 51.2 prior to presenting the Māori Fisheries Report and August 2017 Report to the Minister of Primary Industries, engage in further consultation with mandated iwi organisations, including Te Rūnanga o Ngāi Tahu, on the Amended Surplus Funds Resolution.

Second ground of review – error of law

52 In providing the proposed legislative amendments in the August 2017 Report to the Minister of Primary Industries, TOKM Trustee Ltd exercised its statutory powers to protect and enhance the interests of iwi and Māori in fisheries.

53 Providing the proposed legislative amendments in the August 2017 Report to the Minister of Primary Industries has significant public consequences, and impacts the rights of beneficiaries of the Fisheries Settlement and TOKM Trust, including the rights of Ngāi Tahu at [45]-[48] above.

54 In exercising its powers and duties under the MFA, and in order to act consistently with the rights of Ngāi Tahu at [45]-[48] above, TOKM is required to act consistently with:

- 54.1 the terms of the Fisheries Settlement and the 1992 Settlement Act;
- 54.2 the purposes of the MFA;
- 54.3 TOKM Trust Deed; and

54.4 the principles of the Treaty, in particular the principles of fair redress, and self-determination and protection of rangatiratanga.

55 By including in the August 2017 Report an amendment option which would give effect to the Amended Surplus Funds Resolution, TOKM Trustee Ltd erred in law by failing to act consistently with its obligations at [54] above.

Particulars

55.1 The Amended Surplus Funds Resolution is inconsistent with the Fisheries Settlement allocation model, which anticipates that the benefits of the Fisheries Settlement model will be distributed proportionate to iwi population;

55.2 It is contrary to the collective and individual interests of iwi in fisheries for surplus funds to be dealt with in a manner inconsistent with the balance of the MFA and with the Fisheries Settlement;

55.3 Allocation of the surplus funds equally between iwi, rather than by population, is inconsistent with the Treaty principle of fair redress;

55.4 It runs counter to the Treaty guarantee of self-determination for TOKM Trustee Ltd to identify as an option a resolution opposed by iwi representing over 75 per cent of the notional iwi population (and so a significant percentage of Māori).

55.5 The inclusion in the August 2017 Report of a resolution that was passed contrary to natural justice breaches:

- (a) the right of Ngāi Tahu to natural justice; and
- (b) TOKM Trustee Ltd's fiduciary duties to mandated iwi organisations, including Te Rūnanga o Ngāi Tahu.

Third ground of review - failure to consider relevant considerations

56 When it included in the August 2017 Report an amendment option that would give effect to the Amended Surplus Funds Resolution, TOKM Trustee Ltd erred by failing to consider the following mandatory relevant considerations:

56.1 the rights of Ngāi Tahu at [45]-[48] above, including its legitimate expectation that any surplus funds would be distributed on a population basis, in the proportions set out in Schedule 3 of the MFA;

- 56.2 that the Amended Surplus Funds Resolution is inconsistent with:
- (a) the principles of the Treaty, in particular the principles of fair redress, and self-determination and protection of rangatiratanga;
 - (b) the terms of Fisheries Settlement;
 - (c) the 1992 Settlement Act; and
 - (d) the purpose of the MFA and other provisions of the MFA;
- 56.3 that the Amended Surplus Funds Resolution would constitute a breach of TOKM Trustee Ltd's fiduciary duties as trustee of TOKM Trust;
- 56.4 the procedural irregularities in the passage of the Amended Surplus Funds Resolution outlined at [50] above;
- 56.5 that the 23 mandated iwi organisations that voted in opposition to the Amended Surplus Funds Resolution represent over 75 per cent of the notional iwi population;
- 56.6 the non-binding nature of the Amended Surplus Funds Resolution.

Fourth ground of review – legitimate expectations

- 57 As a result of the legitimate expectation of Ngāi Tahu at [48.3] above, TOKM Trustee Ltd ought to have taken the steps at [51] before including in the August 2017 Report an amendment option which would give effect to the Amended Surplus Funds Resolution.

Fifth ground of review – unreasonableness

- 58 When it included in the August 2017 Report an amendment option which would give effect to the Amended Surplus Funds Resolution, TOKM Trustee Ltd acted unreasonably, due to the errors of law set out at paragraphs [54]-[55] above.

AND the plaintiff claims:

- (a) the decision by TOKM Trustee Ltd to propose amendments to the MFA based on the Amended Surplus Funds Resolution be quashed;
- (b) an order requiring TOKM Trustee Ltd to reconsider the recommendations in its August 2017 Report, insofar as they relate to the Amended Surplus Funds Resolution, in

accordance with Ngāi Tahu's rights at paragraph [45]-[48] and TOKM Trustee Ltd's obligations at paragraph [54];

- (c) a declaration that TOKM Trustee Ltd's proposed amendment that surplus funds be distributed on an equal basis is inconsistent with:
 - (i) the principles of the Treaty, in particular the principles of fair redress, and self-determination and protection of rangatiratanga;
 - (ii) the Fisheries Settlement and 1992 Settlement Act;
 - (iii) the purpose and scheme of the MFA;
 - (iv) TOKM Trustee Ltd's fiduciary duties as trustee of the TOKM trust;
 - (v) The rights of Ngāi Tahu at [45]-[48] above.
- (d) costs.

SECOND CAUSE OF ACTION — DECLARATORY RELIEF AGAINST FIRST DEFENDANT

59 The plaintiff repeats paragraphs [1]-[48] of the statement of claim and says further:

60 By virtue of the obligations at [54], TOKM Trustee Ltd is constrained from recommending amendments to the MFA that are inconsistent with:

- 60.1 the principles of the Treaty, in particular the principles of fair redress, and self-determination and protection of rangatiratanga;
- 60.2 the terms of the Fisheries Settlement and 1992 Settlement Act;
- 60.3 the purpose of and express provisions of the MFA; and
- 60.4 TOKM Trustee Ltd's fiduciary duties under the TOKM trust deed;
- 60.5 Ngāi Tahu's rights at [45]-[48] above.

AND the plaintiff claims:

- (a) a declaration that TOKM Trustee Ltd's decision to advance amendments based on the Surplus Funds Resolution is inconsistent with:
 - (i) the principles of the Treaty, in particular the principles of fair redress, and self-determination and protection of rangatiratanga;
 - (ii) the terms of the Fisheries Settlement and 1992 Settlement Act;
 - (iii) the intention of and express provisions of the MFA; and
 - (iv) TOKM Trustee Ltd's fiduciary duties under the TOKM trust deed;
 - (v) Ngāi Tahu's rights at [45]-[48] above.
- (b) costs.

THIRD CAUSE OF ACTION – DECLARATORY RELIEF AGAINST SECOND DEFENDANT

- 61 The plaintiff repeats paragraphs [1]-[48] of the statement of claim and says further:
- 62 The Crown through its Ministers was required, when considering the proposals in the August 2017 Report, to:
 - 62.1 have due regard to the need to protect and uphold the Fisheries Settlement;
 - 62.2 have due regard to Ngāi Tahu's rights at [45]-[48] above, including by appropriately consulting with Ngāi Tahu;
- 63 Insofar as the Exposure Draft gives effect to the Amended Surplus Funds Resolution, it is inconsistent with:
 - 63.1 the Fisheries Settlement and 1992 Settlement Act;
 - 63.2 the purposes of the MFA;
 - 63.3 the principles of the Treaty, in particular the principles of fair redress, and self-determination and protection of rangatiratanga; and

63.4 Ngāi Tahu's rights at [45]-[48] above.

AND the plaintiff claims:

- (a) a declaration that in considering proposals from TOKM Trustee Ltd, the Crown through its Ministers must act consistently with:
 - (i) the Fisheries Settlement and 1992 Settlement Act;
 - (ii) the purpose of the MFA; and
 - (iii) the principles of the Treaty, in particular the principles of fair redress, and self-determination and protection of rangatiratanga; and
 - (iv) Ngāi Tahu's rights at [45]-[48].

- (b) a declaration that in order to comply with its obligations under the Treaty and Fisheries Settlement, the Crown through its Ministers must:
 - (i) have due regard to the need to protect and uphold the Fisheries Settlement; and
 - (ii) appropriately consult with Ngāi Tahu, as a mandated iwi organisation and party to the Fisheries Settlement;

- (c) a declaration that the Crown through its Ministers will not comply with its obligations, or respect the rights of Ngāi Tahu at [45]-[48] above, by adopting proposals which are inconsistent with:
 - (i) the Fisheries Settlement and 1992 Settlement Act;
 - (ii) the purpose of the MFA; and
 - (iii) the principles of the Treaty, in particular the principles of fair redress, and self-determination and protection of rangatiratanga; and
 - (iv) Ngāi Tahu's rights at [45]-[48].

- (d) a declaration that to the extent the Exposure Draft gives effect to the Amended Surplus Funds Resolution, it is inconsistent with:
 - (i) the Fisheries Settlement and 1992 Settlement Act;
 - (ii) the purpose of the MFA; and

- (iii) the principles of the Treaty, in particular the principles of fair redress, and self-determination and protection of rangatiratanga; and
 - (iv) Ngāi Tahu's rights at [45]-[48].
- (e) costs.

This document is filed by Justin Walter John Graham, solicitor for the plaintiff, of the firm Chapman Tripp. The address for service of the plaintiff is at the offices of Chapman Tripp, Level 34, PwC Tower, 15 Customs Street West, Auckland.

Documents for service on the plaintiff may be delivered to that address or may be:

- (a) posted to the solicitor at PO Box 2206, Shortland Street, Auckland;
or
- (b) emailed to the solicitor by the email addresses on the front page of this document provided that a hard copy is also posted.