BEFORE THE WAITANGI TRIBUNAL

TE RŌPŪ WHAKAMANA I TE TIRITI O WAITANGI **WAI 2666**

IN THE MATTER of the Treaty of Waitangi Act 1975

AND

AND IN THE MATTER of 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.

AND IN THE MATTER of a claim filed by **HAYDN THOMAS EDMONDS** on behalf of Ngātiwai Trust Board and the iwi of Ngātiwai for an urgent inquiry into the Crown's settlement policy regarding overlapping claims and the proposed redress in the Hauraki Collective, Marutūāhu Collective and individual Hauraki iwi settlements.

SUBMISSIONS OF THE CLAIMANTS IN REPLY

6 November 2017

KAHUI LEGAL
PO Box 1654
Telephone: (04) 495 9999
Facsimile: (04) 495 9990
Counsel: K Tahana / M C Tukapua
WELLINGTON

MCT-102021-1-213-V1:MCT

MAY IT PLEASE THE TRIBUNAL

INTRODUCTION

1. These submissions are filed on behalf of the Ngātiwai Trust Board (**Ngātiwai**) in reply to the submissions for the Crown dated 6 October 2017. Accompanying these submissions are affidavits in reply of Haydn Thomas Edmonds and Aperahama Te Kapua-i-waho Hurihanganui.

SUMMARY – SUBMISSIONS IN REPLY

2. The Crown opposes the application for urgency and submits that:

    (a) the process the Crown has followed in dealing with overlapping claims has been fair, robust, in accordance with its overlapping claims process and is Treaty compliant. The Crown submits that Ngātiwai is not satisfied with the outcome and has no basis for challenging the process;

    (b) Ngātiwai has not provided any information as to how the urgency criteria apply to each of the various Treaty settlements or redress deeds from which prejudice is said to arise;

    (c) Ngātiwai is unlikely to suffer prejudice because the redress is:

        (i) not exclusive redress; or

        (ii) not within the Ngātiwai area of interest; or

        (iii) is exclusive redress that does not prevent the Crown from providing redress to settle the claims of other iwi in the same area.

3. In summary, Ngātiwai's response to the Crown's submissions are:

    (a) that this is not an application arising from unhappiness with Crown decisions after a robust and fair process. This application arises from a deep and real sense of grievance because the Crown is proposing to provide redress in the heart of the Ngātiwai rohe (Aotea and on the mainland) to other iwi without having undertaken any tikanga based process to understand the nature of all iwi interests in those areas and

how those interests may be best met in a manner that preserves inter-tribal relationships and upholds the mana of Ngātiwai;

(b) the Crown's policy and practices are not Treaty compliant and the Crown following its overlapping claims policy is not evidence of Treaty compliance as submitted by the Crown;

(c) Ngātiwai meet all the criteria for urgency as follows:

(i) there is significant and irreversible prejudice to Ngātiwai in relation to each settlement, which prejudice is set out at paragraphs 18 below;

(ii) there is no alternative remedy available to Ngātiwai as Ngātiwai has exercised all potential options including requesting political intervention at the highest levels (see paragraph 4 and affidavit of Haydn Thomas Edmonds dated 3 November 2017);

(iii) Ngātiwai is ready to proceed to a hearing; and

(iv) the claim challenges an important current Crown policy and practice, namely, the policy and practices applied to overlapping claims in Treaty settlements;

(d) Ngātiwai submits that this and other urgency applications challenging the Crown's overlapping claims processes in relation to the various Hauraki settlements is an exceptional case. At the heart of this claim is an affront to tikanga and mana and such prejudice is serious; and

(e) the Crown's submissions ignore any "prejudice" other than an inability of the Crown to offer redress to settle claims of other iwi in the same area. It is submitted that this narrow view of prejudice demonstrates the flawed nature of the Crown's approach to overlapping claims and misunderstands that "prejudice" in the Treaty settlement context includes an affront on mana and tikanga.

CLAIM CHALLENGES CROWN'S PROCESSES

4. The Crown has misconstrued the nature of Ngātiwai's claim which includes both challenges to process and outcome. This claim does not arise because

Ngātiwai is unhappy with the outcome. This is clear from the statement of claim which challenges the process undertaken by the Crown and not just the outcome. The fact that Ngātiwai is concerned with the process as much as the outcome is further demonstrated by its request to the Minister of Treaty of Waitangi Negotiations to facilitate a tikanga based process so that process issues can be rectified. The table below demonstrates the extent of Ngātiwai's concerns with the Crown's processes:

No.	Process challenge:	Statement of Claim paragraph reference
1.	**Process for understanding customary interests of overlapping claims:** • Failure to appropriately investigate customary interests in relation to overlapping areas • Crown's overlapping claims process does not include a tikanga based process for considering overlapping interests.	20(f), 20(h), 20(i), 39(d), 39(e), 39(f), 53(b), 58(a), 58(b), 58(c), 64(a), 64(b) 39(d), 53(b), 58(a), 58(c) 64(a), 64(b), 64(c), 65(a)(i), 65(c)(ii), 65(c)(iii)
2.	Failure to consider impact of redress on customary interests of overlapping claimants and inter-iwi relationships.	20(k), 32(c), 39(g), 53(d), 58(d), 65(d), 65(e), 65(f)
3.	Failure to consider impact of protocols on existing Ngātiwai protocols.	39(c), 65(a)
4.	Exclusion of Ngātiwai from overlapping claims process in relation to Aotea.	20(c), 53(a), 65(a)(ii), 65(c)(i),
5.	Lack of information and visibility provided to Ngātiwai.	20(b) 53(c), 65(a)(iii)
6.	Crown engaging Ngātiwai late after redress has been offered.	20(a), 39(a), 65(a)(v)

7.	Failure to facilitate an appropriate engagement process between overlapping iwi.	65(b)(ii)

CROWN'S OVERLAPPING CLAIMS POLICY IS NOT TREATY COMPLIANT

5. The Crown's submission that following its own policy demonstrates that the Crown is acting in accordance with the Treaty is incorrect and assumes that the policy is Treaty compliant when Ngātiwai is challenging that very policy and the Crown's practices in relation to the implementation of that policy. The Crown submission also ignores the previous recommendations of the Tribunal that the Crown's overlapping claims policy and practices should reflect the following matters, which Ngātiwai submits were not followed in relation to the Hauraki settlements (Tāmaki Makaurau Settlement Process Report[1] at pages 108-111):

   (a) the importance of holding hui and committing to a programme of hui that will continue throughout negotiations (see page 109);

   (b) the importance of kanohi-ki-te-kanohi communications (see page 109);

   (c) a focus on building relationships (see page 109);

   (d) the Crown engaging early and not waiting until after redress has been offered (see page 109);

   (e) understanding the customary underpinning of the tangata whenua groups' position (see page 109);

   (f) engaging with Māori sources of knowledge, both written and oral knowledge to understand customary interests (see page 109); and

   (g) understanding the impact of settlements on damaged inter-tribal relations (see page 110).

6. Ngātiwai submits that the above recommendations have clearly not been embedded into Crown policy and practices. *Ka tika ā muri, ka tika ā mua:*

[1] Tāmaki Makaurau Settlement Process Report (Wai 1362, June 2007).

Healing the past building a future[2] (the **Red Book**) includes very little detail on maintaining relationships between groups. While 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"[3], there is very little actual guidance in this respect. In practice, Ngātiwai's experience has been that the Crown has taken a very "hands-off" approach in relation to dealing with overlapping claims, simply encouraging meetings with overlapping iwi, with little or no follow up as to whether such meetings actually take place.

7. Ngātiwai therefore submits that the Crown's overlapping claims policy and practices are a key issue in its claim and their importance justify an urgent hearing being granted.

IRREVERSIBLE PREJUDICE TO NGĀTIWAI

Prejudice includes important matters other than just property being available to Crown for future settlements

8. The Crown asserts that there is no prejudice to Ngātiwai because the redress is either non-exclusive or the Crown retains the capacity to provide redress to settle the claims of other iwi (such as Ngātiwai) in the same area. This response indicates how the Crown's framing of these issues demonstrates a lack of understanding of tikanga, the importance of relationships and mana of tangata whenua. Prejudice is not limited to potential financial prejudice in future Treaty settlements. As the Waitangi Tribunal has noted (Tāmaki Makaurau Settlement Process Report at page 87):

> *"Mana and influence in their rohe go to the core of a group's Maori identity… The Crown needs to recognise and manage this reality. It is not enough to say that the others' turn will come… The Office of Treaty Settlements officers seems to be oblivious to the impact their dealings with a group in settlement negotiation can have on*

[2] Office of Treaty Settlements, Ka tika ā muri, ka tika ā mua: Healing the past, building a future – A Guide to Treaty of Waitangi Claims and Negotiations with the Crown.

[3] Ibid at page 54.

relationships among Māori groups in the same area. The dealings themselves are significant, independently of what the outcome is"

9. The Crown's response also fails to acknowledge the importance of the distinction between commercial and cultural redress, one that has been highlighted in both the Tāmaki Makaurau Settlement Process Report and the Ngāti Tūwharetoa ki Kawerau Settlement Cross-Claim Report[4]. In the latter report, the Tribunal stated (at page 69):

> *"When it comes to cultural redress, and the relationship of communities to culturally significant and sometimes tapu areas close to their turangawaewae, we think that the Crown's approach to awarding interests in contested areas must be even more scrupulous. It must respond to the particular circumstances that apply in each situation. As we have said, this is not a context where a 'one size fits all' approach will work well. Although the Tribunal in the Ngāti Awa Settlement Cross-Claims Report approved the rationale for the Crown's policy with respect to cross-claims to commercial redress, it should not be inferred that the same or similar approach to cultural redress will be found to be compliant with Treaty principles. The two contexts have different features, and differing responses are required for each"*

10. That the relevant redress is non-exclusive is no answer to the fact that cultural redress has been offered without a tikanga process which fully reflects the complex political and cultural dynamics at play.

11. Again, the Ngāti Tūwharetoa ki Kawerau Settlement Cross-Claim Report provides useful guidance to the Crown on these matters:

> *"The situation here as regards cultural redress is also more complex politically, and the potential for contemporary understandings as to tangata whenua status and areas of tribal influence to be unbalanced is very real.* ***Acknowledgements of mana and status, in the context of cultural redress, might seem relatively insignificant to the Crown. But in te ao Maori – and again, depending on the circumstances – they***

[4] Ngāti Tūwharetoa ki Kawerau Settlement Cross-Claim Report (Wai 996, 2003).

can increase the appearance of mana in one group and correspondingly diminish the ostensible mana of another. It is high-risk territory and frankly we were not persuaded that the Crown officials concerned did enough to ensure that they adequately appreciated the political nuances*."* (Emphasis added)

12. The Crown's response ignores the nature of redress in the Treaty Settlement context. This is not compensation where a numerical calculation or the provision of land is suffice. Redress requires that justice has been done and that parties have been dealt with fairly. The protection of relationships between tribal groups exacerbates the need for the content of the settlements to be demonstrably fair (page 104, Tāmaki Makaurau Settlement Process Report).

13. Despite some 14 years passing since the Ngāti Tūwharetoa ki Kawerau Settlement Cross-Claim Report, and 10 years passing since the Tāmaki Makaurau Settlement Process Report, it is submitted that the Crown continues to view Treaty settlements as a commercial negotiation where there is no prejudice to other iwi if the Crown maintains its ability to offer redress in the same area in future settlements. This mindset is contrary to the principles of the Treaty and is itself prejudicial to Ngātiwai. The Crown being able to offer redress to Ngātiwai on Aotea or elsewhere will not repair the trampling of mana, improve intra-tribal relationships or rebuild the partnership relationship between the Crown and Ngātiwai especially where the Crown has granted redress that is not commensurate with another iwi's customary interests.

Prejudice includes removal of lands as potential redress in areas of significance to Ngātiwai

14. The redress offered to iwi of Hauraki includes cultural redress properties both on Aotea and the mainland. The cultural redress properties do comprise exclusive redress in that the vesting of these properties in other iwi will deny Ngātiwai an ability to obtain an interest in the same property. The cultural redress properties are as follows:

    (a) Cape Barrier Conservation Area and the adjacent Cape Barrier Marginal Strip. Ngātiwai is not aware of any other properties in Cape

Barrier being available for redress as other Crown properties are located to the north of Cape Barrier;

(b) Tryphena North Conservation Area and Hilltop Recreation Reserve;

(c) Kawau Island Scenic Reserve;

(d) Mahurangi Scenic Reserve; and

(e) Motuora Island Recreational Reserve.

15. In relation to cultural redress, the Tribunal has acknowledged the importance of deploying this redress in a manner consistent with tikanga, as follows (page 104 of the Tāmaki Makaurau Settlement Process Report):

> *"cultural redress serves the vitally important function of recognising the tangata whenua status of mandated grounds, and, therefore their special relationship with features of the natural landscape of their area… In light of this, it is vitally important that cultural redress not be deployed in a manner contrary to tikanga Maori"*

16. Despite the recommendations of the Tribunal in the Tāmaki Makaurau Settlement Process Report, no regard has been given to tikanga when deciding to provide properties as cultural redress on Aotea to iwi of Hauraki (ie Cape Barrier Conservation Area and Tryphena North Conservation Area and Hilltop Recreation Reserve). Ngātiwai was also excluded from the overlapping claims process for a period of approximately 2 years despite the Crown indicating prior to this that Ngātiwai would be involved.

17. It is submitted that providing the Aotea cultural redress to Ngāti Maru and Ngāti Tamaterā does severely prejudice Ngātiwai because it removes those properties as potential redress properties for Ngātiwai. It is also submitted that this cultural redress has been done in a manner that tramples the mana of Ngātiwai and denies Ngātiwai an opportunity to understand the tikanga basis for awarding these properties to those iwi. From Ngātiwai's perspective the takahi of mana is a significant prejudice and will have impacts on its relationship with these iwi. Ngātiwai has therefore been requesting that a tikanga process take place so that any cultural redress is deployed in a manner that is consistent with tikanga. The Crown has continued to ignore this reasonable request at the expense of creating

potentially longstanding and unnecessary grievances between iwi and between Ngātiwai and the Crown.

Prejudice in relation to each settlement

18. In response to the Crown's submission that Ngātiwai has failed to show how they will suffer prejudice in relation to the proposed redress for each of the relevant Hauraki settlements, below is a table identifying the relevant prejudice in relation to each type of redress as pleaded in the Statement of Claim.

CROWN ACTION	PREJUDICE TO NGĀTIWAI
Overlapping claims process	Ngātiwai views and interests not taken into account so not appropriately reflected in redress (paragraph 20(c) of Statement of Claim). Negative effect on rights and customary interests of Ngātiwai (20(e) of Statement of Claim). Other interests inappropriately extend into Ngātiwai rohe (66(a) of Statement of Claim). Undermining of mana whenua, mana moana and tikanga o Ngātiwai (66(b) of Statement of Claim). Damaged relationships with iwi of Hauraki (66(c) of Statement of Claim). Damaged Crown/Ngātiwai relationship (66(d) of Statement of Claim).
Hauraki Fisheries RFR redress	Discord between Ngātiwai and iwi of Hauraki (32 of Statement of Claim). As above - see also paragraphs 66(a) to (d) of Statement of Claim.
Protocol redress to individual iwi of Hauraki	Negative impact on existing Ngātiwai protocols with Crown agencies (39(c) of Statement of

	Claim). As above – see also paragraphs 66(a) to (d) of Statement of Claim. See paragraph 39-40 of the affidavit of Hori Parata dated 31 July 2017.
Aotea redress: Cultural redress: • Ngāti Maru: vesting of Cape Barrier Conservation Area and Cape Barrier Strip • Ngāti Tamaterā: vesting of Tryphena North Conservation Area and Hilltop Recreation Reserve Commercial redress: • Ngāti Whanaunga: exclusive RFR to Tryphena Hall • Ngāti Maru, Ngāti Tamaterā and Te Patukirikiri: shared RFR over 18 sites Statement of Association relating to a pā site	Undermining of mana whenua of Ngātiwai (53(d)(i) of Statement of Claim). Erosion of customary rights and tikanga of Ngātiwai hapu on Aotea (53(d)(ii)). Damage relationship between Ngātiwai and Marutūāhu (53(d)(ii)). Undermine Treaty relationship between Crown and Ngātiwai (53(d)(ii)). Preclude Ngātiwai hapu from purchasing surplus Crown land that is the subject of the redress (53(d)(ii)). Preclude the Crown from offering the same properties to Ngātiwai hapu (53(d)(ii)). Undermines rights of Ngātiwai as recognised by the Māori Land Court (53(d)(iii)). As above - see also paragraphs 66(a) to (d) of Statement of Claim. Affidavits: See paragraphs 27 and 41 of the affidavit of Haydn Edmonds dated 21 July 2017. See paragraph 35-38 of affidavit of Hori Parata dated 31 July 2017.

Marutūāhu redress: Statutory acknowledgement Cultural redress properties: • Kawau Island • Mahurangi Scenic Reserve • Motuora Island Recreational Reserve	Undermining of mana whenua, tikanga and Ngātiwai interests. Creation of divisions between Ngātiwai and Marutūāhu. See paragraph 58 of Statement of Claim. As above - see also paragraphs 66(a) to (d) of Statement of Claim. See paragraph 36 and 41 of affidavit of Haydn Edmonds dated 21 July 2017.
Ngāti Whanaunga redress Cultural redress properties	Erode rights of Ngātiwai Create divisions between Ngātiwai and Ngāti Whanaunga. See paragraph 64 of Statement of Claim. As above - see also paragraphs 66(a) to (d) of Statement of Claim.

19. Given the matters set out above, it is submitted that Ngātiwai has demonstrated the serious and irreversible prejudice it will suffer if urgency is not granted.

CONCLUSION – GROUNDS FOR URGENCY

20. It is submitted that the Crown's submissions fail to refute the irreversible prejudice Ngātiwai will suffer if urgency is not granted and the Crown proceeds to introducing settlement legislation. Treaty settlements are too important and longstanding to be rushed through at the risk of long term irreparable damage to mana, tikanga and important inter-iwi and iwi/Crown relationships.

21. The Crown has also failed to refute that there are alternative remedies available to Ngātiwai or that Ngātiwai is not ready to proceed to a hearing. In these circumstances, it is submitted that urgency should be granted.

SERVICE OF PROCEEDINGS ON THE CROWN

22. The Crown submits that service on the Crown was not effective and relies on section 16 of the Crown Proceedings Act 1950 (the **Crown Proceedings Act**). The Crown Proceedings Act applies to civil proceedings which are defined as any proceedings in any "court" other than criminal proceedings. The Waitangi Tribunal is not a "court" within the meaning of the Crown Proceedings Act, so the Act does not therefore apply. The Crown also refers to the Waitangi Tribunal's Practice Note: Guide to the Practice and Procedure of the Waitangi Tribunal (**Tribunal Practice Note**). The Tribunal Practice Note acknowledges the unique nature of the Tribunal and states "The Waitangi Tribunal follows the rules of natural justice to ensure that all parties and all other persons entitled to appear before it receive a fair hearing. However, the procedures used in the general courts do not necessarily apply to the unique jurisdiction of the Tribunal".

23. The Crown Memorandum also states that on 26 September 2017, the Waitangi Tribunal registry advised Crown Law that no evidence was filed with Ngātiwai's application for urgency.[5] The Crown Memorandum further provides that Mr Gough, counsel for the Crown, does not have in his inbox, the emails that counsel for Ngātiwai sent on 24 July and 1 August 2017 to the Registrar of the Waitangi Tribunal and to Mr Gough.

24. We refer to the affidavit of Aperahama Hurihanganui dated 17 October 2017. That affidavit indicates that:

    (a) on 24 July 2017, the following documents were emailed to the Registrar of the Waitangi Tribunal and copied to the email address of Mr Gough (see exhibit AH-1 (page 1 of exhibits)):

        (i) application for urgency dated 24 July 2017 (which refers to 5 affidavits in support (paragraph 5);

        (ii) statement of claim dated 24 July 2017; and

[5] Per telephone conversation between Vicky McDowell, Legal Secretary for the Crown Law Office, and Helayna Seiuli of the Waitangi Tribunal on 26 September 2017. See paragraph one and footnote 2 of the Crown Memorandum.

(iii) supporting evidence (including one brief of evidence[6] and three affidavits[7]) (the **Ngātiwai Evidence**).

(b) on 1 August 2017, counsel for Ngātiwai emailed a further affidavit to the Registrar of the Waitangi Tribunal (and copied that email to the email address of Mr Gough) (see exhibit AH-2 (page 11 of exhibits));[8]

(c) no failure or non-delivery messages were received by counsel for Ngātiwai from the email address of Mr Gough;

(d) the affidavit of Haydn Edmonds was also couriered to the Waitangi Tribunal (see exhibit AH-3 (page 13 of exhibits)); and

(e) on 22 August 2017, the Assistant Registrar of the Waitangi Tribunal confirmed that the Tribunal had received Ngātiwai's application for urgency, statement of claim and the Ngātiwai Evidence (see exhibit AH-3 (page 13 of exhibits)).[9]

25. The Ngātiwai evidence has been sent again by both email and courier to the Crown (see exhibit AH-4 (page 15 of exhibits)), and by courier to the Waitangi Tribunal.

26. The memorandum of counsel dated 12 September 2017 on behalf of Ngātiwai also notified the Crown that on 24 July 2017, the Application and supporting documents (Statement of Claim, affidavits and brief of evidence) were provided to the Crown by way of email addressed to Jason.Gough@crownlaw.govt.nz.

27. The Crown did not notify Ngātiwai that it did not receive these emails until it filed the Crown Memorandum on 12 October 2017. At no time, did the Crown request copies of the evidence from Ngātiwai despite:

(a) the evidence being referenced in the urgency application (at paragraph 5), which the Crown says it received on 24 August 2017;

---

[6] Brief of Evidence of Tania McPherson dated 24 July 2017.

[7] Affidavit of Haydn Edmonds dated 21 July 2017; Affidavit of Ropata Diamond dated 21 July 2017; Affidavit of Aperahama Edwards dated 21 July 2017.

[8] Affidavit of Hori Parata dated 31 July 2017.

[9] Email from Abby Hauraki (Assistant Registrar) to Aperahama Hurihanganui (solicitor of Kahui Legal) dated 22 August 2017 (2:55pm).

(b) the Crown being notified that the evidence had been emailed to Jason.Gough@crownlaw.govt.nz;

(c) the Crown requesting two extensions on 7 and 29 September 2017 to file its response to Ngātiwai's application; and

(d) the Crown making enquiries with the Waitangi Tribunal on 29 September 2017 (but not making similar enquiries with Ngātiwai) regarding the filing of evidence.

28. It is submitted that in the circumstances set out in paragraphs 24 to 27 above, it is not reasonable for the Crown to have remained silent by not notifying Ngātiwai of the non-receipt of correspondence. This is particularly so in the context of Waitangi Tribunal proceedings where the good faith of the Crown is important. The Crown should not therefore be able to rely on these circumstances as a basis for delaying or prejudicing Ngātiwai's application.

6 November 2017

Kiri Tahana
Counsel for the Claimant

TO: The Registrar, Waitangi Tribunal, Wellington.

AND TO: Counsel for the Crown.