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 Mōtītī 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

AFFIDAVIT OF MARK MUIRHEAD SOWDEN

Affirmed on 1 October 2013

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Waitangi Tribunal
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WELLINGTON

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I, Mark Muirhead Sowden, of 6 Satara Crescent, Khandallah, Deputy Secretary, Ministry for the Environment, solemnly and sincerely affirm:

Introduction

1. I refer to my previous affidavit on the Wai 2391 and Wai 2393 Claims, affirmed on 27 June 2013.[1]

2. As that affidavit provides, I have been employed as Deputy Secretary of the Ministry for the Environment since November 2011. I have particular responsibility for Organisational Performance.

3. My involvement in the Ministry's response to the *Rena* incident has been at a governance oversight level in my capacity as Deputy Secretary responsible for this area of the Ministry's work.

4. The purpose of this second affidavit is to provide:

   4.1 An update on the *Rena* Long Term Recovery Plan and engagement with Iwi.

   4.2 An outline of the Crown process for informing its position on any resource consent lodged by the *Rena* Owner to leave part of the *Rena* wreck on Astrolabe Reef.

5. In preparing this affidavit, I have reviewed the reply submission from the Wai 2393 Claimants dated 9 September 2013, and the affidavit of Elaine Rangi Butler dated 13 September 2013.

The Current Situation

6. The *Rena* Owner currently has an obligation to remove the wreck from the reef, as provided in Maritime New Zealand's ("MNZ") notice and s 15A of the Resource Management Act 1991 ("RMA"). The obligation under the RMA will remain unless and until the owner obtains a resource consent to leave all or part of the wreck on the reef.

7. The Crown understands that the recent salvage operation has two major elements:

[1] Affidavit of Mark Muirhead Sowden (Wai 2393, #A2), 27 June 2013.

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7.1 First, reduction of the bow section of the wreck to one metre below the low-tide mark. The owner and salvor completed this work in July 2013, the work having taken a year;

7.2 Secondly, removal of the large accommodation block to be undertaken between now and December 2013.

8. The Crown understands that the owner is considering applying for resource consent to leave part of the wreck on the reef. The Crown understands that any application for consent is likely to be made late this year or early next year. As a consequence of the work on the accommodation block and several other relevant matters, the Crown has recently agreed, under the Deed in Relation to Removing the Wreck Arising from the *Rena* Casualty ("Wreck Removal Deed"), to a six month extension (until 31 March 2014) for the owner to make this decision (refer to **Exhibit "MMS1"** and **Exhibit "MMS2"**).

Update to the *Rena* Long Term Environmental Recovery Plan ("the Plan")

9. A first draft of the Environmental Monitoring Report has been completed. The Environmental Monitoring Report was produced by Waikato University and is part of the *Rena* Long Term Recovery Plan. It contains summaries of the different monitoring projects undertaken and the interim results that were found.

10. The report indicates that most environments have fared well, and where there is contamination, the levels are low with few adverse ongoing effects.

11. The *Rena* Owner was provided with a draft to review and expressed some concerns with the methodology and the results detailed in the report. They have raised concerns regarding the levels of Polyaromatic Hydrocarbons within sediments and kaimoana in close proximity to the reef, and the small samples from which these results were obtained.

12. The Bay of Plenty Regional Council ("BoPRC") is working with the University to address these concerns. The report is still in draft and will be externally peer reviewed as part of the report's finalisation process. The final report is due to be released in November.

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Engagement with iwi – Development and implementation of the *Rena* Long Term Environmental Recovery Plan

13. As noted in my previous affidavit, a new operating model for the Plan was developed, following a review into the operational delivery of the Plan in April 2013.[2] Iwi were consulted on the new operating model and no concerns were raised through this process.

14. In July 2013 (two months after the consultation process was completed and recommendations implemented) concerns were raised by Awanui Black, Chair of the Te Moanaui Iwi Leaders Forum. Mr Black felt that the iwi had not been consulted on review of the operation delivery and in particular a proposal to disestablish the Iwi Coordinators. This was not the case as the operational review was signalled at a *Rena* Governance Group meeting in March 2013 (of which Mr Black attends) and agreed that a review document would be issued to stakeholders and iwi for review and feedback.

15. A review document was distributed to stakeholders and iwi (including Mr Black). Through the consultation period one submission was received from Maketu/Te Arawa iwi. Maketu/Te Arawa were supportive of the review its findings and recommendations. No issues were raised by stakeholders or iwi through the consultation phase.

16. Although the Iwi Coordinators roles have now been disestablished, through the *Rena* Governance Group and Steering Group Mōtītī Māori and iwi have an opportunity to remain engaged and contribute to the development of the Plan and its ongoing implementation. Additionally, should there be a future need for Iwi Liaison with regard to the Plan this is something that could be considered by the BoPRC on an as required basis.

The Wreck Removal Deed

17. The "Wreck Removal Deed" was entered into by the Crown to provide that, if the wreck was left on the reef and ultimately resulted in a cost saving to the *Rena* Owner, the *Rena* Owner would be prepared to provide some of that saving to the Crown in certain circumstances.

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

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18. That payment does not, however, prescribe or influence the due process that the Crown will undertake, and which it would have undertaken without any such Deed, in coming to a position on what approach to take on any resource consent application to leave the wreck in part, on the reef.

19. The Wreck Removal Deed, relevantly provides for the following:

19.1 Clause 2: In the event the Owner (either directly or through a nominee), ... decides to apply for one or more Consents, the Crown and MNZ will:

19.1.1 provide all assistance reasonably required by the Applicant to facilitate the preparation, lodging and progressing of an application ... provided always however that the Crown and MNZ shall not involve themselves in the independent decision making process by the relevant local authority, court or board of inquiry in respect of any such application(s);

19.1.2 give (in the case of the Crown) written notice to the Owner of all claims notified to the Crown for recognition of customary marine title or protected customary rights under the Marine and Coastal Area (Takutai Moana) Act 2011 ("MACA") in relation to the location of the Wreck and recognise that the Owner would be directly affected by a recognition agreement or recognition order under MACA that relates to the location of the Wreck; and

19.1.3 not seek to recover in the Consents process, or have imposed by way of financial or other conditions of the Consents, any payment or other compensation.

19.2 Clause 4: In the event that the Applicant applies for a Consent, the Crown and MNZ will in good faith consider making a submission or submissions in support of the Consent taking into account the environmental, cultural and economic interest of New Zealand and the likely cost and feasibility of complete removal of the Wreck.

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19.3 Clause 5: subject to the conditions in the following paragraphs of this clause 5, the Owner will pay to the Crown NZ $10.4 million in accordance with clause 6. Payment is conditional on:

19.3.1 The Crown (including the Minister of Conservation) and MNZ not opposing the grant of any resource consent whether directly or indirectly.

19.3.2 The Crown and MNZ having complied with clauses 2 and 4 of the Deed.

19.3.3 All Consents applied for by the Applicant having been granted on terms and conditions acceptable to the Owner after any appeals or challenges to the Consents have been withdrawn or resolved.

19.3.4 The Applicant's intention being to commence and carry out the activities authorised by the Consents.

19.3.5 There being a substantial cost saving (such as $10.4 million) for the Applicant in carrying out the activities authorised by the Consents when compared with the cost of the removal of the Wreck to the extent required by NZ law.

20. I understand significant interest has been expressed by the Wai 2393 Claimants with respect to the approach that the Crown might take to forming its position on any resource consent if and when lodged by the *Rena* Owner.

21. In summary:

21.1 The Crown has not made any decision on its position on any resource consent application that might be made, and will not make any decisions until an application is made. I emphasise that the owner has not made any decision on the course it will follow, although the Crown understands it is likely to seek a resource consent.

21.2 The Crown will take into account iwi interests when considering any application. In particular, the Crown is committed to engaging with interested parties, including iwi and hapu, in determining its position

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on any resource consent application and, importantly, the proposed conditions which would inevitably involve a significant community restoration element.

21.3 The Crown is not bound to adopt any particular course of action. The matters to be considered in the Wreck Removal Deed do not constrain the Crown, or provide for matters outside of those it would normally consider when forming an all of Government view on an application for consent.

21.4 The Crown's position on any resource consent application is not determinative of the outcome of any application.

21.5 The Crown is not the decision-maker in this process. Rather, consideration of any resource consent is independent of the Crown, and undertaken by an independent judicial body.

21.6 Iwi and hapu, and the claimants, have the ability to participate in any resource consent process and have their concerns heard by the decision-maker. That process takes into account relevant iwi considerations.

22. As I note above, the Crown has not yet made any decision as to the position it will take in relation to any resource consent application that might be made by the owner.

23. Assuming that the consent authority under the RMA notifies the application, the possible options for the Crown would be to:

23.1 Support the application.

23.2 Oppose the application.

23.3 Take no position on the application.

The Crown's process for considering a resource consent application

24. The Ministry for the Environment, Office of Treaty Settlements, Department of Internal Affairs, Department of Conservation, with support of Te Puni Kōkiri and Crown Law, are currently planning the steps and stages required to

ensure that a full and appropriately weighted cultural impact assessment is developed for the Crown's internal consideration.

25. The following principles will underpin the more practical elements of the Crown's proposed approach:

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

25.2 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.

25.3 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.

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

25.5 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.

25.6 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.

25.7 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.

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25.8 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*.

26. The below table sets out the planned process and key milestones the Crown has in place to ensure that, when the Crown makes a decision on any resource consent application by the owner (likely to be early next year), there is a robust Treaty-compliant assessment of cultural, and in particular Māori, concerns with the potential for the *Rena* wreck to in part remain on Astrolabe reef.

Action	**Timeframe**
Crown to write to affected groups to explain the Crown process and interest in the potential application for consent.	October.
Crown to hold a first round of general meeting(s) with affected groups – ahead of obtaining any formal application for resource consent.	November.
Crown to engage expert consultant to provide a report on cultural interests, and particularly impacts to Māori from leaving the *Rena* Wreck on Astrolabe Reef.	Ongoing.

Action	Timeframe
Crown to hold a second round of targeted meetings with groups.	Dependant on the timeframes put in place by the *Rena* Owner, but likely to be February 2014.
Full assessment of all relevant matters to be placed before Ministers. The weighting to be given to particular interests will depend entirely on the above work.	March-April 2014.

AFFIRMED

at Wellington this 1st day of October 2013 before me:)

Mark Muirhead Sowden

A Solicitor/Deputy Registrar of the High Court of New Zealand

Julie Pereira