



WAKATŪ

INCORPORATION

Submission to the Universal Periodic Review of New Zealand 2024

October 2023

Introduction

1. This report is prepared by Wakatū Incorporation (Wakatū), a Māori-owned organisation established in 1977 to administer the remnants of the Nelson Tenth Reserves land located at the top of the South Island of Aotearoa/New Zealand.
2. Wakatū is supporting the plaintiff Kaumātua Rore Stafford, who is acting on behalf of the customary Māori owners of land in the Nelson area (Nelson, Tasman and Golden Bay), with respect to the 2017 Supreme Court decision, *Proprietors of Wakatū v Attorney-General*.¹
3. The human rights of the Māori customary owners, with respect to their lands, and the trust established by the Crown in the 1840s to protect and reserve those lands was recognised by the Supreme Court of New Zealand in its 2017 decision in *Proprietors of Wakatū and Others v Attorney General*.
4. In the Supreme Court decision, a majority of the Court (4-1) determined that the Crown owes legally enforceable duties, as fiduciary, to the Māori customary owners to:
 - a. reserve 15,100 acres of land in Nelson (land known as the Nelson Tenth Reserves); and
 - b. protect those culturally significant lands of the customary owners, which includes their villages and homes (papakāinga); sacred places, burial sites (urupā) and cultivation lands.
5. As part of its decision, the Supreme Court directed the parties back to the High Court to determine the extent of the Crown's breaches, the remedies that are available, and to consider any available Crown defences.
6. The Supreme Court decision established the Crown's legal duties to the customary owners, with respect the Nelson Tenth Reserves trust.

¹ *Proprietors of Wakatū v Attorney-General* [2017] NZSC 17 [28 February 2017] at [153].

7. As a result of the 2017 Supreme Court decision, the New Zealand government has a legal duty to ensure it meets its obligations as set out in the Court's decision. It has yet to fulfil its obligations.
8. Since the 2017 Supreme Court decision, the customary owners have sought meaningful engagement with the New Zealand government in order to resolve this matter and in particular in order to hold the government to account in relation to its legal and fiduciary duties, and in order to recognise and protect the human rights of the customary owners. This has not happened. There has been no meaningful engagement with the customary owners since the 2017 Supreme Court decision. Instead the New Zealand government has engaged in protracted, aggressive and, in our view, unnecessary litigation in an attempt to prolong proceedings.
9. This has led to on-going breaches of the Māori customary owners' human rights as is detailed below, and particularly relates to their rights to use and access their lands and traditional territories, including food, sea gathering and harvesting places; rights to redress; rights to take part in cultural life; and the right to self-determination.
10. This report outlines the New Zealand Government's ongoing violations of the human rights of the Māori customary owners, with respect to their ancestral and trust land within their traditional rohe (area). While these violations are best considered under the UN Declaration on the Rights of Indigenous Peoples (the Declaration), they also directly engage human rights protected under the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), and the New Zealand Bill of Rights Act 1990 (NZBORA).

Background

11. In 1845, the Crown established a legal trust in Nelson, Aotearoa/New Zealand, which reserved and protected specific lands belonging to the Māori customary owners in Nelson, Tasman and Golden Bay. The Crown, as trustee, took on significant legal and fiduciary duties in relation to these lands, which were recognised in the Crown Grant 1845, and subsequently confirmed by the Supreme Court in 2017.
12. As outlined above and in the Supreme Court decision, the trust required the Crown to reserve 15,000 acres of land (known as the Nelson Tenths Reserves) and in addition protect the ancestral and cultural lands of the customary owners from colonial settlement. The Crown Trustee failed to fulfil the terms of the trust. Rather than setting aside 15,100 acres, the Crown reserved less than 3,000 acres of land (less than 20% of the agreed Tenths). The Māori customary owners have been fighting to have their land returned for close to 180 years.
13. Over 14 years ago, and after the New Zealand Government had refused to consider their claim in the Waitangi Tribunal, the claimants instead brought the case before the High Court as a breach of trust case according to private law principles and in particular trust law. The Crown opposed the case at all levels of the proceedings, eventually losing its case in the Supreme Court.
14. Since then, all attempts at commencing out of court negotiations with the New Zealand Government to settle this matter and to ensure that the New Zealand Government recognises its legal obligations have been unsuccessful. Furthermore, despite the Supreme Court's ruling, since 2017 the New Zealand Government has attempted to sell or dispose of further land within the Nelson area, which the customary owners argue is subject to the trust and ought to be returned to them. Further legal proceedings against the New Zealand Government have therefore been

required in order to address the conduct of the government.

15. As of October 2023, the case is back before the High Court to determine the extent of the Crown's breaches, any remedies and any available Crown defences. As part of its budget allocation, the government continues to dedicate significant funding as part of its multi-year budgets (approximately \$5 million) to defend the proceedings.

Breaches of human rights related to the Nelson Tenth's Reserves that are relevant to this matter

The right to land, territories and resources:

16. Articles 25, 26, 27, and 28 of the Declaration recognise and protect the rights of Indigenous peoples to their lands, territories, and resources. These include Indigenous peoples' rights to use, own, control, develop, and maintain and strengthen their spiritual relationship with lands which they traditionally owned or otherwise occupied, used, or acquired. These provisions seek to address a long history of illegal and unjust possession of Indigenous peoples' lands, territories and resources, by States and private actors.
17. The Māori customary landowners of the Nelson area agreed to the peaceful settlement of Nelson by colonial settlers on the condition that their homes, villages and sacred places would be protected from settlement, and that one-tenth (15,1000 acres) of the Nelson settlement, which amounted to 151,000 acres of land, would be reserved for its Māori owners in perpetuity.
18. In failing to set aside this land and associated cultural lands for the Māori customary owners, the Crown has deprived them of their legal ownership of these lands since 1845, and all of the cultural, social and economic rights and interests associated with that land and water.
19. As a result, the Māori customary owners have been prevented from accessing, developing, controlling, and maintaining and strengthening their cultural connection, identity and relationships with these lands for over 180 years.
20. This land dispossession period is significant and has compounded the social, cultural, and economic loss suffered by the Māori customary landowners, leading to widespread land loss, cultural disconnection, poverty and hardship. Many of the families and descendants of the customary owners have been forced to leave their ancestral lands as a result of these breaches of human rights, which the New Zealand government has actively enabled over many years. These breaches have been compounded by the more recent actions of the New Zealand government, whereby they have refused to engage proactively with the Māori customary owners to fulfil their duties as set out by the Supreme Court, and instead have engaged in protracted litigation.
21. The Crown's actions, as outlined above, amount to a significant deprivation of the rights of the Māori customary owners to their lands, territories, and resources, in violation of articles 25, 26, and 27 of the Declaration.

The right to redress

22. Article 28 of the Declaration recognises and protects Indigenous peoples' right to redress, by means that may include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have

traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent.

23. In the period since the 1845 Crown Grant and establishment of the trust, the Crown has failed to provide appropriate redress, by means of restitution or equitable compensation, for failing to reserve the entire 15,100 acres and cultural lands for the Māori customary owners, and the losses resulting from the inability of the owners to access, use, develop and relate culturally to these lands. This is a clear violation of article 28 of the Declaration.
24. Despite the Supreme Court's 2017 ruling, the New Zealand Government continues to oppose the provision of redress, instead choosing to proceed with prolonged and costly litigation. This was demonstrated in the Attorney-General's (on behalf of the New Zealand Government) opening submissions to the High Court in September 2023, where it stated:

"The defendant will argue that not only is no land currently held on any trust (of any kind) for the plaintiff, but that the evidence is insufficient to establish breaches of the more general fiduciary the Supreme Court found to have existed... and it is now too late to do justice: the claims are time barred and barred by laches and acquiescence."; and

"The Crown continues to back its Treaty settlement process as the appropriate means of resolving the issues the subject of this case, and in order to do so in light of the private law duties found to exist, will fully test the application of the remaining steps in the private law process that were initiated by the Supreme Court decision."

25. Such action is inconsistent with the purpose of article 28, and until the Crown provides redress to the Māori customary owners as is required by the Declaration, it will remain in violation of this article. The New Zealand Government should cooperate in good faith with the customary Māori owners to negotiate a principled solution that honors the Supreme Court decision and the rule of law.

The right to take part in cultural life

26. The right to take part in cultural life is recognised under article 27 of ICCPR and article 15 of ICESCR. Similarly, section 20 of the NZBORA recognises the rights of ethnic minorities (which includes Māori) not to be denied the right to enjoy their culture. The Declaration also offers several provisions in protection of the cultural rights of indigenous peoples, including articles 11, 12, and 13.
27. The historical and ongoing alienation of the Māori customary owners from their significant cultural and ancestral lands, as a consequence of the Crown's failure to reserve these lands, has prevented them from expressing their culture, which is inherently linked to the land and waterways.
28. Included in the cultural lands the Crown was required to have reserved for the Māori customary owners, but did not, were lands used for papakainga (settlements), cultivations, urupā (burial grounds), and other wāhi tapu (sacred lands) - each of specific and interrelated importance to the cultural practices, traditions, and overall life of Māori. Dispossession from these lands has resulted in an intergenerational obstruction of core institutions of cultural life for the Māori customary owners, including the loss of language, and other protocols (tikanga) associated with Te Ao Māori (the Māori world).

29. Accordingly, the Crown's failure to reserve the agreed cultural lands for the Māori customary owners has resulted in a long period of dispossession that has denied these owners the ability to exercise and strengthen core aspects of their cultural identity and life. This is in breach of the right to cultural life, to minority rights not to be denied the enjoyment of culture, and cultural rights protected under the Declaration.

The right to self-determination

30. Articles 3, 4, 5, and 26 of the Declaration affirm Indigenous peoples' rights to self-determination, including recognition and protection of their customary land tenure systems based on the collective ownership of lands, territories and resources. Articles 1 of both the ICCPR and ICESCR recognise and protect the right to self-determination.
31. Without access to their lands, territories and resources, the Māori customary owners have been unable to express and exercise self-determination or shape their own lives, destiny and identity according to their values, norms, legal and political systems. Alienation from the land meant that many were forced to move away from Te Taihū (Northern South Island) to other areas of New Zealand, losing connection not just with the whenua (land), but also with whakapapa (genealogy) and with one another.

Recommendations

Wakatū provides the following recommendations for the Human Rights Council's Universal Periodic Review of Aotearoa New Zealand:

32. **THAT** the Council recognise the human rights breaches that have occurred and continue to occur as a result of the New Zealand's Government failure to uphold the terms of the trust established by the Crown Grant 1845, and confirmed by the 2017 Supreme Court decision, and that the Council condemns the actions of the New Zealand Government in this respect;
33. **THAT** the New Zealand Government recognises its legal duties as determined by the Supreme Court of New Zealand in 2017;
34. **THAT** the New Zealand Government recognises the Māori customary owners' right to redress, and as is consistent with the Supreme Court's 2017 decision works directly with the Māori customary owners to negotiate a principled, fair and robust solution that includes the return of lands or, where this is not possible, compensation for losses;
35. **THAT** the New Zealand Government recognises the Māori customary owners' right to take part in cultural life and that this is intrinsically linked to their ownership and use of their cultural and ancestral lands and, on this basis, the New Zealand Government is required to return the cultural lands in question to the ownership of the Māori customary owners in order to fulfil its duties as determined by the Supreme Court.