

IN THE WAITANGI TRIBUNAL

**KEI MUA I TE ROOPU WHAKAMANA
I TE TIRITI O WAITANGI**

**WAI (TBC)
WAI 2660**

IN THE MATTER OF the Treaty of Waitangi Act 1975

AND

IN THE MATTER OF the Marine and Coastal Area (Takutai
Moana) Act 2011 Inquiry

AND

IN THE MATTER OF a claim by the Ngātiwai Trust Board
on behalf of Ngātiwai whānau, marae
and hapū

STATEMENT OF CLAIM

4 July 2018

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MAY IT PLEASE THE TRIBUNAL

Introduction

- 1 This Statement of Claim is filed by Haydn Thomas Edmonds on behalf of the Ngātiwai Trust Board (the **Trust Board**) and Te Iwi o Ngātiwai (**Ngātiwai**) pursuant to sections 6(1)(c) and 6(1)(d) of the Treaty of Waitangi Act 1975.
- 2 The Trust Board was incorporated on 22 November 1966 as a charitable trust under the Charitable Trusts Act 1957 with the purpose of addressing the collective needs of Ngātiwai (the Claimant).
- 3 This Statement of Claim sets out the claimant's kaupapa claim in respect of the legislative framework and the applications process established under the Marine and Coastal Area (Takutai Moana) Act 2011 (the **Act**) and associated Crown policies and practice.
- 4 The Claimant is currently an interested party in this inquiry¹. It submits this particularised Statement of Claim to support its application for full participation in the Wai 2660: Marine and Coastal Area (Takutai Moana) Act Kaupapa Inquiry.
- 5 The Claimant is the mandated representative of Ngātiwai and has authority to make this claim.
- 6 The Claimant supports in principle statements of claim made by whānau, marae and hapū from Ngātiwai in this kaupapa claim.
- 7 The Claimant accepts and acknowledges that the rights and interests of its hapū, marae and whānau in parts of its rohe moana overlap with other iwi, hapū and whānau.

The Claimant - Ngātiwai

Kia tūpato!

Ka tangi a Tūkaiāia ki te moana

ko Ngātiwai kei te moana e haere ana

Ka tangi a Tūkaiāia kei te tuawhenua

ko Ngātiwai kei te tuawhenua e haere ana

¹ WAI 2660 #3.1.040 Memorandum of Counsel Ngātiwai Trust Board at [3] dated 10 March 2018 seeking interested party status

Beware!

When Tūkaiāia calls at sea,

Ngātiwai are at sea

When Tūkaiāia calls inland

Ngātiwai are inland

- 8 Ngātiwai are quite literally the people of the water or sea and this is the basis for its name and identity. Ngātiwai rohe includes the many related hapū and persons affiliated to the kāinga and marae occupying the eastern coastline of the North Island between the Bay of Islands (Te Pēwhairangi) and Whangārei, and southward to Pākiri, Ōmaha and Mahurangi, and including the off shore islands Aotea (Great Barrier), Hauturu (Little Barrier), and other smaller island groups within its rohe moana. Attached marked “A” is the map of the Ngātiwai rohe which includes its rohe moana.
- 9 The Ngātiwai rohe moana extends beyond the 12 nautical mile limit of the territorial sea and includes the chain of islands extending along its coastline, including but not limited to the following islands:
 - a. Motukōkāko off Te Rāwhiti
 - b. Rimuriki off Mimiwhangata
 - c. Tawhitirahi and Aorangi (The Poor Knights)
 - d. High Peak Rocks
 - e. Sugar Loaf Rocks
 - f. The Marotere Islands and Tāranga (The Hen and Chicken Islands)
 - g. Tūturu (Sail Rock)
 - h. Pokohinau and Motukino (The Mokohīnau Islands)
 - i. Te Hauturu o Toi (Little Barrier)
 - j. Aotea (Great Barrier) and surrounding islets and rocky outcrops
 - k. Te Kawa-tūmaro-o-Toi (Kawau Island)
 - l. Te Mau Tohorā-o-Manaia (Motuora Island)
- 10 Ngātiwai has occupied the eastern coastline of lower Northland since the first period of human occupation, extending back to Māui-tikitiki-a-Taranga and Māui Pae. Through this, Ngātiwai has a unique right of “take whenua kite hou” - the right of discovery or first inhabitation.

- 11 Ngātiwai is unified in descent from one of the oldest descent groups in Te Taitokerau: Ngāti Manaia. Although Ngātiwai are an amalgam of a number of older Iwi groups, it is the unbroken line of descent from the eponymous ancestor Manaia; his descendant Manaia II and his people of Ngāti Manaia which gives the Iwi its unique and distinctive identity and ancient rights of “take tūpuna”.
- 12 From Manaia II come the Ngāti Manaia lines, including Tahuhunuiorangi and Te Rauotehuia, descending to Te Rangikapikitia. From Te Rangikapikitia come key tūpuna including Te Kura Makoha, Whāpapa and Te Wairua, Hikihiki I and Huruhurumaiterangi. From Whāpapa and Te Wairua come Toremātao, Te Rangapū and Te Rangihokaia and his descendants known as Ngāti Wai ki te moana.
- 13 These pūtake and take tūpuna are partly shared by other Iwi but collectively are unique to Ngātiwai. No other Iwi in the north can trace their ancestry directly to Manaia and Ngāti Manaia which makes these lineages exclusive to Ngātiwai alone. The tribal name Ngātiwai applies collectively to all hapū who share descent from Manaia II and ngā kōpikopikotanga maha o Ngātiwai.
- 14 Ngātiwai is rich in its seagoing traditions and the moana and motu which make up its identity. Ngātiwai continues to exert its rangatiratanga and kaitiakitanga over the takutai moana in its rohe.

Ngātiwai – Consistent Opposition to the Crown

- 15 Ngātiwai has consistently opposed the Crown and fought to uphold its rights in its rohe moana and takutai moana including:
 - a. Successfully opposing the Crown proposals (the former Department of Lands and Survey) to take land from the Ngātiwai rohe for the Queen’s Chain in the 1970s.
 - b. Challenging the 1992 Sealord’s fisheries settlement which purported to extinguish Ngātiwai customary rights without its consent.
 - c. Successfully challenging the Minister of Conservation in 1998 when the Department of Conservation tried to extinguish Ngātiwai customary rights with the establishment of the Poor Knights Marine Reserve over Aorangi and Tawhitirahi Islands.²

² *Ngatiwai Trust Board & Haddon v Minister of Conservation* High Court 22 December 1998 CP39/98 Smellie J

- d. Establishing the Ngātiwai Whale Stranding Protocol with the Department of Conservation in 1998 to ensure Ngātiwai could continue its tikanga in relation to stranded marine mammals³ including within the takutai moana – this protocol was updated in 2010.
- e. Retaining customary title for the rocks and small islands off Great Barrier Island.
- f. Consistently opposing the implementation of the Foreshore and Seabed Act 2004 by issuing statements⁴ in opposition and participating in the 2004 Hikoi.
- g. Successful negotiations to obtain control and management over Mauitaha and Araara (Marotiri Islands - Hen and Chicken Islands) through a co-management agreement with the Department of Conservation in 2010⁵.
- h. Consistently opposing the implementation of the Marine and Coastal Area (Takutai Moana) Act through statements and submissions to the Crown.
- i. Successful litigation in the Court of Appeal and Supreme Court against the Crown for the return of the foreshore and adjoining land acquired by LINZ and Department of Lands and Survey⁶.

The Claim

Te Tiriti o Waitangi

- 16 Ngātiwai says that the Crown has breached the principles of Te Tiriti by its promulgation of the Act and its associated policies and procedures. The relevant Treaty principles are:

³ Parata H, Donoghue M, "Protocol for management of whale strandings in Ngatiwai rohe including the recovery of bone by Ngatiwai and the provision of scientific samples : an agreement between the Ngatiwai Trust Board and the Department of Conservation, Northland and Auckland Conservancies" Department of Conservation, Ngātiwai Trust Board 1998; *Protocol for the Management of marine mammal strandings in the Ngātiwai rohe*, Department of Conservation, May 2010

⁴ Laly Haddon, "Ngatiwai Trust Board Statement to the Foreshore and Seabed Hui, Whangarei, 16 September 2003" Te Ope Mana a Tai-Maketu, View Key Submissions from the Crown Consultation Hui, PDF file-36.5kb. 16 September 2003. Online. Available: http://www.teope.co.nz/pdf/submissions/ngatiwai_trustboard.PDF (13 April 2005) p. 3

⁵ Part New Zealand Gazette 27 May 2010, No 60, page 1729

⁶ Chief Executive LINZ v Te Whanau o Rangiwhakaahu Hapu Charitable Trust [2013] NZCA 33, Te Whanau o Rangiwhakaahu Hapu Charitable Trust v Chief Executive, Land Information New Zealand [2013] NZSC 67

- (a) The Principle of Rangatiratanga⁷
 - (b) The Principle of Active Protection⁸
 - (c) The Principle of Good Faith⁹
 - (d) The Principle of Mutual Benefit¹⁰
 - (e) The Principle of Partnership¹¹
 - (f) The Principle of Fair Process¹²
- 17 Ngātiwai says that the ways in which the Crown has breached Te Tiriti in terms of the Act and its associated Crown policies and procedures includes but is not limited to the following:
- (a) the failure to recognise Ngātiwai rangatiratanga in the takutai moana.
 - (b) the failure to actively protect Ngātiwai and its interests in the takutai moana.
 - (c) the failure to act in good faith in the imposition of the Crown's policies and procedures in relation to the Act.
 - (d) the failure to ensure the Act and the Crown associated policies and procedures were for the mutual benefit of the Crown and Ngātiwai.
 - (e) the failure to allow for and recognise partnership in the takutai moana.
 - (f) the failure to ensure that the Act and the associated Crown policies and procedures uphold fair process and natural justice.

⁷ The Tribunal has suggested that it was an intrinsic principle of the Treaty that Maori would recognise and respect the Governor and the Governor's right to national governance, while the Governor would recognise and respect Maori and their rangatiratanga: *Muriwhenua Land Report* (Wai 45) at p 390

⁸ See *Report of the Waitangi Tribunal on the Manukau Claim* (Wai 8) at pp 69 and 70.

⁹ *Report of the Waitangi Tribunal on the Orakei Claim* (Wai 9) at p 150; *Muriwhenua Land Report* (Wai 45) at p 390.

¹⁰ *Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim* (Wai 22) at p 195.

¹¹ *Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim* (Wai 22) at p 193.

¹² *Muriwhenua Land Report* (Wai 45) at p 390.

FIRST CAUSE OF ACTION: THE MARINE AND COASTAL AREA (TAKUTAI MOANA) ACT 2011 (THE ACT) AND THE ASSOCIATED CROWN POLICIES AND PRACTICE ARE INCONSISTENT WITH THE TREATY

PARTICULARS

- 18 Ngātiwai did not cede its rangatiratanga and kaitiakitanga in the takutai moana to the Crown.
- 19 The Act extinguishes Ngātiwai rights in the takutai moana. Ngātiwai rights can only be legally recognised through the processes outlined in the Act promulgated by the Crown.
- 20 Ngātiwai filed an application for orders to recognise its customary marine title and protected customary rights on 31 March 2017 (CIV-2017-485-283) under the Act.¹³
- 21 Ngātiwai also filed an application to engage directly with the Crown (MAC-01-01-131) for the recognition of its customary marine title and protected customary rights.¹⁴
- 22 Ngātiwai was forced to make these applications by the 3 April 2017 deadline as specified in section 100 of the Act to protect its customary rights from being extinguished under the Act.
- 23 Ngātiwai made these applications to protect the rangatiratanga of Ngātiwai whānau, kainga, marae and hapū under the Act.
- 24 Ngātiwai notes however that where protected customary rights and customary marine title are recognised under the Act, these rights are second-class rights and subservient to various Crown controls and other property rights as provided for by the Act.
- 25 Ngātiwai says that the imposition of this Act is prejudicial and is in breach of the principles of the Treaty.

Non-Ownership Regime

- 26 The Act purports to provide for a non-ownership regime for the takutai moana whereby section 11 specifies that no-one owns the common marine and coastal area:

*Section 11 Special status of common marine and coastal area
(1) The common marine and coastal area is accorded a special status by this section.*

¹³ s 100 Marine and Coastal Area (Takutai Moana) Act 2011

¹⁴ Section 95 *ibid*

(2) Neither the Crown nor any other person owns, or is capable of owning, the common marine and coastal area, as in existence from time to time after the commencement of this Act.

(3) On the commencement of this Act, the Crown and every local authority are divested of every title as owner, whether under any enactment or otherwise, of any part of the common marine and coastal area.

- 27 The Act does not provide for a co-governance regime for the takutai moana as recognised in recent Treaty legislation¹⁵ and resource management legislation¹⁶.

Exclusion from Non-Ownership Regime

- 28 However under section 9 (1) of the Act the following category of rights holders are excluded from the non-ownership regime for the coastal and marine area:

- (a) specified freehold land located in that area; and*
- (b) any area that is owned by the Crown and has the status of any of the following kinds:*
 - (i) a conservation area within the meaning of section 2(1) of the Conservation Act 1987;*
 - (ii) a national park within the meaning of section 2 of the National Parks Act 1980;*
 - (iii) a reserve within the meaning of section 2(1) of the Reserves Act 1977; and*
- (c) the bed of Te Whaanga Lagoon in the Chatham Islands*

- 29 Any customary marine title, would, if recognised by the Crown, still be subservient to the priority rights which the Act affords to private title holders and land held in the public conservation estate.

- 30 Section 12 of the Act also enables the Crown through an Order in Council made by the Governor-General to remove any land, other than a customary marine title area, from the coastal and marine area for conservation purposes:

¹⁵ Te Awa Tupua (Whanganui River Claims Settlement) Act 2017; Te Urewera Act 2014, Te Rarawa Claims Settlement Act 2015

¹⁶ Mana Whakahono ā Rohe: Iwi Participation Arrangements is provided for by Sections 58L to 58U of the Resource Management Act 1991 which came into force on 19 April 2017.

Section 12 Areas acquiring status under certain enactments may vest in Crown

- (1) *This section applies to any defined area within the common marine and coastal area that acquires a status of any of the following kinds:*
 - (a) *a conservation area within the meaning of section 2(1) of the Conservation Act 1987;*
 - (b) *a national park within the meaning of section 2 of the National Parks Act 1980;*

Section 12 Areas acquiring status under certain enactments may vest in Crown

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 - (a) *a conservation area within the meaning of section 2(1) of the Conservation Act 1987;*
 - (b) *a national park within the meaning of section 2 of the National Parks Act 1980;*
 - (c) *a reserve within the meaning of section 2 of the Reserves Act 1977.*
 - (2) *The Governor-General may, by Order in Council made on the recommendation of the Minister of Conservation, vest in the Crown any defined area to which this section applies other than an area that is within a customary marine title area.*
 - (3) *When an Order in Council made under this section comes into force, the defined area to which it relates ceases to be part of the common marine and coastal area.*
 - (4) *Every Order in Council made under this section is a legislative instrument and a disallowable instrument for the purposes of the Legislation Act 2012 and must be presented to the House of Representatives under section 41 of that Act.*
- 31 If Ngātiwai is able to establish protected customary rights under this Act these rights will still be subject to the Crown ability to remove these rights by vesting the common marine and coastal area pertaining to the protected customary rights, in the public conservation estate.

Priority of Conservation Protection Purposes Over Customary Marine Title

- 32 The Act provides for the Minister of Conservation to declare land that is the subject of a customary marine title recognition order to be Crown conservation land.
- 33 Specifically Section 74 (1) of the Act empowers the Minister of Conservation or Director-General of Conservation:
- (a) *to declare or extend a marine reserve that is wholly or partly in a customary marine title area; or*
 - (b) *to declare or extend a conservation protected area that is wholly or partly in a customary marine title area.*

- 34 Section 74 (2) further provides that

The Minister of Conservation or the Director-General, as the case requires, may proceed with a proposal described in subsection (1) without the permission of the relevant customary marine title group if the Minister or Director-General is satisfied that the proposal is for a protection purpose that is of national importance.

- 35 The Act further enables the Crown to remove land from the Ngātiwai at will for “conservation purposes”

Compensation – only available to Crown

- 34 Section 25 of the Act enables local authorities to apply to the Minister for redress for loss of areas divested in the common marine and coastal area.
- 35 The Act does not provide redress for Ngātiwai for the loss of their takutai moana/common marine and coastal area.

Customary Marine Title Test – Exclusive Use and Occupation

- 36 The test for establishing customary marine title is specified in section 58 (1) of the Act as

58 Customary marine title

- (1) Customary marine title exists in a specified area of the common marine and coastal area if the applicant group—
- (a) holds the specified area in accordance with tikanga; and
 - (b) has, in relation to the specified area,—
 - (i) exclusively used and occupied it from 1840 to the present day without substantial interruption; or
 - (ii) received it, at any time after 1840, through a customary transfer in accordance with subsection (3).

- 37 The “exclusive use and occupation” test is contrary to Ngātiwai tikanga in which it shared the use and occupation of the takutai moana with others through whakapapa connections.
- 38 The “exclusive use and occupation” test is difficult to achieve for Ngātiwai in the face of a series of Crown acts in breach of Te Tiriti which removed much of the land contiguous with the takutai moana from Ngātiwai.
- 39 The “exclusive use and occupation” test is currently being undermined by the Crown policy on overlapping claims in the context of Historical Treaty Settlements.

Limitations on Customary Marine Title – Other Property Rights

40 Section 64 of Act also specifies that Customary Marine Title is subject to a suite of other property rights including

- (a) *activities authorised under a resource consent if the consent is granted before the recognition of customary marine title*
- (b) *a minimum impact activity relating to petroleum*
- (c) *accommodated infrastructure as defined in section 63 (b) of the Act as:*
 - a. *including operations of the Crown, or Crown entity (s 63 (b)(ii))*
 - b. *a local authority or council-controlled organisation; (s 63 (b) (ii))*
 - c. *a network utility operator (section 63 (g) (iii))*
 - d. *an electricity generator (section 63 (b) (iv))*
 - e. *a port company (section 63 (b)(v))*
 - f. *a port operator (section 63 (vi))*
- (d) *the management activities for which a resource consent is required in relation to—*
 - (i) *an existing marine reserve:*
 - (ii) *an existing wildlife sanctuary:*
 - (iii) *an existing marine mammal sanctuary:*
 - (iv) *an existing concession:*
- (e) *an activity carried out under a coastal permit granted under the Resource Management Act 1991 to permit existing aquaculture activities to continue to be carried out in a specified part of the common marine and coastal area,—*
 - (i) *regardless of when the application is lodged or whether there is any change in the species farmed or in the method of marine farming; but*
 - (ii) *provided that there is no increase in the area, or change of location, of the coastal space occupied by the aquaculture activities for which the existing coastal permit was granted:*
- (f) *an emergency activity:*
- (g) *scientific research or monitoring that is undertaken or funded by—*
 - (i) *the Crown:*
 - (ii) *any Crown agent:*
 - (iii) *the regional council with statutory functions in the region where the research or monitoring is to take place:*
- (h) *a deemed accommodated activity.*

- 41 Section 64 (4) provides that where there is a dispute between an accommodated activity provider and a customary marine title holder the Minister for Land and Information may resolve the dispute and the Minister's decision is final. (section 64 (5)).

Limits on Customary Marine Title - Resource Management Act Permission Right

- 42 Under section 66 (2) of the Act a customary marine title holder has the right to give or decline permission, on any grounds, for an activity to which an RMA permission right applies.
- 43 However under section 66 (3) of the Act permission given by a customary marine title group cannot be revoked.
- 44 A consent authority can still decline or impose conditions on a resource consent application irrespective of the RMA permission right exercised by the customary marine title holder (section 66 (3)).
- 45 And under section 67 (4) of the Act if a customary marine title holder does not respond to a request for RMA permission within 40 working days it is deemed to have given permission.

Limits on Customary Marine Title - Conservation Permission Right

- 46 While section 71 provides a conservation permission right for a customary marine title group to give or decline permission, this permission cannot be revoked (section 71) (4).
- 47 The conservation permission is also subject to section 74 of the Act whereby the Minister of Conservation or Director General of Conservation can declare or extend marine reserves or conservation protected areas that are partially or wholly within the customary marine title area without the permission of the customary marine title group.
- 48 A customary marine title group is also deemed to have given conservation permission if the group has not responded within 40 working days. (section 73 (1) and section 73 (2)).

Limits on Customary Marine Title – Crown Ownership of Minerals

- 49 Section 16 (1) of the Act vests all generally nationalised minerals in the Crown – specifically petroleum, gold, silver, and uranium existing in their natural condition.

- 50 Section 82(2) of the Act provides that a customary marine title group may exercise ownership of minerals other than generally nationalised minerals.
- 51 The Act's exclusion of Ngātiwai from the ownership of minerals within its rohe and takutai moana is a further example of the "second class nature" of customary marine title and the Crown's appropriation of property rights.

Protected Customary Rights

- 52 Section 51 of the Act defines protected customary rights as

- (1) *A **protected customary right** is a right that—*
- (a) *has been exercised since 1840; and*
 - (b) *continues to be exercised in a particular part of the common marine and coastal area in accordance with tikanga by the applicant group, whether it continues to be exercised in exactly the same or a similar way, or evolves over time; and*
 - (c) *is not extinguished as a matter of law.*

- 53 Section 51 (2) of the Act however notes that the following activities are not protected customary rights

- (2) *A protected customary right does not include an activity*

.....

- (d) *that relates to—*
- (i) *wildlife within the meaning of the Wildlife Act 1953, or any animals specified in Schedule 6 of that Act;*
 - (ii) *marine mammals within the meaning of the Marine Mammals Protection Act 1978; or*

- 54 Ngātiwai protected customary rights in the takutai moana include, but are not limited to

- a. the harvest of, and/or seeding of eggs from manu oi (mutton birds), hakoakoa (skua), kākā and kororā (little blue penguin) for species recovery and ultimately future consumption purposes;
- b. resource recovery from deceased marine mammals in marine mammal strandings

- 55 Ngātiwai existing rights, practices and tikanga are not provided for nor recognised as protected customary rights under the Act.

Minister of Conservation Control of Protected Customary Rights

56 Protected customary rights are not “protected” under the Act as they are subject to the control of the Minister of Conservation. Under section 56 (1) of the Act the Minister can impose any controls she thinks fit on the exercise of protected customary rights:

(1) *If, at any time, the Minister of Conservation determines that the exercise of protected customary rights under a protected customary rights order or agreement has, or is likely to have, a significant adverse effect on the environment, the Minister may impose controls, including any terms, conditions, or restrictions that the Minister thinks fit, on the exercise of the rights.*

57 Further under section 56 (2) of the Act any person may apply for controls to be imposed on the protected customary rights

(2) *Any person may apply to the Minister of Conservation for controls to be imposed on the exercise of a protected customary right, stating the reasons for the application.*

58 Part 2 of Schedule 1 of the Act specifies a regime for the imposition of and review of controls on protected customary rights in which the Minister of Conservation is the final decision maker.

Part 4 - Statutory Regime for Recognition of Customary Rights Undermines Ngātiwai Rights

59 Part 4 of the Act provides for two ways for customary rights to be recognised in the takutai moana

- a. direct negotiation with the Crown under section 95 for a recognition agreement, which is brought into effect by a section 96 Order in Council or
- b. an application to the High Court under section 100 of the Act for a recognition order.

Direct Negotiation

60 Section 95 (3) provides that “nothing requires the Crown to enter into the agreement, or to enter into negotiations for the agreement: in both cases this is at the discretion of the Crown.”

61 Ngātiwai has applied to both the direct negotiation process and the High Court process for recognition of its customary rights. Should Ngātiwai have only pursued the direct negotiation process however

the Act does not impose an obligation upon the Crown to engage or negotiate with Ngātiwai.

- 62 If the Crown chooses not to engage with a claimant in the negotiation process, and if that claimant has not filed for a recognition order in the High Court, a claimant's rights will have been extinguished, without an opportunity to be heard. The Act therefore enables this breach of natural justice.

Court Application Process – Māori Land Court Appropriate Forum

- 63 The alternative pathway - an application to the High Court - is not appropriate as the High Court has proved to date unable to co-ordinate the volume of claims. The High Court is an adversarial forum and the processes and procedures of the High Court are not capable of tikanga based inquiry into and resolution of customary interests and/or overlapping interests in the takutai moana.
- 64 The appropriate jurisdiction for this Act is the Māori Land Court which has the necessary experience and expertise and has developed processes that are appropriate for dealing with applications for customary title.

No Connection between Direct Negotiation and Court Application Processes

- 65 The two pathways, as prescribed by the Act for the Crown to recognise customary rights are not interconnected or interrelated. These pathways do not provide a cogent regime for reconciliation of the bundle of customary rights that Ngatiwai would otherwise enjoy.
- 66 A claimant could be negotiating rights directly with the Crown and yet the same rights are already the subject of a recognition order adjudicated by the High Court.
- 67 The Act does not provide for the resolution of overlapping claims either in a tikanga sense, or in a logistical sense.

No Provision for Resolution of Overlapping Claims in the Act

- 68 Ngātiwai has grave concerns based on experience as to the Crown's ability to, or interest in resolving overlapping claims in any forum.
- 69 On 24 July 2017 Ngātiwai was forced to file an urgent hearing application with the Tribunal regarding the Crown's Treaty settlement policy regarding overlapping claims and the proposed redress in relation to the Hauraki Collective, Marutūāhu Collective and individual Hauraki iwi settlements.¹⁷

¹⁷ Wai 2666 1.1.001 dated 24 July 2017

- 70 This Act will also give rise to similar applications for urgent inquiries as it does not enable overlapping claims to be addressed within the statutory mechanism prescribed for establishing customary marine title.

SECOND CAUSE OF ACTION: THE RESOURCES PROVIDED BY THE CROWN ARE INADEQUATE RESULTING IN PREJUDICE BEING ACCRUED BY THE CLAIMANTS

PARTICULARS

- 71 The Act imposes two pathways for the recognition of claimant rights in the takutai moana – the section 95 direction negotiation path or the section 100 application to the High Court for a recognition order.
- 72 For effective representation in either pathway it is incumbent upon claimants to engage legal counsel. This is expensive and with no guarantee of legal aid, beyond the reach of many claimants.
- 73 The Crown imposition of the Act to recognise customary rights in the takutai moana denies claimants the opportunity to protect their property rights. This effectively denies claimants access to law and is a breach of natural justice.
- 74 The Act and the current funding regime is devoid of any consideration of funding to support the resolution of overlapping claims.
- 75 The Act also imposes on customary marine title holders and protected customary rights holders various participatory regimes. For customary marine title holders these include:
- a. Sections 66 – 70 Resource Management Permission rights
 - b. Sections 71-73 Conservation Permission rights
- 76 Non-participation in the above decision making processes – not responding within 40 working days - is deemed as an “approval”.
- 77 However the Act does not provide funding for the specialised technical planning support which is necessary for customary marine title holders to be able to analyse and respond to requests for resource management permission or conservation permission in the takutai moana.
- 78 For protected customary rights holders section 57 of the Act provides for the Minister to impose controls on and review protected customary rights.
- 79 A protected customary title holder who has expended funds to obtain their rights under this Act, will again have to expend funds to defend their rights under this Act.

Prejudice

80 Ngātiwai says that it has suffered and will continue to suffer the following prejudice as a result of the Crown's promulgation of the Act and its associated policies and procedures:

- (a) The undermining of Ngātiwai rangatiratanga and kaitiakitanga.
- (b) The failure to recognise Ngātiwai pre-existing and current legal agreements with the Crown in the takutai moana.
- (c) The failure to recognise and allow for the full extent of Ngātiwai interests and rights in the takutai moana.
- (d) The imposition of a statutory regime which does not recognise and provide for a cogent expression of the full bundle of Ngātiwai rights in the takutai moana.
- (e) The expense of having to file applications to participate in the High Court process or the direct Crown negotiation process to defend Ngātiwai rights in the takutai moana.

Relief Sought

81 Ngātiwai seeks the following relief from the Tribunal by the way of findings that

- (f) Ngātiwai claims are well founded.
- (g) The Act and its associated Crown policies and practices are in breach of the principles of the Treaty of Waitangi.
- (h) The Act and its associated Crown policies and practices fail to recognise rangatiratanga and kaitiakitanga of Ngātiwai in its rohe including the takutai moana.
- (i) Such other findings and relief as the Tribunal sees fit.

Recommendation

82 Ngātiwai also seeks from the Tribunal the following recommendations that:

- (a) The Marine and Coastal (Takutai Moana) Act 2011 be repealed.
- (b) The rights of Ngātiwai in the takutai moana are able to be fully tested and determined by the Māori Land Court.
- (c) Any other findings and recommendations as the Tribunal sees fit.

Amendment

83 Ngātiwai also seeks leave to further amend this Statement of Claim in accordance with any research, evidence, submissions or other material adduced in the course of this WAI 2660 inquiry.

84 Ngātiwai therefore reserves the right to file further causes of action, particulars or specific allegations that are not included in this statement of claim.

Dated at Whangārei this 4th day of July 2018



Stuart McDonald Henderson/ Paula J. Wilson
Counsel for the Ngātiwai Trust Board

This document is filed by **STUART McDONALD HENDERSON**, lawyer for the above-named defendants of the firm Henderson Reeves Connell Rishworth Lawyers Limited. The address for service of the defendants is at the office of Henderson Reeves, 96 Bank Street, Whangarei 0110. Documents for service on the defendants may be left at the address for service or may be:

- (a) Posted to the lawyer at PO Box 11, Whangarei 0140; or
- (b) Transmitted to the lawyer by fax to (09) 438 6420.
- (c) Emailed to the lawyer: stuarthenderson@hendersonreeves.co.nz

Ngatiwai MACAA Map

Legend

- Islands
- NGATIWAI ROHE

