IN THE WAITANGI TRIBUNAL **WAI 2840**

IN THE MATTER of The Treaty of Waitangi Act 1975

AND

IN THE MATTER claims in the Hauraki Overlapping Claims inquiry

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BRIEF OF EVIDENCE OF ARETA DONNA GRAY ON BEHALF OF TE TĀWHARAU O NGĀTI PŪKENGA TRUST

DATED 13 MARCH 2019

WACKROW WILLIAMS & DAVIES LTD
BARRISTERS & SOLICITORS

Level 14, 48 Emily Place
Po Box 461
DX CP 20503
AUCKLAND
Te Kani Williams
Ph. (09) 379 5026, Fax (09) 377 6553
E mail: tekani@wwandd.co.nz

MAY IT PLEASE THE TRIBUNAL:

1. My name is Areta Donna Gray and I am a solicitor based in Tauranga.

2. I am also currently the Negotiations Manager for Te Tāwharau o Ngāti Pūkenga Trust ("Te Tāwharau").

3. I have been involved with the Ngāti Pūkenga settlement negotiations since 2009, firstly with Te Au Maaro o Ngāti Pūkenga Charitable Trust ("Te Au Maaro"), then with Te Tāwharau.

4. I am providing this evidence on behalf of Te Tawharau as an interested party and in support of the applications for an urgent Tribunal inquiry into the Hauraki Overlapping claims as contained in the Pare Hauraki Collective Redress Deed.

Ngāti Pūkenga

5. Ngāti Pūkenga today is an iwi comprising the descendants of Te Tāwera, Ngāti Ha and Ngāti Pūkenga.

6. Our customary lands are located at four dispersed kāinga - in Maketu, Tauranga, Manaia and Pakikaikutu. Our ancestral lands and area of interest extend from Amaru Te Waihi at Tauranga Moana inland to Te Aroha, and south to Ngatamahinerua, Waianuanu, Te Weraiti, Puwhenua and Otanewainuku. From Otanewainuku, the area continues east to the coast at Waihi Estuary in Maketū (including the maunga Kopukairoa, Otara and Otawa) and from there to Amaru Te Waihi. We also obtained lands and rights in respect of those lands in the nineteenth century at Manaia in the Coromandel, and at Pakikaikutu, near Whāngārei.

Settlement negotiations

7. In terms of the mandating and settlement processes for Ngāti Pukenga, Te Au Maaro was our mandated entity, initially mandated to negotiate and settle all the historical claims of Ngāti Pūkenga. It did so until 2015.

8. In the course of negotiations, Te Tāwharau was established in 2013 as the post-settlement governance entity for Ngāti Pūkenga. Originally it was intended Te Au Maaro would complete settlement negotiations but as they continued to drag on with no end in sight, the mandate to complete settlement negotiations with the Crown was transferred to Te Tāwharau, with the approval of Ngāti Pūkenga, in 2015.

9. As a result of our geographical dispersion, Ngāti Pūkenga has been involved in the following settlement negotiations with the Crown since 2009:

    9.1. Individual Ngāti Pūkenga negotiations encompassing our four kāinga in Maketu, Tauranga, Manaia and Pakikaikutu;
    9.2. Tauranga Moana Iwi Collective ("TMIC") negotiations together with Ngāi Te Rangi and Ngā Hāpu o Ngāti Ranginui; and
    9.3. Hauraki Collective negotiations together with Hāko, Ngāi Tai ki Tāmaki, Ngāti Hei, Ngāti Maru, Ngāti Paoa, Ngāti Porou ki Hauraki, Ngāti Rāhiri Tumutumu, Ngāti Tamaterā, Ngāti Tara Tokanui, Ngaati Whanaunga and Te Patukirikiri.

10. On 7 April 2013, Ngāti Pūkenga and the Crown entered into a Deed of Settlement settling the historical Treaty of Waitangi claims of Ngāti Pūkenga ("the Ngāti Pūkenga Deed"). A bill giving effect to the Ngati Pūkenga Deed was introduced to Parliament on 2 February 2016 with the Royal Assent provided on 14 August 2017.

11. With respect to the TMIC negotiations, Ngāti Pūkenga, together with Ngāi Te Rangi and Ngāti Ranginui, signed the Tauranga Moana Iwi Collective Deed ("the TMIC Deed") on 21 January 2015. The TMIC Deed provides collective redress for the three Tauranga Moana iwi in Tauranga Moana. A bill giving effect to the TMIC Deed was introduced into Parliament on 3 November 2015 and is currently awaiting its second reading in Parliament.

Hauraki Collective negotiations

12. With respect to the Hauraki Collective negotiations, Ngāti Pūkenga could see there was the potential for overlapping claims between Hauraki iwi and Tauranga Moana iwi arising during the course of negotiations.

13. After considering our position, the Ngāti Pūkenga negotiating team (Te Matakahi) advised the Hauraki Collective and the Crown early in that negotiation process, that we were in conflict with Hauraki with respect to their claims into Tauranga Moana. Consequently:

    13.1. we removed ourselves during Hauraki Collective meetings when Tauranga Moana was discussed and did not receive any Hauraki Collective communications about Tauranga Moana;
    13.2. in negotiations between TMIC and the Hauraki Collective regarding overlapping claims, we participated as part of TMIC; and
    13.3. we supported the Crown and TMIC in Waitangi Tribunal proceedings brought by Hauraki iwi in respect of the Tauranga Moana Framework (redress negotiated with the Crown in respect of the moana and waterways of Tauranga Moana).

14. As a result of overlapping claims discussions between 2012 to 2014, TMIC agreed, as an expression of our rangatiratanga, to the Hauraki Collective receiving the following redress situate in Tauranga Moana (the previously agreed redress):

    14.1. 60% of Athenree Forest;
    14.2. RFRs in the Te Puna/Katikati areas;
    14.3. commercial properties in the Otawhiwhi/Katikati areas; and
    14.4. a Statutory Acknowledgement along the Kaimai ridgeline.

15. These agreements were reached on the basis that they were not a concession of mana whenua by TMIC.

16. It was expected therefore that the Pare Hauraki Collective Redress Deed ("the HC Deed") which we initialled in December 2016 as one of the twelve iwi of Hauraki, would contain the previously agreed redress on the premise that I have outlined.

17. What was not expected was that the HC Deed would contain other redress situate in Tauranga Moana which Tauranga Moana iwi had not been consulted about, let alone agreed to (the additional redress). The additional redress only became apparent after we had initialled the HC Deed, when maps became available which showed the areas of the following redress extending south into Tauranga Moana:

    17.1. Primary Industries and Taonga Tūturu protocols;
    17.2. the Pare Hauraki Conservation Framework;
    17.3. Primary Industries Fisheries Advisory Committee; and
    17.4. Primary Industries Fisheries Quota RFR.

18. As part of the ratification process for the HC Deed, Te Tāwharau held hui in our kāinga in Maketu, Tauranga, Manaia and Pakikaikutu in February 2017. At these hui, there was support for the HC Deed, including the agreed redress identified in paragraph 14. Every hui agreed however, that the additional redress needed to go back to Waiorooro, the boundary that had been agreed by both Tauranga Moana and Hauraki during the Treaty of Waitangi (Fisheries claims) settlement.

19. After careful deliberation, Te Tāwharau trustees decided on 9 March 2017 that they would not sign the HC Deed until overlapping claims issues with Tauranga Moana iwi were resolved, in particular the issue of the additional redress being offered, and advised our people, the Crown, TMIC and Hauraki Collective of this decision.

20. As the ratification process was due to end on 17 March 2017, it was too late to affect the results of that process. Although 82.31% voted in support of the HC Deed through the ratification process, the people of

Ngāti Pūkenga have supported the decision of Te Tāwharau not to sign until overlapping claims issues with Tauranga Moana are resolved.

Division

21. It was considered that the agreed redress did not undermine the mana of the three Tauranga Moana iwi, and so was supported by Te Au Maaro o Ngāti Pūkenga (and Ngāti Pūkenga through the ratification process), and continued to be supported as referred to in paragraph 18.

22. However, at a hui held on 8 May 2018, our Tauranga kāinga changed their position. As set out in their letter dated 9 May 2018 to Minister Little, they were no longer supportive of the agreed redress and instead wanted all Hauraki redress in Tauranga Moana to go through a tikanga process. Annexed and marked **"A"** is a copy of the letter to Minister Little dated 9 May 2018.

23. Not long after, our Maketu kāinga advised they too, supported the Tauranga kāinga position.

24. Unfortunately this led to a division within Ngāti Pūkenga as our kāinga in Manaia still supported the previously agreed redress whilst our kāinga in Pakikaikutu needed more information before they could confirm their position. This lack of unity amongst Ngāti Pūkenga was new for us. All throughout the negotiations, the kāinga supported the decisions made by Te Au Maaro and then Te Tāwharau, the settlement and each other. Furthermore, it led to ill feeling, fraught relationships and a lack of confidence between our kāinga. From our point of view, this schism was a direct result of the Crown's actions and subterfuge, and its failure to recognise the impact of its settlement redress upon mana whenua.

25. Seeing the division between our kāinga, Te Tāwharau strived to identify matters upon which all our kāinga could agree upon so that we could move forward together. As a result, matters which all our kāinga agreed upon included:

    25.1. Waiorooro is the boundary between Hauraki and Tauranga Moana;
    25.2. Hauraki iwi (other than Ngāti Pūkenga) are not mana whenua in Tauranga Moana;
    25.3. That the Hauraki Collective should not receive any additional redress in Tauranga Moana; and
    25.4. They support a tikanga process occurring to deal with the overlapping claims issues between Hauraki and Tauranga Moana.

Concerns

26. With those matters which all our kāinga could agree upon identified, Te Tāwharau considered its position in relation to overlapping claims issues.

27. Although the Waitangi Tribunal Te Raupatu o Tauranga Moana report found that Marutuahu had made claims involving the Katikati block and in relatively limited portions of the Te Puna block, such as at Ongare,[1] in its view, only Ngāti Ranginui, Ngāi Te Rangi, Ngāti Pūkenga and Waitaha were tangata whenua of Tauranga Moana.[2]

28. As such, in order for Te Tāwharau to sign the HC Deed, we need to be assured that any redress offered to the Hauraki Collective and individual Hauraki iwi does not undermine the mana, rangatiratanga and tikanga of Ngāti Pūkenga, Ngāi Te Rangi and Ngāti Ranginui in Tauranga Moana.

29. At present, Te Tāwharau's concern is that offering redress to non-Tauranga Moana iwi within Tauranga Moana (whether agreed or not) will:

    29.1. be objectively viewed as, a recognition by the Crown that Hauraki iwi have customary interests and mana whenua within Tauranga Moana;
    29.2. will create rights, or provide an opportunity for Hauraki iwi to assert rights through means inconsistent with tikanga and the Treaty, within Tauranga Moana;
    29.3. will lead to non-Tauranga Moana iwi seeking to exercise mana whenua in Tauranga Moana iwi rohe, which has the ability to erode the customary rights and tikanga of Tauranga Moana iwi.

30. Ngāti Pūkenga, Ngāi Te Rangi and Ngāti Ranginui are mana whenua in Tauranga Moana. For centuries, these three iwi have lived, fought, rejoiced and died here. Every inch of Tauranga Moana holds special significance to the three iwi, their whanau and hapū, whilst the moana nourishes them physically and spiritually and binds them as illustrated by the following pepeha, "ko tatou te moana ko te moana tatou" - "we are one with the moana".

31. We acknowledge that the Crown's settlement process may not be intended to establish or recognise claimant group boundaries.[3] Nor is it intended to create or confirm any exclusive status, such as exclusive mana whenua or ahi kā.[4] Yet we fear that the Crown's settlement process can lead to this occurring or lead to assertions of mana whenua by those who do not hold that, and third parties such as Councils and Crown developed entities will pay attention to those assertions.

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1 Waitangi Tribunal Te Raupatu o Tauranga Moana Report at p199.
2 At pg 47.
3 Office of Treaty Settlements — Healing the past, Building a Future: A Guide to Treaty of Waitangi claims and negotiations with the Crown at pg 53.
4 *Ngāti Whātua Ōrākei Trust v Attorney-General & Ors* [2017] NZCA 554 at para 51.

32. Obligations for third parties exist for example under sections 6, 7 and 8 of the Resource Management Act 1991 which require consultation and engagement with Māori. We consider the right to participate in decisions about natural resources as kaitiaki lies with mana whenua. In the past year however, we have become aware that some Hauraki iwi are being consulted regarding resource management applications throughout Tauranga Moana, apparently without any regard of where an iwi's interests might lie or what those interests might be. For example:

32.1. Tauriko West development

(a) In December 2017 the Minister for the Environment, Minister Parker, directed the Bay of Plenty Regional Council to consult with the Tauranga Moana Iwi Collective, the Hauraki Collective (and Ngāti Hinerangi) regarding its application to use a Streamlined Planning Process to amend the urban limits in Tauranga Moana. He considered that consultation with those groups was necessary "given the relationships and interests in the area". Annexed and marked **"B"** is a copy of the letter from Minister Parker dated 19 December 2017.

(b) After concerns about this direction were raised by both iwi and the Regional Council, Minister Parker changed his position. Nevertheless, it is concerning that the Minister considered that the Hauraki Collective had relationships and interests in the area given:

(i) The Waitangi Tribunal report finding that Hauraki iwi had claims in the narrow Katikati block and limited areas in the Te Puna block; and
(ii) Redress for the HC extends only as far south as the Te Puna block boundary and Tauriko West is well south of that block.

32.2. Matakana Island

(a) An applicant applied for a new water permit for a property on Matakana Island. As part of the notification / non-notification decision it was noted that the applicant consulted with *"Ngati Ranginui, Ngati Pūkenga, Ngai Te Rangi, Pirirakau Incorporated Society, Ngati Maru, Ngati Hako and Ngati Tamatera as potential Tangata whenua who may have an interest and be affected by any adverse effects of the water abstraction on Tangata whenua values … The iwi and hapū groups listed were identified using an aquifer based*

approach, where all areas of interest within the extent of the groundwater aquifer boundary were recognised". We annex and mark **"C"** the applicant's application.

(b) Although Ngāti Hako and Ngāti Tamatera did not respond, Ngāti Maru is recorded as responding with "Not opposed to this application" as shown on annexure **"C"**. This raises a number of concerns:

(i) No Hauraki iwi has been offered redress on Matakana Island and yet, they have been identified as potential tangata whenua, apparently because of their area of interest;

(ii) Ngāti Pūkenga and Ngāi Tamarawaho responded they were not involved in this application and it was outside their traditional rohe; none of the Hauraki iwi confirmed that, and in fact, Ngāti Maru responded that they were not opposed to this application as if they had an interest in the application. This despite the Chair of the Hauraki Collective, and an Ngāti Maru negotiator, stating on *Marae* (3 June 2018), their *"settlement redress was nowhere near Matakana … it's in Te Puna-Katikati, where the Tribunal said we are."*

Distinction between interests and rights

33. Councils are obligated to consult with affected tangata whenua and treaty settlement redress is, prima facie, evidence that an iwi has interests. If these interests are not properly clarified, it is not surprising that Councils take an inclusive approach – it's better to be criticised for consulting with too many than not enough. The problem though, is that if the interests of iwi are not clarified, then there is the risk that they are "flattened out" as if all are equal, and those with lesser interests being able to exercise the same rights as mana whenua or being treated the same as mana whenua.

34. Worse, some might not even recognise that there is a distinction between interests and rights. In an interview with Tony Walls, the Chair of the Hauraki Collective, Paul Majurey, rejected the suggestion that while Hauraki has interests in Tauranga, it does not have rights, stating, *"In the Treaty world it's interests that are relevant – the Waitangi Tribunal has acknowledged our interests, so has the Crown …".* Annexed and marked **"D"** is a copy of that interview dated 7 August 2018.

35. One does not have to be a Delphic Oracle to see that that mantra is going to be used as justification for continued participation in resource management matters in Tauranga Moana, seemingly without any regard for the iwi who are actually mana whenua.

36. It is the lack of acknowledgement by the Hauraki Collective that the three Tauranga Moana iwi hold the mana in Tauranga Moana that fuels the fear that Hauraki iwi will use the redress that they have been offered to exercise the same rights as us.

37. Despite raising these concerns with the Crown through correspondence and a meeting with Minister Little on 14 June 2018, the Crown either ignores our requests or advises it does not consider the settlement redress to be responsible. Annexed and marked **"E"** and **"F"** are our letters to Minister Little dated 8 June 2018 and 1 August 2018 respectively. Specifically in our letter of the 1st of August 2018 we stated: *"As we noted in our Briefing paper dated 14 June 2018, we are concerned that the settlement redress offered to both the Hauraki Collective and individual Hauraki iwi will create unintended rights which will have the effect of non-Tauranga Moana iwi being treated as if they are mana whenua.*

To mitigate that risk we suggested that the interests of Hauraki iwi in Tauranga Moana needed to be clarified, ideally through a tikanga process, and that safeguards should be developed to ensure that the mana whenua of Ngāti Pūkenga, Ngāti Ranginui and Ngāi Te Rangi is protected and upheld.

While we acknowledge your confirmation that provision of redress to Hauraki iwi in Tauranga does not confer mana whenua rights, on its own it is not a sufficient safeguard. What would be helpful is confirmation from the Crown that:

(a) The Crown recognises the finding of the Waitangi Tribunal that Hauraki iwi are not tangata whenua in Tauranga Moana;
(b) Redress to Hauraki iwi in Tauranga Moana (whether commercial or cultural) is a recognition that the Crown accepts that some Hauraki iwi have historical interests and is not intended to create contemporary rights for those Hauraki iwi in Tauranga Moana;
(c) The Crown recognises the findings of the Waitangi Tribunal that these historical interests are confined to the Katikati block and to relatively limited portions of the Te Puna block;
(d) The Crown recognises that Māori custom provides for a sophisticated hierarchy of interests and settlement redress is not intended to flatten out these interests so that all interests are treated as equal (as noted in Port Nicholson Block Settlement Trust v Attorney General [2012] NZHC 3181); and
(e) Area of Interest maps in Treaty settlements are not intended to, and do not, establish or recognise Iwi boundaries."

38. The Minister responded in his letter of the 26th of July 2018 that the provision of redress to Hauraki iwi in Tauranga Moana does not confer

mana whenua rights. He then went on to say in his letter of the 5th of September 2018 that he acknowledged the concerns expressed in our August 2018 letter but that ultimately he did not think it right to hold back the Hauraki iwi any longer. This means that he and the Crown have done "little" to address our concerns appropriately and certainly not in the manner we sought in our correspondence. Annexed and marked **"G"** and **"H"** are the letters from Minister Little dated 26 July 2018 and 5 September 2018 respectively.

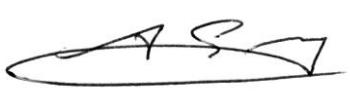
39. We have little faith that the Crown recognises that the practical consequence of the redress is that it will undermine our rangatiratanga in Tauranga Moana and as such, cannot rely upon the Crown to address the impact of the redress it has offered. Minister Little has suggested that the matters may be resolved in a tikanga based process. However, after fighting so hard for the HC Deed to be signed, there is scepticism that the Hauraki Collective will now be amenable to any changes.

40. The Crown keeps saying it does not determine mana whenua status, but in fact, it has an important role to play in ensuring that our mana whenua status is upheld and protected by its settlement processes.

41. The distinction between interests and rights needs to be clarified before it introduces the Pare Hauraki Collective Redress Bill to the House. To be clear, any interests granted to Hauraki iwi in the Tauranga Moana area should not grant them the rights that can only be held by mana whenua. This distinction is important. Another of our negotiating team, Rauangi Ohia, will be providing evidence on our behalf on this issue as well.

42. The Crown can assist in clarifying this distinction by supporting a tikanga process to clarify that the interests of Hauraki iwi in Tauranga Moana are distinct to Tauranga Moana mana whenua and do not provide rights in the Tauranga Moana iwi rohe. This will provide safeguards to protect our mana whenua status that are consistent with tikanga.

Dated at Tauranga this 13th day of March 2019



Areta Donna Gray
On behalf of Te Tāwharau o Ngāti Pūkenga Trust