**In the Waitangi Tribunal** **Wai 2393**

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| Under | the Treaty of Waitangi Act 1975 |
| in the matter of | the grounding of the MV Rena |
| and in the matter of | an application by Ngai Te Hapu for urgency. |

# Further submissions of counsel in reply

16 October 2013

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Ministry of Justice
WELLINGTON

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## May it please the Tribunal

1. These submissions are in reply to the Crown submission of 2 October 2013 to which the Tribunal has provided a chance for comment on any new matters raised by the Crown in reply and not previously addressed by the claimants[1]. Because a judicial conference on this issue is scheduled for 25 October 2013, the matters in this further reply will be argued in more detail at that conference.

### Crown Treaty obligations

2. The Crown accepts that, assuming the reef is a taonga, it is required to take such actions as are reasonable in the prevailing circumstances and treaty obligations attach to the deeds if they affect the claimants' interests.[2] The claimants agree with those conclusions and agree also that the key issue is whether the deeds have an effect on and cause prejudice to the claimants interests or any statutory functions the Crown has in respect of the reef.

### Maritime Transport Act

3. The Crown does not deny that the deed in words allows for a hiatus,[3] and that the Crown is extending the time required.[4] More importantly, while maintaining that no decisions have been made to affect the removal notices, it has already determined that it will provide resources to actively assist in the preparation of a deed to allow the wreck to remain. To put it another way, there is no equivalent deed or deed provision that active support will be provided to prepare a consent to remove the wreck.

4. In addition, as the affidavit of Reese Golding makes clear, there are a number of assumptions already being made about parts of the wreck

[1] #2.5.13 paragraph 8.
[2] Para 16.
[3] Para 23.
[4] Para 24.

remaining on the reef, such as that only some containers are intended to be removed[5] and the intention to place permanent hazard warning signs on the wreck.[6] Despite his extensive discussion about many technical aspects of securing the wreck and removing parts of it, Mr Golding has no awareness of or comment on any plans for fully removing it, because he says he is aware that consent to leave it on the reef may be made.[7] This should be read in context as an admission that no detailed plans have been prepared or are in contemplation for wreck removal as opposed to an application leave it on the reef.

**Marine and Coastal Area (Takutai Moana) Act 2011**

5. The Crown explanation about the meaning of clause 2(b) of the deed referring to MACA[8] does not accord with the clear wording of that clause. The Crown says that it simply means that the Rena owners understand that they may be affected by an application for CMT. But the relevant clause concerns the Crown's reaction to such an application, not the obligations that it may cast on the Rena owner. The Crown's reaction is that it will 'recognise' that specific interest. Such a requirement does not appear in the MACA.

6. At paragraph 45 the Crown argues that rights at least 170 years old cannot be simply taken away by the Rena grounding. That is only partly correct. The MACA has removed the ordinary ability under property law to enforce the status quo while their rights are determined. That is why the specific reference to recognition of the Rena interest before any CMT application has been considered and determined is so concerning to the claimants.

**Resource Management Act 1991**

7. The claimants are not alleging or inferring outright corruption in Crown conduct in entering into the deeds.[9] However they are alleging a profound Treaty breach.

8. The Crown seeks to cast the impending application for consent as a matter which will be dealt with entirely under RMA processes.[10] However, its agreement with the Rena owners is what is known in RMA language as a

[5] Para 33 Golding affidavit.
[6] Para 30 Golding affidavit.
[7] Para 37.
[8] Para 41.3.
[9] Para 50.
[10] Paragraphs 51-54.

'side agreement' which the RMA process cannot recognise. The RMA process will simple record that the Crown supports the application or not.

9. To give an analogy, it is as if a private company was seeking consent for a large freshwater dam for agricultural purposes over a wahi tapu and the Crown announced that it had a private deal to assist in preparation of the application, and also potentially support it, in exchange for a $10 million payment. Even if such an agreement provided that all of that $10 million were to be applied to Maori purposes, as a kind of 'set off'[11] it would still be a Treaty breach not to engage with Maori about the intended deal because of its implications and the trade-off among interests that it implicitly makes.

10. This is not at all the same, as the Crown suggests, as a normal 'all of government' decision on whether and to what extent to become involved in a resource consent application.[12]

11. In addition, even without the complication of a potential $10 million payment, the Crown already has undertaken to assist in the preparation of a consent to leave the wreck on the reef, but has not undertaken to assist in a similar way in a consent to remove it or provided any alternative scenario where it would assist as it could in obtaining consents to remove the wreck. It has therefore already indicated where its intentions are likely to lie to that extent and cannot assert even now to any reasonable observer that it remains in a strictly neutral position as to whether the wreck stays or goes.

12. The Crown accepts that it is 'currently developing a process to inform itself' before making any decision on the consent application.[13] This is an acceptance that the deeds have created a different situation from that for an ordinary consent, one in which work has to be undertaken on a new process make a decision which is not the same as an ordinary 'all of government' decision to support a consent or not. However the Crown cares to characterise this process, it is inescapable that the discussions on it will centre on the fact that there is a monetary 'offset' available should the decision go in the direction of supporting consent which does not exist in relation to any other possibilities.

13. Nor has the Crown answered the problem of how its planning responsibilities under the RMA in relation to the marine coastal area and the reef would not be affected by, for example, a plan change application seeking to prohibit wrecks on the reef. It is not sufficient to say that such responsibilities are

[11] Which is, incidentally, not the case here.
[12] Para 5.3.
[13] Para 5.3.

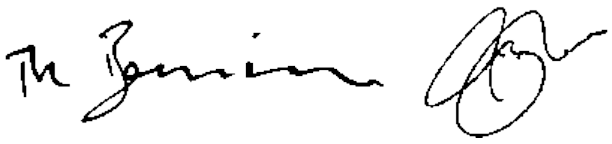
prescribed by statute.[14] The issue is the obvious conflict of interests that now exists between the Crown interest in an $10m payment and its Minister of Conservation having final powers over changes to regional coastal plans. That is why the deeds were careful to say that call-in powers by the Minister were not to be affected by the deeds.

**Timing, duplication of RMA processes, alternative remedies**

14. There is ample evidence that the application for consent will be made in the next few weeks if not within 2-3 months. In addition, the Crown states in its reply that it is currently developing processes of engagement in accordance with the very deeds which the claimants are concerned about.

15. As explained above, the fact that the Environment Court will consider whether the wreck stays or remains and will take Maori values into account in that decision is beside the point. The complaint is that Crown actions have already tarnished the process in a manner which profoundly affects the claimants' Treaty interests.

**Dated** at Wellington this 16th day of October 2013



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[14] Para 59.