

IN THE WAITANGI TRIBUNAL

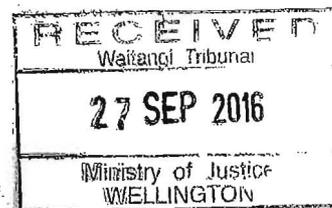
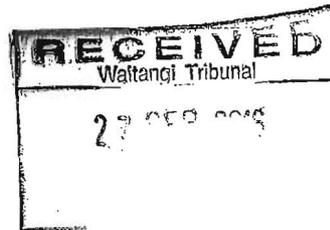
WAI

IN THE MATTER OF The Treaty of Waitangi Act 1975

AND IN THE MATTER OF A claim by **Cletus Maanu Paul, David Potter** and **Andre Paterson** on behalf of the **Mataatua District Māori Council** that the Crown is acting in breach of Treaty of Waitangi obligations towards Maori as a result of the New Zealand Government failing to implement adequate policies to address the threats posed by global climate change.

STATEMENT OF CLAIM

Dated 30 May 2016



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STATEMENT OF CLAIM

THE CLAIMANT SAYS:

1. **The Claimants** represent the **Mataatua District Māori Council** being a District Māori Committee established under the Māori Community Development Act 1962 in relation to the district extending from the mouth of the Waitahanui Stream, inland to Kaingaroa, then across to Cape Runaway, then back across the Bay of Plenty including Motiti Island.
2. The Claimants bring this claim on behalf of Māori in the **Mataatua District Māori Council** district and elsewhere in Aotearoa/New Zealand.

The Claim

3. The New Zealand Government's response to the threat of global climate change represents a breach of the Crown's Treaty of Waitangi obligations towards Māori and Māori have and will continue to suffer prejudice as a result.

Background

Climate Change

4. Since pre-industrial times (prior to 1850) the global average surface temperature has increased by 0.8°C.
5. The effects of this increase in temperature are being felt around the world through consequences such as extreme weather patterns leading to droughts and flooding, sea level and temperature rises (climate change).
6. It is scientifically accepted that the main cause of climate change has been an increase in the amount of greenhouse gases in the atmosphere that have been caused by human activity (anthropogenic greenhouse gases).
7. Greenhouse gases cause a 'greenhouse effect' in the earth's atmosphere by absorbing and emitting radiation heat.

8. Globally, the main source of anthropogenic greenhouse gases has been CO₂ (carbon dioxide) caused largely by the burning of fossil fuels. Methane and nitrous oxide from agricultural activities and HFCs have also been significant contributors.¹
9. Greenhouse gas levels in the atmosphere can be measured by CO₂ equivalent parts per million being the amount of CO₂ (ppm) in the atmosphere that would cause an equivalent amount of atmospheric warming.²
10. At the start of the industrial revolution atmospheric concentration of anthropogenic greenhouse gases was estimated to be 280 ppm. At present anthropogenic greenhouse gas concentrations are approaching the level of 400ppm.³
11. In New Zealand the relative contributions towards anthropogenic greenhouse gases as at 2014 were 43.9 % from CO₂ , 42.9% from methane (mainly from livestock rumination), 11.2% from nitrous oxide (mainly from animal excrement and from the use of nitrogenous fertiliser) and 2% from HFCs.⁴
12. Agriculture is the highest greenhouse gas emitting industry in New Zealand with 49% of total emissions in 2014 followed by energy 40%, industry processes and product uses 6%, and waste 5%.⁵
13. Between 1990 and 2014 New Zealand's annual anthropogenic greenhouse gas emissions increased by 23% from 66,720 tonnes of Carbon Dioxide equivalent (CO₂-e) to 81,104 tonnes CO₂ -e. Emission increases by sector were agriculture 15.2%, energy 35.5%, industry processes and product use 45.1%, and waste -0.5%.⁶

¹ *Climate Change 2007: Synthesis Report*, An Assessment of the International Panel on Climate Change, p 37.

² Above n 1, p 36.

³ Above n 1, p 37.

⁴ *New Zealand's Greenhouse Gas Inventory 1990-2014*, Ministry of the Environment, Submitted to United Nations Convention on Climate Change, 20 May 2016.

⁵ Above n 4.

⁶ Above n 4.

14. New Zealand's per capita emissions of anthropogenic greenhouse gases is presently approximately 17 tonnes CO₂-e and is the fourth highest of the 27 OECD countries.⁷

Requirements to keep temperature rises under dangerous levels

15. The Intergovernmental Panel on Climate Change (IPCC) is a scientific body established by the United Nations Environment Program and the World Meteorological Organisation to acquire insight into all aspects of climate change including the risks, consequences and options for adaption and mitigation.

16. In its AR4/2007 reports the IPCC concluded that:

- (a) A global mean surface temperature increase of 2°C above preindustrial levels (up to the year 1850) creates the risk of dangerous and irreversible change of climate.⁸

- (b) To prevent this temperature increase occurring anthropogenic greenhouse gas concentrations in the atmosphere need to stay below the level of 450ppm.⁹

- (c) That in order to have a realistic chance of keeping anthropogenic greenhouse gas concentrations below 450 ppm developed nations must achieve a reduction in anthropogenic greenhouse gas emissions as compared to 1990 levels of at least 25% to 40% by the year 2020 and at least 80% to 90% by 2050.¹⁰

17. At the United Nations Paris Conference held in December 2015 the attending countries including New Zealand adopted the Paris Agreement which contained an acceptance that post- industrial

⁷ *Climate Cheats, How New Zealand is heating on climate change commitments and what we can do to set it right*, Geoff Simmons and Paul Young April 2016, The Morgan Foundation.

⁸ Above n 1, pp 64-5.

⁹ Above n 1, p 227.

¹⁰ *Climate Change 2007: Mitigation Report*, Contribution of Working Group III to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change, Cambridge University Press, p 776.

temperature changes should be held to below 1.5% in order to avoid the extreme results of climate change.

The Effect of Climate Change on Māori

18. The actual and potential impact of climate change on Maori is serious and widespread.

Natural Ecosystems

19. The well-being of natural ecosystems is of paramount importance to Maori particularly given the fundamental role of the natural environment in defining Māori culture and values.
20. Māori ethics, expressed through tikanga, recognise that cultural order comes from the natural environment and hence people have a responsibility to care for these systems.
21. The role of Māori as kaitiaki (cultural guardians) of the natural environment has not been adequately recognised by the Crown. For instance, the recommendations of the Waitangi Tribunal in its WAI262 *Ko Aotearoa Tenei Report* that the Maori advisory bodies be appointed to be involved in environmental protection were ignored by the New Zealand Government.
22. Climate change has been and will continue to have a detrimental effect on natural eco-systems in New Zealand:
- (a) The production and ecology of native flora and fauna will likely be challenged by new plant and animal pests, as well as the spread of pathogens and diseases as warmer weather favours conditions for increased competition.¹¹ Some vulnerable species may face habitat loss and even extinction.¹²

¹¹ D King et al "The climate change matrix facing Māori society" In *Climate change adaptation in New Zealand: Future scenarios and some sectoral perspectives*. Nottage, R.A.C., Wratt, D.S., Bornman, J.F., Jones, K. (eds). New Zealand Climate Change Centre, Wellington 2010.

¹² *Climate Change Implications for New Zealand* The Royal Society of New Zealand, April 2016.

- (b) The ecosystems surrounding rivers and lakes including freshwater fauna will be affected by lower water levels and higher temperatures.¹³
 - (c) Forest ecosystems will be affected by drought conditions and introduced herbivores and weed species.¹⁴
 - (d) Coastal ecosystems will be affected by rising sea levels and high rain events.¹⁵
23. The detrimental effect of climate change on ecosystems caused by climate change will have a devastating impact on economic, social and cultural values across Māori society.

Water

24. Māori have customary kaitiakitanga and ownership interests in water throughout New Zealand which to date have not been adequately recognised by the Crown.
25. Climate change will cause water scarcity through increased frequency and extremity of droughts.¹⁶ In addition, higher temperatures and lower rainfall are expected to reduce soil moisture, groundwater supplies and river flows for some areas, further aggravating water availability and water quality problems.¹⁷
26. Climate change will detrimentally affect water sources over Māori hold customary rights. The ability of Māori to address these effects is limited due to the lack of recognition of these customary rights.
27. Climate change will also increasing stress on water supply for Māori communities, agriculture, horticultural and commercial end-users.¹⁸

Agriculture and Horticulture

28. The livelihoods of Māori are strongly linked to agricultural and horticultural land use.

¹³ Above n 12.

¹⁴ Above n 12.

¹⁵ Above n 11.

¹⁶ Above n 11.

¹⁷ Above n 11.

¹⁸ Above n 11.

29. Māori freehold land represents an area of some 1.5 million hectares. Of this approximately 83 percent (approximately 1,262, 000 hectares) is suitable for agricultural and horticultural use.¹⁹
30. Maori agribusiness is estimated to provide 8 to 10 percent of New Zealand's national milk solids production and carry 10–15 percent of national sheep and beef stock units.²⁰ Māori horticulture is estimated to provide 10 per cent of New Zealand's national kiwifruit sector.²¹
31. Māori agricultural and horticultural investments are exposed and vulnerable to climate variability.²² There is a high probability that Māori farmers in northern and eastern areas of the country will be highly challenged by a warmer and drier climate as temperature and evaporation rates increase causing more frequent drought.²³ Western regions could be more prone to flooding and erosion from high rainfall events.²⁴
32. Warming temperatures bring a number of challenges to Māori pastoral based investments, with a potential reduction in pasture quality through earlier maturation, evolution of the pasture base toward less palatable herbage, intensification of carbon and nutrient cycles, changes to pest and disease occurrence and increases in heat stress days for the animal.²⁵
33. An associated reduction in frost frequency is also likely to adversely impact some Māori horticultural operations as many temperate fruits need winter chilling to ensure normal bud-burst and fruit set.²⁶ Horticulture is also very dependent on rainfall, temperature and

¹⁹ *Māori agribusiness in New Zealand: A study of the Māori freehold land resource* Ministry of Agriculture and Forestry 2011, p 7.

²⁰ Above n 19.

²¹ *Māori Economy Asset Base and Enterprises* Ministry of Business Innovation and Employment 2010.

²² D Packman et al *Climate change working paper: Māori issues* New Zealand Climate Change Office, Wellington 2001, p 18.

²³ Above n 11.

²⁴ Above n 11.

²⁵ Above n 11.

²⁶ Above n 11.

humidity for growth, maturation, and ripening, as well as for infection and for physical and biological damage.²⁷

34. Climate change will in other respects affect production rates, yields and GDP from Māori agriculture and horticulture.²⁸ Availability of water for irrigation will be an important factor leading to an increased drought risk.²⁹ With the significant and continuing warming the risk of insects and infection is increasing.³⁰ Greater variability and extreme weather increases the risk of later frost in the spring and earlier frosts in autumn.³¹
35. Many Māori individuals, trusts and incorporations that are largely dependent upon returns from agriculture and horticulture for their income will suffer significant economic challenges and may inevitably be forced away from activity in the sector by the impacts of climate change.

Fisheries

36. Māori own about 40% of the national fisheries quota and have substantial shares in several large fishing companies. This includes significant investment in fishing fleets, processing and marketing.³²
37. Climate-induced changes in regional ocean temperature, currents, winds, nutrient supply, ocean chemistry and increasing acidification (as well as extreme weather conditions) are expected to alter regional fisheries productivity and operations, fishing incomes and ocean-based investment.³³
38. Other possible impacts include changes in the productivity of warm and cold water marine species that supply important commercial and customary fisheries such as kina (sea-egg), koura (crayfish), paua

²⁷ Dr Neil Cherry *Climate Changes and the Effect on Horticultural Production in New Zealand* Lincoln University NZ Olive Association National Frost Workshop Blenheim, November 17th 2001.

²⁸ Above n 11.

²⁹ Above n 11.

³⁰ Above n 11.

³¹ Above n 11.

³² Above n 11.

³³ Above n 11.

(abalone), kanae (mullet) and tāmure (snapper).³⁴ Climate variability has already been shown to have significant influences on New Zealand fish stock availability.³⁵

39. These effects present a direct threat to Māori commercial and customary fisheries in New Zealand and will indirectly impact cultural practices and the wellbeing of Māori communities, particularly those whose cultural identity is directly linked to the marine environment.

Forestry

40. Forestry is a mainstay of the Maori economy, currently worth around \$2,242,000,000.³⁶

41. Climate change is expected to affect production rates, wood quality, pest presence and fire-risk and to some extent, determine the scale and species-mix in future plantation.³⁷

42. As projected west-east coast rainfall gradients become more pronounced, growth rates of economically important plantation forests (mainly pinus radiata) are expected to decrease in the east of the North Island.³⁸ Given the location of most Māori forestry land at present, this is likely to disproportionately affect Māori.³⁹ Remote Māori forestry owners also stand to suffer disproportionately from more expensive fuel and higher road costs.⁴⁰

43. Regions most at risk in the coming years will be those that are currently at the edge of climate tolerance, those already stressed by economic and social and biophysical conditions, and those where long-term investments such as slow growing plantation species have been made that restrict adaptation options.⁴¹

³⁴ Above n 11.

³⁵ Above n 11.

³⁶ Above n 21.

³⁷ Above n 11.

³⁸ Above n 11.

³⁹ Above n 11.

⁴⁰ Above n 11.

⁴¹ Above n 11.

Coastal Communities

44. Many Māori communities are situated along coastal margins, and these areas are highly vulnerable to sea level rise and other climatic events such as storms and high tides.⁴²
45. Coastal communities are highly valued by Māori for recreation such as fishing and diving to supplement food supplies and as sources of identity and places of learning customary practices that connect the living with the past.
46. Many of these areas and values are already compromised by environmental changes (including coastal erosion, floods, catchment runoff, landslides, mangrove establishment and pest species incursions), increased pressure on resources and widespread coastal development.⁴³
47. This century, climate change induced sea level rise in tandem with more intense storms are likely to cause widespread and more frequent coastal inundation, erosion of coastal infrastructure such as roads, homes and life-line services, and loss of inter-tidal food gathering areas and sacred places such as coastal urupā and marae.⁴⁴
48. Māori coastal communities and their surrounding infrastructure are likely to be disproportionately affected by sea level changes because of their socio-economic characteristics and vulnerable physical location on exposed, erosion-prone coastal lands.⁴⁵
49. For especially low-lying areas on receding coastlines, gradual to permanent sea inundation, degradation of dunes, sediment infilling, erosion and flooding is expected.⁴⁶

⁴² Above n 11.

⁴³ Above n 11.

⁴⁴ Above n 11.

⁴⁵ Above n 11.

⁴⁶ Above n 11.

Health and well-being

50. The health and well-being of Māori people is dependent on the stability of social and cultural infrastructure which in turn relies on the sustainability and condition of natural resource systems.

51. Climate change is likely to have both direct and indirect effects on these systems and thereby impact the health and wellbeing of Māori. Adverse mental health and psychological issues can result from ongoing drought and the associated impact on local economies and valued eco systems. The impact of climate change on the Māori economy has the potential to dramatically decrease community health and wellbeing.

Treaty of Waitangi Obligations towards Māori in regard to Climate Change Policies

52. Pursuant to the Treaty of Waitangi the Crown as represented by the New Zealand Government owe obligations of active protection to Māori in the use of their land and resources.⁴⁷ ('obligations of active protection').

53. Given the prejudicial effects of climate change to Māori the Crown through the New Zealand Government has obligations of active protection to Māori to take adequate steps to ensure that New Zealand bears its fair share as a developed nation in reducing greenhouse emissions so as keep global temperature rises below dangerous levels that will threaten Māori in the use of their land and resources.

New Zealand Government's response to the threat of climate change

54. The New Zealand Government response threat of global climate change has been limited to setting emission reduction targets under United Nations facilitated international treaties and establishing an emission trading scheme to facilitate compliance with these treaties.

⁴⁷ *NZ Māori Council v Attorney General* [1987] 1 NZLR.

55. Apart from these policies the New Zealand Government has not developed any other policies of substance to reduce greenhouse gas emissions.

United Nations Framework Convention on Climate Change

56. Recognising the issue of climate change in 1992 more than 190 countries (including New Zealand) signed the United Nations Framework Convention on Climate Change (UNFCCC).

57. Article 2 of the UNFCCC states that its objective is to “*achievestabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system*”.

58. Article 3 of the UNFCCC requires that as much as possible “*the parties should take precautionary measures to anticipate, prevent or minimise the causes of climate change and mitigate its adverse effects*”

59. Article 4 of the UNFCCC commits Annexure I “developed countries” (including New Zealand) to ‘take the lead’ to reverse the long term trends in anthropogenic emissions.

60. The parties to the UNFCCC have over time attended further Conferences of Parties (COPs) and made further commitments to addressing climate change.

New Zealand's Commitments 2008-12: Kyoto Protocol

61. NZ signed the Kyoto Protocol to the UNFCCC on 22 May 1998 and ratified it on 19 December 2002.

62. Under the Kyoto Protocol New Zealand as a ‘developed country’ committed to a target of keeping emissions of greenhouse gases during the 2008-12 ‘first commitment period (CP1) to levels not exceeding those in 1990 (‘the 1990 baseline’).

63. Targets under the Kyoto Protocol were expressed as an “assigned amount” of allowed emissions over the 5 year 2008-2012 commitment period. This was divided into assigned amount units (AAU's) (denominated as one tonne of CO₂ equivalent). New Zealand was assigned 302.8 m AAUs.

64. Under the accounting provisions of the Kyoto Protocol ('the Kyoto framework') developed countries including New Zealand were allowed to:

- (a) Accumulate additional emissions 'removal units' generated from growth of post 1990 forestry and other land use activities ('RMUs')
- (b) Purchase approved units through international carbon markets. ('overseas units'). These overseas units included:
 - i. Emission Reduction Units (ERU) - Generated from parties funding emission reducing projects in other Kyoto countries as an alternative to reducing their own emissions.
 - ii. Certified Emission Reductions (CER) – Being generated projects in non- Kyoto developing countries that are approved by the UN as reducing emissions.
- (c) Parties also had restricted rights to carry over surplus units into any subsequent commitment periods to be entered under the Kyoto Protocol.

Climate Change Response Act 2008 and the New Zealand Emissions Trading Scheme.

65. The *Climate Change Response Act 2002* was legislated to allow New Zealand to meet its commitments under CP1 of the Kyoto Protocol through an emissions trading scheme.

66. The *Climate Change Response Act 2002* contained the following objectives:

3 Purpose

(1) *The purpose of this Act is to—*

(a) *enable New Zealand to meet its international obligations under the Convention (UNFCCC) and the Protocol (Kyoto Protocol) , including (but not limited to)—*

(i) *its obligation under Article 3.1 of the Protocol to retire Kyoto units equal to the number of tonnes of carbon dioxide equivalent of human-induced greenhouse gases emitted from the sources listed in Annex A of the Protocol in New Zealand in the first commitment period; and*

(ii) *its obligation to report to the Conference of the Parties via the Secretariat under Article 7 of the Protocol and Article 12 of the Convention:*

(b) *provide for the implementation, operation, and administration of a greenhouse gas emissions trading scheme in New Zealand that supports and encourages global efforts to reduce the emission of greenhouse gases by—*

(i) *assisting New Zealand to meet its international obligations under the Convention and the Protocol; and*

(ii) *reducing New Zealand's net emissions of those gases to below business-as-usual levels; and*

(c) *provide for the imposition, operation, and administration of a levy on specified synthetic greenhouse gases contained in motor vehicles and also another levy on other goods to support and encourage global efforts to reduce the emission of those gases by—*

(i) *assisting New Zealand to meet its international obligations under the Convention and the Protocol; and*

(ii) *reducing New Zealand's net emissions of those gases to below business-as-usual levels.*

67. *The Climate Change Response Act 2002 as it currently stands also:*

(a) *Established a Registry to account for the issue, holding, transfer, retirement, surrender and cancellation of Kyoto units (Part 4) including New Zealand Units (NZUs) issued by the registrar and acquired overseas units;*

(b) *Established the New Zealand emissions trading scheme (NZETS) for the trading of Kyoto units (Part 4);*

(c) *Covered all greenhouse gas emissions from human induced sources including methane from animals and nitrous oxide from animal effluent.*

(d) *Required accounting of emissions from forestry, agriculture, transport, energy, emission intensive industry and waste sectors.*

- (e) Energy, industry and waste participating emitters are required to surrender one emission unit for every 2 tonnes of CO₂-e reported.
- (f) Pre 1990 forestry owners are required to surrender one emission unit for every tonne of CO₂-e of deforestation.
- (g) Post 1990 forest owners have the option to participate which would allow them to receive NZUs annually for every tonne of CO₂-e removed by growing trees which would have to be surrendered once the forest was harvested.
- (h) Agriculture emitters are exempted from surrendering emission units (after initially being scheduled to enter the scheme from 2015).
- (i) Provided for NZUs to be issued free to owners of pre 1990 Forestry and to certain energy intensive and trade exposed emitters on an ongoing output intensity basis.
- (j) As an alternative to surrendering emission units emitters are able to pay to the Government a fixed surrender price of \$25 per tonne of CO₂-e emitted.

68. On 31 March 2011 the New Zealand Government pursuant to s 224 of the *Climate Change Response Act 2002* gazetted a target to reduce greenhouse emissions by 50% from 1990 levels by 2050.

New Zealand's results from CP1 of Kyoto Protocol

- 69. Under the Kyoto Protocol parties to CP1 including New Zealand were allowed a 'true up period' until June 2015 to reconcile and report its emissions accounts for the 2008-12 CP1 period.
- 70. By the end of the true up period the New Zealand Government was able to report that for CP1 New Zealand's gross emissions exceeded 1990 levels by 21.4% but it was able to meet its targets for CP1 through use of forestry RMUs and overseas units.

Particulars

- (a) New Zealand's annual greenhouse gas emissions between 1990 and 2013 increased from 66,720 tonnes CO₂-e to 80,961 tonnes CO₂-e.⁴⁸
- (b) However New Zealand was able to meet its CP1 commitment to surrender 372.8 m AAUs based on total emissions by surrendering 179.1 m AAUs, 97 m ERUs, 80.1 m RMUs, and 16.1 m CERs.⁴⁹
- (c) In addition New Zealand has requested that it carry forward to CP2 a surplus of units represented by 123.7 m AAUs.⁵⁰

New Zealand's Commitments 2013-20: Exit from the Kyoto Protocol and commitment under the Copenhagen Accord

- 71. At the Doha Conference in December 2012 the New Zealand Government announced it would not commit to the second commitment period under the Kyoto Protocol for 2013-20 (CP2). As such, it did not become a party to the Doha Amendment to the Kyoto Protocol under which a number of other developed nations made binding commitments for the 2013- 20 period.
- 72. Rather than making a commitment to CP2 of the Kyoto Protocol the New Zealand Government announced that it would make a commitment under the Copenhagen Accord which New Zealand had become a party to following the Copenhagen Conference held in December 2009.
- 73. The Copenhagen Accord provided for Annex 1 developed countries to submit economy wide emission targets to achieve by 2020 which if the parties were already parties to the Kyoto Protocol would strengthen their targets under the protocol.⁵¹ In contrast with the Kyoto Protocol emission reduction commitments made under the Copenhagen Accord

⁴⁸ Above n 4.

⁴⁹ *Report on the expiration of the additional period for fulfilling commitments by New Zealand*, 16 December 2015.

⁵⁰ Above n 49.

⁵¹ Article 2.

are non-binding in that there are no mechanisms or penalties to ensure compliance.

74. Under the Copenhagen Accord the New Zealand Government set a target to reduce emissions by 15% to 20% from 1990 levels by 2020 but only if there is a comprehensive global agreement on emission reductions. These conditions have not been met and this commitment has not been activated. In 2013 the NZ government made a further unconditional commitment under the Copenhagen Accord to reduce emissions by 5% from 1990 levels by 2020.

75. Under the Kyoto Protocol framework New Zealand as not committing to CP2 will not be able to access the international carbon market from the end of the CP1 true up period. As a result the New Zealand Government regulated that as from 1 June 2015 overseas units will no longer be able to be used to satisfy obligations under the NZETS. From this time the NZETS has become a purely domestic scheme without international linkages.

New Zealand's Indicated Commitments 2021-30: Paris Agreement

76. Leading up to the 2015 UNFCCC Paris Conference the NZ Government announced an 'intended nationally determined contribution' (INDC)⁵² which stated:

- (a) A commitment to reduce net greenhouse gas emissions to 30% below 2005 levels (being equivalent to a reduction 11% from 1990 levels);
- (b) That this target is conditional upon the Paris Agreement providing for the continuation of Kyoto framework rules relating to access to RMU's from forestry and unrestricted access to global carbon markets;
- (c) Amongst other things the INDC also acknowledged that the land was a key economic and spiritual resource for Māori.

⁵² *New Zealand, Submission to the ADP, New Zealand's Intended Nationally Determined Contribution, July 2015.*

77. At the conclusion of the Paris conference the participants including New Zealand agreed in principle to the terms of the Paris Agreement that would apply to participants the period 2021 to 2030 and a mechanism for the eventual adoption of the Paris agreement.

78. The Paris Agreement included the following terms (in summary):

- (a) *Article 2*- There was an agreed objective of holding the increase in global average temperature to well below 2°C above preindustrial levels and to pursue efforts to limit temperature increases to 1.5°C recognising that this would significantly reduce the risks and impacts of climate change.
- (b) *Article 3*- The parties agreed to undertake and communicate 'nationally determined contributions' (NDCs) to reduce greenhouse gas emissions as 'ambitious efforts' to achieve the objectives of the agreement.
- (c) *Article 4*- The parties aim to reach global peaking of greenhouse gas emissions as soon as possible with developed countries taking the lead.
- (d) *Article 8* – The parties recognise the importance of averting, minimising and addressing loss and damage associated with the adverse effects of climate change.

79. The decision of the Paris Conference to adopt the Paris Agreement included the following terms (in summary):

- (a) *Clause 17*- It was noted that the intended nationally determined contributions submitted by the parties to date would not hold global temperature increases to below 2°C by 2030
- (b) *Clause 20*- It was agreed that there will be a facilitated dialogue in 2018 to review collective efforts and inform the setting of NDCs to apply from 2021.

(c) *Clause 22-* It was agreed that NDCs will be communicated at the time of ratifying the agreement and that these will be the INDC's previously communicated unless stated otherwise.

(d) *Clause 24-* The parties who have communicated NDCs applying until 2030 to update these NDCs by 2020 and then again every 5 years.

(e) *Clause 106-* The parties resolved to ensure the highest possible mitigation efforts in the pre-2020 period.

80. The New Zealand government signed the Paris agreement once it became open for signature from 22 April 2016 but has yet to ratify the agreement.

Breach of Treaty of Waitangi obligations in Regard in to Climate Change

81. To date the Crown through the New Zealand Government has acted in breach of its obligations of active protection to Māori to take adequate steps to ensure that New Zealand bears its fair share as a developed nation in reducing greenhouse emissions so as keep global temperature rises below dangerous levels that will threaten Māori in the use of their land and resources.

Emission Trading Scheme ineffective

82. The New Zealand Emissions Trading Scheme which the Government mainly relies on to deal with Climate Change has been and will continue to be ineffective in addressing New Zealand's greenhouse gas emissions.

Particulars

(a) After initially scheduling agriculture emitters to enter the NZETS the legislation was subsequently amended to exclude New Zealand's largest emitting industry.

(b) The NZETS does not operate as is not a "cap and trade" scheme as understood by economics literature in that it does not have any "cap"

on total emissions. In particular, it does not limit the amount of free emissions allocated to energy intensive and trade exposed emitters.

- (c) There is no minimum price of emissions units with only a maximum price set by the Government allowing the surrender of emissions at \$25 per tonne.
- (d) The lack of a floor price was during the first Kyoto commitment period exacerbated by there being insufficient monitoring of on the quality, amount or price of overseas units which could be purchased and used under the scheme.
- (e) In particular, the unrestricted purchases of ERUs was allowed after it became apparent that the bulk of the units on the market were dubious quality units from Russia and the Ukraine where there was no real evidence of emission reducing projects backing the units. As a result of these ERU's being able to flood the New Zealand ETS market the price of ERU's collapsed to as low as 0.18c a unit by the time the market was closed off from the international carbon market from 1 June 2015. This also resulted in the price of NZU's collapsing from \$20 to less than \$2 a unit.⁵³
- (f) The low and fluctuating price of emission units in particular provided a lack of incentives for forestry owners to retain or plant forestry and to enter the scheme. As a result the proportion of forests registered under the scheme has dropped significantly and forestry has since 2013 been a net emitter and is forecast to remain that way until 2025.⁵⁴
- (g) Between 2010 and 2014 with 70% of units surrendered under the NZETS being ERUs New Zealand was in breach of Kyoto Protocol obligations to rely primarily on domestic emission reductions to meet obligations.⁵⁵
- (h) The purchase of ERU's into the NZETS has allowed the New Government to claim that it has a surplus of units from CPI of the

⁵³ Above n 7.

⁵⁴ Above n 7.

⁵⁵ Above n 7.

Kyoto Protocol when this claimed surplus did in reality not represent any reductions in emissions.

- (i) Overall, the NZETS does not result in emitters reducing emissions. The Ministry of the Environment reported in 2016 that nearly all the participants interviewed reported that the NZETS did not provide any incentive for them to look at how to reduce emissions.⁵⁶

Insufficient targets for emission reductions

- 83. The New Zealand Government has set inadequate emission reduction targets.

Particulars

- (a) Current New Zealand Government targets for reducing greenhouse emissions policies fall well short of the targets recommended for developed nations in order to keep global temperature rises below the 2 degrees above pre- industrial levels which will be dangerous to humans.
- (b) These targets being a 25-40% reduction of emission from 1990 levels by 2020 and by 80-90% by 2050. By contrast, New Zealand's current targets are to reduce emissions by 5% by 2020, 11% by 2030 and 50% by 2050 from 1990 levels.
- (c) Even these inadequate targets are exaggerated by the fact that the base 1990 levels are gross emissions while the targets are net emissions after off sets from forestry RMUs and units carried over from previous periods. If gross emissions were compared with gross emissions then the targets equate to a 30% increase in emissions by 2020 and 11% increase by 2030.⁵⁷
- (d) Further, the targets are set in breach of international obligations and norms.

⁵⁶ *The New Zealand's Emission Trading Schemes Evaluation 2016*, February 2016, Ministry for the Environment.

⁵⁷ *Climate Change Tracker Report: New Zealand deploys creative accounting to allow emissions rise*, 15 June 2015.

- (e) In particular, a significant number of developed nations under the Kyoto Protocol have resolved not to carry over surplus emission units from CP1 to CP2 given the issues over the quality of some of the emission units surrendered in CP1. By contrast New Zealand intends to rely on dubious ERU's surrendered during CP1 to report and carry over a significant surplus of 123.7 m CO₂-e units into the 2013-20 period.
- (f) Also, under the Doha Amendment any countries such as New Zealand who did commit to the second period of the Kyoto Protocol were not entitled to use the Kyoto framework to meet their emission targets.⁵⁸
- (g) In breach of these restrictions New Zealand's targets for 2013 -2020 and 2021 - 2030 both assume the ability for NZ to continue to take advantage the Kyoto Framework to carry over surplus units from previous commitment periods and to continue to generate RMUs from forestry.
- (h) Specifically, for the 2013-2020 period while gross emissions are expected to increase by some 30% from 1990 levels by the use of forestry RMUs and surplus 2008-12 AAUs the New Zealand Government expects to meet its target of net emissions reducing by 5% from 1990 levels with a significant surplus 2008-12 AAUs to spare.⁵⁹
- (i) Further, for the 2021-30 period while current gross emissions are expected to increase by some 11% from 1990 levels, by the use of forestry RMUs and carried over 2008-12 AAUs the New Zealand Government expects to meet its target of reducing net emissions by 11% from 1990 levels.⁶⁰
- (j) The current targets by the New Zealand Government are well below that of many other developed nations. For instance, the European Union has set targets to reduce gross emissions by 20% by 2020 and 40% by 2030. Comparatively, the *Climate Action Tracker* organisation

⁵⁸ *Doha Addendum to Kyoto Protocol* 28 February 2013 Decision 1/CMP.8 Parts IV and V.

⁵⁹ Above n 7.

⁶⁰ Above n 7.

that audits international climate change targets rates the New Zealand effort as 'inadequate'.⁶¹

- (k) The current Nationally Determined Contribution committed by New Zealand Government under the Paris Agreement for 2021-2020 will be in breach of the agreement including Article 2 in failing to set an 'ambitious target' to attain the objectives of the agreement to keep global temperature rises below 1.5% above preindustrial levels.

Lack of other policies to reduce emissions

84. The New Zealand Government has failed to develop policies for reducing greenhouse gas emissions outside of the New Zealand Emissions Trading Scheme.

85. In other respects New Zealand Government policy acts to significantly increase the New Zealand's levels of greenhouse gas emissions, including:

Particulars

- (a) The Government actively encourages off shore oil and gas exploration including by providing taxation rebates for exploration costs.
- (b) The state owned enterprise Solid Energy produces over 85% of New Zealand's total coal production.
- (c) The state owned enterprise Landcorp has converted large areas of forestry into dairy farms and is at present the largest dairy farm operator in New Zealand.
- (d) The Government does not incentivise (by way of rebates, tax deductions or otherwise) conduct by individuals that will reduce emissions including, not rebating the cost of electric vehicles, not rebating the cost of solar power for private homes and not requiring power companies to pay a fair price for power fed back into the grid from private solar units.

⁶¹ Above n 7.

- (e) The Government has historically under invested in public transport, cycle ways and other alternatives to private motor vehicle transport.
- (f) The New Zealand government is capable of introducing further cost efficient policies that will reduce greenhouse emissions levels but has to date failed to do so.
- (g) Overall, current New Zealand Government policies to bring about actual reductions greenhouse gas emissions will be not be sufficient to bring down emission levels anywhere near the below 2 degree targets and will be unlikely to bring emissions below current business as usual levels.

Prejudice to Māori as a result of Treaty of Waitangi breaches

86. As a result of the New Zealand Government acting in breach of the Crown's obligations of active protection towards Māori by providing an inadequate response to the threat of Climate Change Māori have and will continue to suffer prejudice in the use of their land and resources from worsening climate change inadequate as set out in paragraphs 18 to 50 above.

87. Further, Māori have suffered further particular prejudice as result of their heavy involvement in the forestry industry:

Particulars

- (a) In general the NZETS has been operated in a manner that does not provide sufficient incentives or certainty for forestry growers (as detailed in paragraph 80(f) above).
- (b) Māori have significant Treaty of Waitangi settlements of Forestry land which included NZUs accumulated from the forestry. With the collapse of the price of NZUs due to the Government's operation of the ETS (as detailed at paragraph 80(e) above) the value of the settlements have decreased.

- (c) The New Zealand Government in 2014 without prior warning introduced legislation to prevent the forestry owners from surrendering overseas units to deforest and as a result prejudiced Māori forest owners who had purchased overseas units in anticipation of deforestation.

Relief Sought

- (a) A finding that the New Zealand Government's inadequate response to the threat of Climate Change is in breach of the Crown's obligations under the Treaty of Waitangi and Māori have and will continue to suffer prejudice as a result.
- (b) A recommendation that the New Zealand Government set targets for the reduction of greenhouse gas emissions that will meet New Zealand's international obligations to take the lead as a developed country to keep global temperature rises below the 2 degrees above pre-industrial levels.
- (c) A recommendation that the New Zealand Government introduce policies that will be effective in reducing greenhouse gases that are sufficient in meeting such targets including restructuring or replacing the present New Zealand Emission Trading Scheme.
- (d) A recommendation that the New Zealand Government specifically introduce policies that will mitigate the ongoing effects of climate change on Māori and their use of their lands and resources.
- (e) Costs.

DATED this 30th day of May 2016



.....
Tania Te Whenua

Solicitor for the Claimants.

This Document is filed by **Tania Te Whenua**, Solicitor for the Claimants of the firm **Te Whenua Law** of Rotorua. The address for service of the First Defendant is at the offices of Te Whenua Law, PO Box 12094, Rotorua.

Documents for service on the Claimant may be left at the address for service or may be:

- (a) Emailed to the solicitor for the claimant at tania@tewhenua.maori.nz;
or
- (b) Emailed to instructed counsel at michael@michaelsharp.co.nz.

IN THE WAITANGI TRIBUNAL

WAI

IN THE MATTER OF The Treaty of Waitangi Act 1975

AND IN THE MATTER OF A claim by **Cletus Maanu Paul, David Potter** and **Andre Paterson** on behalf of the **Mataatua District Māori Council** that the Crown is acting in breach of Treaty of Waitangi obligations towards Maori as a result of the New Zealand Government failing to implement adequate policies to address the threats posed by global climate change.

STATEMENT OF CLAIM

Dated 30 May 2016

Instructing Solicitor:
Toni Brown Law
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Tauranga 3110

COUNSEL ACTING:
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STATEMENT OF CLAIM

THE CLAIMANT SAYS:

1. **The Claimants** represent the **Mataatua District Māori Council** being a District Māori Committee established under the Māori Community Development Act 1962 in relation to the district extending from the mouth of the Waitahanui Stream, inland to Kaingaroa, then across to Cape Runaway, then back across the Bay of Plenty including Motiti Island.
2. The Claimants bring this claim on behalf of Māori in the **Mataatua District Māori Council** district and elsewhere in Aotearoa/New Zealand.

The Claim

3. The New Zealand Government's response to the threat of global climate change represents a breach of the Crown's Treaty of Waitangi obligations towards Māori and Māori have and will continue to suffer prejudice as a result.

Background

Climate Change

4. Since pre-industrial times (prior to 1850) the global average surface temperature has increased by 0.8°C.
5. The effects of this increase in temperature are being felt around the world through consequences such as extreme weather patterns leading to droughts and flooding, sea level and temperature rises (climate change).
6. It is scientifically accepted that the main cause of climate change has been an increase in the amount of greenhouse gases in the atmosphere that have been caused by human activity (anthropogenic greenhouse gases).
7. Greenhouse gases cause a 'greenhouse effect' in the earth's atmosphere by absorbing and emitting radiation heat.

8. Globally, the main source of anthropogenic greenhouse gases has been CO₂ (carbon dioxide) caused largely by the burning of fossil fuels. Methane and nitrous oxide from agricultural activities and HFCs have also been significant contributors.¹
9. Greenhouse gas levels in the atmosphere can be measured by CO₂ equivalent parts per million being the amount of CO₂ (ppm) in the atmosphere that would cause an equivalent amount of atmospheric warming.²
10. At the start of the industrial revolution atmospheric concentration of anthropogenic greenhouse gases was estimated to be 280 ppm. At present anthropogenic greenhouse gas concentrations are approaching the level of 400ppm.³
11. In New Zealand the relative contributions towards anthropogenic greenhouse gases as at 2014 were 43.9 % from CO₂ , 42.9% from methane (mainly from livestock rumination), 11.2% from nitrous oxide (mainly from animal excrement and from the use of nitrogenous fertiliser) and 2% from HFCs.⁴
12. Agriculture is the highest greenhouse gas emitting industry in New Zealand with 49% of total emissions in 2014 followed by energy 40%, industry processes and product uses 6%, and waste 5%.⁵
13. Between 1990 and 2014 New Zealand's annual anthropogenic greenhouse gas emissions increased by 23% from 66,720 tonnes of Carbon Dioxide equivalent (CO₂-e) to 81,104 tonnes CO₂ -e. Emission increases by sector were agriculture 15.2%, energy 35.5%, industry processes and product use 45.1%, and waste -0.5%.⁶

¹ *Climate Change 2007: Synthesis Report, An Assessment of the International Panel on Climate Change*, p 37.

² Above n 1, p 36.

³ Above n 1, p 37.

⁴ *New Zealand's Greenhouse Gas Inventory 1990-2014*, Ministry of the Environment, Submitted to United Nations Convention on Climate Change, 20 May 2016.

⁵ Above n 4.

⁶ Above n 4.

14. New Zealand's per capita emissions of anthropogenic greenhouse gases is presently approximately 17 tonnes CO₂-e and is the fourth highest of the 27 OECD countries.⁷

Requirements to keep temperature rises under dangerous levels

15. The Intergovernmental Panel on Climate Change (IPCC) is a scientific body established by the United Nations Environment Program and the World Meteorological Organisation to acquire insight into all aspects of climate change including the risks, consequences and options for adaption and mitigation.

16. In its AR4/2007 reports the IPCC concluded that:

- (a) A global mean surface temperature increase of 2°C above preindustrial levels (up to the year 1850) creates the risk of dangerous and irreversible change of climate.⁸

- (b) To prevent this temperature increase occurring anthropogenic greenhouse gas concentrations in the atmosphere need to stay below the level of 450ppm.⁹

- (c) That in order to have a realistic chance of keeping anthropogenic greenhouse gas concentrations below 450 ppm developed nations must achieve a reduction in anthropogenic greenhouse gas emissions as compared to 1990 levels of at least 25% to 40% by the year 2020 and at least 80% to 90% by 2050.¹⁰

17. At the United Nations Paris Conference held in December 2015 the attending countries including New Zealand adopted the Paris Agreement which contained an acceptance that post- industrial

⁷ *Climate Cheats, How New Zealand is heating on climate change commitments and what we can do to set it right*, Geoff Simmons and Paul Young April 2016, The Morgan Foundation.

⁸ Above n 1, pp 64-5.

⁹ Above n 1, p 227.

¹⁰ *Climate Change 2007: Mitigation Report*, Contribution of Working Group III to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change, Cambridge University Press, p 776.

temperature changes should be held to below 1.5% in order to avoid the extreme results of climate change.

The Effect of Climate Change on Māori

18. The actual and potential impact of climate change on Maori is serious and widespread.

Natural Ecosystems

19. The well-being of natural ecosystems is of paramount importance to Maori particularly given the fundamental role of the natural environment in defining Māori culture and values.
20. Māori ethics, expressed through tikanga, recognise that cultural order comes from the natural environment and hence people have a responsibility to care for these systems.
21. The role of Māori as kaitiaki (cultural guardians) of the natural environment has not been adequately recognised by the Crown. For instance, the recommendations of the Waitangi Tribunal in its WAI262 *Ko Aotearoa Tenei Report* that the Maori advisory bodies be appointed to be involved in environmental protection were ignored by the New Zealand Government.
22. Climate change has been and will continue to have a detrimental effect on natural eco-systems in New Zealand:
- (a) The production and ecology of native flora and fauna will likely be challenged by new plant and animal pests, as well as the spread of pathogens and diseases as warmer weather favours conditions for increased competition.¹¹ Some vulnerable species may face habitat loss and even extinction.¹²

¹¹ D King et al "The climate change matrix facing Māori society" In *Climate change adaptation in New Zealand: Future scenarios and some sectoral perspectives*. Nottage, R.A.C., Wratt, D.S., Bornman, J.F., Jones, K. (eds). New Zealand Climate Change Centre, Wellington 2010.

¹² *Climate Change Implications for New Zealand* The Royal Society of New Zealand, April 2016.

- (b) The ecosystems surrounding rivers and lakes including freshwater fauna will be affected by lower water levels and higher temperatures.¹³
 - (c) Forest ecosystems will be affected by drought conditions and introduced herbivores and weed species.¹⁴
 - (d) Coastal ecosystems will be affected by rising sea levels and high rain events.¹⁵
23. The detrimental effect of climate change on ecosystems caused by climate change will have a devastating impact on economic, social and cultural values across Māori society.

Water

24. Māori have customary kaitiakitanga and ownership interests in water throughout New Zealand which to date have not been adequately recognised by the Crown.
25. Climate change will cause water scarcity through increased frequency and extremity of droughts.¹⁶ In addition, higher temperatures and lower rainfall are expected to reduce soil moisture, groundwater supplies and river flows for some areas, further aggravating water availability and water quality problems.¹⁷
26. Climate change will detrimentally affect water sources over Māori hold customary rights. The ability of Māori to address these effects is limited due to the lack of recognition of these customary rights.
27. Climate change will also increasing stress on water supply for Māori communities, agriculture, horticultural and commercial end-users.¹⁸

Agriculture and Horticulture

28. The livelihoods of Māori are strongly linked to agricultural and horticultural land use.

¹³ Above n 12.

¹⁴ Above n 12.

¹⁵ Above n 11.

¹⁶ Above n 11.

¹⁷ Above n 11.

¹⁸ Above n 11.

29. Māori freehold land represents an area of some 1.5 million hectares. Of this approximately 83 percent (approximately 1,262, 000 hectares) is suitable for agricultural and horticultural use.¹⁹
30. Maori agribusiness is estimated to provide 8 to 10 percent of New Zealand's national milk solids production and carry 10–15 percent of national sheep and beef stock units.²⁰ Māori horticulture is estimated to provide 10 per cent of New Zealand's national kiwifruit sector.²¹
31. Māori agricultural and horticultural investments are exposed and vulnerable to climate variability.²² There is a high probability that Māori farmers in northern and eastern areas of the country will be highly challenged by a warmer and drier climate as temperature and evaporation rates increase causing more frequent drought.²³ Western regions could be more prone to flooding and erosion from high rainfall events.²⁴
32. Warming temperatures bring a number of challenges to Māori pastoral based investments, with a potential reduction in pasture quality through earlier maturation, evolution of the pasture base toward less palatable herbage, intensification of carbon and nutrient cycles, changes to pest and disease occurrence and increases in heat stress days for the animal.²⁵
33. An associated reduction in frost frequency is also likely to adversely impact some Māori horticultural operations as many temperate fruits need winter chilling to ensure normal bud-burst and fruit set.²⁶ Horticulture is also very dependent on rainfall, temperature and

¹⁹ *Māori agribusiness in New Zealand: A study of the Māori freehold land resource* Ministry of Agriculture and Forestry 2011, p 7.

²⁰ Above n 19.

²¹ *Māori Economy Asset Base and Enterprises* Ministry of Business Innovation and Employment 2010.

²² D Packman et al *Climate change working paper: Māori issues* New Zealand Climate Change Office, Wellington 2001, p 18.

²³ Above n 11.

²⁴ Above n 11.

²⁵ Above n 11.

²⁶ Above n 11.

humidity for growth, maturation, and ripening, as well as for infection and for physical and biological damage.²⁷

34. Climate change will in other respects affect production rates, yields and GDP from Māori agriculture and horticulture.²⁸ Availability of water for irrigation will be an important factor leading to an increased drought risk.²⁹ With the significant and continuing warming the risk of insects and infection is increasing.³⁰ Greater variability and extreme weather increases the risk of later frost in the spring and earlier frosts in autumn.³¹
35. Many Māori individuals, trusts and incorporations that are largely dependent upon returns from agriculture and horticulture for their income will suffer significant economic challenges and may inevitably be forced away from activity in the sector by the impacts of climate change.

Fisheries

36. Māori own about 40% of the national fisheries quota and have substantial shares in several large fishing companies. This includes significant investment in fishing fleets, processing and marketing.³²
37. Climate-induced changes in regional ocean temperature, currents, winds, nutrient supply, ocean chemistry and increasing acidification (as well as extreme weather conditions) are expected to alter regional fisheries productivity and operations, fishing incomes and ocean-based investment.³³
38. Other possible impacts include changes in the productivity of warm and cold water marine species that supply important commercial and customary fisheries such as kina (sea-egg), koura (crayfish), paua

²⁷ Dr Neil Cherry *Climate Changes and the Effect on Horticultural Production in New Zealand* Lincoln University NZ Olive Association National Frost Workshop Blenheim, November 17th 2001.

²⁸ Above n 11.

²⁹ Above n 11.

³⁰ Above n 11.

³¹ Above n 11.

³² Above n 11.

³³ Above n 11.

(abalone), kanae (mullet) and tāmure (snapper).³⁴ Climate variability has already been shown to have significant influences on New Zealand fish stock availability.³⁵

39. These effects present a direct threat to Māori commercial and customary fisheries in New Zealand and will indirectly impact cultural practices and the wellbeing of Māori communities, particularly those whose cultural identity is directly linked to the marine environment.

Forestry

40. Forestry is a mainstay of the Maori economy, currently worth around \$2,242,000,000.³⁶

41. Climate change is expected to affect production rates, wood quality, pest presence and fire-risk and to some extent, determine the scale and species-mix in future plantation.³⁷

42. As projected west-east coast rainfall gradients become more pronounced, growth rates of economically important plantation forests (mainly pinus radiata) are expected to decrease in the east of the North Island.³⁸ Given the location of most Māori forestry land at present, this is likely to disproportionately affect Māori.³⁹ Remote Māori forestry owners also stand to suffer disproportionately from more expensive fuel and higher road costs.⁴⁰

43. Regions most at risk in the coming years will be those that are currently at the edge of climate tolerance, those already stressed by economic and social and biophysical conditions, and those where long-term investments such as slow growing plantation species have been made that restrict adaptation options.⁴¹

³⁴ Above n 11.

³⁵ Above n 11.

³⁶ Above n 21.

³⁷ Above n 11.

³⁸ Above n 11.

³⁹ Above n 11.

⁴⁰ Above n 11.

⁴¹ Above n 11.

Coastal Communities

44. Many Māori communities are situated along coastal margins, and these areas are highly vulnerable to sea level rise and other climatic events such as storms and high tides.⁴²
45. Coastal communities are highly valued by Māori for recreation such as fishing and diving to supplement food supplies and as sources of identity and places of learning customary practices that connect the living with the past.
46. Many of these areas and values are already compromised by environmental changes (including coastal erosion, floods, catchment runoff, landslides, mangrove establishment and pest species incursions), increased pressure on resources and widespread coastal development.⁴³
47. This century, climate change induced sea level rise in tandem with more intense storms are likely to cause widespread and more frequent coastal inundation, erosion of coastal infrastructure such as roads, homes and life-line services, and loss of inter-tidal food gathering areas and sacred places such as coastal urupā and marae.⁴⁴
48. Māori coastal communities and their surrounding infrastructure are likely to be disproportionately affected by sea level changes because of their socio-economic characteristics and vulnerable physical location on exposed, erosion-prone coastal lands.⁴⁵
49. For especially low-lying areas on receding coastlines, gradual to permanent sea inundation, degradation of dunes, sediment infilling, erosion and flooding is expected.⁴⁶

⁴² Above n 11.

⁴³ Above n 11.

⁴⁴ Above n 11.

⁴⁵ Above n 11.

⁴⁶ Above n 11.

Health and well-being

50. The health and well-being of Māori people is dependent on the stability of social and cultural infrastructure which in turn relies on the sustainability and condition of natural resource systems.
51. Climate change is likely to have both direct and indirect effects on these systems and thereby impact the health and wellbeing of Māori. Adverse mental health and psychological issues can result from ongoing drought and the associated impact on local economies and valued eco systems. The impact of climate change on the Māori economy has the potential to dramatically decrease community health and wellbeing.

Treaty of Waitangi Obligations towards Māori in regard to Climate Change Policies

52. Pursuant to the Treaty of Waitangi the Crown as represented by the New Zealand Government owe obligations of active protection to Māori in the use of their land and resources.⁴⁷ ('obligations of active protection').
53. Given the prejudicial effects of climate change to Māori the Crown through the New Zealand Government has obligations of active protection to Māori to take adequate steps to ensure that New Zealand bears its fair share as a developed nation in reducing greenhouse emissions so as keep global temperature rises below dangerous levels that will threaten Māori in the use of their land and resources.

New Zealand Government's response to the threat of climate change

54. The New Zealand Government response threat of global climate change has been limited to setting emission reduction targets under United Nations facilitated international treaties and establishing an emission trading scheme to facilitate compliance with these treaties.

⁴⁷ *NZ Māori Council v Attorney General* [1987] 1 NZLR.

55. Apart from these policies the New Zealand Government has not developed any other policies of substance to reduce greenhouse gas emissions.

United Nations Framework Convention on Climate Change

56. Recognising the issue of climate change in 1992 more than 190 countries (including New Zealand) signed the United Nations Framework Convention on Climate Change (UNFCCC).
57. Article 2 of the UNFCCC states that its objective is to “*achievestabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system*”.
58. Article 3 of the UNFCCC requires that as much as possible “*the parties should take precautionary measures to anticipate, prevent or minimise the causes of climate change and mitigate its adverse effects*”
59. Article 4 of the UNFCCC commits Annexure I “developed countries” (including New Zealand) to ‘take the lead’ to reverse the long term trends in anthropogenic emissions.
60. The parties to the UNFCCC have over time attended further Conferences of Parties (COPs) and made further commitments to addressing climate change.

New Zealand’s Commitments 2008-12: Kyoto Protocol

61. NZ signed the Kyoto Protocol to the UNFCCC on 22 May 1998 and ratified it on 19 December 2002.
62. Under the Kyoto Protocol New Zealand as a ‘developed country’ committed to a target of keeping emissions of greenhouse gases during the 2008-12 ‘first commitment period (CP1) to levels not exceeding those in 1990 (‘the 1990 baseline’).

63. Targets under the Kyoto Protocol were expressed as an “assigned amount” of allowed emissions over the 5 year 2008-2012 commitment period. This was divided into assigned amount units (AAU’s) (denominated as one tonne of CO₂ equivalent). New Zealand was assigned 302.8 m AAUs.

64. Under the accounting provisions of the Kyoto Protocol (‘the Kyoto framework’) developed countries including New Zealand were allowed to:

(a) Accumulate additional emissions ‘removal units’ generated from growth of post 1990 forestry and other land use activities (‘RMUs’)

(b) Purchase approved units through international carbon markets. (‘overseas units’). These overseas units included:

i. Emission Reduction Units (ERU) - Generated from parties funding emission reducing projects in other Kyoto countries as an alternative to reducing their own emissions.

ii. Certified Emission Reductions (CER) – Being generated projects in non- Kyoto developing countries that are approved by the UN as reducing emissions.

(c) Parties also had restricted rights to carry over surplus units into any subsequent commitment periods to be entered under the Kyoto Protocol.

Climate Change Response Act 2008 and the New Zealand Emissions Trading Scheme.

65. The *Climate Change Response Act 2002* was legislated to allow New Zealand to meet its commitments under CP1 of the Kyoto Protocol through an emissions trading scheme.

66. The *Climate Change Response Act 2002* contained the following objectives:

3 Purpose

(1) *The purpose of this Act is to—*

(a) *enable New Zealand to meet its international obligations under the Convention (UNFCCC) and the Protocol (Kyoto Protocol) , including (but not limited to)—*

(i) *its obligation under Article 3.1 of the Protocol to retire Kyoto units equal to the number of tonnes of carbon dioxide equivalent of human-induced greenhouse gases emitted from the sources listed in Annex A of the Protocol in New Zealand in the first commitment period; and*

(ii) *its obligation to report to the Conference of the Parties via the Secretariat under Article 7 of the Protocol and Article 12 of the Convention:*

(b) *provide for the implementation, operation, and administration of a greenhouse gas emissions trading scheme in New Zealand that supports and encourages global efforts to reduce the emission of greenhouse gases by—*

(i) *assisting New Zealand to meet its international obligations under the Convention and the Protocol; and*

(ii) *reducing New Zealand's net emissions of those gases to below business-as-usual levels; and*

(c) *provide for the imposition, operation, and administration of a levy on specified synthetic greenhouse gases contained in motor vehicles and also another levy on other goods to support and encourage global efforts to reduce the emission of those gases by—*

(i) *assisting New Zealand to meet its international obligations under the Convention and the Protocol; and*

(ii) *reducing New Zealand's net emissions of those gases to below business-as-usual levels.*

67. The *Climate Change Response Act 2002* as it currently stands also:

(a) Established a Registry to account for the issue, holding, transfer, retirement, surrender and cancellation of Kyoto units (Part 4) including New Zealand Units (NZUs) issued by the registrar and acquired overseas units;

(b) Established the New Zealand emissions trading scheme (NZETS) for the trading of Kyoto units (Part 4);

(c) Covered all greenhouse gas emissions from human induced sources including methane from animals and nitrous oxide from animal effluent.

(d) Required accounting of emissions from forestry, agriculture, transport, energy, emission intensive industry and waste sectors.

- (e) Energy, industry and waste participating emitters are required to surrender one emission unit for every 2 tonnes of CO₂-e reported.
- (f) Pre 1990 forestry owners are required to surrender one emission unit for every tonne of CO₂-e of deforestation.
- (g) Post 1990 forest owners have the option to participate which would allow them to receive NZUs annually for every tonne of CO₂-e removed by growing trees which would have to be surrendered once the forest was harvested.
- (h) Agriculture emitters are exempted from surrendering emission units (after initially being scheduled to enter the scheme from 2015).
- (i) Provided for NZUs to be issued free to owners of pre 1990 Forestry and to certain energy intensive and trade exposed emitters on an ongoing output intensity basis.
- (j) As an alternative to surrendering emission units emitters are able to pay to the Government a fixed surrender price of \$25 per tonne of CO₂-e emitted.

68. On 31 March 2011 the New Zealand Government pursuant to s 224 of the *Climate Change Response Act 2002* gazetted a target to reduce greenhouse emissions by 50% from 1990 levels by 2050.

New Zealand's results from CP1 of Kyoto Protocol

69. Under the Kyoto Protocol parties to CP1 including New Zealand were allowed a 'true up period' until June 2015 to reconcile and report its emissions accounts for the 2008-12 CP1 period.

70. By the end of the true up period the New Zealand Government was able to report that for CP1 New Zealand's gross emissions exceeded 1990 levels by 21.4% but it was able to meet its targets for CP1 through use of forestry RMUs and overseas units.

Particulars

- (a) New Zealand's annual greenhouse gas emissions between 1990 and 2013 increased from 66,720 tonnes CO₂-e to 80,961 tonnes CO₂-e.⁴⁸
- (b) However New Zealand was able to meet its CP1 commitment to surrender 372.8 m AAUs based on total emissions by surrendering 179.1 m AAUs, 97 m ERUs, 80.1 m RMUs, and 16.1 m CERs.⁴⁹
- (c) In addition New Zealand has requested that it carry forward to CP2 a surplus of units represented by 123.7 m AAUs.⁵⁰

New Zealand's Commitments 20013-20: Exit from the Kyoto Protocol and commitment under the Copenhagen Accord

- 71. At the Doha Conference in December 2012 the New Zealand Government announced it would not commit to the second commitment period under the Kyoto Protocol for 2013-20 (CP2). As such, it did not become a party to the Doha Amendment to the Kyoto Protocol under which a number of other developed nations made binding commitments for the 2013- 20 period.
- 72. Rather than making a commitment to CP2 of the Kyoto Protocol the New Zealand Government announced that it would make a commitment under the Copenhagen Accord which New Zealand had become a party to following the Copenhagen Conference held in December 2009.
- 73. The Copenhagen Accord provided for Annex 1 developed countries to submit economy wide emission targets to achieve by 2020 which if the parties were already parties to the Kyoto Protocol would strengthen their targets under the protocol.⁵¹ In contrast with the Kyoto Protocol emission reduction commitments made under the Copenhagen Accord

⁴⁸ Above n 4.

⁴⁹ *Report on the expiration of the additional period for fulfilling commitments by New Zealand*, 16 December 2015.

⁵⁰ Above n 49.

⁵¹ Article 2.

are non-binding in that there are no mechanisms or penalties to ensure compliance.

74. Under the Copenhagen Accord the New Zealand Government set a target to reduce emissions by 15% to 20% from 1990 levels by 2020 but only if there is a comprehensive global agreement on emission reductions. These conditions have not been met and this commitment has not been activated. In 2013 the NZ government made a further unconditional commitment under the Copenhagen Accord to reduce emissions by 5% from 1990 levels by 2020.

75. Under the Kyoto Protocol framework New Zealand as not committing to CP2 will not be able to access the international carbon market from the end of the CP1 true up period. As a result the New Zealand Government regulated that as from 1 June 2015 overseas units will no longer be able to be used to satisfy obligations under the NZETS. From this time the NZETS has become a purely domestic scheme without international linkages.

New Zealand's Indicated Commitments 2021-30: Paris Agreement

76. Leading up to the 2015 UNFCCC Paris Conference the NZ Government announced an 'intended nationally determined contribution' (INDC)⁵² which stated:

- (a) A commitment to reduce net greenhouse gas emissions to 30% below 2005 levels(being equivalent to a reduction 11% from 1990 levels);
- (b) That this target is conditional upon the Paris Agreement providing for the continuation of Kyoto framework rules relating to access to RMU's from forestry and unrestricted access to global carbon markets;
- (c) Amongst other things the INDC also acknowledged that the land was a key economic and spiritual resource for Māori.

⁵² *New Zealand, Submission to the ADP, New Zealand's Intended Nationally Determined Contribution, July 2015.*

77. At the conclusion of the Paris conference the participants including New Zealand agreed in principle to the terms of the Paris Agreement that would apply to participants the period 2021 to 2030 and a mechanism for the eventual adoption of the Paris agreement.

78. The Paris Agreement included the following terms (in summary):

- (a) *Article 2*- There was an agreed objective of holding the increase in global average temperature to well below 2°C above preindustrial levels and to pursue efforts to limit temperature increases to 1.5°C recognising that this would significantly reduce the risks and impacts of climate change.
- (b) *Article 3*- The parties agreed to undertake and communicate 'nationally determined contributions' (NDCs) to reduce greenhouse gas emissions as 'ambitious efforts' to achieve the objectives of the agreement.
- (c) *Article 4*- The parties aim to reach global peaking of greenhouse gas emissions as soon as possible with developed countries taking the lead.
- (d) *Article 8* – The parties recognise the importance of averting, minimising and addressing loss and damage associated with the adverse effects of climate change.

79. The decision of the Paris Conference to adopt the Paris Agreement included the following terms (in summary):

- (a) *Clause 17*- It was noted that the intended nationally determined contributions submitted by the parties to date would not hold global temperature increases to below 2°C by 2030
- (b) *Clause 20*- It was agreed that there will be a facilitated dialogue in 2018 to review collective efforts and inform the setting of NDCs to apply from 2021.

(c) *Clause 22*- It was agreed that NDCs will be communicated at the time of ratifying the agreement and that these will be the INDC's previously communicated unless stated otherwise.

(d) *Clause 24*- The parties who have communicated NDCs applying until 2030 to update these NDCs by 2020 and then again every 5 years.

(e) *Clause 106*- The parties resolved to ensure the highest possible mitigation efforts in the pre-2020 period.

80. The New Zealand government signed the Paris agreement once it became open for signature from 22 April 2016 but has yet to ratify the agreement.

Breach of Treaty of Waitangi obligations in Regard in to Climate Change

81. To date the Crown through the New Zealand Government has acted in breach of its obligations of active protection to Māori to take adequate steps to ensure that New Zealand bears its fair share as a developed nation in reducing greenhouse emissions so as keep global temperature rises below dangerous levels that will threaten Māori in the use of their land and resources.

Emission Trading Scheme ineffective

82. The New Zealand Emissions Trading Scheme which the Government mainly relies on to deal with Climate Change has been and will continue to be ineffective in addressing New Zealand's greenhouse gas emissions.

Particulars

(a) After initially scheduling agriculture emitters to enter the NZETS the legislation was subsequently amended to exclude New Zealand's largest emitting industry.

(b) The NZETS does not operate as is not a "cap and trade" scheme as understood by economics literature in that it does not have any "cap"

on total emissions. In particular, it does not limit the amount of free emissions allocated to energy intensive and trade exposed emitters.

- (c) There is no minimum price of emissions units with only a maximum price set by the Government allowing the surrender of emissions at \$25 per tonne.
- (d) The lack of a floor price was during the first Kyoto commitment period exacerbated by there being insufficient monitoring of on the quality, amount or price of overseas units which could be purchased and used under the scheme.
- (e) In particular, the unrestricted purchases of ERUs was allowed after it became apparent that the bulk of the units on the market were dubious quality units from Russia and the Ukraine where there was no real evidence of emission reducing projects backing the units. As a result of these ERU's being able to flood the New Zealand ETS market the price of ERU's collapsed to as low as 0.18c a unit by the time the market was closed off from the international carbon market from 1 June 2015. This also resulted in the price of NZU's collapsing from \$20 to less than \$2 a unit.⁵³
- (f) The low and fluctuating price of emission units in particular provided a lack of incentives for forestry owners to retain or plant forestry and to enter the scheme. As a result the proportion of forests registered under the scheme has dropped significantly and forestry has since 2013 been a net emitter and is forecast to remain that way until 2025.⁵⁴
- (g) Between 2010 and 2014 with 70% of units surrendered under the NZETS being ERUs New Zealand was in breach of Kyoto Protocol obligations to rely primarily on domestic emission reductions to meet obligations.⁵⁵
- (h) The purchase of ERU's into the NZETS has allowed the New Government to claim that it has a surplus of units from CPI of the

⁵³ Above n 7.

⁵⁴ Above n 7.

⁵⁵ Above n 7.

Kyoto Protocol when this claimed surplus did in reality not represent any reductions in emissions.

- (i) Overall, the NZETS does not result in emitters reducing emissions. The Ministry of the Environment reported in 2016 that nearly all the participants interviewed reported that the NZETS did not provide any incentive for them to look at how to reduce emissions.⁵⁶

Insufficient targets for emission reductions

- 83. The New Zealand Government has set inadequate emission reduction targets.

Particulars

- (a) Current New Zealand Government targets for reducing greenhouse emissions policies fall well short of the targets recommended for developed nations in order to keep global temperature rises below the 2 degrees above pre- industrial levels which will be dangerous to humans.
- (b) These targets being a 25-40% reduction of emission from 1990 levels by 2020 and by 80-90% by 2050. By contrast, New Zealand's current targets are to reduce emissions by 5% by 2020, 11% by 2030 and 50% by 2050 from 1990 levels.
- (c) Even these inadequate targets are exaggerated by the fact that the base 1990 levels are gross emissions while the targets are net emissions after off sets from forestry RMUs and units carried over from previous periods. If gross emissions were compared with gross emissions then the targets equate to a 30% increase in emissions by 2020 and 11% increase by 2030.⁵⁷
- (d) Further, the targets are set in breach of international obligations and norms.

⁵⁶ *The New Zealand's Emission Trading Schemes Evaluation 2016*, February 2016, Ministry for the Environment.

⁵⁷ *Climate Change Tracker Report: New Zealand deploys creative accounting to allow emissions rise*, 15 June 2015.

- (e) In particular, a significant number of developed nations under the Kyoto Protocol have resolved not to carry over surplus emission units from CP1 to CP2 given the issues over the quality of some of the emission units surrendered in CP1. By contrast New Zealand intends to rely on dubious ERU's surrendered during CP1 to report and carry over a significant surplus of 123.7 m CO₂-e units into the 2013-20 period.
- (f) Also, under the Doha Amendment any countries such as New Zealand who did commit to the second period of the Kyoto Protocol were not entitled to use the Kyoto framework to meet their emission targets.⁵⁸
- (g) In breach of these restrictions New Zealand's targets for 2013 -2020 and 2021 - 2030 both assume the ability for NZ to continue to take advantage the Kyoto Framework to carry over surplus units from previous commitment periods and to continue to generate RMUs from forestry.
- (h) Specifically, for the 2013-2020 period while gross emissions are expected to increase by some 30% from 1990 levels by the use of forestry RMUs and surplus 2008-12 AAUs the New Zealand Government expects to meet its target of net emissions reducing by 5% from 1990 levels with a significant surplus 2008-12 AAUs to spare.⁵⁹
- (i) Further, for the 2021-30 period while current gross emissions are expected to increase by some 11% from 1990 levels, by the use of forestry RMUs and carried over 2008-12 AAUs the New Zealand Government expects to meet its target of reducing net emissions by 11% from 1990 levels.⁶⁰
- (j) The current targets by the New Zealand Government are well below that of many other developed nations. For instance, the European Union has set targets to reduce gross emissions by 20% by 2020 and 40% by 2030. Comparatively, the *Climate Action Tracker* organisation

⁵⁸ *Doha Addendum to Kyoto Protocol* 28 February 2013 Decision 1/CMP.8 Parts IV and V.

⁵⁹ Above n 7.

⁶⁰ Above n 7.

that audits international climate change targets rates the New Zealand effort as 'inadequate'.⁶¹

- (k) The current Nationally Determined Contribution committed by New Zealand Government under the Paris Agreement for 2021-2020 will be in breach of the agreement including Article 2 in failing to set an 'ambitious target' to attain the objectives of the agreement to keep global temperature rises below 1.5% above preindustrial levels.

Lack of other policies to reduce emissions

84. The New Zealand Government has failed to develop policies for reducing greenhouse gas emissions outside of the New Zealand Emissions Trading Scheme.

85. In other respects New Zealand Government policy acts to significantly increase the New Zealand's levels of greenhouse gas emissions, including:

Particulars

- (a) The Government actively encourages off shore oil and gas exploration including by providing taxation rebates for exploration costs.
- (b) The state owned enterprise Solid Energy produces over 85% of New Zealand's total coal production.
- (c) The state owned enterprise Landcorp has converted large areas of forestry into dairy farms and is at present the largest dairy farm operator in New Zealand.
- (d) The Government does not incentivise (by way of rebates, tax deductions or otherwise) conduct by individuals that will reduce emissions including, not rebating the cost of electric vehicles, not rebating the cost of solar power for private homes and not requiring power companies to pay a fair price for power fed back into the grid from private solar units.

⁶¹ Above n 7.

- (e) The Government has historically under invested in public transport, cycle ways and other alternatives to private motor vehicle transport.
- (f) The New Zealand government is capable of introducing further cost efficient policies that will reduce greenhouse emissions levels but has to date failed to do so.
- (g) Overall, current New Zealand Government policies to bring about actual reductions greenhouse gas emissions will be not be sufficient to bring down emission levels anywhere near the below 2 degree targets and will be unlikely to bring emissions below current business as usual levels.

Prejudice to Māori as a result of Treaty of Waitangi breaches

86. As a result of the New Zealand Government acting in breach of the Crown's obligations of active protection towards Māori by providing an inadequate response to the threat of Climate Change Māori have and will continue to suffer prejudice in the use of their land and resources from worsening climate change inadequate as set out in paragraphs 18 to 50 above.

87. Further, Māori have suffered further particular prejudice as result of their heavy involvement in the forestry industry:

Particulars

- (a) In general the NZETS has been operated in a manner that does not provide sufficient incentives or certainty for forestry growers (as detailed in paragraph 80(f) above).
- (b) Māori have significant Treaty of Waitangi settlements of Forestry land which included NZUs accumulated from the forestry. With the collapse of the price of NZUs due to the Government's operation of the ETS (as detailed at paragraph 80(e) above) the value of the settlements have decreased.
- (c) The New Zealand Government in 2014 without prior warning introduced legislation to prevent the forestry owners from surrendering

overseas units to deforest and as a result prejudiced Māori forest owners who had purchased overseas units in anticipation of deforestation.

Relief Sought

- (a) A finding that the New Zealand Government's inadequate response to the threat of Climate Change is in breach of the Crown's obligations under the Treaty of Waitangi and Māori have and will continue to suffer prejudice as a result.
- (b) A recommendation that the New Zealand Government set targets for the reduction of greenhouse gas emissions that will meet New Zealand's international obligations to take the lead as a developed country to keep global temperature rises below the 2 degrees above pre- industrial levels.
- (c) A recommendation that the New Zealand Government introduce policies that will be effective in reducing greenhouse gases that are sufficient in meeting such targets including restructuring or replacing the present New Zealand Emission Trading Scheme.
- (d) A recommendation that the New Zealand Government specifically introduce policies that will mitigate the ongoing effects of climate change on Māori and their use of their lands and resources.
- (e) Costs.

This Statement of Defence is filed by **ANTOINETTE (TONI) BROWN**, Solicitor for the First Defendant of the firm Toni Brown Law. The address for service of the First Defendant is at the offices of Toni Brown Law, 31 The Strand, Tauranga.

Documents for service on the filing party may be left at the address for service or may be:

- (a) Posted to instructed counsel at PO Box 5111 Mount Maunganui 3116;
or
- (b) Emailed to instructed counsel at michael@michaelsharp.co.nz.