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## Wāhi Tapu Sites on Crown Lands

Tēnā koe Maui,

Thank you for your email of 22 December 2016 that followed our discussion on 20 December. In that discussion you offered to relinquish Moriori claim to 100% ownership of Te Whanga lake bed in exchange for Ngāti Mutunga o Wharekauri agreeing to the transfer of exclusive ownership or control to Moriori by the Crown of all Moriori wāhi tapu areas located on Crown land in Wharekauri and associated islands. These Moriori wāhi tapu areas were not identified exactly but would include urupa (although not confined to urupa). I indicated that your suggested trade-off was unlikely to be accepted by Ngāti Mutunga o Wharekauri for two reasons:

1. Ngāti Mutunga o Wharekauri is unlikely to agree to any arrangement over the ownership of the bed of Te Whanga lagoon that is less than 50:50 in any circumstances.
2. Ngāti Mutunga o Wharekauri has a customary interest in every part of Wharekauri and are likely to oppose the transfer of exclusive ownership or control of land currently in Crown ownership for that reason. Furthermore, Ngāti Mutunga o Wharekauri would oppose the transfer of exclusive ownership or control of Crown land to any other iwi on the basis that the Crown determines that the Ngāti Mutunga o Wharekauri customary interest can be ignored or over-ridden in particular places.

I note that in your email, you describe the present Ngāti Mutunga o Wharekauri position as claiming an interest in Moriori wāhi tchap (tapu) areas. This is disappointing as I had explained as carefully as I could why this language is not an accurate description of the Ngāti Mutunga o Wharekauri position and is therefore unhelpful. Ngāti Mutunga o Wharekauri has not claimed, and is not claiming, ownership or control of anything that is Moriori. This is true whether 'claim' is used as a verb or a noun. Ngāti Mutunga o Wharekauri are not demanding or requesting a cultural interest in Wharekauri from the Crown. Such a cultural interest is not in the power of the Crown to confer. Neither is Ngāti Mutunga o Wharekauri demanding, requesting or asserting that it owns something that is culturally (or otherwise) Moriori.

As I have previously described, the Ngāti Mutunga o Wharekauri position underpinning the current Treaty Settlement negotiations is that:

1. There are two iwi on Wharekauri/Rekohu (Ngāti Mutunga o Wharekauri<sup>1</sup> and Moriori);
2. The rohe of the two iwi overlap completely there;
3. The nature and extent of the customary interests in those rohe are unique to each iwi and the way in which those interests should be recognised and protected is properly a matter for the two iwi to determine - not the Crown. In developing structures and processes to provide for such cultural recognition and protection, the starting point must be one of mutual respect and equality in status between Ngāti Mutunga o Wharekauri and Moriori.

To be clear, Ngāti Mutunga o Wharekauri do not seek to veto, or even influence, processes within Moriori to designate the location and nature of places that are wāhi tchāp to Moriori. Neither does Ngāti Mutunga o Wharekauri expect that Moriori would attempt to veto or influence such processes within Ngāti Mutunga o Wharekauri o Wharekauri. In the event that wāhi tapu were to overlap, this could be addressed respectfully through actions such as the erection of twin pou to mark particular sites as was discussed at Te Kopinga. However, the identification of a particular site as a wāhi tapu by one iwi does not automatically extinguish the cultural interest of the other in that location even though that interest may not have the status of wāhi tapu. Neither is there any sound independent basis by which customary interests can be arranged in a hierarchy whereby one interest could be determined to predominate over the other. In the special context of Wharekauri/Rekohu, all parameters of the structure and processes for the future management and control of wāhi tapu sites must be agreed parameters.

You may recall, Maui, when we were at Te Ohu Kai Moana and we were required to wrestle with the issues of who were the iwi of Aotearoa and what are their respective coastal interests? The answer to these questions was delivered successfully over a relatively short time by Te Ohu Kai Moana implementing a policy of establishing iwi status through mutual recognition (an iwi is an iwi if iwi say it is an iwi) followed by negotiation of coastline based shares between properly mandated organisations (facilitated if need be by mediation or arbitration). I have always thought that the success of this approach reflected the wisdom of Te Ohu Kai Moana in not intruding into these matters beyond what was necessary to establish a devolved process (notwithstanding its potential status as an expert Maori entity). If it was unwise for Te Ohu Kai Moana to make such judgements it would be positively foolish for the Crown to do so in my opinion.

Unfortunately, our reading of the 'overlapping claims letter' dated 27 June 2016 signed by Fran Wilde leaves this course of action open (I assume that you received a similar or identical letter at that time). In it, two contradictory positions are set out. First "*it is not intended for the Crown to resolve or determine 'predominance' in interests, if any – that is a matter that can only be addressed by the groups themselves. Rather, the Crown recognises that a number of groups may have interests in the same general area. The basis for these interests can be different and derive from different tikanga. The Crown does not make a judgement about the hierarchy of either group's tikanga and respects both equally.*" This is contradicted by two prior statements in the letter. "*The Crown's preference is that groups decide between them how best to deal with overlapped interests, if it is not possible, a Ministerial decision may be necessary*" and "*During the Treaty settlement process the Crown needs to satisfy itself that asserted interests are legitimate...*"

Ngāti Mutunga o Wharekauri is the sole arbiter of the nature and extent of their customary interests. I would be surprised if the Moriori position is different. Ngāti Mutunga o Wharekauri completely rejects the proposition that our customary interests need be

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<sup>1</sup> Ngāti Mutunga o Wharekauri in this sense means the descendants of the Maori passengers on the two voyages of the Rodney to Wharekauri in 1835 that were Ngāti Mutunga, Ngāti Tama, Kekereawai, and Ngāti Haumia and may also have identified themselves as Atiawa. Irrespective of how they chose to identify themselves in 1835 and however their descendants choose to identify themselves today, all are included within the ambit of the use of the term 'Ngāti Mutunga o Wharekauri'.

'legitimised' by the Crown or that a Minister of the Crown should decide how overlapping claims between iwi should be dealt with. The 27 June letter has been posted on the Ngāti Mutunga o Wharekauri Iwi Trust website and has understandably contributed to a marked reluctance by Ngāti Mutunga o Wharekauri individuals to contribute sensitive information on customary information to the settlement negotiation process when that information could possibly be rejected as 'illegitimate' by Crown representatives or discounted or ignored under a Ministerial decision of some kind. When tested on this point, OTS representatives maintain that these two offensive possible outcomes remain 'on the table'.

It is subject to the background communicated on the 20<sup>th</sup> of December and at previous meetings and with the thoughts above in mind that I undertook to try and identify how the management and control of wāhi tapu sites on Crown lands anywhere on Wharekauri might be controlled and managed in future by Ngāti Mutunga o Wharekauri and Moriori. Briefly, the structure and process I would suggest for consideration is that outlined by the Department of Conservation (DoC) at our last joint meeting with them. The key features would be along these lines:

- Land presently in the DoC estate or owned by LINZ would remain in Crown ownership with the two iwi having equal rights of first refusal to acquire any land declared surplus by the Crown at any future time.
- Wāhi tapu and wāhi tchap sites in the DoC/LINZ estate would be identified and defined by the two iwi individually. The boundaries of these sites could be extended in future or new sites added. These sites would not be subject to any 'legitimacy' test by any third party and both iwi would show respect for each other's tikanga by supporting the outcome of the identification process of the other.
- All wāhi tapu and wāhi tchap areas identified and defined above would have reserve status conferred on them and be placed under the management of a Wāhi Tapu Reserve Board with equal Ngāti Mutunga o Wharekauri o Wharekauri and Moriori representation. My suggestion is that a Board of six would be sufficient, with a majority of participants being island based. Decision making would be by majority (therefore usually consensus in practice given the presumed structure above). Board members would be appointed and supported by the two PSGEs and selection of Board members should consider both the cultural knowledge and a willingness to work constructively with all fellow board members of applicants.
- The main function of the Board would be to ensure the effective recognition and protection of all cultural values associated with wāhi tapu/wāhi tchap with reserve status. Those cultural values would be simply as stated by the relevant individual iwi and the appropriate practical means of achieving effective recognition and protection of those values would also be identified in the first instance by the same iwi. One function of the Board would be to ensure that the means of recognition and protection adopted to protect one set of values did not prevent the effective recognition and protection of any overlapping cultural interests.
- The over-arching principle to be followed by the Board (and therefore endorsed by both iwi) would be that the responsibility for the definition and protection of Ngāti Mutunga o Wharekauri interests lies with Ngāti Mutunga o Wharekauri and the responsibility for the definition and protection of Moriori interests lies with Moriori. It follows from this, that where there is no overlap in interests, that responsibility lies solely with one or other iwi. Where there is an overlap of interests the objective would be to achieve maximum protection of all interests by means that do not sacrifice the effective protection of any.
- Consistent with the over-arching principle above, it follows that the financial responsibility for the means of achieving protection and recognition of cultural interests in reserve areas would rest on individual iwi in proportion to the extent that those means are employed at the behest of that iwi. Third party or government funding obtained by the Board to support its function would be allocated to the protection of the cultural interests of both iwi transparently, but this allocation would not be on a 50:50 basis, rather it would be prioritised according to pre-agreed analysis of the risk to particular wāhi tapu/wāhi tchap if protective measures were not taken.

Obviously, these thoughts would require considerable development and elaboration that must involve discussion between Ngāti Mutunga o Wharekauri, Moriori, DoC, LINZ and OTS (assuming it is given full effect through our respective settlement legislation). I note your concerns about lack of uncertainty and the timeframe for this process. All I can say is that the sooner we implement this (or a similar) approach together, the faster these concerns will be allayed. As far as I am concerned there is nothing that would prevent an immediate start to the development of this concept so that there will be a high level of certainty about its content long before we get to the ratification stage of the settlement process.

Finally, I am personally committed to the creative and energetic resolution of this crucial issue in a spirit of good faith and mutual respect. In that regard, my own view is that the foundation of mutual respect is an acceptance of the equal legitimacy of the interests and status of both parties by the other.

I hope you find these suggestions helpful. Please contact me at any time if there are any aspects of this letter that you may wish to discuss.

Naku noa na,

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