BEFORE THE WAITANGI TRIBUNAL WAI 2666

IN THE MATTER OF	The Treaty of Waitangi Act 1975
AND	
IN THE MATTER OF	A claim by Haydn Thomas Edmonds on behalf of the Ngātiwai Trust Board and the iwi of Ngātiwai

MEMORANDUM OF COUNSEL FOR THE CROWN IN RESPONSE TO AN APPLICATION FOR AN URGENT HEARING

6 October 2017

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MAY IT PLEASE THE TRIBUNAL:

BACKGROUND

1. On 24 July 2017 the applicant filed an application for an urgent inquiry[1] together with a Statement of Claim.[2]

2. On 24 August 2017 the Deputy Chairperson of the Waitangi Tribunal issued a memorandum-directions directing:

   2.1 the registration of the claim and summarising the alleged breaches of the principles of the Treaty of Waitangi asserted by the applicant as well as the relief sought by the applicant;[3] and

   2.2 that the Crown and interested parties respond to the application for an urgent hearing by Thursday 7 September 2017.[4]

3. An extension of time for the Crown to file its response to the application for an urgent hearing was granted by the Tribunal on 8 September 2017.[5] A further short extension was sought on 28 September owing to the unavailability of Crown officials to finalise the Crown's response and evidence.

SUMMARY OF CROWN'S POSITION

4. The Crown opposes the grant of urgency. The process the Crown has followed in dealing with overlapping claims that arise through negotiating each of the Pare Hauraki Collective, the Marutūāhu Collective and the individual Iwi of Hauraki settlements (collectively, the **Hauraki and Marutūāhu settlements**) has been fair, robust, in accordance with its overlapping claims process and is Treaty compliant.

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1 Wai 2666, #3.1.1

2 Wai 2666, #1.1.1. While the application refers to five affidavits being filed in support of the application,[2] the Tribunal registry advises that no evidence was filed with the application.[2] (Per telephone conversation between Vicky McDowell, Legal Secretary for the Crown Law Office, and Helayna Seiuli of the Waitangi Tribunal on 26 September 2017.) Crown Counsel understand however that Counsel for the Hauraki Collective was served copies of the affidavits referred to on 24 July by email, and that that email included the Waitangi Tribunal registrar and Jason Gough of Crown Law as addresses. Mr Gough does not have those emails in his inbox. Please refer to paragraph 23 for details of proper service on the Crown.

3 Wai 2666, #2.1.1

4 Wai 2666, #2.5.1

5 See email from Registrar dated 8 September 2017

5. Throughout negotiations between the Crown and the Hauraki and Marutūāhu iwi, the Crown has been mindful of, and acted in accordance with, its overlapping claims policy. This has included engagement with Ngātiwai in relation to proposed settlement redress that is either within the Ngātiwai area of interest attached to their Deed of Mandate or which Crown officials have anticipated may be of concern to Ngātiwai. Details of this engagement, together with discussion of the Crown's overlapping claims policy, are set out in Leah Campbell's affidavit, filed with this memorandum.

6. Despite attempts by both the Crown negotiators and iwi negotiators for the settling groups to resolve matters of dispute, Ngātiwai has not been satisfied with the decisions made and have consequently commenced this proceeding. Disagreement among iwi over Treaty settlements is often a source of ongoing dispute. However the Crown can only do so much to try to assist with the resolution of disputes among settlement groups and other groups. Ultimately, the Crown may have to make decisions on the content of Treaty settlements, fair in terms of process and reasonable in terms of substance, that groups are unhappy with. This alone is not sufficient to justify an urgent hearing.

CRITERIA FOR URGENCY

7. The Tribunal will grant an urgent hearing only in exceptional cases and where it is satisfied that adequate grounds for urgency have been made out. Applicants need to establish that there is an exceptional case that warrants the diversion of the Tribunal's resources from the Tribunal's other inquiries and priorities to conduct an urgent inquiry into their claims.[6] The Crown submits that this is not an exceptional case warranting the diversion of the Tribunal's resources.

8. The criteria the Tribunal will consider in determining whether to grant an urgency application are set out at paragraph 2.5 of the *Guide to the Practice and Procedure of the Waitangi Tribunal* of May 2012. We set these criteria out in Appendix 1.

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6 Guide to the Practice and Procedure of the Waitangi Tribunal (May 2012) at [2.5(1)].

9. The applicant has not provided any information as to how these urgency criteria apply to each of the various Treaty settlements or redress deeds from which prejudice is said to arise. The applicant appears to treat all Hauraki iwi Treaty negotiations as having been the same. This is not accurate. In order to respond to the applicant's claim, for example, that there is no alternative remedy available to it in order to avoid what is claimed to be a significant and irreversible prejudice arising from any given settlement, the applicant must provide details specific to each relevant settlement. The applicant has not done so.

THE CLAIM AND APPLICATION FOR URGENCY

10. The applicant's claim and application for urgency concern Ngātiwai's dissatisfaction with the outcome of engagement with them in relation to the Treaty settlement negotiations between the Crown and iwi of Hauraki.

11. The applicant seeks the following recommendations:[7]

    11.1 that the Crown not sign the Pare Hauraki Collective Redress Deed;

    11.2 that the Crown not take any steps to give effect to the Ngāi Tai ki Tāmaki Deed of Settlement; and

    11.3 that the Crown not take any steps to provide the redress described in the claim to the Marutūāhu Collective and/or Hauraki iwi.

12. The applicant asserts that should the redress they have identified be granted to the various iwi collectives or individual iwi as presently provided for in the respective draft settlement deeds or redress deeds, Ngātiwai will suffer significant and irreversible prejudice and that there is no alternative remedy available to them to prevent the suffering of this prejudice. Counsel are instructed that Ngātiwai wrote to the Minister after filing this application suggesting a tikanga based process to resolve the issues the subject of this application.

13. The applicant asserts the Crown's actions have been in breach of tikanga and the principles of the Treaty of Waitangi.[8]

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7 Wai 2666, #3.1.1 at [2]

CROWN RESPONSE

14. In relation to the Ngāi Tai ki Tāmaki Deed of Settlement, the Ngāi Tai ki Tāmaki Claims Settlement Bill was introduced to the House of Representatives on 9 August 2017. It had its first reading on 16 August and has been referred to select committee. The matters raised by the applicant in relation to the Ngāi Tai ki Tāmaki settlement are therefore currently non-justiciable.

15. In relation to remaining matters the Crown denies that Ngātiwai will suffer significant and irreversible prejudice should the Hauraki and Marutūāhu settlements proceed.

16. Counsel submit that despite the efforts of the Crown and the various settlement groups to resolve matters, the applicant is not satisfied with the outcome of the overlapping claims process.

17. There is some level of overlap in most Treaty settlements. Neither the mere fact of overlap, nor a claimant's unhappiness with the outcome of an overlapping claims process, is sufficient to amount to significant and irreversible prejudice. Rather, what is important is that the Crown follows its overlapping claims policy as relevant to particular circumstances and, where necessary, makes decisions that are fair in terms of process and reasonable in terms of substance.

18. In terms of process:

    18.1 Details of the Crown's overlapping claims policy and how it has been followed throughout negotiations with Hauraki iwi is set out in the Campbell affidavit. This included engagement with Ngātiwai in relation to proposed settlement redress that appears to overlap with the Ngātiwai rohe or which Crown officials have anticipated may otherwise be of concern to Ngātiwai.

    18.2 The Crown denies it has failed to act in good faith towards the applicant or has failed to act proactively or on anything but a fully-informed basis. The Crown has throughout its negotiations with

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8 Wai 2666, #3.1.1 at [26(e)]

Hauraki iwi taken account of the concerns of Ngātiwai either directly or through their relevant hapū, in particular, Ngāti Manuhiri and Ngāti Rehua who have completed or are completing their Treaty settlements.

18.3 We refer also to paragraph 20 below and the affidavit of Leah Campbell, which set out the current status of each of the Hauraki and Marutūāhu settlements or redress deeds.

19. In terms of substance:

19.1 The Crown also denies there is likely prejudice to be suffered by Ngātiwai from the various settlement/ redress deeds as the redress complained of is either largely not exclusive redress or is not within the Ngātiwai area of interest, or is exclusive redress that recognises specific Iwi of Hauraki cultural interests but which does not prevent the Crown from providing redress to settle the claims of other iwi in the same area.

19.2 The only relevant exclusive redress is included in the Marutūāhu Iwi Collective redress deed, and in relation to this:

19.2.1 The exclusive redress is:

(a) Mahurangi Scenic Reserve (8.1450 ha)

(b) Part of Motuora Island Recreation Reserve (2.5 ha, subject to subject to conservation covenant)

(c) Part of Kawau Island Historic Reserve (1.5495 ha, subject to historical reserve status);

19.2.2 In each case, the Crown retains land at the same or nearby locations that is available for negotiation as part of the redress for other groups, including the applicants.

19.3 The settlement process is not intended to establish or recognise claimant group boundaries. Such matters can only be decided between claimant groups themselves. Nor is it intended that the

Crown will resolve the question of which claimant group has the predominant interest in a general area. That is a matter that can only be resolved by those groups themselves.

19.4 It is submitted that, ultimately, the applicant is unhappy with the substantive results of the overlapping claims process: being redress currently offered to Hauraki iwi. We are instructed to provide a list of the relevant redress in the table below along with a summary explanation of the Crown's position.

Type of Redress	**Crown response**
Hauraki Fisheries RFR	is a non-exclusive form of redress. An RFR over fishing quota is an RFR over quota for new species and is owned by the Crown. The Crown is free to deal with the quota it owns in any way it chooses. The Crown has selected the boundaries of the Hauraki Fisheries RFR based on the agreements reached between iwi under the 1992 fisheries settlement. While how the Crown distributes rights of first refusal over fishing quota is unrelated to the 1992 fisheries settlement, the Te Ohu Kaimoana allocation policy and agreements reached between iwi under that policy are considered the most equitable way to determine allocation of RFR rights under the redress offer. The Crown has preserved the ability to offer iwi who had not yet settled with the Crown a fisheries RFR in their settlements, including Ngātiwai. Ngātiwai have been advised of this.
Protocol Redress to individual Iwi of Hauraki	Protocol redress is non-exclusive redress. Protocols set out how the relevant Minister and Chief Executive will interact with an iwi governance entity within the protocol area. There is no protocol redress in the Pare Hauraki Collective Redress Deed. For the individual Hauraki iwi settlements, the intention of the Crown, following feedback from overlapping groups (including Ngātiwai), is to align the protocol areas for each iwi with their areas of interest, rather

Type of Redress	Crown response
	than use a single area for all Hauraki iwi. A final decision on the protocol areas has not yet been made. OTS is continuing to assess and respond to feedback received from overlapping groups. Deeds of settlement initialled with Hauraki iwi have not included protocol area maps. The maps will be finalised through the overlapping claims process prior to deed signing.
Aotea Redress to Ngāti Maru, Ngaati Whanaunga, Ngāti Tamaterā and Te Patukirikiri	As noted in the Statement of Claim,[9] consultation with Ngātiwai in relation to the proposed redress for Iwi of Hauraki described as the "Aotea Redress" commenced in 2013 and has continued through until 2017. Ngāti Rehua-Ngātiwai ki Aotea are a Ngātiwai hapū with interests on Aotea. The Crown engaged throughout with Ngāti Rehua-Ngātiwai ki Aotea on this overlapping claims redress and all overlapping groups (including Ngātiwai) were advised of the final decision regarding redress for Ngāti Maru, Ngaati Whanaunga, Ngāti Tamaterā and Te Patukirikiri on Aotea in November 2016. The Crown retains capacity to provide redress to Ngātiwai on Aotea. The applicant has been advised of this and on 29 September 2016 was provided a map showing land in Crown ownership on Aotea.
Marutūāhu Collective Redress	Between 6 June 2013 and 31 October 2013 there was correspondence and meetings between the Crown and Ngātiwai representatives on the proposed redress included in the Marutūāhu Iwi Record of Agreement signed on 17 May 2013. Until November 2016, when the applicant advised of its objections, the Crown had considered overlapping claims consultation on the Marutūāhu Collective redress package to be concluded. The Marutūāhu Iwi Collective Redress Deed has not yet been initialled.
Ngaati Whanaunga Redress	As noted in the Statement of Claim,[10] consultation with Ngātiwai has been undertaken throughout 2017 in

9 Wai 2666, #1.1.1 at [41-45]

10 Wai 2666, #1.1.1 at [60-63]

Type of Redress	Crown response
	relation to the preliminary decision of the Minister concerning the Ngaati Whanaunga Redress. The Crown has made no assumptions regarding Ngātiwai customary interests in the areas in which Ngaati Whanaunga will receive redress. The Crown's Lead Negotiator consistently encouraged Ngaati Whanaunga to meet with overlapping claimants, including Ngātiwai, both prior to and following the Minister's preliminary decision. Ngaati Whanaunga negotiators arranged to meet Ngātiwai in July 2017 but were unable to do so at the agreed time due to illness. Ngaati Whanaunga advised the Crown that shortly after the meeting was deferred Ngātiwai advised they were filing an urgency application in the Tribunal. No meeting was subsequently arranged. The Ngaati Whanaunga deed was initialled on 25 August. The only outstanding overlapping claims decision to be made is on their protocol areas, maps of which were not included in the initialled deed.

CURRENT STATUS OF HAURAKI SETTLEMENT NEGOTIATIONS

20. We now provide information on the current status of each of the relevant Hauraki settlement or redress deeds.

20.1 The Pare Hauraki Collective Redress Deed was initialled on 22 December 2016 (see Crown memorandum of 22 September 2017). The decision to sign this deed will be the responsibility of the Minister for Treaty of Waitangi Negotiations once a Government is formed.

20.2 The Ngai Tai ki Tamaki settlement legislation was introduced to Parliament on 9 August 2017 and is therefore non-justiciable.

20.3 Ngāti Paoa, Ngaati Whanaunga, Ngāti Maru, Ngāti Tamaterā and Te Patukirikiri initialled their deeds between 18 August and 20 September and are now proceeding to ratification. The decision to accept the ratification results and sign will be the responsibility of the

Minister for Treaty of Waitangi Negotiations once a Government is formed.

20.4 The Marutūāhu Collective Redress Deed remains in negotiation. A decision to initial this deed will be the responsibility of the Minister for Treaty of Waitangi Negotiations once a Government is formed.

NOTE – SERVICE OF PROCEEDINGS ON THE CROWN

21. In the memorandum filed by counsel for the applicant on 12 September 2017, reference was made to a service copy of the proceedings having been sent to an individual Crown counsel's email address on 24 July 2017. This does not effect service on the Crown. For effective service on the Crown, applicants should either serve on the Solicitor-General (per section 16 Crown Proceedings Act 1950) or send to treaty.issues@crownlaw.govt.nz (as set out in the Waitangi Tribunal's Practice Note: *Guide to the Practice and Procedure of the Waitangi Tribunal* at p6). Crown Counsel who are personally sent a copy of legal proceedings will not formally act on receipt of those documents but rather will wait until the proceedings are registered and directions issued by the Tribunal before seeking instructions on a response. Counsel for the Crown, however, always appreciate receiving advance copies of pleadings and memoranda and will pass these on to the relevant clients.

6 October 2017

Jason Gough / Jacki Cole
Crown Counsel

TO: The Registrar, Waitangi Tribunal
AND TO: Claimant Counsel