IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

I TE KŌTI MATUA O AOTEAROA
TE WHANGANUI-Ā-TARA ROHE CIV-2022-485-650

UNDER	The Judicial Review Procedure Act 2016 and the Declaratory Judgments Act 1908
BETWEEN	**Te Rūnanga o Ngāi Tahu** Plaintiff
AND	**Te Ohu Kai Moana Trustee Ltd** First Defendant
AND	**Minister for Oceans and Fisheries** Second Defendant

STATEMENT OF DEFENCE FOR THE FIRST DEFENDANT

2 December 2022

Judicial officer: unknown
Next event date: Judge's List Monday 12 December 2022 at 10am

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The first defendant by its solicitor says in response to the statement of claim dated 1 November:

Parties

1. It admits paragraph 1.

2. It admits paragraph 2.

3. It admits paragraph 3.

Ngāi Tahu

4. It admits paragraph 4.

5. It admits paragraph 5.

6. It admits paragraph 6.

Fisheries Settlement

7. It admits paragraph 7.

8. It admits paragraph 8.

Interim settlement

9. It admits paragraph 9.

10. It admits paragraph 10.

11. It says that the Māori Fisheries Act 1989 created the Māori Fisheries Commission which progressively received 10 per cent of *total allowable commercial catches* for all species then subject to the QMS, and otherwise admits paragraph 11.

Final settlement

12. It admits paragraph 12 and says further that in the Fisheries Settlement the Crown recognised the full extent of Māori customary rights to fishing and fisheries by:

    12.1 providing funds for Māori to buy a 50 percent stake in Sealord Products Limited (now Sealord Group Limited) which, as one of the largest fishing companies in New

Zealand at the time, was a major owner of fisheries quota;

12.2 undertaking to provide Māori with 20 percent of commercial fishing quota for all new species brought within the quota management system (QMS),

12.3 undertaking to ensure the appointment of Māori on statutory fisheries bodies; and

12.4 agreeing to make regulations to allow self-management of Māori fishing for communal subsistence and cultural purposes.

In return, Māori agreed:

12.5 that all Māori commercial fishing rights and interests were settled;

12.6 to accept regulations for customary fishing;

12.7 to cease litigation, and to endorse the QMS.

13. It admits paragraph 13.

14. It admits paragraph 14 and says further that the 1992 Settlement Act conferred additional functions and powers on Treaty of Waitangi Fisheries Commission, including to develop, after full consultation with Maori, proposals for a new Maori Fisheries Act that is consistent with the Deed of Settlement and makes provision for the development of a procedure for identifying the beneficiaries and their interests under the Deed of Settlement, and a procedure for allocating to them, in accordance with the principles of the Treaty, the benefits from the Deed of Settlement.

15. It denies paragraph 15 and says the Deed of Settlement refers to the allocation assets to Māori, not to the Commission. In

accordance with the Deed of Settlement, the Commission was directed to hold the settlement assets.

16. It denies paragraph 16 and says the Treaty of Waitangi Fisheries Commission was required to:

16.1 consider the resolutions adopted by the Annual General Meeting of the Commission on 25 July 1992 in respect of the assets held by the Commission at the settlement date, and consider how best to give effect to the resolutions, and allocate those assets; and

16.2 following consultation with Maori, to devise and report to the Crown on a scheme for the distribution of the Commission's other assets.

17. Other than denying the allocation model was agreed, it admits paragraph 17 and says further:

17.1 from 1992 the Treaty of Waitangi Fisheries Commission worked towards developing a method for allocating the Fisheries Settlement assets to iwi;

17.2 the process of achieving a final compromise took approximately 12 years;

17.3 the principle elements of the allocation model presented to the Minister of Fisheries on 9 May 2003 in the report *He Kawai Amokura* comprised:

17.3.1 All Inshore Quota (pre-settlement "PRESA" and post-settlement "POSA") will be allocated to Iwi using a coastline formula only;

17.3.2 All Deepwater Quota (PRESA and POSA) will be allocated to Iwi using a 75% Iwi

Population: 25% Iwi Coastline formula (except for the Chathams);

17.3.3 Prior to allocation the shares in Moana Pacific Fisheries Limited (a PRESA asset) will be exchanged for cash from POSA and on allocation that cash will be distributed on the same basis as the PRESA cash;

17.3.4 PRESA cash will be allocated to Iwi using a population formula subject to: the establishment of Te Putea Whakatupu Trust to assist Maori including those who do not know their Iwi or choose not to associate with their Iwi organisations ($20 million); the supplementing of certain Iwi allocations in order that all Iwi achieve a minimum allocation value of $1 million ($2.72 million); the initial establishment of Te Wai Maori Trust to assist freshwater fisheries initiatives ($10 million); the establishment of an initial capital reserve for Te Ohu Kai Moana ($5 million); and funding to enable Te Ohu Kai Moana to perform all of its various functions ($18 million). After provision for these matters, the remaining PRESA cash will be allocated directly to Iwi on the basis of Iwi population (expected to be approximately $20.7 million);

17.3.5 The unique status of the Chatham Islands would be recognised through the allocation of quota on the basis of a separate Chatham Zone in which Inshore Quota will be allocated

to the Chathams Iwi and Deepwater Quota will be allocated 50% to the Chathams Iwi and 50% on a population basis to all Iwi;

17.3.6 The Te Putea Whakatupu Trust will be established to deliver assistance with capital of $20 million. All Maori will have the right to apply to Te Putea Whakatupu Trust for assistance in order to develop human resources so that Maori can participate at all levels of the fishing industry;

17.3.7 The Te Wai Maori Trust will be established for freshwater fisheries development purposes with initial capital of $10 million, increasing over time to $20 million;

17.3.8 An Electoral College, Te Kawai Taumata, established through regional groupings of Iwi and certain representative Maori organisations, will have responsibility for selecting and appointing a team of Commissioners to a new organisation called Te Ohu Kai Moana;

17.3.9 Shares in all of the POSA fisheries companies (Sealord, Moana Pacific, Prepared Foods, etc) will be held by a new company, Aotearoa Fisheries Limited (AFL);

17.3.10 Te Ohu Kai Moana Commissioners will appoint the directors of AFL;

17.3.11 AFL will issue Income Shares, 80% of which will go to Iwi using a population formula and

20% of which will be held by Te Ohu Kai Moana;

17.3.12 Te Ohu Kai Moana will hold all Voting Shares in AFL;

17.3.13 AFL will only be able to pay distributions to income shareholders and will be required to ensure 40% of its net profit after tax is paid as a dividend on its Income Shares with the remainder being invested back into growing the business;

17.3.14 Iwi will be able to sell Allocated Quota and their Income Shares through a specified process to other Iwi and Te Ohu Kai Moana, but not outside those parties;

17.3.15 Iwi within the same Quota Management Area and Te Ohu Kai Moana will have the right of first refusal on the sale of Allocated Quota by an Iwi;

17.3.16 A review of the structures, performance and governance of the post-allocation bodies (including Te Ohu Kai Moana, AFL, Te Kawai Taumata, Te Putea Whakatupu Trust and Te Wai Maori Trust) will be held 12 years after allocation commences;

17.3.17 Iwi will be the ultimate beneficiaries on the windup of each of Te Ohu Kai Moana, Te Putea Whakatupu Trust and Te Wai Maori Trust.

18. In response to paragraph 18 it says the final allocation model recommended by the Treaty of Waitangi Fisheries Commission achieved the support of 93.1% of iwi representing 96.7% of iwi affiliated Māori.

19. In response to paragraph 19 it says that the principle elements of the allocation model were given effect to through the enactment of the Maori Fisheries Act 2004, which also included additional provisions relating to freshwater asset allocation.

20. It admits paragraph 20.

Allocation under the MFA

21. In response to paragraph 21 it says that the intention of the Fisheries Settlement was to reach a just and honourable solution of the disputes in relation to fishing rights and interests and the QMS in conformity with the principles of the Treaty of Waitangi. It further relies on the full terms and effect of the 1992 Deed of Settlement and subsequent legislation, repeats paragraphs 14 to 17 above and otherwise denies paragraph 21.

22. It apprehends that paragraph 22 contains allegations of law to which it is not required to plead, but says that the MFA provides for a range of allocations, including:

    22.1 Section 43: allocation and transfer of surplus loan funds – by population;

    22.2 Sections 36, 84 and 96: allocation of funds on winding up of entities – by population;

    22.3 Section 138: allocation of surplus funds after the first five years of operation of TOKM Trustee Ltd – by population;

22.4 Section 138A: allocation of NZ units under the Climate Change Response Act – as associated with quota;

22.5 Section 139: allocation of income shares of Aotearoa Fisheries Ltd – by population;

22.6 Section 140: allocation of inshore quota – allocated 100% by iwi coastline (determined by agreements with neighbouring iwi);

22.7 Section 141: allocation of deepwater quota – total quota divided into two parcels (75% and 25%) with the 75% parcel allocated by population and the 25% parcel allocated by coastline;

22.8 Section 142: Chatham Island Allocations – If the quota management area is wholly in the Chatham zone then: all inshore quota is provided to the Chatham iwi either by coastline or alternative agreement by the iwi; deepwater quota is split into two equal parcels with one parcel being provided to the Chatham iwi (on the same basis as the inshore) and one parcel to all iwi by population;

22.9 Section 143: allocation of quota within harbours – by iwi agreement (consultation and provision of coastline claims);

22.10 Section 144,145 and 146: allocation of quota in Fishery Management Areas 4, 6 and 10– by population;

22.11 Section 147: allocation of highly migratory species – by population;

22.12 Section 148: allocation of freshwater quota – by agreement of iwi in the quota management area, if no agreement then by population (2001 census);

22.13 Section 149: allocation in lieu of shortfall in Settlement quota – In the same proportion as the quota for the relevant stocks.

Independent review of Te Ohu Kai Moana Trustee Ltd

23. In response to paragraph 23 it says that in 2014 and 2015 an independent review of Māori commercial fisheries structures under the Māori Fisheries Act was conducted by Tim Castle, Barrister.

24. In response to paragraph 24 it says that in February 2015 Mr Castle released a report *Tāia Kia Matariki*.

25. It admits paragraph 25 and says further that the February 2015 Report:

25.1 Acknowledged the achievement of both the purposes and principle objective of TOKM Trustee Ltd;

25.2 Recorded that TOKM Trustee Ltd had distributed 94% of the assets, by value, held at the commencement of the MFA;

25.3 Recorded that TOKM Trustee Ltd had since 2005 transferred to iwi fisheries Settlement assets to the value of $543 million;

25.4 Recommended that the TOKM Trustee Ltd be wound up and its assets transferred to iwi in accordance with the MFA, but allowed for the alternative that it instead be significantly restructured entity with a new funding model.

26. It admits paragraph 26 and says further that from June 2015 to March 2016 TOKM Trustee Ltd carried out an extensive engagement process with iwi to clarify its own future business and funding model, and how the resolutions of the June 2015

SGM should be implemented. This included a survey of iwi priorities, a series of regional hui, a national workshop and smaller focus groups. Proposals were circulated to iwi in February 2016 and a further process of engagement carried out before the Hui-a-Tau on 31 March 2016.

27. It admits paragraph 27 and says further that the main issue to be decided at the March 2016 Hui-a-Tau was the future funding model for TOKM Trustee Ltd, but the recommended approach developed by TOKM Trustee Ltd was not approved by the vote at the Hui-a-Tau. Instead a set of alternative resolutions was proposed from the floor by Ngāpuhi and adopted, to the effect that iwi should lead an independent review of the funding models considered and proposed by TOKM Trustee Ltd.

28. In response to paragraph 28 it says that the IWG commissioned and received in July 2016 a report from consultants, Chapman Tripp and KordaMentha (the **July 2016 Consultants Report**).

29. In response to paragraph 29 it says that the July 2016 Consultants Report recorded that as at March 2016 TOKM Trustee Ltd held $73 million as 'available funds' as it described that term in its report.

30. In response to paragraph 30 it says the July 2016 Consultants Report:

    30.1 identified "two credible funding options" for TOKM Trustee Ltd, being to "retain all" or "distribute some, retain some", with the latter identified as the preferred option;

    30.2 expressly considered whether distribution of surplus funds should be on a population basis or equal sharing basis, and recorded that the consultants "could not see any compelling arguments as to why TOKM's

assets should be distributed either equally or proportionate to the value of Settlement Quota";

30.3 proposed distribution of funds either "by population" or "to charitable MIO [mandated iwi organisations] or charity for fishing".

31. It says that TOKM Trustee Ltd is required to administer the settlement assets in accordance with the purpose of the Act and the purpose of Te Ohu Kaimoana, including performing the duties and functions set out in sections 34 and 35 of the MFA, admits that there are currently 56 iwi with registered mandated iwi organisations (MIOs), say that there are a further two iwi with recognised iwi organisation (RIO) status, and otherwise denies paragraph 31.

32. In response to paragraph 32 it says:

32.1 In anticipation of the 2016 Consultants Report and the recommendations of the IWG, on 13 July 2016 it emailed iwi explaining the proposed process, advising that it was expecting the IWG's recommendations, the dates of regional hui, and that an SGM would be held on 30 August to discuss the outcome of the IWG review.

32.2 The IWG received the July 2016 Consultants Report and on 2 July 2016 provided their recommendations to TOKM Trustee Ltd to be considered by iwi at the August 30 SGM.

32.3 On 1 August 2016 it provided notice of the 30 August SGM and upcoming regional hui.

32.4 On 2 August 2016 it advised iwi that it welcomed the recommendations of the IWG.

32.5 It held regional hui on:

32.5.1 8 August 2016 in Christchurch

32.5.2 9 August 2016 in Wellington

32.5.3 10 August 2016 in Auckland

32.6 On 25 August 2016 it circulated the IWG report and the proposed resolutions (including the Surplus Funds Resolution) for the August 30 SGM.

32.7 On 30 August 2016 the SGM was held.

33. It admits paragraph 33.

34. It admits paragraph 34 and says further that iwi also supported non-binding resolutions providing for:

34.1 an immediate review by TOKM Trustee Ltd of its operational structure and activities to confirm funds available for retention and possible distribution;

34.2 a preferred funding model for TOKM Trustee Ltd of "retain some, distribute some", subject to (1) above;

34.3 establishment of processes to enable iwi to be involved in approval of unbudgeted projects requiring expenditure of over $1m capital;

34.4 broadening of the charitable purposes to which distributions can be made by TOKM Trustee Ltd;

34.5 inclusion of a compulsory levy system in the MFA;

34.6 a further review of the funding requirements of TOKM Trustee Ltd within 5 – 7 years from the date of its restructure.

35. It admits paragraph 35 and says further:

35.1 the SGM was conducted and the resolution passed in accordance with TOKM Trustee Ltd's constitution; and

35.2 No objection to the meeting procedure or voting process was raised by iwi at the meeting.

36. It admits paragraph 36.

37. It admits paragraph 37.

Proposed amendments to the Māori Fisheries Act

38. It denies paragraph 38 and says that on 2 September 2016 it circulated the final resolutions from the SGM, and advised the next step would be to proceed to complete the report to the Minister for Primary Industries, due on 30 September 2016. It says further that on 30 September 2016 it presented the report to the Minister for Primary Industries on the Māori Fisheries Review (the **September 2016 Māori Fisheries Review Report**). This Report set out the process followed by TOKM Trustee Ltd and the IWG, and reported the resolutions as voted for by mandated iwi organisations, including the Amended Surplus Funds Resolution. It says further that the Report:

38.1 recorded that the Amended Surplus Funds Resolution was a non-binding resolution;

38.2 recorded that the Amended Surplus Funds Resolution did not reflect the recommendation of the IWG;

38.3 set out the limited level of support for the resolution with the number of votes for and against;

38.4 summarised the discussion at the meeting; and

38.5 advised that the resolution of the distribution of any surplus funds "generated the most contention amongst iwi."

39. It admits paragraph 39 and says further that on 8 June 2017 it shared a draft of the August 2017 Report with MIOs, including the plaintiff, for feedback. A summary of the feedback received was included in the final Report as appendix 3.

40. In response to paragraph 40 it says that the August 2017 Report:

40.1 Recorded that the resolution passed at the SGM in August 2016 supported distribution of surplus funds being made to iwi on an equal basis, but as had already been reported to the Minister, this resolution generated the most contention amongst iwi;

40.2 Recorded that distribution of surpluses on an equal basis would conflict with the allocation model, including the basis for distributing TOKM Trustee Ltd's assets on winding up;

40.3 Recorded that some iwi had made the point that distribution of surpluses on an equal basis is inconsistent with the basis for payment of levies, which they consider unfair;

40.4 Recorded that the August 2016 SGM was conducted in accordance with TOKM Trustee Ltd's constitution;

40.5 Recorded that the resolution passed with a majority of 5: 28 for and 23 against;

40.6 Set out in detail the feedback from iwi including the opposition to distribution of surpluses on an equal basis and the reasons for that;

40.7 Provided commentary on the matters raised by iwi;

40.8 Advised that in view of the closeness of the vote and the several issues raised by iwi, TOKM Trustee Ltd had incorporated in the draft legislative amendments two alternative options for distributing surpluses: one based on an equal share; the other based on population;

40.9 Did not recommend either option; and

It otherwise denies paragraph 40.

41. It repeats paragraph 40 and denies paragraph 41.

42. It repeats paragraph 40 and denies paragraph 42 to the extent it relates to the Amended Surplus Funds Resolution.

43. In response to paragraph 43 it:

43.1 admits that in the week of 8 August 2022 the Minister for Oceans and Fisheries released an exposure draft of the Māori Fisheries Amendment Bill (the Exposure Draft) for the purposes of engaging in consultation on the proposed amendments;

43.2 says that on 11 August it hosted a 'MFA 101' workshop for MIO and RIO and funded their attendance;

43.3 says that it attempted to hold a hui on 10 October 2022 to discuss the amendments to the MFA but due to low response rates from iwi this hui did not proceed;

43.4 says that it is planning a further hui in early 2023;

43.5 understands that the Ministry of Primary Industries conducted a consultation process with iwi and other stakeholders on the exposure draft;

43.6 says that following consultation the Minister decided that it was not appropriate to support an amendment giving effect to the Amended Surplus Funds Resolution, and on 16 November 2022 advised that he proposed to recommend to Cabinet that the Bill provide for distribution of surplus funds on a population basis.

44. It denies paragraph 44 and says that the Exposure Draft put forward for consultation proposals for legislative change that included draft provisions that would, if enacted, give effect to the intent of the Amended Funds Resolution, and repeats paragraph 43.

Ngāi Tahu rights

45. In response to 45 it says:

45.1 Māori have inherited rights and interests in fisheries and this is guaranteed through whakapapa;

45.2 Ngāi Tahu was not party to the Fisheries Settlement but is a beneficiary of it;

45.3 Ngāi Tahu is subject to and a beneficiary of the 1992 Settlement Act;

45.4 the purpose of the MFA is to provide for the development of the collective and individual interests of iwi in fisheries, fishing and fisheries-related activities in a manner that is ultimately for the benefit of all Maori;

45.5 56 mandated iwi organisations and 2 recognised iwi organisations are recognised as having rights and obligations under the MFA; and

45.6 it otherwise denies paragraph 45.

46. In response to paragraph 46 it admits that Māori fishing rights were secured and guaranteed by Article II of the Treaty of Waitangi as a 'taonga' for all Māori.

47. In response to paragraph 47 it:

47.1 admits that Ngāi Tahu through its MIO is a beneficiary of the TOKM Trust and is owed the same fiduciary obligations as all beneficiaries of that Trust;

47.2 denies that those fiduciary obligations include the alleged rights pleaded in paragraph 48 of the statement of claim.

48. In response to paragraph 48 it repeats paragraph 47 and:

48.1 admits that TOKM Trustee Ltd is obliged to follow fair processes in conducting its SGM and in consulting with MIO;

48.2 otherwise denies paragraph 48.

FIRST CAUSE OF ACTION

First ground of review – procedural unfairness

49. In response to paragraph 49 it

49.1 admits that in convening and chairing the SGM, TOKM Trustee Ltd was required to act in accordance with the terms of the Trust Deed and Constitution;

49.2 says that compliance with those terms meet the requirements of natural justice in the context of the SGM process; and

49.3 otherwise denies paragraph 49.

50. It repeats paragraph 49 and denies paragraph 50.

51. It repeats paragraph 49 and denies paragraph 51.

Second ground of review – error of law

52. It repeats paragraph 40 and denies paragraph 52. It says further that the delivery of the August 2017 Report was not the exercise of statutory power as defined in s 5 of the Judicial Review Procedure Act 2016.

53. It repeats paragraph 52 and denies paragraph 53.

54. It apprehends that paragraph 54 contains allegations of law to which it is not required to plead, but says that the act of accurately reporting the outcome of the SGM to the Minister is consistent with these purposes and principles set out.

55. It apprehends that paragraph 55 contains allegations of law to which it is not required to plead, but says further that:

55.1 its actions in delivering the August 2017 Report do not engage the allegations pleaded in the particulars at [55.1] – [55.4];

55.2 it is not the proper respondent to the allegations in [55.1] – [55.4] which relate to the lawfulness of future legislative amendments;

55.3 the allegations in [55.1] – [55.4] are substantive matters that are subject to debate between iwi beneficiaries and are not appropriate for

determination in a claim pleaded against the first defendant;

55.4 to the extent that these allegations concern proceedings in Parliament consideration by the Court is prohibited by s 11 of the Parliamentary Privilege Act 2014;

55.5 it otherwise denies paragraph 55.

Third ground of review – failure to consider relevant considerations

56. It repeats paragraphs 54 and 55 and denies paragraph 56.

Fourth ground of review – legitimate expectations

57. It denies paragraph 57.

Fifth ground of review - unreasonableness

58. It denies paragraph 58.

Relief

In response to the relief sought by the plaintiff, it says:

(a) the delivery of the August 2017 Report to the Minister was not the exercise of a statutory power under the Judicial Review Procedure Act 2016;

(b) the claim and the relief sought are moot given the process that the Minister has undertaken since receipt of the Report, including further consultation with iwi including the plaintiff, consideration of their position, and the decisions made as a result of that process;

(c) the declaration at (c) is factually inaccurate as it did not propose the amendment that surplus funds be distributed on an equal basis; rather, the proposal was made by iwi and approved by resolution at the 2016 SGM and its action was to convey that resolution to the Minister;

(d) the substantive declarations sought in (c) purport to determine matters of debate between iwi beneficiaries and are not appropriate in proceedings against the first defendant;

(e) to the extent that these declarations sought concern proceedings in Parliament consideration by the Court is prohibited by s 11 of the Parliamentary Privilege Act 2014.

SECOND CAUSE OF ACTION

59. It does not plead to paragraph 59.

60. It repeats paragraph 54 and denies paragraph 60.

Relief

In response to the relief sought by the plaintiff, it says:

(a) the delivery of the August 2017 Report to the Minister was not the exercise of a statutory power under the Judicial Review Procedure Act 2016;

(b) the claim and relief sought are moot given the process that the Minister has undertaken since receipt of the Report, including further consultation with iwi including the plaintiff, consideration of their position, and the decisions made as a result of that process;

(c) the substantive declarations sought purport to determine matters of debate between iwi beneficiaries and are not appropriate in proceedings against the first defendant;

(d) to the extent that these declarations concern proceedings in Parliament consideration by the Court is prohibited by s 11 of the Parliamentary Privilege Act 2014.

THIRD CAUSE OF ACTION

61. It does not plead to paragraphs 61 to 63.