

Memorandum

To: Bronwyn Carruthers – Fast Track Panel Chair

From: Matthew Allan / Matthew Hill

Client/Matter: Environmental Protection Authority - 705519 / Dominion Road mixed-use development

Subject: Advice – Ngāti Koheriki Claims Committee

Date: 25 June 2021

1. INTRODUCTION

1.1 We have been asked to consider and comment on the following questions:

- (a) Is Ngāti Koheriki Claims Committee (**NKCC**) a Post-Settlement Governance Entity (**PSGE**)?
- (b) If so, meaning NKCC is a person the Panel must invite comment from, can the Panel do that now?

1.2 We understand that invitations to comment were issued on 25 May 2021 and closed on 16 June 2021.

1.3 The Panel has received comments from Hon Andrew Little, Minister for Treaty of Waitangi Negotiations dated 14 June 2021, which states:

The application site falls within the area of interest of a number of groups that are yet to settle their historical Treaty of Waitangi claims, including Ngāti Koheriki. I understand Ngāti Koheriki may not fit a definition under the COVID-19 Recovery (Fast-track Consenting) Act 2020 that requires the Panel to invite their comment on this application. I therefore request you provide the Ngāti Koheriki Claims Committee with a copy of the application, and invite the Ngāti Koheriki Claims Committee to comment on the application.

2. EXECUTIVE SUMMARY

2.1 We have not been able to identify any evidence that NKCC is a PSGE in terms of the relevant definition in section 7(1) of the COVID-19 Recovery (Fast-track Consenting) Act 2020 (**Act**). Rather, the available evidence indicates that NKCC is only a mandated entity for the purposes of negotiating settlement with the Crown.

- 2.2 There is no settlement legislation for Ngāti Koheriki and no Deed of Settlement. Given the status of negotiations, it is quite possible that no PSGE exists for Ngāti Koheriki.
- 2.3 Despite this, for reasons addressed below, we consider that it may be prudent for the Panel through the EPA to request further information from the Minister responsible for the Māori Crown Relations: Te Arawhiti portfolio as to the status of NKCC and to confirm whether any ratification process has taken place (recognised by the Crown) for a governance entity or PSGE for Ngāti Koheriki, and to provide information concerning the status of NKCC more generally.
- 2.4 In the (unlikely) event that NKCC is a PSGE, or that a PSGE has been established for Ngāti Koheriki, and – as a result – an “omission” in the exercise of the power in clause 17(6) is identified, then section 13 of the Interpretation Act 1991 may open up the possibility of exercising the power in clause 17(6) again on a confined basis to remedy that omission. This possibility is discussed further briefly below.

3. IS NGĀTI KOHERIKI CLAIMS COMMITTEE A PSGE?

Definition of PSGE

- 3.1 Section 7(1) of the Act states that “post-settlement governance entity”:¹
- (a) means a body corporate or the trustees of a trust established by a claimant group for the purposes of receiving redress or participating in arrangements established under a Treaty settlement Act; and
 - (b) includes an entity established to represent a collective or combination of claimant groups

Red Book – Treaty settlement process and establishment of PSGEs

- 3.2 As context for our further discussion below, it is helpful to refer to the Crown’s “Red Book”. As the Supreme Court has noted,² *“the Crown’s general negotiating stance has been set out in what is known as the “Red Book”, a publication to inform Maori about the settlement process”*.³
- 3.3 We note the following matters, drawing on the Red Book:
- (a) As a very broad overview of the negotiation and settlement process, typically, following settlement negotiations and agreement in principle, a Deed of Settlement

¹ We observe in passing that there are inconsistent legislative definitions for PSGEs across different statutes. For example, while the Infrastructure Funding and Financing Act 2020 and Urban Development Act 2020 also refer to “a body corporate or the trustees of a trust established by a claimant group for the purposes of receiving redress”, the Hawke’s Bay Regional Planning Committee Act 2015 defines ‘governance entity’ as “the post-settlement governance entity established by an iwi or a hapū **and approved by the Crown** for the purposes of receiving redress in the settlement of the historical Treaty of Waitangi claims of that iwi or hapū” (emphasis added).

² *New Zealand Māori Council v Attorney-General* [2013] NZSC 6, [2013] 3 NZLR 31, at [99].

³ The full title of the Red Book, the current version of which is dated June 2018, is *Ka tika ā muri, ka tika ā mua: Healing the past, building a future - A Guide to Treaty of Waitangi Claims and Negotiations with the Crown*: <https://www.govt.nz/assets/Documents/OTS/The-Red-Book/The-Red-Book.pdf>.

containing all details of the final settlement of the claim would be entered into, and then ratified by claimant group members. It is at this point that an appropriate governance entity to receive settlement assets would usually be ratified by the claimant group, reviewed by the Crown and accepted. Settlement legislation making the Deed of Settlement operational would then typically be passed. Introduction of settlement legislation normally occurs within six to twelve months of a Deed of Settlement being signed. This process is outlined in the Red Book.⁴

- (b) The Red Book identifies that the “*Deed of Mandate should set out the proposed entity to hold the mandate to receive funding, and the proposed accountability arrangements for managing these funds*”.⁵ However, as the Red Book states:⁶

... deciding on representation and accountability during negotiations is separate from establishing a legal entity to represent members and manage settlement assets. This legal entity is commonly referred to as the post-settlement governance entity.

- (c) The Crown requires that the governance entity be ratified by a claimant group and established as a legal entity by the time the settlement legislation enacting the settlement package is introduced in Parliament.⁷
- (d) Claimants are encouraged to give early consideration to an appropriate governance entity, and to have their governance entity established by the time the legislation implementing the settlement is introduced to Parliament.⁸
- (e) While the definition in section 7(1) of the Act also refers to a “body corporate”, increasingly, claimant groups form private trusts to meet post-settlement objectives, with the Red Book noting:⁹

Based on the experience of claimant groups, it is unlikely that an existing tribal governance entity will meet the needs and purposes of claimant groups following a settlement. Existing entities may not be legal entities, and may also lack transparency or not be representative of the entire claimant group.

- (f) The Crown has also developed a set of principles against which a proposed governance entity will be assessed. The Red Book states that “[i]f the proposed governance entity is consistent with these principles – which are normally included in the Deed of Settlement – the Crown is able to transfer settlement assets to the claimant group, once any settlement legislation is enacted”.¹⁰

⁴ E.g. Red Book, pages 31 and 55.

⁵ Red Book, page 44.

⁶ Ibid.

⁷ Red Book, page 55.

⁸ Red Book, pages 67-68.

⁹ Red Book, page 67.

¹⁰ Red Book, page 67.

- (g) Following on from this, the Crown must have had the opportunity to assess the proposed governance entity against its principles before the wider claimant group membership is asked to ratify the entity.¹¹

Status of NKCC

- 3.4 The official New Zealand Government Treaty settlements website generally contains all documents currently available in relation to specific settlements.¹² For Ngāti Koheriki, the website contains a letter dated 26 June 2013 from the Ministers for Treaty of Waitangi Negotiations and the Minister of Māori Affairs to the NKCC's negotiator (**Mandate Letter**) which states:¹³

... we are pleased to recognise the mandate of Ngāti Koheriki Claims Committee to represent Ngāti Koheriki in negotiations with the Crown for the settlement of all outstanding historic Treaty claims. This is on the condition that any issues raised by submitters regarding the deed of mandate are addressed to the satisfaction of the Crown.

- 3.5 The Mandate Letter confirms that the Crown has recognised NKCC as the mandated entity for Treaty settlement negotiations. As one would expect, the Mandate Letter does not address post-settlement governance matters.
- 3.6 We have not been able to locate the Deed of Mandate or any detailed information about NKCC. NKCC is not registered on the Companies Register, the Incorporated Societies Register or the Charitable Trusts Register.
- 3.7 There is no settlement legislation for Ngāti Koheriki and no Deed of Settlement. The official New Zealand Government Treaty settlements website for Ngāti Koheriki states:¹⁴

Claim not settled at this time. No settlement documents available.

- 3.8 The letter received by the Panel from Hon Andrew Little (quoted above) essentially reaffirms that this is the case.
- 3.9 Having reviewed a number of sources (including those reviewed already by EPA officers), we have not been able to identify any evidence that NKCC has subsequently been put forward by Ngāti Koheriki, and accepted by the Crown, as a PSGE for receiving redress / assets (as defined above). Rather, the available evidence indicates that NKCC is only a mandated entity for the purposes of negotiating settlement with the Crown.
- 3.10 Given the status of negotiations with Ngāti Koheriki, with no Deed of Settlement entered into, we consider that it is quite possible that no PSGE exists. We also observe that the PSGE established to receive redress / assets for Ngāti Koheriki, when a settlement is reached, is most likely to be a new governance entity, which satisfies all Crown principles (i.e. not NKCC itself): refer to paragraph 3.3(e) above.

¹¹ Red Book, page 69.

¹² <https://www.govt.nz/browse/history-culture-and-heritage/treaty-settlements/>

¹³ 'Crown Recognition of Mandate', Letter from the Office of Hon Christopher Finlayson, Minister for Treaty of Waitangi Negotiations and Minister of Māori Affairs to Kiwi Johnson, Negotiator for Ngāti Koheriki Claims Committee dated 26 June 2013.

¹⁴ <https://www.govt.nz/browse/history-culture-and-heritage/treaty-settlements/find-a-treaty-settlement/ngati-koheriki/>

- 3.11 Having noted the above matters, it is possible (consistent with the Red Book's encouragement referred to at paragraph 3.3(d) above) that some work on establishing a PSGE has been commenced by Ngāti Koheriki. We cannot rule this out, and observe that it is difficult to confirm the position definitively solely based on information in the public domain (e.g. given PSGEs are often private trusts, as noted above).
- 3.12 Although, as noted above, we have not located any documentation to suggest that a ratification process has taken place and subsequently been approved by the Crown, it may be prudent for the Panel through the EPA to request further information from the relevant Minister confirming that no ratification process has taken place (recognised by the Crown) for a governance entity or PSGE for Ngāti Koheriki. The Minister responsible for the Māori Crown Relations: Te Arawhiti portfolio should have current information concerning any such PSGE, and concerning the status of NKCC more generally.

4. IF THE NGĀTI KOHERIKI CLAIMS COMMITTEE IS A PSGE, CAN THE PANEL NOW INVITE COMMENT FROM IT?

- 4.1 Clause 17(6) and (8) of Schedule 6 to the Act address, respectively, persons that “must” or “may” be invited to comment on a referred project.
- 4.2 Your questions are directed at clause 17(6)(c) relating to Treaty settlement entities relevant to the referred project. Section 7(1) of the Act relevantly defines “Treaty settlement entity” as including a PSGE.
- 4.3 As noted, we consider that NKCC is unlikely to be a PSGE, and therefore is unlikely to fit within this aspect of the definition of “Treaty settlement entity”, and therefore we have considered your second question only briefly at this point.
- 4.4 On the face of the Act, the requirement in clause 17 to invite comment from prescribed parties is a power that can only be exercised once.
- 4.5 However, section 13 of the Interpretation Act 1999 may provide a possible remedy, should the Panel decide to follow the suggestion in paragraph 3.12 above of seeking further information from the Crown, **and** in the (unlikely) event that the Crown provides information either confirming that NKCC is a PSGE, or confirming that a PSGE has in fact been formed for Ngāti Koheriki.
- 4.6 Section 13 of the Interpretation Act 1991 provides as follows:

Power to correct errors

The power to make an appointment or do any other act or thing may be exercised to correct an error or omission in a previous exercise of the power even though the power is not generally capable of being exercised more than once.

4.7 We acknowledge that the power in section 13 is intended to be narrow in scope, as Potter J observed in *Ellipse Institute Ltd v New Zealand Qualifications Authority*.¹⁵

... it is clear that s 13 was intended to have a narrow scope and should not be applied in situations where it would result in a change of decision would cause significant hardship to the plaintiff or applicant. The decisions of the courts are heavily dependent on the factual and statutory context. ...

4.8 However, in the unlikely event that an “omission” in the exercise of the power in clause 17(6) is identified, then section 13 opens up the possibility of exercising the power in clause 17(6) again on a confined basis to remedy that omission.

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¹⁵ [2012] NZHC 2083, [2012] NZAR 871, at [63].