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BEFORE THE WAITANGI TRIBUNAL

WAI 2666

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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

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**AFFIDAVIT OF SUSAN KIRI LEAH CAMPBELL IN SUPPORT OF  
CROWN RESPONSE TO THE APPLICATION FOR AN URGENT  
HEARING**

9 October 2017

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<b>RECEIVED</b> Waitangi Tribunal
<b>9 OCT 17</b>
Ministry of Justice WELLINGTON

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I, Susan Kiri Leah Campbell, of Wellington, public servant, solemnly and sincerely affirm:

### **Introduction**

1. I am the Regional Director, Te Waenga, at the Office of Treaty Settlements (OTS). I have held this role since March 2017. I was previously the Deputy Director, Negotiations, at the OTS. I held that role from March 2014. I am authorised to make this affidavit on behalf of the OTS.
2. In my role as Regional Director, Te Waenga, I provide direction and oversight to a team responsible for providing advice relating to policy, negotiations and implementation of Treaty of Waitangi claims in the Te Waenga region. This includes the Tāmaki Makaurau and Hauraki areas. I have worked closely on a number of settlements with Hauraki iwi, with involvement in and oversight of the Crown's negotiations with the Pare Hauraki Collective, the Marutūāhu Collective, and the individual iwi of Pare Hauraki since June 2015.
3. This affidavit is prepared based on my personal knowledge and the relevant OTS files.
4. The purpose of this affidavit is to provide evidence in support of the Crown's response to the Ngātiwai application for an urgent hearing into aspects of the settlement redress proposed in relation to the Pare Hauraki Collective, the Marutūāhu Collective and various of the individual Hauraki iwi.

### **Structure of Pare Hauraki negotiations**

5. Settlement negotiations with Hauraki iwi are comprised of 2 Collective and 12 individual iwi negotiations. The 12 iwi of Hauraki make up the Hauraki Collective, and will each receive collective redress through the Pare Hauraki Collective redress deed. Five of the Hauraki iwi make up the Marutūāhu Collective and it is intended to provide them collective redress through the Marutūāhu Collective redress deed. The Collective redress deeds do not settle any historical claims. The historical claims of each iwi are settled through each of the 12 individual deeds of settlement.



### Crown overlapping claims policy

6. The Crown can only settle the claims of the group with which it is negotiating, not other groups with overlapping interests. However, addressing overlapping claims is a key issue for settlements.
7. The settlement process is not intended to establish or recognise claimant group boundaries. Nor does the settlement process lead to the Crown resolving a question of which claimant group has the predominant interest in a general area. While the Crown has been mindful to properly inform itself of these interests before providing redress, matters of boundaries or predominance can only be decided between claimant groups themselves.
8. In areas where there are overlapping claims, the Crown encourages claimant groups to discuss their interests with neighbouring groups at an early stage in the negotiation process and establish a process by which they can reach agreement on how such interests can be managed. The Crown assists this process by providing information on proposed redress items to all groups with a possible interest in a site or property.
9. Disagreement relating to redress offers on the basis of overlapping claims is not uncommon. This is particularly so in relation to a proposal for exclusive redress, which is why the Crown takes particular care with these offers. Further, in areas where there are multiple interests to be accommodated, non-exclusive redress enables the interests of different groups to be recognised.
10. Clearly the Crown would prefer that disagreements over redress were settled by mutual agreement between claimant groups. However, in the absence of agreement amongst them, the Crown may have to make a decision. In reaching any such decision on overlapping claims, the Crown will be guided by two general principles:
  - 10.1 the Crown's wish to reach a fair and appropriate settlement with the claimant group in negotiations; and
  - 10.2 the Crown's wish to maintain, as far as possible, its capability to provide appropriate redress to other claimant groups and achieve a fair settlement of their historical claims.

11. The Crown does not require the agreement of other claimant groups when it is offering redress in areas with overlapping claims, but such agreement is preferable.
12. I have set out at paragraph 17 below the Crown's response to the various concerns raised by the applicant in its statement of claim. As stated above, managing overlapping claims is an important issue for the Crown. It is equally important to settling groups.

*Exclusive redress*

13. Some forms of redress can only be available in exclusive form, for example return of Crown land to one settling group cannot be available as redress for another claimant group.
14. Where there are overlapping claims to a site or area, the Crown will only offer exclusive redress in specific circumstances. The Crown will consider the following questions:
  - 14.1 Has a threshold level of customary interest been demonstrated by each claimant group?
  - 14.2 If a threshold interest has been demonstrated:
    - (a) what is the potential availability of other land for other groups?
    - (b) what is the relative size of likely redress for the Treaty claims, given the nature and extent of likely Treaty breaches?
    - (c) what is the relative strength of the customary interests in the land?
  - 14.3 What are the range of uncertainties involved? (The Crown is likely to take a cautious approach where uncertainties exist.)
15. The Waitangi Tribunal has found that this approach to addressing overlapping claims to licensed Crown forest land is consistent with the Treaty of Waitangi and its principles (see the Tribunal's Ngāti Awa Settlement Cross-Claims Report 2002, chapter 4). Although this approach was developed in the context of licensed Crown forest land, similar principles apply to other redress.

*Non-exclusive redress*

16. Where overlapping claims exist and there is no agreement among groups about how these should be dealt with in a settlement, the Crown may offer non-exclusive redress. This may include legal instruments such as Statutory Acknowledgements, Deeds of Recognition and Protocols with government departments and agencies. These forms of redress allow more than one claimant group to obtain redress in relation to a site or property.

*How overlapping claims have been dealt with for the Hauraki settlements*

17. The types of redress identified as objected to by Ngātiwai are:

Type of Redress	Crown response
Hauraki Fisheries RFR	<p>is a non-exclusive form of redress.</p> <p>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.</p> <p>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.</p>
Protocol Redress to individual Iwi of Hauraki	<p>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.</p> <p>There is no protocol redress in the Pare Hauraki Collective Redress Deed.</p> <p>For the individual Hauraki iwi settlements, the intention of the Crown, following feedback from overlapping</p>

Type of Redress	Crown response
	<p>groups (including Ngātiwai), is to align the protocol areas for each iwi with their areas of interest, rather than use a single area for all Hauraki iwi.</p> <p>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.</p>
<p>Aotea Redress to Ngāti Maru, Ngaati Whanaunga, Ngāti Tamaterā and Te Patukirikiri</p>	<p>As noted in the Statement of Claim,<sup>1</sup> 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.</p> <p>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.</p> <p>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.</p>
<p>Marutūāhu Collective Redress</p>	<p>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.</p> <p>The Marutūāhu Iwi Collective Redress Deed has not yet been initialled.</p>

<sup>1</sup> Wai 2666, #1.1.1 at [41-45]

Type of Redress	Crown response
Ngaati Whanaunga Redress	<p>As noted in the Statement of Claim,<sup>2</sup> consultation with Ngātiwai has been undertaken throughout 2017 in relation to the preliminary decision of the Minister concerning the Ngaati Whanaunga Redress.</p> <p>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.</p> <p>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.</p>

#### HISTORY OF ENGAGEMENT BETWEEN THE CROWN AND NGĀTIWAI IN RELATION TO HAURAKI SETTLEMENT NEGOTIATIONS

18. Annexed marked "A" is a summary of the engagement that has occurred between the Crown and Ngātiwai in relation to Hauraki settlement negotiations. It can be seen from this summary that engagement has been extensive and over a lengthy period of time.
19. The explanation as to why, for example, engagement in relation to the proposed Fisheries RFR did not commence until January 2017 is because the area over which this redress would apply item of redress had not been agreed at the time the Pare Hauraki Collective Redress Deed was initialled in December 2016. Prior to this, there was nothing to discuss with Ngātiwai or any other iwi in relation to the Fisheries RFR.

<sup>2</sup> Wai 2666, #1.1.1 at [60-63]

20. The Crown considers the engagement with Ngātiwai in relation to overlapping claims issues has been robust and thorough. The fact that agreement has not been able to be reached with Ngātiwai in relation to the items of exclusive redress is not required, nor an indictment on the process the Crown has followed.

#### **CURRENT STATUS OF HAURAKI SETTLEMENT NEGOTIATIONS**

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

21.1 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.

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


21.3 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.

21.4 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.

**Conclusion**

22. The Crown has taken active steps to ensure its overlapping claims policy has been adhered to throughout the settlement negotiations with the Hauraki iwi. We are confident that we have adhered to that policy openly and robustly in relation to our engagement with Ngātiwai.

**AFFIRMED** at Wellington  
this 9<sup>th</sup> day of October 2017  
before me:

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)   
Susan Kiri Leah Campbell.



A Solicitor/Deputy Registrar of the High Court of New Zealand  
Alexandra Hassard