BEFORE THE WAITANGI TRIBUNAL

WAI 2391
WAI 2393

IN THE MATTER OF	The Treaty of Waitangi Act 1975
AND	
IN THE MATTER OF	Wai 2391 a claim by GRAHAM HOETE, UMUHURI MATEHAERE and JACQUELINE TARO HAIMONA for and on behalf of themselves and the Motiti Rohe Moana Trust; and CLETUS MAANU PAUL for and on behalf of himself and the Mataatua District Māori Council
AND	
IN THE MATTER OF	Wai 2393 an application for an urgent hearing by ELAINE BUTLER on behalf of Ngāi Te Hapū Incorporated Society

FURTHER CROWN SUBMISSIONS IN RESPECT OF APPLICATION FOR URGENCY

2 October 2013

CROWN LAW
TE TARI TURE O TE KARAUNA
PO Box 2858
WELLINGTON 6140
Tel: 04 472 1719
Fax: 04 473 3482

Contact Person:
Matthew Andrews / Jeremy Prebble
Email: Jeremy.Prebble@crownlaw.govt.nz

RECEIVED
Waitangi Tribunal
2 Oct 2013
Ministry of Justice
WELLINGTON

MAY IT PLEASE THE TRIBUNAL

INTRODUCTION

1. These further submissions are filed on behalf of the Crown in response to the Wai 2393 application for urgency and the Waitangi Tribunal's Memorandum-Directions of 17 September 2013 directing that any party wishing to file any further response do so by 2 October 2013.[1]

2. On 28 June 2013 the Crown filed a response to the Wai 2393 application for urgency and statement of claim.[2] The Wai 2393 submissions in reply of 9 September 2013 have significantly evolved since their original statement of claim was filed on 28 May 2013, contain a number of inaccuracies, and raise new issues the Crown has not yet had an opportunity to address.[3] The Crown considers the Tribunal would benefit from further Crown submissions addressing the points raised by the Wai 2393 Claimants.

3. The crux of the Wai 2393 claim is that by entering into the various Deeds of Settlement with the *Rena* owner the Crown has fundamentally altered its approach to the removal notices issued by the Director of Maritime New Zealand (MNZ) under section 100A and section 248 of the Maritime Transport Act 1994 (MTA).[4] The Claimants say that this demonstrates the Crown's "apparent intention" not to enforce the removal notices.[5]

4. The Claimants also now argue that the Deed in Relation to Removing the Wreck Arising from the *Rena* Casualty ("Wreck Removal Deed") precludes the Crown from carrying out its required role of active protection, as provided for in three statutes, the MTA, the Marine and Coastal Area (Takutai Moana) Act 2011 ("MACA"), and the Resource Management Act 1991 ("RMA").

---

1 *Memorandum-Directions of the Presiding Officer* (Wai 2393, #2.5.13, 17 September 2013) at [7].

2 Crown Response to Application for Urgency (Wai 2393, #3.1.13, 28 June 2013).

3 Submissions of Counsel in Reply (Wai 2393, #3.1.35, 9 September 2013).

4 Submissions of Counsel in Reply (Wai 2393, #3.1.35, 9 September 2013) at [3].

5 Submissions of Counsel in Reply (Wai 2393, #3.1.35, 9 September 2013) [2].

SUMMARY

5. The Wai 2393 Claimants have failed to establish they are suffering or are likely to suffer significant or irreversible prejudice as a result of a current or pending Crown action or omission.[6] There are also alternative remedies available that, in the circumstances, would be reasonable for the Claimants to exercise:[7]

5.1 **The Crown's Treaty obligations**: The Crown does not accept that it was required to consult with iwi as part of the *Rena* settlement. The *Rena* settlement does not, contrary to the Claimants' assertions, impact on the Crown's statutory obligations, nor does it impair the position the Crown may decide to take before a consent authority under the RMA. The rights of iwi remain unaffected by the Deeds. The inferences adverse to the Crown which the Claimants purport to identify and rely on in this and other respects have no evidential or legal basis.

5.2 **The effect of the *Rena* Deeds**: The Wai 2393 Claimants incorrectly argue the Wreck Removal Deed impairs the Crown and MNZ's various statutory roles concerning Otaiti reef:

5.2.1 **Marine Transport Act 1994**: The issuing of removal notices under the MTA, and the enforcement of those notices, is the statutory responsibility of the Director of MNZ. The removal notices have not been revoked by the Director and they remain in force. The Crown considers the *Rena* owner has an ongoing legal obligation to comply with the notices and to make arrangements to secure and remove the *Rena* wreck from the reef.[8] The Claimants have legal remedies available to them in relation to decisions of the Director.

---

6 Waitangi Tribunal 2012 Guide to Practice and Procedure, page 5.

7 Refer to Wai 1294, Decision of the Chairperson in respect of Application for urgency – Ngati Koroki Kahukura. The Wai 2393 #1.1.1 Statement of Claim expressly acknowledges that the Claimants will also be opposing any application for resource consent.

8 Maritime Transport Act 1994, section 100A.

5.2.2 **Marine and Coastal Area (Takutai Moana) Act 2011**: The Wreck Removal Deed does not impair the Crown's ability to enter into, and recognise if appropriate, Customary Marine Title (CMT) or Protected Customary Rights (PCR). The reference in the Deed to the Crown giving the owner written notice of CMT and PCR claims is a consequence of MACA and is contained in a public register. The reference in the Deed to the Owner being a "directly affected" person is to ensure that if an agreement is reached, it is notified to those persons the Minister considers to be directly affected under section 97 of the MACA. This recognises that should the *Rena* owner decide to apply for resource consent to leave part of the *Rena* on reef, and should CMT be subsequently recognised, that the owner's future management of the wreck under the resource consent could be affected by the rights attached to CMT.

5.2.3 **Resource Management Act 1991:** The *Rena* owner has a legal obligation under the RMA to remove the wreck, or seek resource consent to leave it on the reef (sections 15 and 15A). The Deed simply recognises the owner's stark choices under existing legislation. Should the *Rena* owner apply for resource consent, the relevant consent authority under the RMA will make an independent decision on this matter, taking into account relevant matters including Maori concerns under Part 2 of the RMA. The Crown is not fettered in the position it can take before any consent authority. Nor does the Wreck Removal Deed impair any statutory decisions under the RMA.

5.3 **Alternative remedy - potential RMA application**: The Crown is currently developing a process to inform itself before making a decision on what position to take on any resource consent the *Rena* owner may make. No decision has been reached. Further, the matters provided for in the Wreck Removal Deed simply provide for

consideration of the same factors the Crown would consider when forming an all-of-Government submission on any resource consent application. The Claimants can also participate in this process, which remains an alternative remedy for them.

Background - the reality of the *Rena* Situation

6. Before addressing the various issues raised by the Claimants, it is important to bear in mind the reality of the *Rena* grounding.

7. The grounding of the *Rena* on the Otaiti reef was New Zealand's worst maritime environmental disaster, and a unique and difficult situation that had never before been dealt with in New Zealand. The response to the grounding, including the immediate response, clean-up, and salvage operation, has been a huge undertaking, and will require significant resourcing for some time.

8. As noted in the affidavit of Reece Golding, and as a demonstration of the significant operation, one only needs to consider the immediate response, which involved:

   8.1 Between 200–300 personnel managing the response from the incident command centre.

   8.2 Approximately 600–800 people in the oil spill response team, including members of the ICC and people in the field undertaking beach clean-up and wildlife response.

   8.3 Around 150 NZDF personnel, from the Air Force, Navy and Army, with another 150 on short notice to respond as needed.

   8.4 Around 150 Department of Conservation (DoC) personnel providing field support to the wildlife response, conducting field surveys, collecting live and dead oiled wildlife, and providing logistical support, with others available at short notice.

   8.5 Around 100 people working in the wildlife response team, including National Oiled Wildlife Response Team personnel, veterinarians,

ornithologists and expert responders with experience in the capture and treatment of oiled birds.

8.6 Around 8,000 volunteers contributing more than 19,000 hours to collect more than 1,000 tonnes of oily waste from the coastline.

9. It would be naive to think that responding to the *Rena* grounding has been easy, or that ongoing processes surrounding the *Rena* wreck are straightforward for the Crown and for Maritime New Zealand. There is still much to do, and it will take time.

10. The owner has presented information to the Crown and Maritime New Zealand which confirms that the owner likewise has much to do in relation to the wreck, irrespective of whether it follows the consent path. The Crown understands that the owner has presented similar information to the Bay of Plenty communities, including the Claimants.

11. Work on removing the *Rena* wreck continues, and has continued since the Claimants filed their statement of claim. There has been no hiatus in salvage operations. The Claimants appear to think the fact that part of the *Rena* remains on the reef is evidence that salvage operations have ceased and the removal notices are not being enforced. The reality is compliance with the removal notices issued by the Director of MNZ continues. If and when that situation changes, the Director will need to consider what legal options remain open to him or her. In any case, irrespective of the decisions of the Director, the requirements of section 15 and 15A of the RMA still apply.

12. It is in this context and against this background that the Crown is working, and against which any alleged Crown Treaty breach must be assessed.

CROWN RESPONSE TO ISSUES RAISED BY THE CLAIMANTS

1 The Crown's Treaty Obligations

13. The Claimants argue Otaiti reef is an important taonga of Ngai Te Hapu, in respect of which the Crown has an obligation of active protection under the Treaty of Waitangi.[9] The Claimants further contend that, following the *Rena*

[9] Submissions of Counsel in Reply (Wai 2393, #3.1.35, 9 September 2013), at [6.a]–[6.b].

grounding, Treaty principles meant the need to consult was heightened to ensure the obligation of active protection was maintained,[10] and if it became a situation where national and other interests had to be balanced against Maori interests, then consultation was required.[11] The Claimants say the Crown's failure to consult with them in entering into the Deeds of Settlement with the *Rena* owners represents a radical change in the Crown's approach to its obligation of active protection in respect of the Otaiti reef.[12]

14. The Crown accepts that, under Article Two of the Treaty, it has an obligation of active protection in respect of taonga. If the Otaiti reef is such a taonga, then the Crown's obligation of active protection would obviously extend to the reef. That obligation would require the Crown to take such action as is reasonable in the prevailing circumstances to protect the reef. The following statement from the Privy Council's judgment in the *New Zealand Maori Council v Attorney-General (Broadcasting Assets)* case is relevant:[13]

> Foremost among those "principles" are the obligations which the Crown undertook of protecting and preserving Maori Property including the Maori language as part of taonga, in return for being recognised as the legitimate government of the whole nation by Maori.... It is therefore accepted by both parties that the Crown in carrying out its obligations is not required in protecting taonga to go beyond taking such action as is reasonable in the prevailing circumstances. While the obligation of the Crown is constant, the protective steps which it is reasonable for the Crown to take change depending on the situation which exists at any particular time.

15. In responding to the *Rena* grounding, the Crown has complied with all Treaty obligations it may have in respect of Otaiti reef and local tangata whenua. Following the grounding, an extensive pollution clean-up programme was initiated to reduce the impact of debris and pollutants on the environment surrounding the reef. Further, as outlined in the Crown's initial response to the Wai 2391 and Wai 2393 applications for urgency,[14] and the earlier affidavit of Mark Sowden,[15] the Ministry for the Environment Developed a *Rena* Long

---

10 Submissions of Counsel in Reply (Wai 2393, #3.1.35, 9 September 2013), at [6.e].

11 Submissions of Counsel in Reply (Wai 2393, #3.1.35, 9 September 2013), at [6.e].

12 Submissions of Counsel in Reply (Wai 2393, #3.1.35, 9 September 2013), at [6.f].

13 *New Zealand Maori Council v Attorney-General* [1994] 1 NZLR 513, at 517.

14 Crown Response to Application for Urgency (Wai 2393, #3.1.13, 28 June 2013) at [7].

15 Affidavit of Mark Muirhead Sowden, (Wai 2393, #A2, 27 June 2013) at [13]-[22].

Term Environmental Recovery Plan with the support of, and input by, iwi and a range of Crown and local government agencies. The Crown says the Plan sets in place a Treaty-compliant process for the environmental recovery of Otaiti reef and surrounding area.

16. The Crown rejects the Claimants' assertion that Treaty principles required the Crown to consult with them before entering into the Deeds of Settlement. Any Treaty obligation could only attach to the Crown's action in signing the Deeds if the Deeds affected the Claimants' interests. As set out in the Crown's initial response,[16] and in more detail below, the Deeds have no effect on, let alone cause prejudice to, any interests the Claimants might have or any statutory functions or powers the Crown may have in respect of Otaiti reef.

17. The claim in relation to the Claims Deed can be dealt with briefly. The claim in relation to the Wreck Removal Deed is addressed in more detail below.

18. The Claims Deed only settles the Crown's claims in respect of its expenditure and losses as a result of the *Rena* grounding. Other claims, including those of the Claimants, and iwi and hapu generally, have not been settled, and may still be pursued by those groups. The owner has established under the MTA a limitation fund of approximately $11 million to meet the claims of other parties. It will only be available for New Zealand claimants.

19. As the Claimants' interests have not been affected by the Claims Deed, the Crown did not have an obligation to consult with them before agreeing to this settlement. In any case, the Claimants are really complaining about past Crown action. The Deed has already been signed; no prejudice, let alone imminent prejudice, arises through the Crown's action of signing this Deed. As such, the requirements for urgency are not satisfied.

20. The same can be said of the Wreck Removal Deed.

2 The Effect of the Deeds on the Crown's Statutory Roles

21. The Claimants argue the Crown has a number of special statutory roles under the MTA, MACA, and RMA in respect of Otaiti reef through which its

16 Crown Response to Application for Urgency (Wai 2393, #3.1.13, 28 June 2013) at [49]-[53].

obligation of active protection finds expression.[17] The Claimants say that the Deeds of Settlement agreed to by the Crown have direct implications for its roles under those statutes.[18]

2A Maritime Transport Act 1994

The Wreck Removal Deed

22. One of the Claimants' key complaints appears to be that they consider the Wreck Removal Deed discloses a hiatus could occur while the *Rena* Owner considers its options.[19]

23. This complaint is premised on interpretation of clause 1 of the Wreck Removal Deed which ignores the context, as well as the considerable information which has been provided to the Bay of Plenty communities, including the Claimants. The context for this reference is that when this Deed and other Deeds were executed on 1 October 2012, the owner considered that much of the work required to stabilise the vessel would have been completed by the 1 October 2013. Further, it assumed that it would be likely to be in a position, by 1 October 2013, to decide whether to recommence removal of the wreck, having completed the earlier work, or to apply for a consent in relation to the wreck.

24. As is explained in the affidavit of Mark Sowden affirmed 1 October 2013, this assumption (which was not contractually binding) was not realised. Rather, as is clear from Exhibits "MMS 1" and "MMS 2", the owner's operational activities and engagement with the Bay of Plenty communities, as well as a number of other matters, have meant that it has continued with major removal work throughout this period. On the basis of the information which the owner has provided to the Crown and to Maritime New Zealand, and which, as has been stated above, the Crown understands the owner has already provided to the Bay of Plenty communities, including the Claimants, the Crown has under clause 1 of the Wreck Removal Deed agreed to extend the period within which the owner may make its decision to 31 March 2014.

---

17 Submissions of Counsel in Reply (Wai 2393, #3.1.35, 9 September 2013), at [6.c] and [20].

18 Submissions of Counsel in Reply (Wai 2393, #3.1.35, 9 September 2013), at [6.g].

19 Submissions of Counsel in Reply (Wai 2393, #3.1.35, 9 September 2013) at [33].

25. Therefore, at this point there is no hiatus. The owner is making arrangements to remove the accommodation block, which represents a significant component of the wreck. That physical work is shortly to commence and is anticipated to take until the end of 2013.

26. The powers of the Director of MNZ under the MTA are the same now as they were before the Deeds of Settlement were signed. The notices issued by the Director are still being complied with. The work to reduce the fore section to "LAT -1m" was recently completed, and as stated above, work continues to remove the accommodation block from Otaiti reef. Refer to the affidavit of Reece Golding. There is no prejudice to the Claimants arising from action taken by the Director under the MTA.

27. The *Rena* Owner can decide under New Zealand law to apply for resource consent to leave part of the wreck on the reef. Clause 1 of the Wreck Removal Deed requires the *Rena* Owner to advise the Crown of its intention to re-commence the removal of the wreck as, and to the extent, required by NZ law, or apply for one or more consents.

28. Clause 1 does not enable work to stop on the wreck in contravention of the removal notices. Rather, it provides a notice requirement to the Crown of the Rena Owners' intention on whether it will continue to remove the wreck, or seek consent to leave part of the wreck on the reef.

29. Should consent be sought (as the *Rena* Owner has signalled is likely) the Director will most likely have to consider what, if any, steps should be taken in the event a pause in removal work occurs. Clause 1 does not change the legal landscape dealing with the wreck, nor does it fetter the ability of the Director to take action under the notice provisions if that was ultimately considered necessary by him.

The Director's powers under the MTA

30. The Claimants say that the Crown has the ability to require removal of the *Rena* wreck under the MTA, and note that sections 110 and 248 provide a discretion

to require removal of the wreck.[20] The Claimants also state that notices have been issued under both section 110 and section 248 of the MTA.[21]

31. The Claimants are correct that section 110 and 248 provide such a discretion, but that discretion is exercised by the Director of MNZ in accordance with the specific legal requirements in the Act. The Claimants are incorrect that a section 110 notice has been issued. As outlined in the earlier affidavit of Stephanie Winson,[22] and as has previously been advised to Claimant counsel, no notices have been issued under section 110 of the MNZ. For clarity, the only notices that have been issued to the *Rena* owners by the Director of MNZ have been issued under section 100A and section 248 of the MTA.

32. The notices that have been issued under section 100A and section 248 have protected the interests of the Claimants and have required, and in the Crown's view still require, the wreck to be removed. The Director of MNZ is likely to evaluate these notices as removal of the wreck continues. The legal ability the Director has to require full removal has been overstated by the Claimants.

33. Section 100A (and for that matter the provision the Claimants rely on, section 110) requires the wreck to remain a "hazard to navigation" in order to require removal.[23] Thus, the Director must legally assess whether the wreck remains in contravention of that provision as it continues to be removed by the *Rena* owner. Also, if resource consent is sought, matters including whether the wreck is a hazard to navigation will be considered.[24]

34. Similarly, section 248 of the MTA requires the wreck to be hazardous to the environment.[25] The MTA also provides that the Director shall not take measures under section 248 unless such measures appear necessary to the Director to avoid, reduce, or remedy, pollution, or a significant risk of

---

20 Submissions of Counsel in Reply (Wai 2393, #3.1.35, 9 September 2013), at [21].

21 Submissions of Counsel in Reply (Wai 2393, #3.1.35, 9 September 2013), at [21].

22 Affidavit of Stephanie Winson (Wai 2393, #A3, 28 June 2013) at [9].

23 Sections 100A(1) and s 110(c) of the MTA.

24 Navigation and safety issues fall within the scope of s 5(2) of the RMA under "health and safety" matters. Refer to *Yachting New Zealand v Tasman DC* [2004] NZRMA 373 (EnvC) at [33].

25 Section 248(1) and s 247 and the definition of "Hazardous ship": "...is discharging, or is likely to discharge, a harmful substance into the internal waters of New Zealand...".

pollution, by a harmful substance that is causing, will cause, or will be likely to cause, serious harmful consequences to the marine environment or marine interests.

35. These legal tests are within the discretion of the Director. The Wreck Removal Deed does not and cannot impact on that discretion. This is reflected in Recital D to the Wreck Removal Deed. Further, all parties to the Wreck Removal Deed understood that the Director could not lawfully fetter his statutory powers and discretions.

36. If the wreck is removed to the extent it is no longer in contravention of those notices, or if resource consent is obtained to enable the Rena wreck to remain in place on the reef, the Director of MNZ will need to consider what statutory decision is required to be taken, including whether to amend or revoke the relevant statutory notices. Nothing in the Wreck Removal Deed, including clause 10, changes that legal position. Clause 10 of the Wreck Removal Deed is essentially tautologous, providing that if the owner has met the terms of the Consent or removed the Wreck as, and to the extent, required by New Zealand law, then it will have complied with the New Zealand Law.

37. The Director has yet to make any decision on such matters. This is understandable given the current status of the owner's activities, and the fact that it has not reached a view on which approach to take.

Limited liability

38. Finally, the Claimants argue that, under Part 7 of the MTA, the Crown has limited the financial liability of ship owners for repairing environmental and cultural damage.[26] Any limitation of liability under the MTA was not affected by the Deeds of Settlement. The Crown does not understand, and the Claimants have failed to explain, how the Deeds affect Part 7 of the MTA.

2B Marine and Coastal Area (Takutai Moana) Act 2011

39. The Claimants argue the Crown's policy in deciding on CMT and PCR applications is now affected by its private understanding with the *Rena* owner

---

26 Submissions of Counsel in Reply (Wai 2393, #3.1.35, 9 September 2013), at [22].

that in exercising its discretion it will specifically recognise the impact such an application will have on the owners.[27]

40. The Claimants say that, were Ngai Te Hapu or any other groups, to lodge applications for CMT or PCR they would be affected by the Crown's undertakings in the Deeds of Settlement.[28] The Claimants further state that the final decision on, timing of consideration by the Minister for, and resourcing of, their applications for CMT and PCR are being affected by the Deeds.[29]

41. Again, the Claimants provide little explanation as to how their applications for CMT and PCR are being affected by the Deeds of Settlement. The only undertakings the Crown has given to the *Rena* owner in respect of the MACA is to provide written notice of all claims for CMT or PCR in relation to the location of the *Rena* wreck, and to recognise that the owner would be directly affected by a recognition agreement or order under the MACA that relates to the location of the wreck:[30]

41.1 The Crown's obligation to give written notice to the owner of all claims notified to the Crown for recognition of CMT or PCR simply reflects the MACA itself. At the time of execution of the Wreck Removal Deed, it was anticipated that there would be a public register of MACA applications. That register now exists and can be accessed on the Ministry of Justice website.[31]

41.2 In relation to the Crown's recognition that the owner "would be directly affected by recognition agreement or recognition order" under the MACA, this signalled to the owner that should it decide to apply for a resource consent, and should that consent be granted, and should CMT be subsequently recognised, that the owner's future management of the wreck under the consent could be affected by the rights that are attached to CMT. It is noted that under the MACA,

---

27 Submissions of Counsel in Reply (Wai 2393, #3.1.35, 9 September 2013), at [40].

28 Submissions of Counsel in Reply (Wai 2393, #3.1.35, 9 September 2013), at [40].

29 Submissions of Counsel in Reply (Wai 2393, #3.1.35, 9 September 2013), at [40].

30 Deed in Relation to Removing the Wreck Arising from the *Rena* Casualty (1 October 2012), clause 2(b).

31 http://www.justice.govt.nz/treaty-settlements/office-of-treaty-settlements/marine-and-coastal-area-takutai-moana/current-marine-and-coastal-applications

section 96, that CMT reached by recognition agreement requires legislative implementation.

41.3 So, the consequence of this is that:

41.3.1 should additional resource consents be required, the CMT holder could exercise its rights to give or decline permission for the activities for which the consent is sought (section 66);

41.3.2 should a planning document prepared by the CMT holder apply to the area, then this could directly or indirectly influence the resource consent decision made by the Bay of Plenty Regional Council (section 85); and

41.3.3 should the Otaiti Reef be recognised as wahi tapu or a wahi tapu area, navigation in the area may be prohibited or restricted (section 79).

42. Therefore, clause 2(b) of the Wreck Removal Deed was simply recognising the owner's obligations to CMT applicants and holders, not creating any new procedural or substantial rights in the owner.

43. Further, the Claimants' CMT and PCR applications are being processed in accordance with the provisions of the MACA and the statutory process provided therein. However, and as highlighted in the earlier affidavit of Marian Smith,[32] customary interests in respect of Motiti Island are not straightforward; there are a range of complex and overlapping interests, which must be carefully assessed before any decisions on CMT and PCR can be made.

44. The complex nature of interests in respect of Motiti Island is clearly evident in this proceeding. As has already been seen in the various documents filed by the Wai 2391 and Wai 2393, there is a dispute between the Claimants themselves as to which group has mana whenua in respect of Motiti Island and its

32 Affidavit of Marian Ruth Smith (Wai 2393, #A4, 1 July 2013).

surrounds.[33] The Tribunal, and the Claimants, would thus appreciate the importance of ensuring that decisions on CMT and PCR are not rushed, but are made following a robust and considered appraisal of all interests.

45. Finally, it should be remembered the MACA provides for the recognition of rights that have been shown to be present for the last 170 years. These rights cannot be simply taken away by the *Rena* incident. Nor can the Crown control the fact that the *Rena* was wrecked on the reef. The Crown can, and has, ensured that all appropriate legal avenues are taken regarding clean up and removal.

2C Resource Management Act 1991

The Crown's Role Generally

46. The Claimants suggest that applications for resource consent to leave part of the *Rena* wreck on Otaiti reef are "imminent".[34] Further, the Claimants assert the Crown has placed itself in a position of balancing its interest in obtaining a $10.4 million payment from the *Rena* Owner against the strength of conditions it might seek should the owner apply for resource consent.[35] The Claimants say the payment is an indication of how significant the Crown's approval is for resource consents in the coastal marine area.[36]

47. As a starting point, the Claimants' assertion that resource consent applications are "imminent" is incorrect. Crown Counsel has previously advised the Tribunal that the *Rena* owner has indicated any application will not be made until the end of 2013 at the earliest, with early 2014 being more likely.[37] The affidavit of Mark Sowden, and the exhibits annexed to his affidavit, now confirm this timing.

48. This evidence further undermines the urgency with which the Claimants argue their claim must be determined.

---

33 Submissions of Counsel in Reply (Wai 2393, #3.1.35, 9 September 2013), at [62]-[72]; Affidavit of Umuhuri Matehaere (Wai 2393, #A5, 28 June 2013), at [10]-[20]; and Affidavit of Elaine Rangi Butler (Wai 2393, #A6, 13 September 2013) at [11]-[13].

34 Submissions of Counsel in Reply (Wai 2393, #3.1.35, 9 September 2013), at [6.j].

35 Submissions of Counsel in Reply (Wai 2393, #3.1.35, 9 September 2013), at [37].

36 Submissions of Counsel in Reply (Wai 2393, #3.1.35, 9 September 2013), at [34].

37 Memorandum of Counsel (Wai 2393, #3.1.36, 12 September 2013) at [8.2].

49. With respect to the Claimants' assertions regarding the Wreck Removal Deed, under that Deed the Crown has agreed to:

49.1 Provide all assistance reasonably required by the Applicant to facilitate the preparation, lodging and progressing of any consents.[38]

49.2 Consider, in good faith, making a submission in support of the consent taking into account the environmental, cultural and economic interests of New Zealand and the likely cost and feasibility of complete removal of the wreck.[39]

50. The Crown emphatically rejects the inference of corruption underpinning the Claimants' submissions on this point. It is important to note the terms of the Wreck Removal Deed do not require the Crown to make any particular decision on any resource consent application that might be made; the Crown is free to support, oppose, or indeed take no position at all, on a resource consent application. Further, the Crown's undertaking to consider making a submission in respect of any application is not novel; it simply reflects what the position would have been even if the Deeds had not been signed.

51. As recognised by the High Court in *Ngati Ruahine v Bay of Plenty Regional Council*,[40] the RMA involves a weighing process, leading to a balanced judgment. The High Court referred to the decision of the Court of Appeal in *Watercare Services Limited v Minhinnick* where the central issue was an application for an enforcement order designed to prevent a sewer pipeline was being laid through an archaeological site that included wahi tapu.[41] The Court of Appeal said:[42]

> The Court must weigh all the relevant competing considerations and ultimately make a value judgment on behalf of the community as a whole. Such Maori dimension as arises will be important but not decisive even if the subject-matter is seen as involving Maori issues. Those issues will usually, as here, intersect with other issues such as health and safety: compare s 5(2) and its definition of sustainable management. Cultural

38 Deed in Relation to Removing the Wreck Arising from the *Rena* Casualty (1 October 2012), clause 2(a).

39 Deed in Relation to Removing the Wreck Arising from the *Rena* Casualty (1 October 2012), clause 4.

40 *Ngati Ruahine v Bay of Plenty Regional Council* [2012] NZHC 2407, at [56].

41 *Watercare Services Limited v Minhinnick* [1998] 1 NZLR 294 (CA).

42 *Watercare Services Limited v Minhinnick* [1998] 1 NZLR 294 (CA), at 305.

> well-being, while one of the aspects of s 5, is accompanied by social and economic well-being. While the Maori dimension, whether arising under s 6(e) or otherwise, calls for close and careful consideration, other matters may in the end be found to be more cogent when the Court, as the representative of New Zealand society as a whole, decides whether the subject-matter is offensive or objectionable under s 314. In the end a balanced judgment has to be made.

52. The Crown is entitled to consider, in the national interest, cultural interests, economic interests, environmental interests, costs, and feasibility of removal – including impacts on Otaiti reef and those with interests in the reef. These are matters relevant to the RMA process, and would be considered regardless of whether the Crown had signed the Wreck Removal Deed. These matters do not provide any particular factor with a weighting – rather they are deliberately wide, to reflect the statutory context for any application for consent under the RMA.

53. The particular factors ultimately relied upon, and the weighting applied, in reaching its position on any resource consent application is for the Crown to determine. The Crown has clearly signalled that its decision will be determined having regard to a range of interests, including cultural interests. As such, any interests the Claimants may have in respect of Otaiti reef will be taken into account in the Crown's assessment of its position. The Crown's decision will ultimately be determined through a Treaty-compliant process and after consideration of the range of interests at stake, and not on the basis of any payment it might receive from the *Rena* owner. The outline of the Treaty-compliant process which the Crown is developing is set out below.

54. The potential payment of $10.4 million is not an incentive for the Crown to support, or not oppose, any application by the owner for a consent. Rather, it is a consequence of a decision-making process by which the Crown might end up in a position of supporting, or not opposing, any such consent application, and as a result of which, significant savings are realised by the owner. The payment is a consequence of savings which the owner may realise, not a payment in exchange for the Crown's support. It could not be otherwise, and it was certainly not in the Crown's contemplation, that this would ever be so, when the Wreck Removal Deed was entered into. At that stage, there was very little information or evidence about the environmental status of the reef and its

environment. That information assessment is developing, but the Crown is still not in a position where it can form any view.

55. Finally, the Claimants overstate the role of the Crown in the resource consent process. The Crown will not decide whether any resource consent application the *Rena* owner might make should be granted. That decision will be made by an independent decision-making body. The Crown, like the Claimants, is simply another party that may, if it so chooses, put forward its views on any application. Those views, however, are not determinative of the outcome of any application.

The Minister of Conservation

56. The Claimants state the Minister of Conservation is a key stakeholder in the marine coastal area, and the Minister and the Department of Conservation's approach to their Treaty obligations in relation to Otaiti reef is an extremely important determinant of the likely success of a consent application.[43] The Claimants say that if they were to seek a change to the regional coastal plan to better protect the reef, such as a rule prohibiting the dumping of any ships on it, the Minister would be consulted on the request and be responsible for final approval of it.[44]

57. Again, the role of the Minister of Conservation in the resource consent process is overstated by the Claimants. Any position the Minister, of the Department, might take on a resource consent application is not determinative of the application.

58. The Crown's undertakings in the Deeds of Settlement have no impact on the roles, powers, and functions of the Minister of Conservation or the Department. The role of the Minister under the RMA is a statutory role that must be undertaken in accordance with the purpose and principles of the RMA; the Deeds do not, and cannot, modify that obligation.

59. Finally, contrary to the suggestion of the Claimants, under schedule 1, clause 19 of the RMA, the Minister does not have wide-ranging powers to amend

43 Submissions of Counsel in Reply (Wai 2393, #3.1.35, 9 September 2013), at [26].

44 Submissions of Counsel in Reply (Wai 2393, #3.1.35, 9 September 2013), at [25].

regional coastal plans. The Minister has restrictions on when and in what circumstances he or she can seek amendments to any Regional Coastal Plan. In any case, the Minister's role in respect of such plans is prescribed in statute, and cannot be fettered or otherwise impacted upon by the Deeds.

Effects of Successful Resource Consent Application

60. The Claimants argue that, should the *Rena* wreck remain on the reef, the impacts will be significant.[45] They state that hundreds of containers will remain in the *Rena* hull along with leftover oil and other contaminants, and the site will be unsafe for recreation.[46] The Claimants also say the water column above the wreck may be unusable,[47] and that area of the reef will, in effect, be closed of permanently from use.[48]

61. At this point in time, arguments as to the effect of leaving part of the *Rena* wreck in place are pure speculation; no assessment of impacts can be made without knowing the conditions that might be attached to any resource consent application, or the state of the wreck when a consent is made. The Claimants simply cannot point to any prejudice they will suffer at this stage. If the Claimants are not satisfied with any such decision, they can exercise appeal rights provided under the RMA.

62. As outlined below, the Crown will assess the impacts of leaving the wreck on Otaiti reef if and when a resource consent application is made, and only after it has all of the necessary information before it and has considered the range of interests potentially at stake.

3 Alternative remedy - potential RMA application

63. In the event the *Rena* owner decides to apply for resource consent to leave part of the wreck on Otaiti reef, the Crown has agreed to consider making a submission in support. That decision will only be made if and when the owner applies for consent, and only after the Crown has considered the

---

45 Submissions of Counsel in Reply (Wai 2393, #3.1.35, 9 September 2013), at [41].

46 Snbmissions of Counsel in Reply (Wai 2393, #3.1.35, 9 September 2013), at [41].

47 Submissions of Counsel in Reply (Wai 2393, #3.1.35, 9 September 2013), at [42].

48 Submissions of Connsel in Reply (Wai 2393, #3.1.35, 9 September 2013), at [43].

environmental, cultural and economic interests of New Zealand, and the likely cost and feasibility of complete removal of the wreck. All options remain open to the Crown, and it may decide to support, oppose, or taken no position at all, on any resource consent application that might be made.

64. The Crown is putting in place a robust and Treaty-compliant process for determining its position on any resource consent application. As set out in the further affidavit of Mark Sowden, that process will include engagement with tangata whenua, and consideration of the cultural, environmental, and economic interests of iwi, hapu, and whanau. The Crown has not yet finally determined its engagement process, but officials have met and are currently working on that matter. However, the following principles will underpin the more practical elements of the Crown's proposed approach:

64.1 The Crown seeks meaningful engagement with iwi and hapu interests.

64.2 The Crown seeks to ensure it is sufficiently informed of the particular iwi and hapu interests that might be affected by a resource consent to leave part of the *Rena* wreck on the reef.

64.3 The Crown plans to commission, but not solely rely upon, expert assistance to ensure a comprehensive cultural impact assessment has been developed, once sufficient details are known about the resource consent application.

64.4 The Crown seeks to complete a first round of consultation before the end of this year.

64.5 The Crown plans to undertake a second round of more detailed consultation as soon as the Crown is sufficiently informed regarding the resource consent applications from the *Rena* Owner.

64.6 The Crown will consider how, in the context of the overall *Rena* situation and after undertaking the above assessment, the interests of iwi and hapu can be protected, from complete removal to conditions on the *Rena* Wreck.

65. The Tribunal has previously indicated that, generally speaking, the Tribunal will not commence urgent inquiries into resource consent applications for which there are separate hearing rights and separate statutory references to considerations of Treaty principle. As former Chief Judge Williams (now Justice Williams) stated in relation to a decision in respect of the Transpower proposal for a transmission line between Whakamaru and Otahuhu:[49]

> Generally speaking the Waitangi Tribunal will not commence urgent inquiries into resource consent applications for which there are separate hearing rights and separate statutory references to considerations of Treaty principle. Given the Tribunal's limited resources, it is usually far better to await the outcome of processes under that Act than to intervene pre-emptively. In a decision on an application by Sam Hahunga and Ngati Rangiwewehi in respect of their claims WAI 218 and WAI 219, I set out the circumstances in which the Waitangi Tribunal might depart from its usual practice. In that application I said:
>
> > "Even with the exercise of this alternative [Resource Management Act] remedy, the Tribunal might still grant urgency if it could be established that, **without duplicating or pre-empting the inquiry before the Environment Court,** it could contribute usefully on matters relevant to a decision. In other words, although as a general principle, the Tribunal does not inquire into matters for decision under the RMA that is not to say that the Tribunal can have no role at all in consent decisions. Under Part II of the RMA, resource loss and the cumulative effects of loss may be relevant to relationships of Maori with natural resources. The Tribunal is uniquely placed to examine such relationships. Even if the RMA is not about resource ownership, cumulative loss by Maori can be relevant to resource allocation decisions in respect of which a decision is claimed."
>
> In this case, the concerns of the claimants relate to the potential effect of the proximity of the project to their community. Given those impacts, their argument is that the model for consultation between the promoters of the project and the community should be the process supported by the community. Consultation is a matter of much discussion in resource management processes. Local authorities and the Environment Court often deal with allegations about a failure of consultation by project promoters. I am not satisfied in that respect that the Tribunal is, at this point, any better placed to deal with that issue than the local authority or the Environment Court. The project is at an early stage and there is still room for dialogue between the parties. It is certainly too early to undertake an urgent inquiry into a matter that is so clearly evolving between the parties. [Emphasis added]

66. With respect, the Wai 2393 Claimants seek to have the Tribunal exercise its jurisdiction and duplicate and pre-empt the RMA statutory process – should

---

49 Wai 1294, *Decision of the Chairperson in respect of Application for Urgency – Ngati Koroki Kahukuru*, at 4–5.

the owner seek to leave part of the wreck on Otaiti reef. Quite simply, the Claimants are seeking to use the Tribunal's resources to influence a separate statutory decision-making process at a stage where no decision has yet been made and through which they can legitimately raise their concerns. Until a decision is made to allow the wreck to remain on the reef, no prejudice can be said to arise.

67. Engagement, including the timing of any engagement, with iwi, hapu, and whanau, will, to a large extent, be determined by the timing of any resource consent application, the nature of the application, and what is being proposed by the owner. The Crown's engagement process should be finalised, and initial consultation is likely to occur, before the end of 2013.

CONCLUSION

68. The Claimants have not demonstrated they are about to suffer significant or irreversible prejudice from any Crown action. As such, the Claimants have failed to satisfy the criteria for urgency, and their application should be dismissed.

69. The Deeds of Settlement between the Crown and the *Rena* owner have no impact on any rights or interests the Claimants, or iwi and hapu generally, might have in respect of Otaiti reef. Any rights or interests the Claimants had before the Deeds were signed remain, and the Claimants have the ability to seek to have those rights or interests protected. As such, the Crown did not have any Treaty duty to consult with the Claimants when signing the Deeds. Similarly, the Deeds do not affect, let alone prejudice, any statutory powers or functions under the MNZ, MACA, or RMA. Any powers or functions the Crown or MNZ has under those Acts are preserved.

70. The Claimants have overstated the role of the Crown, including the Minister of Conservation, in the resource consent process. The resource consent process is independent of the Crown, and any decision on whether to grant or decline a resource consent application will be made by an independent decision-making body.

71. The Crown has not made any decision on the position it will take should the *Rena* Owner apply for resource consent to leave part of the wreck on Otaiti reef, if it decides to take any position at all. The Crown will only determine its position if and when a resource consent application is made, and only following a robust and Treaty-compliant process that includes engagement with iwi, hapu, and whanau, and consideration of their various cultural, environmental, and economic interests.

72. Officials are currently developing a process for engagement with iwi, hapu, and whanau. It is likely that process will be finalised, and initial consultation will occur, by the end of this year.

JUDICIAL CONFERENCE

73. Crown counsel notes the Tribunal has indicated a judicial conference is likely to be convened in Wellington on either 24 or 25 October 2013 to determine the Wai 2393 application for urgency.[50]

74. Counsel wishes to advise the Tribunal that one of its witnesses, Mr Mark Sowden of the Ministry for the Environment, will be unavailable to attend a judicial conference on the proposed dates of 24 and 25 October, were the Tribunal wishing to hear from witnesses.

Dated 2 October 2013

Matthew Andrews / Jeremy Prebble
Counsel for the Crown

TO: The Registrar, Waitangi Tribunal
AND TO: Claimant counsel

50 *Memorandum-Directions of the Presiding Officer* (Wai 2393, #2.5.13, 17 September 2013) at [12].