EVIDENCE Patuharakeke te Iwi Trust Board.
TOPIC PC 113
SUB# One. the Resource Management Act
DATE 18 November 2013.

**IN THE MATTER OF**

**AND** an application to for Private Plan Change (PC 113)

**BY** **THE WHANGAREI RACING CLUB**

Applicant

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**SUBMISSIONS ON BEHALF OF PATUHARAKEKE TE IWI TRUST BOARD**

**DATED 18 NOVEMBER 2013**

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## 1. Introduction

1.1 These submissions address the matters raised in the Memorandum of the Chair of the Hearings Panel, dated 5 November 2013, in relation to the legal opinion provided by Mr Mathias and any procedural issues arising out of that legal opinion.

1.2 It is submitted that direct reference to the issue of section 27B of the State Owned Enterprise Act 1986 was not raised in the original submission of Patuharakeke Te Iwi Trust Board ("PTB") or the Cultural Effects Assessment. However, the issue was raised at the pre-hearing meeting on 31 July 2013, as indicated in the Section 42A Hearing Report of Ms Heather McNeil.

1.3 The Treaty Claim of Patuharakeke was first filed with the Tribunal in 1998 by Ms Luana Pirihi and Amended in 2011. Both documents at the time of filing form part of the Northland – Te Paparahi o Te Raki Record of Inquiry and are accessible from the Waitangi Tribunal.

1.4 A significant issue for PTB in relation to the Private Plan Change (PC 113) is that the matter of the 27B Memorials (as noted on the Certificate of Title of the Whangarei Racing Club site and several other properties) is extant before the Waitangi Tribunal and our instructions are to pursue remedies in relation to all memorialised lands within the Patuahrakeke rohe.

1.5 It is submitted that the proposal for PC113 will render the land irretrievable for Patuharakeke if it is successful in any remedies application or treaty settlement. Further, the issue of irretrievability poses a threat to the rights afforded to Patuharakeke under articles 2 and 3 of Te Tiriti and the principles of self-determination and the right to development and the right of redress for past breaches[1]. To that

[1] Dr Janine Hayward. Rangahaua Whanui National Overview Report, p.475-494.

extent Part 2 of the Resource Management Act 1991 ("RMA") does become an integral consideration of this proposal and in particular sections 6, 7 and 8 of the RMA.

## 2. State Owned Enterprise Act 1986, Section 27B Framework

2.1 The State Owned Enterprises Act 1986 (the "SOE Act") was enacted to allow government to create State Owned Enterprises ("SOE"). Section 9 of the SOE Act, provides that nothing in the Act permits the Crown to act in a manner that is inconsistent with the principles of the Treaty of Waitangi.

2.2 The core issue of the case that dealt with this issue, *New Zealand Maori Council v Attorney General (1987)* ("the Lands Case") was that land owned by the Crown, but transferred to SOEs, would no longer be available to settle Treaty claims. It was argued that the establishment of, and transferring of land to SOEs, without ensuring that land remained available for future Treaty settlements, was inconsistent with the principles of the Treaty, and therefore breached section 9 of the Act.

2.3 The Court of Appeal agreed and held that the Crown was obliged to administer the Act so that Maori Treaty claims to land transferred to SOEs were protected.[2]

2.4 Following the Lands Case decision, the Crown and Maori agreed to a mechanism that allows the Crown to transfer land to SOEs, while also ensuring that land would remain available for future Treaty settlements. Any land transferred to SOEs would have a "memorial" placed on the certificate of title, meaning that it could be compulsorily repurchased by the Crown if the Waitangi Tribunal recommended its return to Maori.

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[2] New Zealand Maori Council v Attorney General [1987] 1 NZLR 719.

## 3. Section 27B memorials

3.1 The titles for land transferred by the Crown to SOEs include a notation that advises that the land is subject to section 27B of the Act. As required by section 27A of the Act, that notation reads:

> *Subject to section 27B State-Owned Enterprises Act 1986 (which provides for the resumption of land on the recommendation of the Waitangi Tribunal and which does not provide for third parties, such as the owner of the land, to be heard in relation to the making of any such recommendation).*

3.2 The same notation appears on the current Certificate of Title (NA139A/702) to which this proposal for PC113 is the subject of.

3.3 Section 27B of the SOE Act provides that all land transferred to SOEs under the Act must be compulsorily acquired by the Crown and returned to claimants in the event that the Waitangi Tribunal makes a binding recommendation to that effect under section 8A of the Treaty of Waitangi Act 1975. The Tribunal is able to make such a recommendation if it finds that:

a) a claim is well founded; and

b) in all the circumstances of the case, the compensation to the claimant should include the return to Maori ownership of the whole or part of that land, or interest in land.[3]

3.4 The Tribunal is able to make a binding recommendation for the resumption regardless of whether the land is still owned by the SOE, or has been on-sold to a third party.

## 4. The Context

4.1 Within the rohe (area of in which Patuharakeke holds mana whenua) the number of Crown properties available for settlement within the Crown landbank numbers only some 28 hectares in the Ruakaka and Waipu area. Further, the number of properties that have 27B memorials number in the region of over 300 however of this number no more than 30 are commercial/industrial properties.

4.2 The Waitangi Tribunal is yet to make binding recommendations in relation to memorialised residential properties therefore it is likely that the pool of properties available for settlement for Patuharakeke is small. This makes it even more important that Patuharakeke pursue remedial opportunities where they exist.

4.3 In order to provide further context, evidence presented before the Waitangi Tribunal in October indicated that within the Whangarei District alone, of the 172,000 hectares originally in Maori ownership only 11,200 remained by 1908.

4.4 For Patuharakeke between the years 1845 – 1856 some 67,000 acres were transferred into Crown ownership. In relation to the Ruakaka block containing some 14,000 acres the price paid to the "first to come forward" was 6 ½ pence per acre and no reserves were set aside.

4.5 Other issues raised included whether those that had come forward first had authority to sell, whether the Crown had properly surveyed the block and the failure to provide for 10% promises.

4.6 Extensive evidence has been presented by Patuharakeke (Brief of Evidence of Luana Pirihi attached at Appendix A), other related claimants and Researchers Commissioned by the Crown Forestry

Rental Trust in relation to the above mentioned issues. In addition to that the Crown has conceded that Whangarei Hapu were left 'landless' and the Crpwn's failure to endure that they retained sufficient land for their present and future needs was a breach of Te Tiriti or Waitangi/The Treaty of Waitangi and its principles.[3]

*Remedies Applications*

4.7 As outlined in the evidence of Ms Ani Pitman, it is the intention of Patuharakeke to now pursue with urgency a remedies application in relation to all Crown owned lands within the area that it has made claim to. The remedies application will undoubtedly include all properties that have section 27B memorials on the titles.

4.8 In the case of *Haronga v Waitangi Tribunal and Ors* [2011] the majority decision of the Supreme Court affirmed the position that a party prejudiced by wrongful alienation of land has a right to be heard on the remedy of resumption. Moreover, it stated,

> *It would not be in the spirit of the legislation or its policy of providing greater security to Maori claimants in obtaining return of land to treat the loss of opportunity as irrelevant.*[4]

4.9 The Waitangi Tribunal that heard the *Turangi Township Remedies* application in 1997 was the first Tribunal to make binding recommendations on the Crown in relation to memorialised properties. In essence the Turangi Township Tribunal summed up the approach taken to reaching its decision on whether binding recommendations should be made as follows:

> *A restorative approach to remedies is appropriate. This should include facilitating the restoration, to an extent reasonably*

[3] Crown Statement of Position and Concessions, p. 1.
[4] Haronga v Waitangi Tribunal and Ors [2011] NZSC 53, para 105.

*possible, of the rangatiratanga and hence the mana of Turangitukua. While the Crown cannot restore rangatiratanga in the abstract, resources can be restored to the hapu that enable it to exercise rangatiratanga. The return of land is an essential component of the restoration of rangatiratanga. A policy of restoration should attempt to assure the hapu's continued presence on the land, the recovery of its status in the district and the recognition of its tribal authority. Thus, where the place of a hapu has been wrongly diminished, an appropriate response is to ask what is necessary to re-establish it.*[5]

4.10 The Tribunal ruled that a higher standard of proof was not required, and that the Tribunal will follow a common sense principle that greater care should be taken in considering more serious issues, stating that:

*When the Tribunal is considering whether or not, as part of its recommendation under s 6, [of the Treaty of Waitangi Act 1975], to make a binding recommendation for the return to Maori of memorialised land, it will be concerned with 'a whole range of circumstances' which it will need to weigh. Clearly, the consequences of such a recommendation would need to be given serious consideration given its effect on the Crown.*[6]

4.11 Although the Tribunal made binding recommendations for the return of certain memorialised properties, it declined to make binding recommendations for the return of memorialised residential properties, as there were sufficient commercial properties available in the possession of Crown agencies that could be returned.[6]

4.12 It is submitted that in relation to Plan Change 113, the fact that the proposal includes varying development including residential

[5] The Turangi Township Remedies Report, Chapter 5, pg 77.
[6] Ibid, p.5.

development, exacerbates the urgency in which Patuharakeke must deal with its remedies application. This proposal has the potential to further alienate Patuharakeke of more land and removes the ability for them to determine how they envisage the land to be utilised. In Treaty jurisprudence this falls within the realm of Articles 2 and 3 rights to tribal self-determination and the right to development (development of the people and the resources within their control).

*Ngati Kahu Remedies Application*

4.13 In the most recent case to deal with a remedies application, the Ngati Kahu Remedies Application, the Waitangi Tribunal affirmed the fundamental underpinnings of remedies to be *"for the purpose and with the intent of restoring not only the well-being of the group that has been prejudiced but also the relationship with the Crown."*[7] The Waitangi Tribunal in that particular case was unable to make binding recommendations in favour of Ngati Kahu alone due to cross claims of the other 5 iwi that were settling with the Crown. However, recommendations were made that effectively meant that resumable commercial properties became part of the settlement package of all 5 iwi that were settling with the Crown as part of the Te Hiku Agreement.

4.14 Therefore, while the memorialised properties did not feature in binding recommendations, some of the commercial properties did form part of the overall settlement package.

4.15 It is submitted that how the land is dealt with in a Treaty settlement context by the Crown is quite different to how the Waitangi Tribunal assesses the land. Therefore, while the Waitangi Tribunal cannot consider improvements made to the property after the property is

[7] The Ngati Kahu Remedies Report, p. 98.

transferred, the value of the property is a significant factor in determining settlement amounts.

4.16 In terms of settlement negotiations with the Crown, most commercial redress properties offered by the Crown must be purchased by the particular claimant group using cash that the Crown provides in settlement of Treaty claims. Accordingly, claimant groups are limited to purchasing properties up to the value of their cash settlement amount.

4.17 It is submitted that with land values increasing particularly in this area, it will be very difficult for Patuharakeke to purchase commercial properties. Further, if a proposal of this scale is approved it will likely create a situation where the land is irretrievable for Patuharakeke.

4.18 The memorialised properties in this area provide an opportunity for Patuharakeke to recover a small portion of the land that was obtained by the Crown. The protection mechanism exists for the reasons given in the various inquiries that have dealt with Treaty claims, fundamentally to restore the hapu to the position that it was in prior to the land being transferred to the Crown.

4.19 Counsel implores this hearing panel to adopt the recommendation set out at paragraph 9.1 of Ms Pitman's evidence, that in the interests of due process and for the reasons set out above that this Hearing Panel await the outcome of any Treaty Settlement and/or hearing before progressing the consent of this plan change.

**Prue Kapua/Kelly Dixon**

**Counsel for Patuharakeke Te Iwi Trust Board**