OFFICIAL

I TE RŌPU WHAKAMANA
I TE TIRITI O WAITANGI

WAI 3325
WAI 2397

KEI RARO I TE MANA o te ture o te Tiriti o Waitangi 1975

I TE TAKE O te pakirehua, Climate Change Priority Inquiry (Wai 3325)

Ā

I TE TAKE O he kerēme nā te Ngāti Hine Forestry Trust (Wai 2397)

SYNOPSIS OF CLOSING SUBMISSIONS FOR WAI 2397

I tēnei rā, i te 12 o Oketopa 2026

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TĒNĀ, E TE RŌPŪ WHAKAMANA I TE TIRITI O WAITANGI:

1.0 THE CLAIM

1.1 The Ngāti Hine Forestry Trust claim ("Trust" / "NHFT") concerns the impact of the Emissions Trading Scheme ("ETS") on the Trust, the lands within its administration, and ultimately its beneficiaries.

1.2 The first statement of claim for Wai 2397 was filed on 24 January 2013.[1] It was originally filed as an urgent application but did not proceed because the statement of claim required further particularisation. It was suggested that the claim may be better suited to a kaupapa or contemporary inquiry.[2]

1.3 The claim took some years to find its place in a contemporary inquiry, ultimately seeking inclusion in the Wai 3325 Climate Change Priority Inquiry. Per the Amended Statement of Claim, broader aspects of the Wai 2397 claim are to be heard as part of the Wai 3450 Natural Resources and Environmental Management Kaupapa Inquiry.[3]

1.4 The Wai 2397 claim was heard in Hearing Week One in November 2024.[4] Evidence was filed by Waihoroi Shortland, trustee;[5] Pita Tipene, trustee and Chairman;[6] and Beth (Te Tui) Tui Shortland, former trustee.[7]

1.5 The claim is retrospective and prospective regarding the prejudice caused by the ETS. The claim is retrospective where it asks the Tribunal to make findings and recommendations about the implementation of the ETS in 2008, a decision that was made by the Crown without input and involvement from the Trust; and in relation to

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[1] Wai 2397, #1.1.1, *Statement of Claim* (30 January 2013).
[2] Wai 2397, #2.1.1, *Memorandum-directions of the Deputy Chairperson registering Statement of Claim* (21 August 2013).
[3] Wai 2397, #1.1.1(a), *Amended statement of claim on behalf of the beneficial owners of Ngāti Hine H2B* (3 March 2023) at [1.6].
[4] Wai 3325, #4.1.3, *Transcript for hearing week one held at the Waitangi Tribunal Offices via AVL Wellington, Monday 25 November - Friday 29 November 2024* (21 January 2025).
[5] Wai 3325, #A21, *Brief of evidence of Waihoroi Shortland* (1 November 2024) at [2].
[6] Wai 3325, #A19, *Brief of evidence of Pita Tipene* (30 October 2024) at [2].
[7] Wai 3325, #A20, *Brief of evidence of Beth (Te Tui) Tui Shortland* (30 October 2024) at [2].

the duration the ETS has been imposed over the Trust where the Crown determines the settings of the scheme. The claim is also prospective where it asks the Tribunal to consider the prejudice that will be caused to the Trust where the ETS limits the operation of the Trust and use of the land for the foreseeable future; a concerning prospect for the Trust given the volatility of the environment and climate change, and the uncertainty that surrounds our economy post-Covid and amidst international conflict.

1.6 The primary and fundamental breach the Trust says arises from the ETS is the restriction on its tino rangatiratanga where the scheme binds the Trust to a particular model of land use; forestry. There is an inherent imbalance and unfairness that arises in the treaty relationship where the Trust is responsible for the land, its administration, and how it is managed to benefit owners, while the Crown has total control over the legislative settings including the ETS which regulates what the Trust can and cannot do in relation to the land.

1.7 Counsel submit that the NHFT's claim differs from others in this inquiry. Where the majority of claims focus on the question of how climate change impacts Māori and the Crown's response from a mitigation and adaptation lens, the Wai 2397 claim is more nuanced where it concerns how the ETS impacts the Trust's administrative functions. It is upon this basis that the Trust's treaty interests are different from other claimants, and that difference needs to be articulated in this Tribunal's reporting.

1.8 Counsel note there are specific factors that are relevant to the Trust's claim. These unique factors not only contextualise the claim but are the basis for a unique treaty interest in climate change, which in turn gives rise to the need for specific findings and recommendations for the NHFT's claim. These factors include location, compounding administrative difficulties, and unstable legislative and policy settings caused by a constant state of reform.

1.9 The NHFT closing submissions traverse these factors in a succinct way, providing evidential citations should the Tribunal wish to explore

them more fully. The submission then establishes the treaty interests arising under the Wai 2397 claim, and applies existing treaty jurisprudence to the particulars of the claim.

2.0 ISSUES WITH CROWN POSITION ON CONSISTENCY OF THE ETS WITH THE TREATY

2.1 The Crown and Trust's legal position and evidence in relation to forestry and the ETS are quite apart from each other, particularly the Crown's position that the ETS is consistent with the treaty.[8] The Crown's opening submissions acknowledge the significance of the problem posed by climate change, explaining that although the response required to meeting climate change targets is "challenging and complex",[9] its response to climate change, and the ETS as a standalone policy, have been and continue to be consistent with the Treaty.[10] However, the Trust rejects the Crown's position and any suggestion that the ETS is treaty compliant.[11]

2.2 The Crown cites the treaty principles of partnership, active protection and redress as treaty principles relevant to climate change and the ETS.[12] Although there are no authorities or Tribunal jurisprudence provided for the ETS specifically, in the overarching "Applicable Treaty principles" section the Crown relies on the *Lands* case as the measure for treaty standards.[13] The Crown's reliance on the *Lands* case is a recurring trend that counsel have addressed in multiple inquiries,[14] where counsel submit that Treaty jurisprudence has evolved over the last 40 years, and the Crown's continued reliance on the *Lands* case is inappropriate where it provides an opportunity for the Crown to read down its treaty duties and overlook its obligations to give effect to the principles of tino rangatiratanga and partnership in a way that is

[8] Wai 3325, #3.3.31, *Opening submissions for the Crown* (10 March 2026) at [4], [16].
[9] Wai 3325, #3.3.31, *Opening submissions for the Crown* (10 March 2026) at [3].
[10] Wai 3325, #3.3.31, *Opening submissions for the Crown* (10 March 2026) at [4], [91].
[11] Wai 3325, #3.3.31, *Opening submissions for the Crown* (10 March 2026) at [4], [16].
[12] Wai 3325, #3.3.31, *Opening submissions for the Crown* (10 March 2026) at [12], [91].
[13] Wai 3325, #3.3.31, *Opening submissions for the Crown* (10 March 2026) at [12]-[28].
[14] Wai 3400, #3.3.84, *Joint reply submissions* (20 May 2025); Wai 2660, #3.3.56, *Joint closing submissions* (12 July 2019); Wai 2660, #3.3.76, *Submissions in response to Crown closing submissions for stage one* (24 September 2019).

meaningful to Māori, on a matter as significant as climate change. Counsel submit that the treaty principles that are relevant to climate change, including in respect of the NHFT's claim, must necessarily go beyond those expressed by the Crown in its opening submissions and evidence.

3.0 TE MATAAPONO O TE TINO RANGATIRATANGA: THE PRINCIPLE OF TE TINO RANGATIRATANGA

3.1 The focus of this part of the closing submission is on the treaty principle of tino rangatiratanga. The witnesses say the primary issue is that the ETS imposes mandatory obligations on the Trust that undermine its rangatiratanga to use and manage its lands according to its preferences and tikanga,[15] as guaranteed to Ngāti Hine under Article 2 of te Tiriti o Waitangi.[16]

3.2 The principle of tino rangatiratanga has been expressed in many ways by different Tribunals.[17] The commonality across reporting is that by the Crown's guarantee of tino rangatiratanga under Article 2, Māori should be able to exercise autonomy and authority in decision-making, in accordance with tikanga, in relation to their lands, people and affairs.[18] More recent Tribunal reporting continues a trend from earlier reporting that explains the spheres of influence,[19] whereby Māori exercise tino rangatiratanga in relation to themselves, the Crown exercises kāwanatanga authority in relation to itself, and where

[15] Wai 3325, #A19, *Brief of evidence of Pita Tipene* (30 October 2024) at [56]-[57]; Wai 3325, #A20, *Brief of evidence of Beth (Te Tui) Tui Shortland* (30 October 2024) at [26].
[16] Wai 3325, #1.1.1(a), *Amended statement of claim on behalf of the beneficial owners of Ngāti Hine H2B* (3 March 2023) at [1.4].
[17] Waitangi Tribunal *Ngā Mātāpono/The Principles* (Wai 3300, 2024); Waitangi Tribunal, *Tino Rangatiratanga me te Kāwanatanga: The Report on Stage 2 of the Te Paparahi o Te Raki Inquiry, Part I* (Wai 1040, 2023); Waitangi Tribunal *Te Tinihanga o Ngā Mātāpono: The Urgent Report on the Treaty Principles Reform* (Wai 3565, 2026); Waitangi Tribunal *Te Mana Whatu Ahuru: Report on Te Rohe Pōtae Claim* (Wai 898, 2023); Waitangi Tribunal *Te Tau Ihu o te Waka a Māui: Report on Northern South Island Claims* (Wai 785, 2008).
[18] Wai 3325, #3.3.34, *Generic closing submissions on Te Tiriti o Waitangi and Te Tiriti Principles* (25 September 2026) at [7.16]; Waitangi Tribunal *Tino Rangatiratanga me te Kāwanatanga: The Report on Stage 2 of the Te Paparahi o Te Raki Inquiry, Part I, volume 2* (Wai 1040, 2023) at 848.
[19] Wai 3325, #3.3.34, *Generic closing submissions on Te Tiriti o Waitangi and Te Tiriti Principles* (25 September 2026) at [7.24]-[7.36].

matters overlap, the two partners reach necessary agreements.[20] The principle of tino rangatiratanga and the concept of spheres of influence, when applied to the NHFT and the imposition of the ETS, make it clear that the Crown's decision-making in relation to the ETS, and the ETS itself, are out of step with the treaty duties owed to the Trust. Per the concept of spheres of influence, the land governed by the NHFT is Ngāti Hine land and squarely within the sphere of Ngāti Hine tino rangatiratanga. The Trust should therefore be able to exercise tino rangatiratanga to the fullest extent over those lands. Where the ETS was developed and implemented by the Crown and imposed over the NHFT's lands, and where the ETS continues to restrict the ability of the NHFT to exercise tino rangatiratanga in relation to their lands, that is an overreach of Crown kāwanatanga, and an ongoing undermining of the Trust's right to exercise tino rangatiratanga.

3.3 The government's commitment to the Kyoto Protocol and reduction of emissions levels became the catalyst for the Crown's rationale to design and implement the ETS; a scheme that imposes mandatory liabilities and obligations on the NHFT, and limits their ability to exercise mana and rangatiratanga over their lands. This has been compounded by the inability of the NHFT to influence policy settings, wherein the Trust says it "had no involvement in the development of the ETS or the discussions around the Kyoto Protocol";[21] the result being that the ETS and other climate-related policies do not provide for their tino rangatiratanga and their own mātauranga Māori-based "environmental plans and strategies" which they prefer to use to mitigate and adapt to climate change.[22] The practical consequence of this for the NHFT is that the ETS then constrains how it can use its whenua, for example transitioning from an exotic to indigenous forest. From the claimants' perspective, if the underlying purpose of the ETS

[20] Wai 3325, #3.3.34, *Generic closing submissions on Te Tiriti o Waitangi and Te Tiriti Principles* (25 September 2026) at [7.27]; Waitangi Tribunal *Tino Rangatiratanga me te Kāwanatanga: The Report on Stage 2 of the Te Paparahi o Te Raki Inquiry, Part I, volume 1* (Wai 1040, 2023) at 60.
[21] Wai 3325, #A19, *Brief of evidence of Pita Tipene* (30 October 2024) at [51].
[22] Wai 3325, #A19, *Brief of evidence of Pita Tipene* [30 October 2024] at [50].

is environmental protection, then consistent with their right to exercise tino rangatiratanga, Māori are experts in that field and should be part of the discussion and decision-making process.[23]

4.0 TE MĀTĀPONO O TE WHAKATIKA: THE PRINCIPLE OF REDRESS

4.1 The Crown and the Trust view the principle of redress differently. The Crown addresses the principle of redress at paragraphs 28 and 91.3 of its opening submissions, saying the principle of redress involves "a fair and reasonable recognition of, and recompense for, the wrong that has occurred",[24] and explaining that in its view, it "has transferred significant forestry assets to Māori by way of Treaty settlement redress", and that this has provided Māori with a greater scope to exercise tino rangatiratanga.[25]

4.2 Ngāti Hine are a pre-settled group and have (to date) had a fraught historic claims pathway.[26] There remains no immediate pathway available to Ngāti Hine to enter negotiations; Ngāti Hine does not hold a recognised Crown mandate to negotiate a treaty settlement of their claims; and there is no certainty that forestry assets are available to Ngāti Hine. In any case, the more important point to be made is that the principle of redress should be considered by parties in relation to alleged Crown breaches arising from this inquiry, not in relation to an entirely different issue and process; settlement. An issue also arises where the Crown considers itself as sole determiner of whether, and to what extent, redress is fair and reasonable; holding authority and ultimate decision-making over what redress should be afforded to Māori forest landowners who are impacted by the ETS, like the NHFT.

4.3 The Tribunal in the *Te Mana Whatu Ahuru* report stated that the principle of redress is relevant where the Crown has acted in excess of its kāwanatanga powers, or otherwise breached the Treaty's terms,

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[23] Wai 3325, #A21, *Brief of evidence of Waihoroi Shortland* (1 November 2024) at [54].
[24] Wai 3324, #3.3.31, *Opening submissions for the Crown* (10 March 2026) at [28].
[25] Wai 3324, #3.3.31, *Opening submissions for the Crown* (10 March 2026) at [91.3].
[26] Wai 3325, #1.1.1(a), *Amended statement of claim on behalf of the beneficial owners of Ngāti Hine H2B* (3 March 2023) at [3.9].

in a manner that results in prejudice to Māori, making the Crown liable to compensate its Treaty partner.[27] The *He Pāharakeke* report then provides a useful step through on the evolution of the principle of redress across several Waitangi Tribunal reports,[28] asserting that the principle of redress is invoked where the Crown has failed to protect a tribe's rangatiratanga.[29] It is further relevant to the Trust's claim that the principle of redress exists to ensure past Crown failures can be rectified by addressing the current and future needs of Māori.[30]

4.4 The Trust ultimately seeks as part of their claim a finding that per the principle of redress, where their right to exercise tino rangatiratanga has been breached by the imposition of the ETS, the Crown should compensate the Trust.

6.0 PREJUDICE AND RELIEF

6.0 The Tribunal is asked to consider prejudice against the difficulties the Trust has had to navigate in relation to the ETS. The assessment of prejudice centres on understanding the different worldviews and positions of the Crown and the Trust, and acknowledging that the assessment of what is important to the Trust and how the Trust is impacted, is not an assessment that can be done by the Crown. Significantly, the Crown evidence does not show where the Trust's interests are fully appraised and understood.

6.1 Prejudice arises from the power imbalance between the Crown and the NHFT where the Crown has held all the power to ultimately decide how the ETS would be imposed over the Trust. This power imbalance has meant the Trust has had to attempt to exercise tino rangatiratanga in a constant state of constraint and undermining. Without measures being taken to address the inherent imbalance in the relationship

[27] Waitangi Tribunal *Te Mana Whatu Ahuru: Report on Te Rohe Pōtae Claim, volume 1* (Wai 898, 2023) at 212, 217.
[28] Waitangi Tribunal *He Pāharakeke, he Rito Whakakīkinga Whāruarua: Oranga Tamariki Urgent Inquiry* (Wai 1915, 2021) at 24-25.
[29] Waitangi Tribunal *He Pāharakeke, he Rito Whakakīkinga Whāruarua: Oranga Tamariki Urgent Inquiry* (Wai 1915, 2021) at 24.
[30] Waitangi Tribunal *He Pāharakeke, he Rito Whakakīkinga Whāruarua: Oranga Tamariki Urgent Inquiry* (Wai 1915, 2021) at 24.

between the Crown and the Trust, other impacts cannot be resolved. Findings and recommendations are sought from this basis.

6.2 The claimants seek a finding that their claims are well-founded and that through the ETS, the Crown has breached te Tiriti and its principles by undermining the NHFT's ability to exercise mana and tino rangatiratanga over the use, development and management of their lands.

6.3 Further, the claimants seek findings that the Crown's acts and omissions in respect of the law and policy surrounding forestry and the ETS are inconsistent with te Tiriti and its principles, including:

(a) The development and implementation of ETS law and policy without adequate engagement with the NHFT and meaningful opportunities for the NHFT to influence decision-making and outcomes (previously and ongoing);

(b) The imbalance and unfairness that arises when the NHFT is responsible for the land, its use, and how it is managed on behalf of its beneficiaries, while the Crown holds complete control over the legislative settings which regulate what the Trust can and cannot do in relation to its lands;

(c) The mandatory imposition of the ETS on pre-1990 forestry owners, meaning the NHFT had no choice over whether or not to participate, and are forced to carry the liabilities and obligations of the scheme;

(d) The liabilities and obligations imposed by the ETS that prevent the NHFT from using their land in accordance with their preferences, for example transitioning from an exotic to indigenous forest;

(e) The failure to include and provide for the NHFT's environmental values, strategies and responses to climate change in the operation of the ETS;

(f) The Crown continuously developing and amending ETS policy on an ad hoc and unpredictable basis, creating significant uncertainty for the NHFT and investors; and

(g) The Crown's ongoing actions and decision-making that impact the NHFT and their beneficiaries economically, socially and culturally.

6.4 Accordingly, consistent with the principle of redress, the claimants seek the following recommendations:

(a) An apology for the prejudice caused to date and experienced by the NHFT and its beneficiaries;

(b) The Crown enter into discussions with the claimants to determine how their tino rangatiratanga can be recognised and provided for in response to climate change, including the structures and processes through which they wish to engage with the Crown and participate in international climate change discussions and negotiations;

(c) The Crown develop and implement its climate change response in partnership with the Trust, where options are co-designed and preferences are agreed – rather than participation being reduced to providing feedback or in some cases, being told that changes are being made without their input;

(d) The Crown provide funding, resourcing and the necessary support for the claimants to participate in any future co-design process, including resources to explore their own environmental and climate strategies in accordance with their tikanga and mātauranga Māori;

(a) The Crown commit to addressing the vulnerability and uncertainty the NHFT (and other Māori forestry owners) are exposed to when successive governments develop and amend ETS policy on an ad hoc basis; and

(b) The Crown work with the claimants to address the constraints imposed by the ETS on the NHFT's ability to use, develop and manage their lands in accordance with their preferences and priorities.

I TĒNEI RĀ, i Whāngarei, te rā 12 o Oketopa 2026

Dr Season-Mary Downs/Chelsea Terei-Tipene/Tatijana Simon-Larsen
Rōia mō Wai 2397