THE WAITANGI TRIBUNAL **WAI 2840**
TE RŌPŪ WHAKAMANA I TE TIRITI O WAITANGI **WAI 2666**

IN THE MATTER of the Treaty of Waitangi Act 1975

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 ON BEHALF OF NGĀTIWAI IN RESPONSE TO CLOSING SUBMISSIONS OF THE CROWN AND CLOSING SUBMISSIONS OF HAURAKI IWI
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MAY IT PLEASE THE TRIBUNAL

Introduction

1. These submissions are filed by Haydn Edmonds (Wai 2666 claimant) on behalf of the Ngātiwai Trust Board (**Ngātiwai**) in response to the closing submissions of the Crown dated 17 June 2019[1] and the closing submissions of the iwi of Hauraki dated 14 June 2019.[2]

Summary

2. At the heart of the differences between Ngātiwai and the Crown is the place of tikanga in the Crown's settlement process. The Crown settlement process and policies were not designed to accommodate or incentivise tikanga in recognition that tikanga is a taonga afforded protection under Article 2 of the Treaty of Waitangi (the **Treaty**). The Crown submits that its Treaty obligations do not require it to compel iwi to engage in accordance with tikanga and the Crown must ultimately make a decision. That decision may be made without any tikanga process having taken place and irrespective of the impact on tikanga. The key issue for the Crown is whether the Crown considers the redress is justified as a result of the Crown's Treaty breach and the settling of iwi's customary interests.

3. The Crown's closing submissions defend its approach and policies and make no concessions as to the impact of that approach on tikanga. The submissions assert that Ngātiwai is merely unhappy with the outcome.

4. The Crown states that Ngātiwai has sought to recreate, rather than recount, the negotiation process and has paid insufficient regard to the fact that the Crown negotiated with Ngāti Rehua and Ngāti Manuhiri with the support and encouragement of Ngātiwai.[3] Ngātiwai says that its support for its hapū could not reasonably be inferred as agreement to being excluded from engagement regarding iwi of Hauraki.

[1] Closing Submissions of the Crown in relation to Ngātiwai (Wai 2840, #3.3.30, 17 June 2019) ("#3.3.30").
[2] Closing Submissions of the Iwi of Hauraki in relation to Ngātiwai (Wai 2840, #3.3.29, 14 June 2019) ("#3.3.29").
[3] #3.3.30 at [4] and [34].

5. The Crown argues that there is no prejudice to Ngātiwai because other redress remains available to Ngātiwai and much of the redress offered to Hauraki is non-exclusive. The Crown does not accept that prejudice arises by reason of the influence provided to Hauraki through non-exclusive redress or that the impact on mana and rangatiratanga is prejudicial to Ngātiwai. Again, there is a clear difference of views on tikanga and the impact on tikanga concepts arising from the Crown's processes and outcomes.

Ngātiwai response

6. Ngātiwai submits that not only are its arguments tenable and supported by evidence (the chronology of which was set out in detail in the affidavit of Tania McPherson[4] and summarised in Appendix 3 of the closing submissions of Ngātiwai),[5] but that the Crown has failed to comply with its Treaty duties to actively protect tikanga Māori and inter-tribal relationships. Tikanga was not at the forefront of the Crown's settlement process. The Crown's process focussed on the Crown being satisfied that the Treaty breach justified the redress offered.

7. Ngātiwai responds to the Crown's submissions under the following headings:

   (i) **Tikanga:** the Crown's Treaty obligations require that it protect tikanga while concluding settlements and design its policies and processes to incentivise and accommodate tikanga. If the Crown fails to do this, it allows tikanga to be undermined and this will result in damaged inter-tribal relations as is demonstrated by the evidence of all claimants in this inquiry;

   (ii) **Engagement:** there was one kanohi-ki-te-kanohi meeting between Ngātiwai representatives and Mr Majurey of Marutūāhu[6] and one hui with each of Hako and Ngāti Pāoa. Ngātiwai requested many more meetings but the evidence demonstrates that Marutūāhu would not meet. The Crown maintains that it was not required to do more than encourage such meetings and had no option but to make a decision on redress. The Crown had no reasonable basis for taking

[4] #33 and #33(a).
[5] Appendices to Closing Submissions on behalf of Ngātiwai (Wai 2840, #3.3.11(a), 8 May 2019) ("#3.3.11(a)") at Appendix 3.

Ngātiwai consent for its hapū to undertake their own settlements as acceptance that Ngātiwai did not need to also be included in the context of settlements with Hauraki. Ngātiwai says the engagement was flawed from the beginning by the initial exclusion of Ngātiwai and then the failure to properly inquire into important tikanga concepts;

(iii) **Redress offered:** the redress offered gives rise to prejudice to Ngātiwai both because of the process followed and the outcome; and

Treaty Principles

8. The relevant principles of the Treaty include:

(a) **Partnership**: The Crown and Māori, being Treaty partners, must act reasonably and in good faith towards each other;

(b) **Active Protection**: The Crown has a duty to actively protect the interests of Māori as specified in the Treaty. To this end, in its decision making processes regarding settlement redress, the Crown must act:

(i) proactively and on a fully informed basis;

(ii) in accordance with tikanga;

(iii) with appropriate acknowledgement of the customary interests and mana whenua / mana moana of relevant iwi; and

(iv) in a manner that does not erode the customary interests and mana whenua of relevant iwi.

(c) **Reciprocity**: The Crown must respect tino rangatiratanga and tikanga in exercising kāwanatanga and this should be reflected in its decision making.

(d) **Equity and impartiality**: The Crown has a duty to act fairly and impartially towards iwi. This principle means the Crown:

(i) must not allow one iwi to have an unfair advantage over another in relation to process and/or outcomes;

(ii) must take into account the particular circumstances of each iwi rather than simply treat all iwi the same; and

(iii) must not create divisions between iwi or damage the relationships between iwi.

Tikanga

9. Ngātiwai submitted in its closing submissions that the Crown showed little regard for tikanga and provided no incentive for Hauraki to engage with Ngātiwai in accordance with tikanga. There were no consequences for Hauraki when Hauraki did not engage and the Minister proceeded to make final decisions.[7]

10. The Crown submits in reply that it cannot "incentivise" tikanga processes for engagement through compulsion and that iwi must be free to engage in accordance with tikanga. This means that iwi must be free to either engage or not engage in a tikanga process. According to the Crown, the freedom of choice is a consequence of the rangatiratanga that the Crown must actively protect.[8] Tino rangatiratanga however, respects and follows tikanga, and therefore it is inconsistent for the Crown to rely on rangatiratanga as a basis for undermining the importance of what is in effect, the law of te ao Māori, tikanga. The Crown also has an obligation under Article 2 of the Treaty to protect tikanga.

11. The Crown raises concerns such as "what is tikanga engagement" and "who decides the questions and by what standard?"[9] as though, tikanga (unlike Pākehā law) has no standards or process for determining how tikanga is to operate. These assertions are made by the Crown without any evidence as to tikanga. The Tribunal is asked to accept these assertions but the Crown failed to bring any evidence to support its submission as to the difficulties of compelling compliance with tikanga.

12. The Crown's arguments as to the "problems" with tikanga demonstrate the Crown's ignorance of tikanga and unwillingness to enforce a Māori process to govern, what is in effect, a Māori issue (inter-tribal interests and rights). To argue tikanga cannot be compelled (without bringing any evidence to support this assertion) ignores the depth and history of tikanga and demonstrates the Crown's own bias and unwillingness to accept that tikanga, unlike Pākehā law, is capable of being used as a legal system to govern inter-tribal relationships.

13. Prejudice arises when one iwi is requesting a tikanga process and the other will not engage. The prejudice is exacerbated when it is more beneficial for an iwi (Hauraki) to

[7] Closing Submissions on behalf of Ngātiwai (Wai 2840, #3.3.11, 8 May 2019) ("#3.3.11") at [3].
[8] #3.3.30 at [203].
[9] #3.3.30 at [206].

not engage with overlapping iwi (Ngātiwai). When this situation arises, as it has here, the Crown cannot be a mere bystander or take a back-seat and say that engagement cannot be compelled. This approach favours the iwi that does not wish to partake in the process and prejudices the iwi that wants to engage in accordance with tikanga. It undermines Māori cultural values and allows them to be ignored. Written submissions, historical reports and Court decisions take precedence over the marae, kōrero and kanohi-ki-te-kanohi interactions. The Crown however, refuses to acknowledge that this is the consequence of its process and instead asserts that rangatiratanga requires that it not require Hauraki to respect tikanga. The damage this creates is real and undermines mana and rangatiratanga.

14. The iwi of Hauraki have quoted the transcript to argue that a decision maker would be required in the absence of a consensus.[10] It appears that Hauraki are foreshadowing a failed tikanga process but Hauraki has not allowed such a process to occur. The Crown in its process, readily accepted the position of Hauraki that differences were irreconcilable and the Crown relies on hearsay evidence of alleged conversations between Mr Majurey and Mr Edmonds.[11] Mr Majurey provided no evidence and Mr Edmonds disputed the assertion that differences were irreconcilable.[12] Rather, the Crown accepted Mr Majurey's assertions and proceeded to make a decision.

Redress held hostage

15. The Crown asserts that redress is held hostage if negotiations are unable to continue because a tikanga process has not taken place.[13] This is an unfounded statement not supported by any evidence. Given the years that the Crown has been engaging with Hauraki, had the Crown instigated a tikanga process upfront (e.g. in 2013), there would have been more than enough time for such a process to have taken its course. The Crown however, did not seek to do this. The Crown could have easily prescribed that a tikanga process take place within a reasonable period (e.g. months) and provided the resources to enable this to happen. Tikanga would not hold the settlement "hostage". Rather, it would ensure that mana was upheld and iwi were given an opportunity to

[10] #3.3.29 at [22].
[11] Brief of Evidence of Susan Kiri Leah Campbell dated 14 March 2019 at [126].
[12] #4.1.1 at 157-158.
[13] #3.3.30 at [206].

discuss overlapping claims issues in the most appropriate forum and with regard to important Māori concepts such as mana whenua. To bypass and ignore this process is to denigrate the importance of these principles to te ao Māori and to allow the settlement process to create new grievances and Treaty breaches.

16. The Crown's reluctance to acknowledge the role of tikanga in understanding customary interests or to inquire into its meaning and how this is relevant to the types of redress being offered was apparent during the cross-examination of Mr Dreaver:[14]

> *Q. The court case is quite interesting because it does … talk about the holding of kaitiakitanga in accordance with the tikanga of – sorry, this is on the last page of the judgment where it talks about Ngāti Rehua holding the same as kaitiaki for themselves and in accordance with the tikanga of whanaungatanga for Ngātiwai ki Aotea and Marutūāhu. I take that to mean that in order to understand customary interests we really need to know what the tikanga of whanaungatanga means, that's the Court's words.*
>
> *A. Yes, those are the Court's words. But as I said we're not trying to create mana whenua or lock in a particular form of customary ownership or customary interest we're trying to address a maemae that existed.*
>
> *Q. That's right. I think we accept that the Crown's s not trying to do that. Our concern is more around the effect of what the Crown's doing and you say that yes we've written a letter we've said they have customary interests at Aotea, so there is an acknowledgement of customary interest. There's no request for evidence around what the tikanga of whanaungatanga means despite the Court using those words. There's a preference for historical written documents above maybe tikanga evidence, would that be a fair.*
>
> ***A. Well the Treaty settlements, I think you're asking too much of the Treaty settlement process which is admittedly flawed. It is flawed in the sense it has particular goal in mind.***
>
> *Q. Yes*
>
> *A. It's trying to meet the Treaty principle of redress, that's such a critical principle that Hauraki whānui deserved as do all iwi.*
>
> *Q. Absolutely.*
>
> *A. including Ngātiwai. So it was not our job I don't think to try and codify what the court judgment was talking to we were trying to address breaches of the treaty by the Crown.*
>
> *Q. No I completely agree with you that's not necessarily your role but at the same time you heavily rely on that same judgment to say that there's customary interests but you fail to gather evidence around tikanga of whanaungatanga which was at the heart of the judgment, that's what I'm struggling with.*
>
> *A.* ***I'm struggling to see why that's relevant in terms of the Treaty settlement***

[14] #4.1.1 at 455-456.

[emphasis added]

17. The above evidence indicates that Mr Dreaver did not consider it necessary to understand tikanga even when that tikanga was at the heart of a Court finding that the Crown relied on to justify Marutūāhu's customary interests – which warranted that redress be provided. Those interests sit with the interests and rights of others – which rights arise by reason of tikanga and must be understood in that context. If redress is being provided because of those interests that redress should be consistent with those interests and not offend the tikanga on which they are based. By focussing on settling the grievance without regard to tikanga is contrary to the Crown's obligation to actively protect tikanga.

Mana whenua and non-exclusive redress

18. The Crown has continued to argue that statutory acknowledgements and the grant of non-exclusive redress in overlapping areas within the Ngātiwai rohe can sit alongside the rights and interests of Ngātiwai.[15] The Crown also asserts that Ngātiwai challenges the Crown position that a statutory acknowledgment is non-exclusive redress.[16]

19. The Ngātiwai submission is **not** that statutory acknowledgements are exclusive. The Ngātiwai submission is that the Crown proceeded on the wrong assumption that the grant of non-exclusive redress to Hauraki (either collectively or to individual Hauraki iwi) has no prejudicial effect on Ngātiwai in the redress areas.[17] The effect of this non-exclusive redress is that iwi of Hauraki obtain a degree of influence within the Ngātiwai rohe that does not reflect the nature of their interests. Again, if tikanga was afforded the respect the Treaty guaranteed, the Crown would enquire into the impact on tikanga of allowing another iwi to have influence within the rohe of Ngātiwai. To ignore this enquiry, is to allow a process that will create a further Treaty grievance. Again, the Crown's key focus is settlement and not preservation of tikanga or the long term impact of its Treaty redress. The Crown should be able to undertake settlements that provide appropriate compensation whilst protecting tikanga. The Crown however, has not sought to innovate the forms of compensation or increase monetary compensation to

[15] #3.3.30 at [192].
[16] #3.3.30 at [189].
[17] Amended Statement of Claim (Wai 2666, #1.1.1(a), 21 December 2018) at [31](d).

avoid offending tikanga because protection of tikanga is of secondary importance to the Crown's objective of achieving a settlement acceptable to the Crown.

20. Ms Anderson's evidence demonstrated that statutory acknowledgements allow an iwi to exert influence in a particular area.[18] It is that influence that a statutory acknowledgement infers that needs to be understood from a tikanga perspective as it does impact on mana and rangatiratanga despite the Crown not intending such a consequence.

21. The Crown submits that the mana and rangatiratanga of Ngātiwai cannot be diminished by the offer of redress to Hauraki iwi[19]:

> *The Crown recognises the significance of concepts of mana whenua, mana moana to iwi Māori. But, as has been repeatedly stressed in these submissions (and accepted by Ngātiwai), the Crown does not presume to determine who has mana whenua or mana moana over a given area. Fears that allocation of redress to Hauraki iwi will be "objectively viewed" as giving them mana whenua are unfounded.*

22. Further, redress should be viewed in the following light[20]:

> *The Crown does not claim to have the right to determine mana whenua or mana moana and an offer of redress should not be seen as a signal that the Crown is doing so. A redress offer is simply a recognition the Crown accepts a claimant group has a level of interest sufficient to warrant that redress.*

23. Ngātiwai submits that from a legal point of view, the Courts have recognised that the purpose of Crown acknowledgments in settlements is to enable settling groups to support their land interests in the Courts and when seeking consents from local authorities.[21] This means that the Crown's recognition of Hauraki interests and offers of redress to Hauraki go beyond mere recognition and have legal and practical implications.

24. The Crown provided no evidence to the Waitangi Tribunal to support its submission that mana whenua (which is a tikanga concept) is not impacted by the types of redress

[18] Draft Transcript for Hearing Days 1-3 held at Waiwhetu Marae from 8-10 April 2019 (Wai 2840, #4.1.1, 27 May 2019) ("#4.4.1") at 258-261 and 416-418.
[19] #3.3.30 at [22.1].
[20] Exhibit A of the Affidavit of Tania McPherson (Wai 2840, #A33(a), 28 February 2019) ("#A33(a)") at 472 regarding Letter from Minister to Ngātiwai dated 18 August 2017.
[21] *Raukawa Settlement Trust v The Waitangi Tribunal* [2019] NZHC 383 at [37].

the Crown is providing to Hauraki within the Ngatiwai rohe. Again, the Crown asserts a position without any tikanga evidence to support its assertion.

Aotea

25. Ngātiwai does not agree that Marutūāhu have mana whenua on Aotea despite the submission by Hauraki iwi. The Crown argues that it does not determine mana whenua. It is clear however, from their closing submission that Marutūāhu considers the Crown has determined iwi of Hauraki as possessing mana whenua status and this is appropriately reflected in the redress offered.[22] This contradicts the Crown's submission that the redress it offers has no impact on mana whenua. It has direct impact and the redress entrenches the position of Hauraki without this proposition having been tested or any tikanga process being undertaken to understand what mana whenua means and how Marutūāhu's interests would appropriately be recognised as a matter of tikanga or in accordance with the tikanga of whanaungatanga as determined by the Māori Land Court.

26. The iwi of Hauraki have relied on the Māori Land Court decision *da Silva – islands and Rocks off the coast of Aotea*[23] to establish a number of Marutūāhu and rangatira connections to Aotea. They also state that they have tūpuna buried there. This is disputed by Ngātiwai and Ngāti Rehua[24]:

> *Dead buried at Harataonga following the 1838 battle. There are no dead buried at Harataonga from the 1838 battle. The Court has made this finding in error. They were buried at Tukari and Te Parekura. Kitahi Te Taniwha uplifted the Marutuahu dead in 1844.The Court found that they had wahi tapu where they fought and died in battle. A wahi tapu does not provide Native proprietary custom at Whangapoua.*

27. Hauraki also refer to a lament composed following the murder of Te Maunu and attach a copy as Appendix A to their closing submissions. That lament clearly identifies that Hauraki belong to Moehau in the Coromandel and she refers to her child as the sapling totara from the forest of Moehau. Ngātiwai have their own narrative about this event and the place referred to as Te Karaka. If a tikanga based process had been applied to work through these overlapping claims issues, Ngātiwai would have been able to

[22] #3.3.29
[23] *da Silva – Islands and Rocks off the coast of Aotea* (1998) 25 Auckland MB 212.
[24] #4.1.1 at p451 and #45(a) at 445.

debate and wananga these issues on the marae so that all waiaita and stories were heard and understood.

28. Tā Hirini Moko Med sets out a test to enable iwi and hapū to assess their claims of mana whenua.[25] This test states that when all of the below aspects are met, mana whenua is secured, this includes:

(a) Take raupatu - Land acquired through military action such as raupatu, that displaces the people and leaders and extinguishes existing rights of occupation;

(b) Take ahikāroa - The occupation of land over several generations;

(c) Take moe whenua - Marriage to women of the land;

(d) Acknowledgement by neighbouring iwi to validate that a new political reality now controls the estate;

(e) The establishment of alliances to validate occupation;

(f) The new group sets in place leadership, kāinga and food systems;

(g) The new group is able to defend its rohe against others for several generations.

29. The *da Silva* decision does not establish mana whenua for Marutūāhu, it recognises Marutūāhu interests on Aotea. The Court decision did not attempt to distinguish between those interests, although interests can only be found through Ngāti Tai. It is also clear from the court decision that Ngāti Rehua did not validate the presence of Ngāti Tai as one of the requirements for establishing mana whenua.

30. The decision states that Marutūāhu's connections are established in accordance with the tikanga of whanaungatanga. Whanaungatanga does not amount to mana whenua.

31. In summary, Ngātiwai does not dispute Marutūāhu connections to Aotea through whanaungatanga, it does however,dispute that Marutūāhu share mana whenua as set out in the iwi of Hauraki submissions.

[25] Hirini Moko Mead *Tikanga Māori: Living by Māori Values* (Huia Publishers, Wellington, 2016) at 306 – 307.

Engagement

32. The Crown disputes the complaint by Ngātiwai that there was no upfront engagement, a lack of openness and transparency, and unfair and unequal treatment.[26]

33. It was not however, until reading the Marutūāhu Record of Agreement (**ROA**) that Ngātiwai was made aware of the Crown's offer to provide redress to Marutūāhu that fell within the rohe of Ngātiwai.[27] The Crown relies on its earlier engagement with Ngāti Manuhiri and Ngāti Rehua to demonstrate that it was acting in good faith and had a reasonable basis for not engaging with Ngātiwai. The Crown then says that it engaged with Ngātiwai once it was aware that Ngātiwai was asserting interests on Aotea separate from those of Ngāti Rehua-Ngātiwai ki Aotea.

34. The overall Crown approach prejudiced Ngātiwai because at no time did the Crown articulate to Ngātiwai that its support for its hapū settlements would be taken by the Crown as a basis for not involving Ngātiwai in discussions regarding other iwi. Further, the Office of Treaty Settlements had acknowledged in 2012 that the support by Ngātiwai for Ngāti Manuhiri did not extend to extinguishing any of the rights or interests of Ngātiwai in the same areas:[28]

> *The Ngatiwai Trust Board's support of the Ngati Manuhiri settlement is nevertheless qualified by a motion it passed on 2 March 2012 that it "does not support any settlement which extinquishes any iwi rights, interests or redress to the Islands within the Ngatiwai rohe"*

35. Given the above acknowledgement, there was no reasonable basis for the Crown to exclude Ngātiwai from overlapping claims discussions with Hauraki. From a tikanga perspective, the Crown position is also offensive and ignores the mana of iwi relative to third party iwi. The Crown's ignorance of tikanga does not justify an assertion that the Crown was acting in good faith. Good faith requires the Crown to educate itself as to important tikanga concepts such as mana whenua and to stand by acknowledgements and conditions that were provided in the context of Ngātiwai supporting its hapū.

[26] #3.3.30 at [196]-[200] and [223]-[251].
[27] #A33 at [25].
[28] Office of Treaty Settlements Ngāti Manuhiri Claims Settlement Bill Departmental Report (30 May 2012) at [59].

36. The Tribunal questioned Mr Dreaver about this issue and that questioning illustrates that the Crown did have a preference to only talk to Ngāti Rehua:[29]

> *A. … we felt that with the overlapping interest it was appropriate that that engagement be with Ngāti Rehua. There is a real complexity, if you're thinking about what we are talking about, it would be really complex to sort of try and reach an agreement with Ngāti Rehua over here and then sort of take the whole thing over to another. You know, I would think from the Marutūāhu iwi's perspective or Hauraki iwi's perspective it would feel like, "Hang on, we've just got that agreement and now were having with the same group in a different form, the iwi rather than the hapū, we go through it all over again." So we took the view that it was appropriate to keep talking to Ngāti Rehua on overlapping issues.*
>
> *Q. But didn't you have Ngātiwai differently saying to the Crown, "We want to be heard on the overlapping claim issue?"*

37. The questioning of Mr Dreaver demonstrates that the real concern of the Crown was to minimise the parties with which it was engaging to remove complexity. Mr Dreaver refers to the perspective of Hauraki without regard to the perspective of Ngātiwai. Mr Dreaver's answers demonstrate a disregard for the interests of Ngātiwai in favour of Hauraki and simplicity.

38. Further, the questioning of Mr Dreaver also shows that the Crown were fully aware that Ngātiwai wished to be involved:[30]

> *Q. So it seems that Ngātiwai were making it very clear that they supported Ngāti Rehua proceeding with their settlement. They supported Ngāti Rehua being involved in the overlapping claims process. But they were saying. "We also have an interest. We also need to be involved."*
>
> *A. That's certainly – yes that's – I think that's a correct reading.*
>
> *..*

[29] #4.1.2 at p48-50.
[30] #4.1.2 at 50.

Q. Well I struggle a bit then as to why the Crown is coming back and saying, "We're dealing with Ngāti Rehua. You should go and talk to Ngāti Rehua?"

A. I can't remember what our response was to that…

39. It is submitted that the above indicates that the Crown was not acting in good faith and was motivated by its own desire to limit the parties it needed to deal with rather than by acknowledging tikanga and the mana of an iwi.

Information requests

40. The Crown responded to the statement that "Ngātiwai was concerned about the nature and extent of Marutūāhu interests being recognised in Ngātiwai's rohe" by saying that Ngātiwai needed to "ask" for this information from the Crown.[31] This was not a mere "observation".[32] This was Ngātiwai expressing its concerns to the Crown about the process the Crown had followed to understand Hauraki interests and arrive at proposed redress. That the Crown chose not to respond to this statement, is reflective of the process that the Crown followed, which did little to acknowledge or appease Ngātiwai concerns or uphold its mana. It is submitted that the Treaty requires the Crown to be open and upfront, which includes providing to Ngātiwai those reports and decisions that the Crown was seeking to rely on. At no time during that process did the Crown provide Ngātiwai with the Hauraki report or explain that the Crown relied on this report to justify Hauraki's alleged interests, despite this now being referred to in the Crown's closing submissions.[33]

41. Ngātiwai consistently and repetitively asked to be made aware of the process followed by the Crown in arriving at the redress provided to Marutūāhu within the Ngātiwai rohe.[34] Ngātiwai asked for all and any relevant information that the Crown may hold that would be of interest to them.[35] Ngātiwai then received certain information from the Crown due to formal Official Information Act requests. This would not have been

[31] #3.3.30 at [229].
[32] #3.3.30 at [229].
[33] #3.3.30 at [223].
[34] #A33(a) at 5 and 69.
[35] See, for example, #A33(a) at 51, 69, 74, 196-197, 264 and 315.

necessary if the Crown provided this upfront so that Ngātiwai was able to understand and then respond to that material.

42. The Crown rejects the Ngātiwai assertion that its overlapping claims process lacked transparency and states that the Ngātiwai OIA requests were not a last resort effort to ascertain information. The Crown fails to understand however, that an OIA request does not reflect a trusting relationship or an open and transparent exchange of information. The table the Crown submits in its closing submission highlights just how much information was kept from Ngātiwai prior to its OIA requests.[36] The table also shows that the Crown did not provide the historical report by Armstrong to Ngātiwai until October 2016 despite that report being prepared in November 2013. Ngātiwai first asked for information as to the basis for Marutūāhu's interest in 2013 but the Crown did not freely provide such reports until Ngātiwai requested them.[37] The Hauraki report was never provided to Ngātiwai as a basis for Marutūāhu's interests until the closing submissions. It is submitted that the Crown should, as a matter of process, provide information regarding customary interests within a tribal rohe to iwi and hapū, especially when they have requested this information.

Ngātiwai engagement with the Crown

43. The Crown states that Ngātiwai did not raise concerns to the vesting of properties on Aotea until 2016 and 2017.[38] Because Ngātiwai was not provided with properties until later in the process, it would be impossible for Ngātiwai to raise concerns about the vesting of properties that it did not know were being vested. When Ngātiwai were made aware of these properties, it opposed the properties being offered to Marutūāhu.[39]

Ngāti Whanaunga redress – outside of Ngātiwai rohe

44. The Crown has submitted with regards to Omaha and Ōtanerua that Ngāti Whanaunga were encouraged to engage directly with Ngātiwai, and that the Crown engaged openly and honestly with Ngātiwai and adhered to its overlapping claims process throughout.

[36] #3.3.30 at 59.
[37] #A33(a) at 51.
[38] #3.3.30 at [55] and [94]-[103].
[39] #A33(a) at 290.

The Crown considered in good faith the relevant research and opinions that led to finding Ngāti Whanaunga interests at Omaha and Ōtanerua.[40]

45. Ngātiwai expressed its concerns to OTS about the Ngāti Whanaunga interests found at Omaha and Ōtanerua.[41] Ngātiwai highlighted that OTS's letter does not recognise that while iwi have formal rohe, they also have ancestral associations with numerous places adjoining and outside of their rohe, and maintain connections with them.[42]

46. Hauraki submit that there is no basis to the Ngātiwai claim in relation to redress offered to Ngāti Whanaunga that is outside of the Ngātiwai rohe.[43] This alone is not a basis for denying the Ngātiwai claim. Iwi may have interests outside of their tribal rohe. Those interests may not be akin to mana whenua (as Ngātiwai asserts is the positon with Marutūāhu claiming within the Ngatiwai rohe) however, they are relevant and should be considered in the context of overlapping claims. For The Crown has offered redress to Ngāti Whanaunga that Ngātiwai submits[44]:

(a) did not follow a process based on tikanga, and therefore the Crown did not identify Ngāti Whanaunga's relative customary interests;

(b) the Crown proceeded on the assumption that Ngātiwai has no customary interests in relation to the Ngāti Whanaunga redress because the redress area is not within the map depicting the formal Ngātiwai rohe;

(c) The Crown did not provide an information to Ngātiwai to explain or justify the recognition of customary interests of Ngāti Whanaunga; and

(d) offering the redress will create rights for Ngāti Whanaunga that erode the customary rights of Ngātiwai and create divisions and further damage the relationship between Ngātiwai and Ngāti Whanaunga.

47. The Crown argues that Ngātiwai can have no cause to complain about this process as it engaged openly and honestly with Ngātiwai even though the redress lay outside of

[40] #3.3.30 at [172].
[41] #A33(a) at 372 and 427.
[42] #A33(a) at 427.
[43] #3.3.29 at [5].
[44] Wai 2666, #1.1.1(a) at [92].

the Ngātiwai area of interest.[45] In response, Ngātiwai again submits that the Crown did not engage in good faith as it did not provide any information to Ngātiwai as to the nature of Ngāti Whanaunga's interests.[46]

Redress offered

48. It is the Crown's argument that its overlapping claims process was fair and robust, the redress offered was carefully considered and calibrated in light of all evidence, Ngatiwai views were sought and considered and an offer was only confirmed when the Crown was satisfied that there was no resolution possible between iwi.[47] The Crown submits that the contested redress does not prejudice Ngātiwai enough to warrant action and that it acted in good faith in respect of each piece of redress.[48]

49. Ngātiwai says in response that the Crown did not act in good faith because the Crown did not seek to understand the impact of the Crown redress on matters of tikanga. This would include understanding the relationships that exist between Hauraki and Ngātiwai and how tikanga regulates those relationships. Because the Crown did not appropriately inform itself of these matters, it has offered redress that extends beyond how those interests would be given effect as a matter of tikanga. The Treaty settlement process is therefore impacting and redesigning inter-tribal relationships and undermining tikanga.

Vesting of land

50. The Crown submits that a modest amount of redress to Marutūāhu is reasonable and justified due to the strength of Marutūāhu interests.[49] The Crown considered information provided by Marutūāhu iwi including written information provided by overlapping groups, supplemented by external research and OTS historian reviews on Marutūāhu interests. The Crown has further acknowledged a Treaty breach in failing to ensure Marutūāhu iwi retained adequate reserves in the Mahurangi-Omaha block. The

[45] #3.3.30 at [171].
[46] Wai 2840, #A45(a) at 296-298.
[47] #3.3.30 at [3].
[48] #3.3.30 at [3].
[49] #3.3.30 at [23] and [221].

Crown also acknowledged significant Ngāti Manuhiri and Te Kawerau a Maki grievances when the Mahurangi transfer was negotiated.

51. With regards to Aotea, the Crown concluded that Marutūāhu had sufficient interests for redress offered based on whakapapa, tuku whenua, wahi tapu and land transactions. These interests acknowledged a Crown Treaty breach when it took Ngāti Maru lands, including lands on Aotea.

52. The Crown argues that due to prior Crown breaches of the Treaty and based on the information it relied on, the redress offered to Marutūāhu is appropriate. To the first point, the Tribunal has said that the Crown, through its settlement process, must not create new grievances.[50] The Crown is unable to say that it won't create new grievances because it does not fully understand the nature of interests or the histories of all iwi concerned and how, as a matter of tikanga, it is appropriate to reflect those interests.

53. To the second point, the Crown has favoured the whakapapa, stories and histories of Hauraki without requiring that those kōrero happen in a tikanga context where all parties have an opportunity to kōrero and discuss appropriate redress that will not offend tikanga. The Crown cannot therefore say that it was fully informed or that the redress it offered took into account the impact on tikanga and inter-tribal relationships. The Crown considers it has no option but to make a decision. However, the Crown has many options including crafting alternative redress and insisting on a tikanga process.

54. The Crown submits that with regards to protocol redress, Ngātiwai objected to Marutūāhu interests on the basis that not all iwi of Marutūāhu had interests. The Minister then revised proposed protocol areas after taking into account feedback from Ngātiwai, other overlapping groups and historical information. The Crown submits that no final decisions have been made with regards to protocol redress. The key issue for Ngātiwai remains that the Crown will provide redress and subsequently influence to Hauraki that does not reflect the nature of their interests thereby impacting the influence of Ngātiwai and their hapū as the mana whenua.

[50] Waitangi Tribunal *Ngāti Awa Settlement Cross-claims Report* (Wai 958, July 2002).

Fisheries RFR redress

55. The Crown submits with regards to the fisheries RFR deed quota that it does not preclude Ngātiwai from receiving its full share of new quota. Further, that there is no exclusivity – Hauraki will receive a RFR for a proportion of fish stock, Ngātiwai will also to receive an applicable proportion. The Crown submits that this process and outcome are not prejudicial to Ngātiwai and were discussed at length with Ngātiwai.

56. As is set out in the Ngātiwai Amended Statement of Claim there are two possible methods of agreeing coastline lengths between mandated iwi organisations (MIO) in relation to a fishery settlement.[51] The option that Ngātiwai opted for was to not record or fix specific boundary points so an agreement on allocation was reached based on percentages. The Ngātiwai concern is the boundary points. If those were removed, Ngātiwai has no issue with the redress.

Crown consideration of Ngātiwai submissions regarding redress

57. The Crown has submitted that the redress it has offered was formed after considering the views of Ngātiwai.[52]

58. The Iwi of Hauraki submitted a table that outlined the redress offered and the information the Crown considered as the basis for that offer[53], Ngātiwai has inserted its response to that table below:

Pare Hauraki Redress	**Basis for Crown Offer**	**Ngātiwai response**
• Hauraki Collective Fisheries RFR • Aotea Cultural and Commercial Redress • Coastal Statutory Acknowledgement • Marutūāhu Collective cultural redress properties at Kawau, Mahurangi and Motuora	• *da Silva* decision • Native Land Court Records • Historical agreements • Commissioned historical research, including Armstrong Report • Binding Ngātiwai – Pare Hauraki coastline agreements	• No process to inquire into the tikanga findings in *da Silva* • No consideration of the layers of interests • Reports were not provided to Ngātiwai prior to redress being crafted • Ngātiwai were not involved until after redress was offered to Hauraki • No consideration of how redress impacts tikanga

[51] Wai 2666, #1.1.1(a) at [41]-[42].
[52] #3.3.30 at [3].
[53] #3.3.29 at 6-7.

		• No tikanga process to understand the interplay between NW and Hauraki
Pare Hauraki Redress	**Crown Consideration**	**Ngātiwai response**
Hauraki Collective Fisheries RFR	• Ngātiwai was a voluntary party to the binding Ngātiwai – Pare Hauraki coastline agreeements • Crown advised Ngātiwai the redress is non-exclusive and is also available in Ngātiwai settlement	• Ngātiwai opted for the RFR redress to be allocated through percentages and not specified through a map • Ngātiwai has no issue if the dots and map are removed
Aotea Cultural & Commercial Redress	Crown considered responses, made no changes	• The Crown did not engage with Ngātiwai in relation to the name change of Aotea • The Crown did not consider the offensiveness of allowing the name change other than through the mana whenua (Ngāti Rehua) • Crown excluded Ngātiwai from overlapping claims process from October 2013 – July 2016 on the wrong assumption that it could engage with Ngāti Rehua
Coastal Statutory Acknowledgment	Crown considered responses, made no changes	• Redress does not reflect the nature of interests
Marutūāhu Collective cultural redress properties at Kawau, Mahurangi & Motuora	Crown considered responses, made no changes	• No tikanga process undertaken to understand the nature of interests

Ngāti Rehua engagement

59. The absence of Ngāti Rehua in these proceedings is not evidence of Ngāti Rehua's support of Hauraki. The Wai 2677, the Aotea Overlapping Claims Process claimants filed an urgent application on behalf of Ngāti Rehua, Ngātiwai and Ngāpuhi, opposing the Crown's overlapping claims process. It was noted in the Wai 2677 decision declining a grant of urgency, the Tribunal considered that Ngāti Rehua interests could

be represented at hearing by other mandated groups challenging the Hauraki settlement process, such as Ngātiwai.[54]

Conclusion

Crown breaches of the Treaty

60. Ngātiwai submits that the Treaty principles that the Crown has breached include but are not limited to:

(a) **Active Protection –** the Crown has failed to protect the interests of Ngātiwai during the course of the negotiations and overlapping claims processes it undertook with Hauraki. As has been highlighted in these submissions, the Crown has inappropriately acknowledged the customary interests, and **recognised** mana whenua and mana moana where it does not exist. The Crown has not acted in accordance with tikanga and stated that it cannot ensure tikanga is adhered to even though it has an obligation to ensure tikanga is followed.

(b) **Reciprocity –** the Crown has not respected the rangatiratanga and tikanga of Ngātiwai, it has favoured the rangatiratanga of Hauraki iwi. This is a takahi on the rangatiratanga of Ngātiwai.

(c) **Equity and impartiality –** the Crown has not acted fairly and impartially towards Ngātiwai. The Crown favoured Hauraki when agreeing that issues between iwi were irreconcilable. This has allowed Hauraki to have an unfair advantage over Ngātiwai and resulted in redress that prejudices Ngātiwai. The Crown has further created divisions and damaged the relationships between Ngātiwai and the iwi of Hauraki.

Prejudice suffered

61. As a result of the above Treaty breaches, Ngātiwai will be significantly and irreversibly prejudiced including (but not limited to) the following:

(a) the Proposed Hauraki Redress inappropriately extends into the Ngātiwai Rohe without the consent of Ngātiwai;

[54] Wai 2677, #2.5.11 at [20].

(b) the Proposed Hauraki Redress undermines the mana whenua, rangatiratanga, mana moana and tikanga of Ngātiwai;

(c) the Proposed Hauraki Redress has created divisions and damaged relationships both within Ngātiwai and between Ngātiwai and the iwi of Hauraki; and

(d) the partnership between the Crown and Ngātiwai has been damaged.

DATED this 12th day of July 2019

K Tahana
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