Chatham Islands Customary Interests Memorandums

April 2018

1. Introduction

This paper comments upon the series of five memoranda prepared by OTS officials dated between 15 January 2018 and 28 January 2018. The stated purpose of the memoranda is to provide a summary of the available evidence of customary interests on Chatham Island but explicitly not to evaluate the relative strength of different types of customary interest.

First, it is apparent that these memoranda were prepared before the March 2018 Ngāti Mutunga o Wharekauri *Cultural Interests and Overlapping Claims Paper* was available. The March paper expanded and clarified an earlier draft that was available to officials before these memoranda. There is a substantial amount of information provided by Ngāti Mutunga o Wharekauri that is not included in the memoranda for reasons that are not clear.

Second, it is disingenuous at least, to say that the summarized information in the memoranda does not seek to evaluate the relative strength of customary interest (of Moriori and Ngāti Mutunga o Wharekauri) in these five particular areas when the Crown has already made such an evaluation. Offers, necessarily based on some sort of evaluation have already been made by the Crown. In the case of Wharekauri/Cape Young, Ocean Mail, Owenga/Awatea and Pitt Island, the Moriori AIP offers all of these areas on an exclusive basis to Moriori. The Moriori AIP reflects a Crown position that, notwithstanding submissions outlining the ubiquitous nature of customary interests in the entirety of the Chathams group, Ngāti Mutunga o Wharekauri interests in those areas are considered to be negligible. It is surely inconceivable that the Crown would offer exclusive rights to one iwi if it held any other view. That such an offer was made reflects a very bad, indeed biased, process employed by the Crown in its settlement negotiations with Ngāti Mutunga o Wharekauri.

It is plain that the Crown has unilaterally decided that certain customary interests such as the many interests that derive from Ngāti Mutunga o Wharekauri mana whenua/ mana moana status are not to be considered within the overlapping claims context and have therefore been omitted from the memoranda. This Crown position cannot exist without the Crown defining what is, or is not, a customary interest and axiomatically establishing a hierarchy between those "officially recognised" interests and those (which for whatever reason) are not recognised. The Crown is not qualified or entitled to make these cultural determinations. On one level, the Crown acknowledges this, hence the explicit denial that the memoranda would seek to evaluate the relative strengths of different types of interests. However, the Moriori AIP contains black and white evidence that the Crown has, in fact, done what it says it ought not to do.

The five memoranda have common introductory sections before summarising information pertaining to particular blocks of land with overlapping claims. This paper confines itself to comment on these generic issues linked to Waitangi Tribunal comments upon the performance of the Native Land Court during its first sitting on Wharekauri in 1870.

2. The Waitangi Tribunal Report and the Native Land Court

Surprisingly and concerningly, the memoranda all contain a common section referring to the Waitangi Tribunal Rekohu Report (WAI 64). This is surprising because we have previously identified some serious deficiencies in that Report, its findings and recommendations and had been assured verbally that those recommendations were not determinative of the outcome of these negotiations. It is concerning because those Tribunal recommendations have no actual relevance to the issue of overlapping claims other than to reflect some sort of Crown predisposition to allocate land on a preferential and exclusive basis to Moriori within the Chathams settlements.

"This memo includes a section on the 1870 hearing of the Native Land Court that resulted in around 97% of the land in the Chathams being awarded to Ngāti Mutunga. The Waitangi Tribunal considered that this award was unjust and a breach of the Treaty of Waitangi, as the criteria set by the Crown prevented all circumstances being taken into account.[1]"

We know that the opinion of the Tribunal was that the outcome of the 1870 Native Land Court hearings in which 97% of land was awarded to Maori owners and 3% to Moriori was unfair. The Treaty of Waitangi reasoning behind this opinion is not at all coherent in the Waitangi Tribunal Report (it is assumed to be self-evident by the ratio 97:3). However, an opinion – even an opinion by the Waitangi Tribunal – is only that. It is not a fact and, in this case, neither is it a conclusion that can it be deduced from the known facts.

The detail relating to particular blocks within the memoranda confirms that all awards of land to Moriori by the Native Land Court in 1870 were made upon the request of Ngāti Mutunga o Wharekauri people in their capacity as representatives of the recognised customary owners of that land. To claim that Moriori should have been awarded more land in 1870 (which presumably would have to have been awarded against the wishes of Ngāti Mutunga o Wharekauri) the Court would need to have recognised that Moriori had customary title to those "additional lands".

The Tribunal criticises the Court for not doing this on the basis that it supposedly did not take into account all of the circumstances it should have. Three of these 'circumstances' are mentioned in the memoranda and are dealt with individually below. Individually and collectively these 'circumstances' do not establish that Moriori were the customary owners of Wharekauri whose lands forests and fisheries were secured and guaranteed by the Treaty of Waitangi.

[1] *Waitangi Tribunal, Rekohu: A Report on Moriori and Ngāti Mutunga Claims in the Chatham Islands (2001), pp 5-7. The circumstances identified by the Tribunal included the ancestral right of Moriori to the land, the return of Chathams Maori to their ancestral homes by the time of the hearing, the Moriori petition for the principles of British justice to be applied in their case, and the question of which group's custom was to be followed by the Court.*

When the Crown agrees with the assertions of the Tribunal above (as it apparently does in the memoranda), it is declaring a Crown position that Ngāti Mutunga o Wharekauri were not the customary landowners of all of Wharekauri when British Sovereignty was first asserted over Wharekauri in 1842 and thereafter and that Ngāti Mutunga o Wharekauri did not hold mana whenua/mana moana over Wharekauri along with the full suite of Article II Treaty rights associated with that status. Any such declaration by the Crown is both historically incorrect and a contemporary grievance.

The three 'circumstances' that the Waitangi Tribunal felt the Native Land Court in 1870 should have 'taken into account' were:

i. Ngati Mutunga had returned to Taranaki by 1870;
ii. Moriori custom was not followed by the Court;
iii. "Higher' principles of British justice should have been applied.

The Tribunal failed to show why, even if the three supposed circumstances had been taken into account (along with all of those that were) how the outcome of the Native Land Court hearing in 1870 would have been different. More importantly, it failed to show that the three 'circumstances' when tied to the known historical facts and the terms of the Treaty of Waitangi constituted a Treaty breach (beyond the imposition of the 'ten owner rule'). It is wholly unsatisfactory for the Crown, in developing acknowledgement and redress proposals to simply assume that the Tribunal had succeeded in an endeavour that it had failed at. Of course, the Crown could construct Treaty arguments of its own seeking to justify its proposed exclusive customary redress to Moriori but it cannot simply refer to the Tribunal or to the three circumstances below as if that argument exists and has been articulated.

2.1. Ngāti Mutunga o Wharekauri had Returned to Taranaki (Abandoned Wharekauri) by 1870

The history of Ngāti Mutunga o Wharekauri provided on pages 1,3 and 4 of the Rekohu Report (actually less than 2 pages of text) is so abbreviated, selective and inaccurate as to be a travesty. No other iwi has had to endure such a shoddy representation of its history from a Tribunal that normally prides itself on the quality of its historical research. The Tribunal summary mainly comprises a one-sided account that collects various pro-Moriori assertions, even those that have been comprehensively disproven or understandably rejected.

One such example is the assertion that Ngāti Mutunga o Wharekauri had abandoned Wharekauri by 1870 and therefore had relinquished all customary land title by that abandonment. This assertion is simply untrue and was dealt with in the Ngāti Mutunga o Wharekauri Special Factors Papers. It is therefore very disappointing that this falsehood should re-appear in the overlapping claims memoranda prepared by the Crown more than a year later.

The fact that some Ngāti Mutunga o Wharekauri people did not return to Wharekauri after their largely unsuccessful and financially ruinous attempts to represent themselves before the Taranaki Compensation Court in no way weakened the control of Ngāti Mutunga o Wharekauri over their Chathams lands. The Tribunal simply states "*Ngati Tama did not*

return to Rekohu." This bald fallacy is contradicted by the numerous Ngāti Mutunga o Wharekauri persons resident on Wharekauri who cherish Ngāti Tama whakapapa.

The ownership of lands on Wharekauri did not preclude the simultaneous customary ownership of lands by Ngāti Mutunga in Taranaki. Not all Ngāti Mutunga went to Wharekauri and many of those who did so were very active in maintaining their connections in Taranaki.

In 1870, Ngāti Mutunga had two separate rohe. The Wharekauri rohe was established in 1835 by conquest, subjugation and continuous occupation that evolved into increasingly deep ancestral connection. The Taranaki rohe was based upon ancestral connection and even though Taranaki iwi, including Ngāti Mutunga, were subject to defeat by Waikato and Maniapoto in the musket wars of the 1820s and 1830s, the victors did not maintain the subsequent subjugation and continuous occupation necessary to extinguish Ngāti Mutunga customary ownership in Taranaki by conquest. Contrary to the narrative of the Waitangi Tribunal, the Taranaki Compensation Court did not award lands in Taranaki to Ngāti Mutunga for political reasons but because particular Ngāti Mutunga could prove to a fundamentally hostile Court that they were the customary owners of lands that had been confiscated unjustly in 1865.

2.2. Which Group's Custom should be followed by the Court?

The question facing the Native Land Court in 1870 was not the red herring mooted by the Tribunal: 'which group's custom should be followed?' but 'who were the customary owners of Wharekauri lands in 1870?'. This is a question of fact about who exercised control and who enjoyed the incidents of land ownership, not a question of custom or philosophy. Quite rightly, the Court found the facts to be that Ngāti Mutunga o Wharekauri were the customary owners of all Wharekauri lands on the basis of conquest, ongoing exercise of control (ringa kaha) and continuous occupation of land since 1835. Moriori were subjugated in 1835 and even though the conditions of that subjugation improved over time, especially after 1842, Ngāti Mutunga o Wharekauri control over land and resources was continuous and comprehensive.

The Waitangi Tribunal and Moriori attempt to deprecate the crucial role of conquest in the establishment of Ngāti Mutunga o Wharekauri rights and interests (secured and guaranteed by the Treaty of Waitangi) on Wharekauri. A considerable time after the event and when it was safe to do so, some Moriori began to propound the idea that Moriori had not been conquered because they had not resisted the invaders and furthermore that the lack of resistance was due solely to the pacifist beliefs of Moriori. First, conquest is achieved through force but does not require resistance for it to be conquest. According to the Shorter Oxford English Dictionary, the word **conquer** means "*acquire, get possession of, attain to…acquire by force of arms, win in war, subjugate (a country etc.) by force.* To **subjugate** means to "*bring (a country, people etc) into subjection, vanquish, subdue,..bring under domination or control; make subservient or dependent.*" A **subject** is "*under the rule or domination of another country, group etc…under the control and influence of, subordinate to*". Moriori claims to customary title to land cannot be sustained by the mere unilateral invention of some retrospective 'game rules' to be applied to the process of subjugation that supposedly have the power to negate the historical fact or outcome of subjugation.

Second, adherence to Nunuku's law was not the reason why Moriori were subjugated by Ngāti Mutunga o Wharekauri. The simple facts are that Ngāti Mutunga o Wharekauri had the will and capacity to impose that subjugation on Moriori; and that Moriori did not have the will and capacity to prevent that imposition. If Moriori had chosen to resist the Ngāti Mutunga o Wharekauri invasion in 1835, the eventual outcome would have been the same but with much larger loss of life on the Moriori side. Moriori had no firearms, no cannon, no military experience in a wide range of combat situations and no realistic plan of attack.

There is no tribe or country in history who thought that their subjugation was fair and just. That did not nullify the unfortunate fact of their subjugation.

The Tribunal saw fit to repeat these two Moriori positions without critical analysis but went further in that it also suggested the extraordinary idea that the only basis for customary ownership of Māori land is ancestral association and that such ownership is somehow immune from the effects of conquest, subjugation enslavement, occupation of the land by others and the assimilation of conquered peoples. This was a radical attempted re-characterisation of Māori culture by the Tribunal that does not stand examination. Certainly, the Native Land Court deserves praise rather than criticism if it did not accept this cultural revisionism when it deliberated on the customary ownership of lands in 1870.

2.3. The Moriori Petition for the "higher principles of British Justice" to be applied in their case

This petition contained a variant of the custom argument above. It pleaded that the Court should have rejected land ownership and control founded (at least to some extent) upon conquest on the grounds that the behaviour necessary to achieve conquest and subjugation are inconsistent with the British notion of fair play. An expectation that Britain would reject the entire notion of conquest as one of the bases for sovereignty and ownership betrays a lack of knowledge of British history and it is not surprising that such a naïve petition failed. The only thing that is surprising is that the Waitangi Tribunal one hundred and thirty years later would take it seriously.

When the Tribunal criticises the Native Land Court in 1870 for not responding to the Moriori petition, it is criticising a Court for not abandoning the statutory framework that it was operating under. This is a grossly unfair criticism of any Court. If such a criticism is to be mounted it should be directed towards the Government who enacted the relevant legislation. Without joining the dots of its argument, perhaps this what the Tribunal meant in its recommendation that there should be a new Maori Land Law developed and enacted for the Chatham Islands. The suggested content of that law was not elaborated by the Tribunal.

There are some very good reasons why that recommendation should be ignored today but the problems with the concept of developing and implementing an alternative Native Land Law are no less formidable if that herculean task is hypothetically projected back in time to the middle of the nineteenth century or ideally, to 1842. First, it assumes that the Crown had the knowledge, inclination and capacity to pass and enforce the alternative law for the Chatham Islands. This was not the case and while it is fair to hold the Crown accountable for actions it might reasonably have taken, the Crown should not have to apologise for things it could not possibly have done.

Second, the intention to pass a law implementing alternative land ownership policies would create a major new caveat in the Treaty of Waitangi. Article II would require amendment so that rights to lands, forests and fisheries were secured and guaranteed *except to the extent that the Crown thought they might have been obtained by conquest (or something similar)*. It is most unlikely that many rangatira would have endorsed this alternative Treaty text in 1840/42. The customary rights secured and guaranteed by the alternative Treaty would not then be defined by a Māori understanding of custom but by a British prescription of custom. The implication of the Waitangi Tribunal recommendation on land law is not that Moriori custom or Ngāti Mutunga o Wharekauri custom would be respected but that something which is neither one thing nor the other be invented and imposed.

It is absurd for the Tribunal to indirectly suggest a theoretical modification to the Treaty of Waitangi that would establish the Crown as the arbiter of Maori custom and which would therefore, in all likelihood, have guaranteed the rejection of that Treaty by Māori if it was presented in that form for signing. It is doubly absurd for the Crown in 2018 to contemplate a Treaty Settlement based upon the unspecified wording of an alternative and hypothetical Treaty to the one we actually have.

3. Conclusion

The three 'circumstances' that the Waitangi Tribunal in WAI 64 criticise the Native Land Court for not taking into account during its 1870 Wharekauri sitting do not withstand critical examination. They comprise:

- a falsehood (that Ngāti Mutunga o Wharekauri abandoned Wharekauri and thereby vacated their customary title);
- a red herring (that the Native Land Court did not follow Moriori custom in its deliberations) and;
- the invention of a parallel universe and alternative Treaty of Waitangi (in which the Crown – not Māori- would determine Māori custom about land ownership and control).

Clearly the Tribunal were in favour of a Treaty of Waitangi Settlement for Moriori that would contain the transfer of more land to Moriori than to Ngāti Mutunga o Wharekauri. Land. However, it failed in its attempts to ground this preference in the Treaty of Waitangi and historical fact. The Tribunal also evaded the reality that the transfer of land on Wharekauri on an exclusive basis to Moriori, inevitably entails the transfer of land in which Ngāti Mutunga o Wharekauri have an undeniable customary and historical interest as the iwi with 183 years of unbroken mana whenua status over all of Wharekauri.

Establishing that Moriori have a historical or ancestral connection to an area does not alter the nature and extent of Ngāti Mutunga o Wharekauri rights to the same area. These rights are to be secured and guaranteed by the Crown, not damaged or even removed by a deeply flawed 'settlement' process. Even if the Crown shares the Tribunal's proclivity to somehow give land to Moriori, that inclination has no relevance at all to the description of overlapping interests. All references to those Tribunal comments should therefore be removed from the overlapping claims memoranda.