IN THE WAITANGI TRIBUNAL
OF NEW ZEALAND

WAI

IN THE MATTER of the Treaty of Waitangi Act 1975

A N D

IN THE MATTER of an application by Charlie Tawhiao on behalf of the Ngai Te Rangi Settlement Trust for an urgent inquiry into the Crown's settlement negotiations policy and practice concerning Hauraki redress

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MEMORANDUM OF COUNSEL

Dated this 14th day of March 2017

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MAY IT PLEASE THE TRIBUNAL:

> If the Hauraki settlement is finalised with redress that is in Tauranga Moana, the Crown is effectively saying that Hauraki have mana whenua, mana moana, and rangatiratanga in Tauranga Moana. That is just patently wrong, and it is simply not true. [1]
>
> **Dr Hauata Palmer**

Urgency criteria

1. Ngai Te Rangi seek the Tribunal's urgent assistance for their claim that the Crown's Deed of Settlement with Hauraki (see **Appendix C**), where it grants Hauraki redress in Tauranga Moana, breaches Te Tiriti, undermines their mana, rangatiratanga and tikanga, and is causing them significant, and potentially irreversible prejudice.

2. The Tribunal will grant an urgent hearing in exceptional cases, once it is satisfied that adequate grounds for according priority have been made out.[2]

3. In deciding whether to grant an urgent application, the Tribunal considers whether:[3]

   (a) The applicant for an urgent inquiry can demonstrate that they are suffering, or are likely to suffer, significant and irreversible prejudice as a result of current or pending Crown actions or policies;

   (b) There is no alternative remedy that, in the circumstances, it would be reasonable for the applicant to exercise; and

   (c) The applicant is ready to proceed urgently to a hearing.

4. Other factors that the Tribunal may consider include:[4]

[1] ROI TBC, *Brief of Evidence of Dr Hauata Palmer* [14 March 2017], at para 17.
[2] Waitangi Tribunal Practice Note, *Guide to the Practice and Procedure of the Waitangi Tribunal* [May 2012], at 4.
[3] At 5.
[4] At 5.

(a) An injunction has been issued by the Court on the basis that the claim or claims for which urgency has been sought have been submitted to the Tribunal;

(b) Any other grounds justifying urgency have been made out; and

(c) The claim challenges an important current or pending Crown action or policy.

5. This memorandum establishes that the grounds for urgency are clearly met by Ngai Te Rangi's claim.

The issue

6. Overlapping claims issues have arisen during many settlement negotiations and the Waitangi Tribunal has intervened on an urgent basis to avoid significant prejudice as issues of mana whenua and rangatiratanga go to the very heart of Te Tiriti guarantees.[5]

7. The Ngai Te Rangi claim against the Hauraki Deed also requires the urgent intervention of the Tribunal.

8. This claim is not about a group being prejudiced by being left out of settlement negotiations, as was the case in the *Tamaki Makaurau* and *Te Arawa* urgent inquiries. Both Ngai Te Rangi and Hauraki are in the final stages of settling their historical Te Tiriti claims.

9. Rather, Ngai Te Rangi's claim is that the Crown has acted inconsistently with the principles of Te Tiriti by incorrectly and inappropriately providing for the historical interests claimed by Hauraki in Tauranga Moana, by granting Hauraki redress that:

(a) Is far greater than what their interests justify;

(b) Encroaches into the heartlands of Ngai Te Rangi; and

[5] See for instance: Waitangi Tribunal, *The Tamaki Makaurau Settlement Process Report* [Wai 1362, June 2007]; Waitangi Tribunal, *The Ngāti Awa Settlement Cross-claims Report* [Wai 958, July 2002; Waitangi Tribunal, *The Ngāti Tūwharetoa ki Kawerau Settlement Cross-Claim Report* [Wai 998, July 2003]; Waitangi Tribunal, *The Te Arawa Settlement Process Reports* [Wai 1353, June 2007].

(c) Undermines the mana, rangatiratanga and tikanga of Ngai Te Rangi.

10. The longstanding dispute regarding the allocation of redress to Hauraki in Tauranga Moana was formalised on 22 December 2016, when the Crown initialled the Hauraki Deed which contains the following redress that is located within Tauranga Moana (see **Appendix D**):[6]

(a) Provision to preserve a fifth seat in the Tauranga Moana Framework for Hauraki, and the right for Hauraki to participate in alternative redress if the Framework is abandoned by the Tauranga Moana Iwi Collective. The Framework provides, among other things, for Hauraki to participate in decision making and the framing of policy for Tauranga Moana. We note that Hauraki's representation on the Framework has always been a significant point of contention and is discussed further below;[7]

(b) Department of Conservation rights for Hauraki to engage in planning, customary take of flora and fauna and dead marine mammals, establishing wahi tapu reserves and other decision making rights;[8]

(c) The Kaimai Statutory Acknowledgement and Statement of Association;[9]

(d) The Ministry of Primary Industries ("MPI") Advisory Committee rights for Hauraki to advise the Minister on the utilisation of fisheries resources within Tauranga Moana;[10]

[6] ROI TBC, *Brief of Evidence of Huhana Rolleston* [14 March 2017], at paras 8-26.
[7] Appendix C - Pare Hauraki Collective Redress Deed [22 December 2016], clauses 20.7-20.8.
[8] At clauses 7.67-7.76.
[9] At clause 8.1.1.
[10] At clauses 10.1-10.2.

(e) MPI Quota right of first refusal for Hauraki to purchase certain fish quota;[11]

(f) The Pare Hauraki Worldview statement of "Mai Matakana ki Matakana" which encompasses the heartlands of Ngai Te Rangi;[12] and

(g) The Pare Hauraki Redress Area claims area up to Oturu stream (Te Puna).

11. Given the extent of the redress now contained in the Hauraki Deed, Ngai Te Rangi also take issue with the specific redress items that were provided to Hauraki as a result of previously negotiated outcomes including:

(a) Athenree Forest;

(b) RFR properties in Tauranga Moana;

(c) Commercial properties in Tauranga Moana;

(d) Kaimai Statutory Acknowledgement; and

(e) Kauri Point Reserve.

12. Ngai Te Rangi's position is that the negotiated outcomes for the above redress was due to the pressures to achieve a timely Treaty settlement, and on the basis that it was intended at the time that that redress would be the full redress sought by the Hauraki Collective in Tauranga Moana. Further these agreements were not a reflection or acknowledgment of Hauraki rights in these areas.

13. Given the recent conflation of redress, Ngai Te Rangi's position is now that all redress contained in the Hauraki Deed, that falls within Tauranga Moana, be removed until there has been a proper process for determining the interests claimed by Hauraki and the issues are resolved.

[11] At clause 10.3.
[12] At clause 4.1.

14. There is also additional redress that relates to Tauranga Moana contained in separate individual Hauraki iwi deeds.[13] Those deeds have not been made available to Ngai Te Rangi, despite several requests.[14]

15. A fundamental failure of Crown process occurred when the Crown notified Ngai Te Rangi of the nature and extent of the above redress in issue, only three days prior to the initialling of the Hauraki Deed.[15]

16. When Ngai Te Rangi asked the Crown not to initial the Deed in order to provide time to resolve the issues, the Crown declined and initialled it anyway. Ratification of the Hauraki Deed then commenced and is currently in train.

17. An additional failure of Crown process, is that some of the above redress in issue, is redress that has not been through an overlapping claims process. The Crown's initial response was that such redress items did not affect Ngai Te Rangi rohe. Only as a result of Ngai Te Rangi's insistence that no overlapping claims process had been completed for the MPI protocol and Quota RFR, did the Crown agree to run an overlapping claims process for this redress which commenced in January/February 2017.

18. It is also significant that the redress on the Tauranga Moana Framework is now formulated in the Deed in a way that generally preserves the ability of Hauraki to participate in the Framework as an equal partner. This redress has been provided by the Crown, in the face of years of consistent and clear opposition from Ngai Te Rangi to Hauraki gaining that particular redress in their rohe.

19. The evidence demonstrates that it was as recent as October 2016 that the Crown told Ngai Te Rangi no commitments would be made to other iwi regarding the Framework, while the Framework was parked from the TMIC Deed to allow for the resolution of the issues. Further, the

[13] Ngai Te Rangi have not formally responded to this redress as they have made a request to the Crown to review the full Deeds first.
[14] ROI TBC, *Brief of Evidence of Huhana Rolleston* [14 March 2017], at para 29(a).
[15] Appendix H - *Document bank,* at 231-238.

Crown said that it would inform, and get agreement from Ngai Te Rangi on any matters concerning the Framework, and that if agreement could not be reached then renegotiation of the Framework would be necessary.[16] The Crown did not consult with, or get agreement from Ngai Te Rangi about the Tauranga Moana Framework redress contained in the Hauraki Deed.

20. Prejudice arises from the Framework redress in the Deed as it effectively sets the parameters for any future negotiations concerning the Framework. The clause, as it is contained in the Hauraki Deed, puts Ngai Te Rangi in a position where they are required to: [17]

    (a) Agree to allowing Hauraki to take the fifth seat on the Framework on conditions they have never agreed to, and accept the undermining and redefining of their mana, rangatiratanga and tikanga;

    (b) Let go of the Framework; and

        (i) Re-negotiate lesser redress for Tauranga Moana. Under the Hauraki Deed, Hauraki will still be entitled to "no less favourable" treatment as Tauranga Moana Iwi; or

        (ii) Not settle their historical claims over Tauranga Moana, which has already been acknowledged by the Minister as a "critical" part of their settlement.[18]

21. All these options are highly prejudicial to Ngai Te Rangi.

22. Counsel note at this point that if the Crown and TMIC agreed to remove the TMF from the TMIC Deed, then it is only right and fair that the Crown and Hauraki remove the redress in issue from the Hauraki Deed.

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[16] At 214-220
[17] See: ROI TBC, *Brief of Evidence of Huhana Rolleston* [14 March 2017], at paras 35-39.
[18] Appendix H, *Document bank,* at 178-181.

23. It is also noteworthy that the Crown provided the Tauranga Moana Framework redress to Hauraki with the knowledge that the allocation would entrench a significant longstanding dispute and cause further division.

24. The Crown has now informed Ngai Te Rangi that it is unable to get agreement from Hauraki to make changes to the Deed that will be to Ngai Te Rangi's satisfaction.[19]

25. Further, the Crown will not engage on terms that are going to lead to a resolution, Hauraki refuses to engage at all, and ratification of the Deed is underway. On this basis, it is highly unlikely that parties will be able to resolve the issues without the Tribunal's intervention.

26. To be clear, Ngai Te Rangi do not deny that Hauraki has some historical connections with Tauranga Moana. However, they do deny that those historical interests give Hauraki a right to obtain settlement redress in Tauranga Moana that essentially elevates their status to iwi with mana whenua/mana moana and rangatiratanga.

27. Ngai Te Rangi has always maintained that it is their iwi, together with Ngati Ranginui and Ngati Pukenga who hold mana whenua/mana moana and rangatiratanga (authority) over Tauranga Moana; not Hauraki.[20]

28. Ngai Te Rangi evidence is that Hauraki has not exercised rangatiratanga over Tauranga Moana, and the Crown is incorrect to afford Hauraki this authority by legislation.[21]

29. The redress, where it enables Hauraki to exercise rangatiratanga, fundamentally changes the relationship between Hauraki and Tauranga Moana, and consequently, impacts on the mana, rangatiratanga, tikanga and identity of Ngai Te Rangi. The Crown does not seem to appreciate this point.

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[19] At 336-337.
[20] ROI TBC, *Brief of Evidence of Reon Tuanau* [14 March 2017], at paras 24-29.
[21] ROI TBC, *Brief of Evidence of Dr Hauata Palmer* [14 March 2017], at paras 21-41.

30. Ngai Te Rangi will suffer significant and irreversible prejudice if the Crown and Hauraki enact legislation for the Hauraki settlement.

31. We now turn to address the following assertions, that are relevant considerations in terms of whether the Crown has acted inconsistently with the principles of Te Tiriti:

    (a) The Crown has failed to uphold its own principles for settling claims;

    (b) The Crown has incorrectly and inappropriately applied its undertaking to Hauraki;

    (c) The Crown has incorrectly applied past Tribunal findings; and

    (d) The Crown's overlapping claims policy is deficient and incapable of resolving the issues.

The Crown has failed to uphold its own principles for settling claims

32. The overarching objective of the Crown's settlement policy is to negotiate settlements of historical claims that are lasting and acceptable to most New Zealanders (see **Appendix F**).

33. The Crown should also be consistent in its approach to claimant groups involved in negotiations, while acknowledging that each claimant group is different.[22]

34. In order to achieve this objective, the Crown has developed guidelines for the resolution of historical claims, which includes:[23]

    (a) Treaty settlements should not create further injustice;

    (b) They are to be durable, must be fair and remove the sense of grievance; and

[22] 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* [March 2015] ("*Red Book*"), at 24.
[23] At 24.

(c) The Crown must deal fairly and equitably with all claimant groups.

35. If the essential factors of durability and fairness are still in question when a group is near the completion of their settlement, it follows that the Crown has an obligation to address this.

36. The Crown is the Te Tiriti partner who holds all the power, decision making authority and resources. This puts Maori in a vulnerable position, and at the whim of the Crown. [24]

37. The Tribunal has already found that the Crown's position of authority means that it is expected that the Crown will be "rigorous in its endeavours to uphold the honour of the Crown, and to discharge the Crown's Treaty duties": [25]

> OTS should at all times be mindful that because of these multiple roles, ***OTS holds a powerful position in the negotiation process: it becomes the negotiator, the dispenser of justice, and the policy adviser to the Minister who has the final power***. This makes it critical that OTS is rigorous in its endeavours to uphold the honour of the Crown, and to discharge the Crown's Treaty duties. In the context of overlapping claims, it must do so in a manner that is ***fair and impartial***. It must be an ***honest broker***, and it ***must remain independent*****.**

38. It is apparent from the evidence that the Crown has not acted "rigorously" to resolve the issues. In particular, it appears that the Crown has not:

(a) Commissioned further evidence on the respective nature of the Tauranga Moana Iwi and Hauraki interests in Tauranga Moana;

(b) Sought independent pukenga or expert advice on the respective interests of Tauranga Moana Iwi and Hauraki, and considered the impact of Crown allocation of redress on the mana, rangatiratanga and tikanga of Ngai Te Rangi;

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[24] Waitangi Tribunal, *The Te Arawa Settlement Process Reports* [Wai 1353, June 2007], at 63-64 ("*Te Arawa Reports*").
[25] At 63-64 (Emphasis added).

(c) Required parties to engage in independent facilitated or mediated processes;

(d) Required or provided for a tikanga based process be developed and undertaken by the parties;[26]

(e) Ensured an even playing field in order for parties to engage;

(f) Revised the shortfalls of its overlapping claims policy with the view to implementing more robust processes that would resolve the issues.

39. There is more that can be done.

40. If the Crown will not do more to resolve the current issues claimed by Ngai Te Rangi of its own volition and within the scope of its own policy and practice, then it follows, that the intervention and assistance of the Waitangi Tribunal is essential.

The Crown has inappropriately applied its undertaking to Hauraki

41. What is very clear from a review of the negotiations history is that the Crown, TMIC and Hauraki have never been able to reach an agreement on what redress, if any, would appropriately provide for the historical interests claimed by Hauraki in Tauranga Moana.

42. There has been a particularly significant dispute over the level of participation that Hauraki sought to have on the Framework.

43. The ongoing opposition and resistance from TMIC to Hauraki participating in the Framework is understandable given the nature of

[26]Counsel refer the Tribunal to other tikanga based approaches that have taken place to resolve settlement issues. In particular, the Central North Island Forests Land Collective Settlement Act 2008, which contains a tikanga based resolution process. A unique feature of the CNI Forests Collective Settlement was the agreement that iwi themselves, rather than the Crown, would decide which areas of the returned land would rightfully belong to each iwi. A process is undertaken to identify, discuss and eventually agree the respective mana whenua interests, which was designed by the Collective during the settlement negotiation process. This is known as the mana whenua process. There are three main stages of the process, which flow towards a Final Allocation Agreement:

(a) Stage 1 – Identification of mana whenua interests;
(b) Stage 2 – Kanohi ki te kanohi Negotiation; and
(c) Stage 3 - Dispute Resolution.

the redress, and that it has been identified by the Minister himself as a "critical" part of settling the TMIC historic claims.[27]

44. In short, the Framework was negotiated by TMIC, for TMIC, under the TMIC Deed (see **Appendix M**).

45. The purpose of the Framework is to recognise the mana, rangatiratanga and kaitiakitanga of Tauranga Moana iwi and hapu, in terms of Tauranga Moana, in order to provide for: [28]

    (a) The restoration, protection and maintenance of the health and wellbeing of Tauranga Moana and the health and wellbeing of the people around the moana;

    (b) Direct involvement in policy development and decision-making affecting Tauranga Moana;

    (c) Use of the full range of tools available under existing and newly developed regulatory Frameworks; and

    (d) Consistent good-faith engagement on relevant issues.

46. Hauraki has not been satisfied with the Crown's redress allocation and has challenged the Crown to provide it with redress in Tauranga Moana. Hauraki's challenge included an application to the Waitangi Tribunal in 2012 for an urgent inquiry into the TMIC Deed, and a claim that the Framework redress was prejudicial in that it excluded Hauraki.

47. In response, the Crown gave an undertaking to Hauraki to treat Hauraki "no less favourably" than TMIC.

48. The undertaking was set out in the joint memorandum filed by Crown and Hauraki, which said: [29]

> Counsel advise that a teleconference and urgent hearing will not now be required prior to initialling of the Tauranga Moana Iwi Collective (TMIC) deed, scheduled to take place on 31 October 2012.

[27] Appendix H, *Document bank*, at 178-181.
[28] Appendix M, clause 2, at 4.
[29] Wai 215, #2.695, *Joint Memorandum* [24 October 2012], at paras 2-4.

The Hauraki Collective has reached this position on the following basis:

> Cultural redress will be provided to iwi of Hauraki within the Te Puna and Katikati Blocks, as agreed with the Crown.
>
> The Tauranga Moana Framework will not prevent Hauraki iwi and the Crown negotiating no less favourable co-governance arrangements with local government in their areas of customary interests than provided to TMIC.
>
> Commercial redress will be provided to iwi of Hauraki within the Te Puna and Katikati Blocks, as agreed with the Crown.
>
> The Hauraki Collective will have the right to acquire 60% of the Athenree Crown Forest Licensed Land on agreed terms.

49. Ngai Te Rangi did not object to the 2012 undertaking at the time because it was not presented to mean that Hauraki will get redress over Tauranga Moana. Rather, TMIC representatives understood the undertaking to mean that Hauraki would be able to negotiate no less favourable co-governance arrangements for their own area. This is certainly how the undertaking reads.

50. In 2013 and 2014, the Minister then undertook an overlapping claims process to consider what level of participation Hauraki should have in the Framework.[30]

51. The Minister made a preliminary and then final decision that a separate co-governance arrangement for Hauraki's area was not practical, and that the creation of a fifth seat on the Framework for other iwi, including Hauraki, would be appropriate. The terms of this fifth seat were to be dealt with through an overlapping claims process.[31]

52. The Minister and TMIC then prepared drafting for the fifth seat. The fifth seat was conditional upon a number of conditions, which both the

[30] Appendix H, *Document bank*, at 1-69.
[31] At 41-43.

Crown and TMIC thought would appropriately recognise the limited nature of the historical interests that Hauraki claimed.[32]

53. The conditions were such that Hauraki would be able to have limited participation on the Framework.[33] The Crown held the position between 2014 through to most of 2016 that the limited provision for Hauraki by way of the fifth seat on the Framework appropriately provided for Hauraki's interests. Hauraki continued to oppose.

54. Because agreements could not be reached between parties on the terms of the fifth seat, on 31 August 2015, the Crown encouraged Ngai Te Rangi to remove the Framework from their settlement. This would enable Ngai Te Rangi to complete the remainder of their settlement. The Minister advised that, given the significance of the Framework, separate negotiations and settlement legislation could take place in the future, and that negotiations for the Framework would be a Crown priority.[34]

55. Ngai Te Rangi, again reluctantly and on conditions, agreed to remove the Framework from their Deed and temporarily park it.[35] Parties have again, unsuccessfully attempted to engage on the terms of the fifth seat on the Framework.

56. Instead of continuing to work through the issues, the Crown has preserved the ability of Hauraki to take the fifth seat in Tauranga Moana by including a representation of its 2012 undertaking in Hauraki's Deed, which states:[36]

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[32] At 44-49.
[33] At 44.
[34] At 178-181.
[35] Conditions were:
- No more seats will be added;
- The fifth iwi seat will only take effect if the Crown recognises that another iwi has interests in Tauranga Moana following an overlapping claims process in which Tauranga Moana iwi will be entitled to participate;
- If the fifth iwi seat does take effect, it will only be occupied when Tauranga Moana Governance Group ("TMGG") considers matters relating to the area in which other iwi share interests with the three Tauranga iwi; and
- In relation to Hauraki, this would be limited to Katikati and Te Puna blocks at the north-western end of Tauranga Moana.

[36] Appendix C, at clauses 20.6-20.8.

20.6 The Crown acknowledges and affirms the Iwi of Hauraki will be able to participate in any governance and management arrangements for Tauranga Moana to be negotiated between the Crown and relevant iwi (including the Iwi of Hauraki) and included in standalone legislation.

20.7 In the event there is continued development of the Tauranga Moana Framework, the Crown:

> affirms the right of the Iwi of Hauraki, on the basis of its recognised interests in Tauranga Moana, to participate through the seat described in clause 3.11.4(e) of the Legislative Matters Schedule of the Tauranga Moana Iwi Collective Deed will be preserved.

20.8 In the event the Tauranga Moana Framework is not developed, the Crown:

> confirms any future governance and management arrangements over Tauranga Moana will be subject to agreement between the Crown and all relevant iwi (including the Iwi of Hauraki), having regard to the rights of participation set out in clause 20.7.

The Crown agrees to negotiate redress in relation to Tauranga Moana with the Iwi of Hauraki as soon as practicable in accordance with Te Tiriti o Waitangi / the Treaty of Waitangi, and on a basis which gives all iwi with recognised interests in Tauranga Moana the opportunity to be involved.

57. The issue with including the undertaking in the Hauraki Deed in this way is that it effectively sets the parameters of any future negotiations held between the Crown and TMIC, and preserves the ability of Hauraki to get equal treatment in terms of the Framework (or any other negotiated redress).[37]

58. The Crown has also diverged significantly from the original 2012 undertaking, which provided that "Cultural redress will be provided to iwi of Hauraki within the Te Puna and Katikati Blocks, as agreed with the Crown", to now grant Hauraki redress that encompasses Tauranga

[37] See paragraphs 10-14 for all redress that is contested. How other iwi are to be accommodated in the Framework now needs to be renegotiated.

Moana (from the inner harbour to the territorial sea, inclusive of islands of Ngai Te Rangi).

59. The Crown has therefore incorrectly and inappropriately extended the application of the undertaking, by enabling Hauraki to gain redress into a far broader area of Tauranga Moana than was envisaged or understood by TMIC.

60. What seems to have been lost on the Crown is that it is not treating Hauraki "less favourably" to give them lesser (or no) redress than the TMIC in Tauranga Moana, if the Hauraki interests in Tauranga Moana are lesser than those of the TMIC.

61. The fundamental failing of the Crown is that in the five years that this matter has been an issue, the Crown has never properly assessed the nature of Hauraki's interests in comparison to those of the TMIC, in order to correctly determine what redress is appropriate for the recognition of each.[38]

62. Therefore, the question that still needs to be answered is *"how, if at all, should the interests claimed by Hauraki in Tauranga Moana be provided for in settlement?"* There is no process, nor any evidence that demonstrates that this question has been fairly or properly considered.

63. Ngai Te Rangi say that the Crown has never properly investigated whether the interests claimed by Hauraki justify the ongoing conflation of Hauraki settlement redress in Tauranga Moana, from a very narrow acknowledgement to Hauraki now having recognised interest and authority right into the heartlands of Ngai Te Rangi.[39]

64. Instead, the Crown has relied on its undertaking and on limited extracts from a Tribunal report (discussed below), in order to justify the redress given to Hauraki.

[38] ROI TBC, *Brief of Evidence of Dr Hauata Palmer* [14 March 2017], at paras 13-23; ROI TBC, *Brief of Evidence of Reon Tuanau* [14 March 2017], at paras 14-21.
[39] ROI TBC, *Brief of Evidence of Dr Hauata Palmer* [14 March 2017], at paras 21-23.

65. On this point, it must also be appreciated that while the Crown says that it does not like to determine the interests of groups, it has ultimately done just that when it provided redress of the nature that it has to Hauraki.

The Crown has incorrectly applied past Tribunal findings

66. Ngai Te Rangi say the Crown has incorrectly applied past Tribunal findings to justify the redress provided to Hauraki.

67. For example, the Crown relies on the 2004 Tauranga Moana Raupatu report, which identified that some payments were made to Hauraki tupuna for Crown purchase of the Te Puna-Katikati block at the northern end of Tauranga (see **Appendix J**).[40]

68. We note that that report rejected Hauraki's claim that they were exclusive rights and instead accepted that the area was a contested zone where the rights of Hauraki overlapped with the rights of Ngai Te Rangi.

69. However, the Crown has failed to balance that finding against the 2010 finding of the Tauranga Moana Tribunal, which said that the Tauranga Moana Iwi should have **full protection of Treaty rights to rangatiratanga and kaitiakitanga over Tauranga Harbour**, recognised at all times, unless alienated by freely negotiated agreement or when strictly necessary in national interests (see **Appendix K**).[41]

70. These are clearly different levels of interests, which warrant different treatment in settlement negotiations.[42]

71. In addition, the Crown and Hauraki have erroneously relied on the finding of the Tamaki Makaurau Tribunal, which states that layers of interests are still valid.[43]

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[40] Waitangi Tribunal *Te Raupatu o Tauranga Moana* [Wai 215, August 2004], at 189-190; Appendix J at 2-3.
[41] Waitangi Tribunal, *Tauranga Moana 1886-2006,* [Wai 215, August 2010], at 608.
[42] *Te Arawa Reports,* above n 24, at 201.
[43] Waitangi Tribunal, *The Tamaki Makaurau Settlement Process Report* [Wai 1362, June

72. Again, it is submitted that where layers of interests exist, it does not mean that they are the same interests, that should be provided for in the same way in settlement.

73. While Hauraki's historical interests in the northern blocks of Te Puna and Katikati may be valid, they are not the same as the Tauranga Moana Iwi in Tauranga Moana, and the Crown, via the settlement process, is wrong to provide for them as if they are.

74. It is important to note that the Tiriti principle of equity and equal treatment "does not mean treating all groups exactly the same where they have different populations, different interests, leadership structures, and preferences"; "tino rangatiratanga must be respected".[44]

75. Rather, where particular circumstances of a group "warrants a more flexible approach, the Crown must be prepared to apply its policies in a flexible, practical and natural manner"."[45]

The Crown's overlapping claims policy is deficient and incapable of resolving the issues

76. Ngai Te Rangi also claim that the Crown's overlapping claims policy has failed the iwi on two counts:

    (a) Firstly, the policy itself is deficient as it does not operate to resolve issues; and

    (b) Secondly, the Crown's application of the policy has been deficient and has failed to uphold its principles for settling historical claims.

77. The *Red Book* provides that an overlapping claim exists where two or more claimant groups make claims over the same area of land that is the subject of historical Treaty claims.[46]

2007], at 97; ROI TBC, *Affidavit of Ngarimu Blair* [8 March 2017], at paras 13-16.
[44] *Te Arawa Report*, above n 24, at 201.
[45] At 21.
[46] Such situations are also known as 'cross claims'.

78. Fundamentally, the Crown's policy states that the Crown "can only provide redress if it is satisfied that any overlapping claims have been addressed": [47]

> Crown's policy provides that overlapping claims or interests of other claimant groups **must be addressed to the satisfaction of the Crown before the Crown will conclude a settlement** involving any of the sites or assets concerned.

79. At the outset, one must ask how can the Crown possibly be satisfied that the issues with the Hauraki redress in Tauranga Moana have been sufficiently addressed given:

(a) Crown knowledge of the ongoing nature of the dispute in regards to Hauraki seeking redress in Tauranga Moana;

(b) Crown knowledge that new redress had not undergone any overlapping claims process; and

(c) Crown knowledge that the redress would be opposed by Ngai Te Rangi.

80. The *Red Book* also states that overlapping claims should be addressed early on in the settlement process:

(a) Extra research may be sought to address overlapping claims or cross-claims; [48]

(b) As part of the development of their Negotiating Brief, claimant groups are asked to identify the interests they wish to have addressed, and promote in the settlement. If those interests are subject to claims by other groups, processes will need to be established as early as possible in the negotiations process to address overlapping claims or shared interests between claimant groups. Developing these processes may be critical in ensuring a settlement is completed in a timely manner.[49]

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[47] *Red Book,* above n 22, at 27 (Emphasis added).
[48] At 38.
[49] At 49.

81. The evidence does not demonstrate Crown observance of its own policy here.

82. The Crown does not appear to have commissioned extra research on the substantive issue of assessing the nature and extent of the Hauraki interest in Tauranga Moana, and it does not appear that the Crown sought to address and properly resolve this issue early in the settlement process. In fact, as mentioned, for some of the new redress contained in the Hauraki Deed, the Crown only commenced the overlapping claims process following the initialling of the Deed, and as recent as February/March of this year (2017).

83. Additional principles also guide the Crown's approach to the provision of cultural redress and include that: [50]

    (a) Redress must be a meaningful expression of the relationship of the claimant group with the site, animal, plant or resource; and again

    (b) Overlapping claims must be addressed to the satisfaction of the Crown.

84. It is unsurprising that the current overlapping claims policy has failed to resolve the issues that have arisen here, particularly given the flaws of the policy, as identified by previous Tribunals, that have yet to be addressed by the Crown. In particular, the Tamaki Makaurau Tribunal was critical of the Crown's overlapping claims policy and said: [51]

    (a) The explanation of the process for dealing with 'overlapping' claimants in the Office of Treaty Settlement's policy manual *Ka Tika ā Muri, Ka Tika ā Ma* (the *Red Book*) is summary and unhelpful. It deals only in broad principles, and gives no clear idea as to how they will be applied or achieved; and

    (b) The *Red Book*'s treatment of how cultural redress will be handled in situations where there is competition over sites and

[50] At 38.
[51] *The Tamaki Makaurau Report,* above n 43, at 86.

recognition provides no insight into how problems will be identified and addressed.

85. One of the recommendations from the Tamaki Makaurau Report was that OTS amend the *Red Book* to better reflect the multiplicity of groups within a proposed settlement district. Later in 2010, OTS has conceded that no amendments were made as a result of the Te Arawa Settlement Process Reports and Tamaki Makaurau Report.[52]

86. The current overlapping claims policy continues to deal only with broad principles. The principled approach falls over in practice where the Crown fails to properly address the issues.

87. In this case, the Crown has failed to engage in a robust/effective process with the iwi to consider the relative weightings of each groups' interests.

88. In addition, the Crown has also not demonstrated to Ngai Te Rangi that it has considered, or understands, the impact of the allocation of the redress on Ngai Te Rangi mana, rangatiratanga and tikanga.

89. Overlapping claims issues remain live.

Iwi Working Party

90. It is important to note that the high level of concern among Maori to the Crown's overlapping claims policy has led to the creation of an Iwi Working Party, including Ngati Whatua, Ngati Manuhiri, Ngati Rehua, Waikato Tainui, Ngati Haua, Ngati Ranginui and Ngai Te Rangi who together, with other interested iwi, seek to address the policy.

91. The Iwi Working Party have advised the Minister of the following:

    (a) The policy causes fundamental breaches of tikanga and a breach of Treaty rights for iwi who have already settled with the Crown, or who are about to settle. The principles of tikanga Maori, derived from ancestral tipuna, guide iwi and Crown

[52] Waitangi Tribunal, *East Coast Settlement Report* [Wai 2190, May 2010], at 52.

relationships, and the Crown should respect those principles in its decision-making concerning iwi. The Crown's approach to Treaty settlements is not based on tikanga and Maori land rights and customs, but rather on the political expediency of achieving these settlements;

(b) The Crown is incorrect to ignore, or reinterpret customary rights (including questions of mana whenua), or create new contemporary non-customary rights when seeking to settle historical Treaty of Waitangi claims;

(c) The Crown's approach of recognising "layers of interest" disregards tikanga and ahi kaa roa, and the Crown should take tikanga Maori into account when making decisions affecting iwi (settled or not settled) in a Treaty settlement context. A flow on effect is that local government also appear to be following the Crown's approach with multi-iwi engagement processes that do not reflect tikanga and Maori land customs;

(d) The Crown should not offer redress to an iwi if it is within the area of primary interests of another iwi, without first getting the agreement of the iwi that hold mana whenua. To do so would effectively recognise both iwi as having the same level of mana, and in many cases, that is not right;

(e) Iwi should respect tikanga and each other's mana. It appears that Crown policy has allowed some overreach in their negotiations;

(f) The policy pits iwi against iwi and, at times, hapu against their own iwi; and

(g) The policy creates further contemporary claims in the future.

92. The Iwi Working Party maintains that the Crown's ad hoc and disorganised approach to overlapping claims cannot continue. If it does, the health of the Crown's future relationships with iwi, as well as

the health of relationships between iwi, is in jeopardy, which is something neither group wants.

93. The Iwi Working Party has requested a hui with Ministers, including the Prime Minister, the Minister for Treaty of Waitangi Negotiations, the Minister of Maori Development, and the Deputy Prime Minister.

94. The Minister for Treaty of Waitangi Negotiations has acknowledged the shortfalls of the overlapping claims policy and has invited the input of the Iwi Working Group.

95. While the Iwi Working Party is willing to undertake this work, this will not provide immediate relief to the issues raised by Ngai Te Rangi unless the Crown agrees to put the Hauraki Deed on hold until a new policy is in place.

Significant and irreversible prejudice[53]

96. Ngai Te Rangi claim that a fresh grievance and prejudice has arisen due to:

(a) The Crown's allocation of redress to Hauraki that incorrectly and inappropriately extends into the heartlands of Ngai Te Rangi;[54]

(b) The redress allocated to Hauraki in the rohe of Ngai Te Rangi undermines the mana whenua/mana moana, rangatiratanga and tikanga of Ngai Te Rangi;[55]

(c) The redress allocated to Hauraki extends far beyond the nature of the limited historical interest claimed by Hauraki;[56]

[53] See: ROI TBC, *Statement of Claim* [14 March 2017], at paras 48-49; ROI TBC, *Brief of Evidence of Reon Tuanau* [14 March 2017], at paras 35-39; ROI TBC, *Brief of Evidence of Charlie Tawhiao* [14 March 2017], at paras 33-38; ROI TBC, *Brief of Evidence of Dr Hauata Palmer* [14 March 2017], at paras 10-20.
[54] See paragraphs 9, 31, 59 above.
[55] See paragraphs 1, 9 above.
[56] See paragraphs 9, 59, 63 above.

(d) The failure of the Crown's overlapping claims policy to resolve the issues;[57]

(e) The lack of transparency and fairness in the Crown's approach to the issues;[58]

(f) The preservation of the ability of Hauraki in their Deed to gain redress in Tauranga Moana, which unfairly and prejudicially sets the parameters of what Ngai Te Rangi and TMIC are able to negotiate for their own claims;[59]

(g) The Crown's provision of extensive new redress to Hauraki in Tauranga Moana, which was not dealt with in overlapping claims processes;[60]

(h) The Tiriti partnership between the Crown and Ngai Te Rangi is suffering due to Ngai Te Rangi having to commence litigation to resolve the issues;[61] and

(i) There is division and damaged relationships caused between the whanau and hapu of Ngai Te Rangi and Hauraki;[62]

(j) A loss of resources.

Relevant current or pending Crown actions or policies

97. The Crown actions and policies that are causing Ngai Te Rangi significant prejudice are both current and pending, and includes:

(a) The Crown's initialling of the Hauraki Deed on 22 December 2016, which includes redress in the Ngai Te Rangi rohe that is strongly opposed by Ngai Te Rangi;

(a) The Crown's failure to ensure its overlapping claims policy:

[57] See paragraphs 76-89 above.
[58] See paragraphs 34-35, 62-64 above.
[59] See paragraphs 20, 57 above.
[60] See paragraphs 11-17, 79 above.
[61] See paragraphs 18, 36, 38-40 above.
[62] See paragraphs 23, 29, 92 above.

(i) Was applied in a way that dealt fairly with all groups;

(ii) Properly resolved the ongoing issues; and

(iii) Ensured that the settlements of each group were fair and durable and did not create further injustice;

(b) The Crown's indication that it is unable to get agreement from Hauraki to change the redress to an extent that will resolve the issues.

98. The pending Crown action that will cause significant and irreversible prejudice is the passing of settlement legislation, which will finalise the Hauraki Deed of Settlement and provide Hauraki with recognised permanent interests and redress in Ngai Te Rangi's rohe.

99. The Crown will not inform Ngai Te Rangi as to when the Crown and Hauraki intend to introduce Hauraki's settlement legislation into the House.

100. There is a period of time prior to the completion of the Hauraki Settlement in which these issues can be resolved.

No alternative remedies exist

101. No alternative remedies exist in the current circumstances.

102. The nature and scope of the issues, the strong positions of the parties, and the unique jurisdiction of the Tribunal to be able to consider the issues from a Te Tiriti perspective, means an inquiry under urgency is the most appropriate course of action.

103. It is the even handedness and independent supervision of the Tribunal that is necessary in this case.

Other grounds that justify urgency

104. The issues raised in this application are significant for both Maori and the Crown, including Crown agencies and local government.

105. Given the significance of natural resource management, and the number of high level agreements being reached for both historical and contemporary claims, it is important that issues concerning overlapping claims and the relative interests of Maori groups are examined now.

What can the Tribunal do?

106. The Tribunal can grant the urgent application and inquire into the issues.

107. If the Tribunal determines that the issues are valid, the Tribunal can provide independent findings and make practical recommendations on how the issues can be resolved.

108. The parties will be able to consider the content of the Tribunal's final report, and determine possible pathways forward.[63]

Concluding remarks

109. Ngai Te Rangi do not seek to stop Hauraki from settling.

110. However, Ngai Te Rangi have the right to the "**full protection** of their Treaty rights to rangatiratanga and kaitiakitanga over Tauranga Harbour recognised at all times."

111. The Crown's provision of redress to Hauraki that falls within Tauranga Moana seriously undermines the mana, rangatiratanga and tikanga of Ngai Te Rangi.

112. The simple solution is that the Crown remove the redress in issue from the Hauraki Deed.

113. The Crown refuses to engage on the substantive issues; Hauraki refuses to engage at all. Ratification of the Hauraki Deed is taking place, and settlement legislation may be introduced to the House in the near future.

[63] ROI TBC, *Brief of Evidence of Charlie Tawhiao* [14 March 2017], at paras 39-42; ROI TBC, *Brief of Evidence of Huhana Rolleston* [14 March 2017], at paras 31-33.

114. The urgent assistance of the Tribunal is necessary.

115. Ngai Te Rangi eagerly await the Tribunal's response.

DATED at Pakaraka this 14th day of March 2017

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