

The Final Report on
the mv *Rena* and
Motiti Island Claims



The Final Report on the *MV Rena* and Motiti Island Claims



WAI 2391, WAI 2393

WAITANGI TRIBUNAL REPORT 2015

LEGISLATION
DIRECT 

The cover photograph shows the remains of the *mv Rena* aground on Otaiti (the Astrolabe Reef), with Motiti Island visible in the background, on 9 February 2012. The photograph on the preceding pages shows the *mv Rena* at low tide, with Otaiti visible in the foreground, on 5 November 2011. Both photographs reproduced courtesy of London Offshore Consultants.

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Waitangi Tribunal

Te Rōpū Whakamana i te Tiriti o Waitangi

Tākiri te haeata, ka ao, ka awatea, horahia mai ko te ao mārama

The Honourable Te Ururoa Flavell
Minister for Māori Development

The Honourable Nick Smith
Minister for the Environment

The Honourable Maggie Barry
Minister of Conservation

The Honourable Paula Bennett
Minister of Local Government

The Honourable Simon Bridges
Minister for Transport

The Honourable Christopher Finlayson
Attorney-General

Parliament Buildings
WELLINGTON

28 November 2014

E ngā Minita, tena koutou,

We enclose our final report on the *mv Rena* and Motiti Island claims, which concern the Crown's response to the wreck of the *mv Rena* on Otaiti (Astrolabe Reef). This report follows the interim report that we released on 18 July 2014, where we found that the Crown's consultation process with Māori in preparation for deciding its position on the *Rena* owners' resource consent application to leave the wreck on Otaiti had breached the Treaty of Waitangi principles of good faith and partnership. We adopt that report as it stands and note that the combination of our interim report and this report comprises the totality of our findings in this inquiry.

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This report focuses on the Crown's conduct in entering into the wreck removal deed (WRD) as part of its October 2012 settlement with the *Rena* owners. That deed obliged the Crown to consider, in good faith, supporting an application by the owners for resource consent to leave the wreck on the reef.

In our report, we note our understanding of the Crown's reasons for reaching a settlement with the *Rena* owners and we acknowledge the complex situation that the Crown was faced with in negotiating that settlement. We have found that many key clauses of the WRD, when considered on an individual basis, have no, or only limited, effect on Māori interests. However, we have also found that the Crown, in obliging itself to consider, in good faith, supporting the *Rena* owners' resource consent application, placed the owners in a special position in the resource consent process in a way that had the potential to significantly affect Māori interests in Otaiti.

Further, in incurring the obligations under the WRD, we have found that the Crown was not adequately informed of the nature and extent of Māori interests in the reef or of how those interests might be affected by a successful resource consent application to leave the wreck on the reef. For the Crown to make an informed decision and actively protect Māori interests while incurring the obligations under the WRD, as Treaty principles demand, we consider that it was necessary and practical in the circumstances for the Crown to first consult with Māori on the nature and extent of their interests in Otaiti and their general views on the possibility of an application to leave the wreck on the reef. By not undertaking any consultation prior to signing the deed, the onus was on the Crown to demonstrate utmost good faith in its dealings with Māori and in its efforts to actively protect both their rangatiratanga and the taonga of Otaiti in the subsequent period.

Since we released our interim report, the Crown has decided to partially oppose the *Rena* owners' resource consent application. In doing so, we consider that the Crown has avoided the primary prejudice that could have arisen from its conduct both before and after entering into the WRD. However, we also consider that the Crown's conduct in relation to the WRD has damaged its relationship with Māori. By failing to consult prior to entering into the deed, the Crown denied Māori the opportunity to inform its decision-making on an agreement that had the potential to significantly affect their interests, and it did so without itself being adequately informed about those interests. The Crown then exacerbated this failure by not releasing relevant parts of the WRD to Māori as soon as possible and by conducting an inadequate consultation process as it decided whether to make a submission on the owners' resource consent application. The Crown's conduct in this regard has diminished the Treaty partnership to the detriment of Māori and so has prejudicially affected the claimants.

We have therefore found that the Crown's conduct in entering into the WRD without having consulted Māori breached the principle of partnership and mutual benefit. The Crown has failed in its duty to act reasonably, honourably, and in good faith. We have made recommendations designed to remedy the prejudice that this has caused the claimants.

Heoi anō

A handwritten signature in black ink, appearing to read 'Sarah Reeves'.

Judge Sarah Reeves
Presiding Officer

ABBREVIATIONS

app	appendix
CA	Court of Appeal
ch	chapter
CNI	central North Island
comp	compiler
doc	document
ed	edition, editor
fn	footnote
fol	folio
J	Justice (when used after a surname)
LOC	London Offshore Consultants
ltd	limited
MNZ	Maritime New Zealand
MTA	Maritime Transport Act 1994
MV	Motor Vessel
NZAR	<i>New Zealand Administrative Reports</i>
no	number
NZHC	<i>New Zealand High Court</i>
NZLR	<i>New Zealand Law Reports</i>
NZSC	<i>New Zealand Supreme Court</i>
p, pp	page, pages
para	paragraph
PC	Privy Council
pt	part
RMA	Resource Management Act 1991
ROI	record of inquiry
s, ss	section, sections (of an Act of Parliament)
SCC	<i>Supreme Court of Canada</i>
sec	section (of this report, a book, etc)
session	session
vol	volume
WRD	wreck removal deed

‘Wai’ is a prefix used with Waitangi Tribunal claim numbers.

Unless otherwise stated, endnote references to claims, documents, memoranda, papers, and submissions are to the Wai 2393 record of inquiry, a select copy of the index to which is reproduced in appendix iv. A full copy is available on request from the Waitangi Tribunal.

CHAPTER 1

BACKGROUND TO THE URGENT INQUIRY

1.1 INTRODUCTION

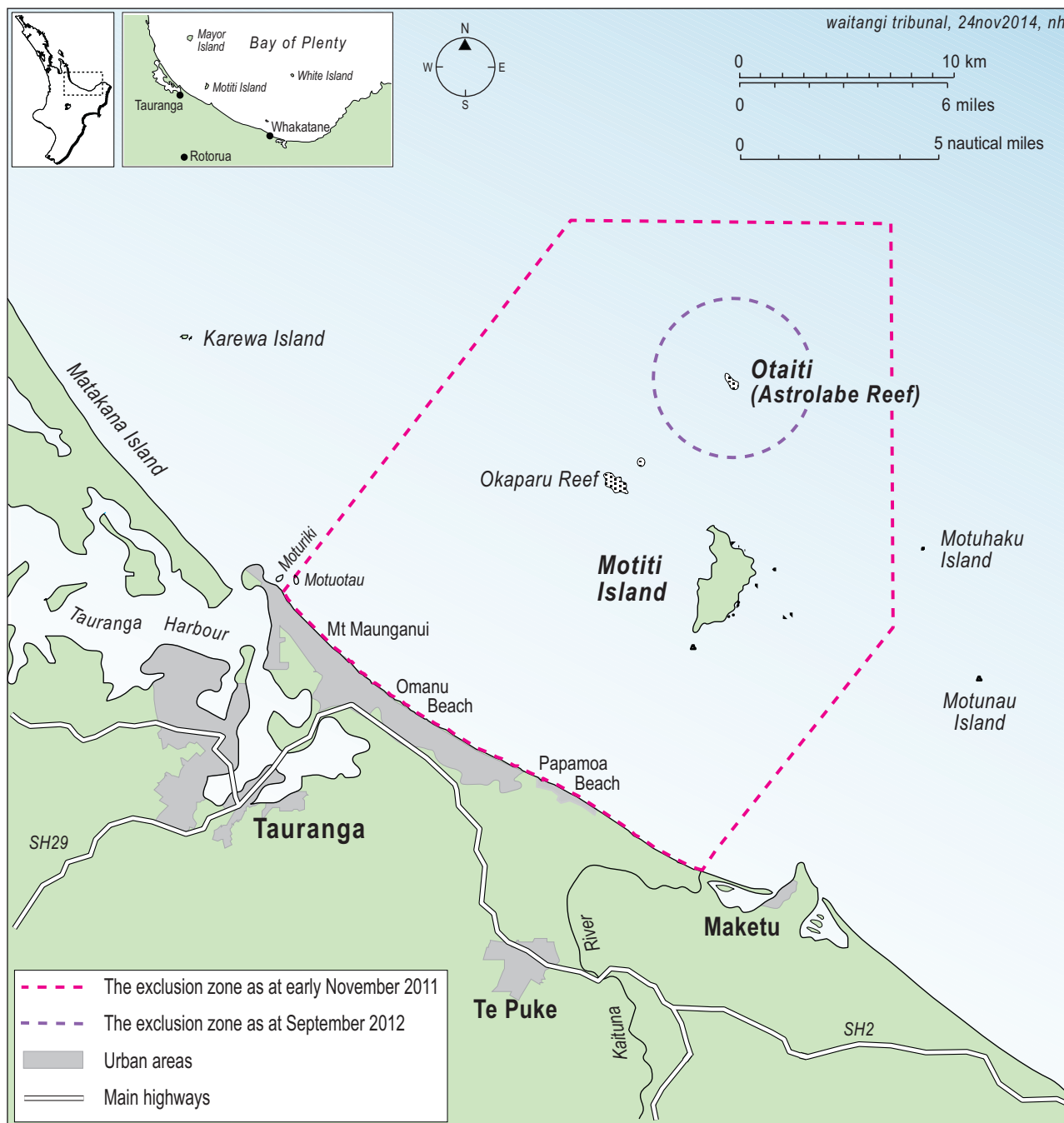
This report is the result of an urgent inquiry by the Waitangi Tribunal into Crown conduct following the grounding of the container ship the *MV Rena* (the *Rena*) on Otaiti (Astrolabe Reef) near Motiti Island on 5 October 2011.

Our inquiry has focused on the Crown's conduct in entering into three related deeds with the *Rena* owners in October 2012 to settle the Crown's claims against the owners.¹ We have focused in particular on the wreck removal deed (WRD), which provided the Crown with an opportunity for an additional payment of \$10.4 million for public purposes if it supported a resource consent application by the owners to leave part or the whole of the wreck on the reef.

The claimants alleged that the Crown's actions in entering into the WRD with the *Rena* owners constituted a breach of the principles of the Treaty of Waitangi. They submitted that the Crown had failed to act honourably and in good faith and had failed to fulfil its duty of active protection, in particular by failing to consult with Māori prior to signing the WRD. The claimants submitted that, whatever decision the Crown made on whether to support the owner's resource consent application, Māori would be prejudiced because the Crown's process for making that decision was not Treaty compliant.² In closing submissions, made before the Crown decided whether to make a submission on the owners' resource consent application, the claimants requested that the Tribunal make recommendations that the Crown submit in opposition to the owners' resource consent application (or make no submission), provide Motiti Māori with adequate resourcing to participate in the resource consent process, and allow Motiti Māori to be involved in the decision over the expenditure of any money received by the Crown if it decided to support the owners' application.³

The Crown did not accept that the WRD amounted to a Treaty breach or that it incentivised it to breach its Treaty obligations, and it submitted that the deed preserved its ability to meet those obligations. The Crown also submitted that it was 'conscious of the Treaty issues that arise for tangata whenua' and that it had acted in a Treaty-compliant manner in seeking Māori views on the *Rena* owners' resource consent application.⁴

Our inquiry has been conducted on an urgent basis because, on 30 May 2014, the Astrolabe Community Trust, on behalf of the *Rena* owners, lodged a resource consent application to leave the wreck on the reef. The closing date for submissions on that application was fixed at 8 August. During our hearing, held in Tauranga from 30 June to 2 July, Crown counsel informed us that Cabinet would meet on 28 July to decide whether the



Otaiti (Astrolabe Reef) relative to Motiti Island and Tauranga and the changes to the exclusion zone around the wreck of the *MV Rena*



Jacqueline Taro Haimona and Umuhuri Matahaere, two of the named claimants for Wai 2391



Buddy Mikaere, who presented evidence on behalf of Wai 2393

Crown would make a submission on the owners' resource consent application. In preparation for that decision, the Crown had, since November 2013, been consulting with Māori in order to formulate its position on any resource consent application by the owners.

To assist the Crown's decision-making process, we released an interim report on 18 July 2014 (attached as appendix 1, from page 47). That report addressed two matters: first, the consultation process that took place subsequent to the signing of the WRD, as the Crown was deciding whether to make a submission in respect of the resource consent application; and, secondly, issues relevant to the Resource Management Act 1991 that the Crown would take into account when making its decision. We found (see page 57) that the Crown's consultation with Māori was neither meaningful nor robust, and as a result the consultation process had

neither adequately informed the Crown of relevant Māori views on all aspects of the *Rena* owners' application nor adequately equipped Māori to participate usefully or with informed insight in the resource consent process themselves.

The Crown had accordingly failed in its duty to actively protect Māori in the use of their lands and waters, especially their taonga, and in the exercise of tino rangatiratanga over their taonga. We therefore found that the Crown's consultation process had breached the Treaty principles of good faith and partnership.

In the time since we released our interim report, the Crown has made the decision to partially oppose the owner's resource consent application.

Our inquiry has been concerned with three main periods: first, the time up to the signing of the WRD; secondly, the Crown's consultation process for determining its

Chronology of Key Events

5 October 2011: *MV Rena* runs aground on Otaiti (Astrolabe Reef).

December 2011: The *Rena Long-Term Environmental Recovery Plan* is released.

Late 2011: The Crown initiates negotiations with the *Rena* owners to settle its claims arising from the grounding.

7 January 2012: The *Rena* breaks in half during a storm.

10 January 2012: The stern section of the *Rena* sinks on the reef.

25 May 2012: The master and navigational officer of the *Rena* are convicted of offences relating to the grounding.

2 October 2012: The Crown announces its settlement with the *Rena* owners.

26 October 2012: Daina Shipping Company, the registered owner of the *Rena*, is convicted of an offence under the Resource Management Act 1991 relating to the grounding.

Late May 2013: The Tribunal receives the two claims and applications for urgency.

29 November 2013: The Crown sends a letter to Māori seeking their views on a possible resource consent application by the *Rena* owners.

21 January 2014: The Tribunal grants an urgent hearing into the Wai 2393 application.

31 January 2014: The Crown is informed by the *Rena* owners that they intend to apply for resource consent to leave the wreck on the reef in the near future.

Early February 2014: The Crown meets with Ngāti Awa and Ngāi Te Rangi to seek their views on a possible resource consent application by the *Rena* owners.

12 March 2014: Part of the *Rena* accommodation block is raised from the reef.

Mid-March 2014: Cyclone Lusi results in the stern section of the *Rena* slipping further down the reef.

29 April 2014: The Crown sends a further letter seeking Māori views on a possible resource consent application by the *Rena* owners.

22 May 2014: The Minister of Local Government, in her capacity as the territorial authority for Motiti, writes to iwi and hapū groups encouraging them to participate in the Crown's consultation process.

30 May 2014: The Astrolabe Community Trust, on behalf of the *Rena* owners, lodges a resource consent application to leave the wreck on the reef.

6 June 2014: The Crown sends a letter to Māori seeking their general and specific responses to the *Rena* owners' resource consent application.

24 June 2014: The Crown meets with the Mataatua District Māori Council as part of its consultation process.

27 June 2014: The Crown meets with the Motiti Rohe Moana Trust as part of its consultation process.

30 June – 2 July 2014: The Tribunal holds its hearing in Tauranga.

18 July 2014: The Tribunal releases its interim report on the *MV Rena* and Motiti Island claims.

28 July 2014: Cabinet meets to decide whether the Crown would make a submission on the *Rena* owners' resource consent application.

8 August 2014: The Crown makes a submission in partial opposition to the *Rena* owners' resource consent application. This was also the final date for submissions on the application.

position on the *Rena* owners' resource consent application; and, thirdly, the developments since our hearing in early July 2014. This report addresses issues relating to the first and third periods, and is primarily concerned with the question of whether the Crown's conduct in entering into the deeds of settlement with the *Rena* owners was Treaty compliant. We are adopting our interim report, which dealt with the second period, largely as it stands. We refer to its findings and recommendations where they are relevant to the issues before us in this report.

1.2 THE PARTIES TO THIS INQUIRY

There are two claims in this inquiry. Wai 2391 was filed by Graham Hoete, Umuhuri Matehaere, and Jacqueline Taro Haimona for and on behalf of themselves and the Motiti Rohe Moana Trust and by Cletus Maanu Paul for and on behalf of himself and the Mataatua District Māori Council.⁵ Wai 2393 was filed by Elaine Rangi Butler on behalf of the Ngāi Te Hapū Incorporated Society.⁶

The Crown is the other main party to this inquiry. There are also a number of interested parties, including the *Rena* owners, the Bay of Plenty Regional Council, Te Whānau a Tauwhao, Ngāi Te Rangi, Ngāti Makino, and Ngāti Whakahemo.

1.3 THE EVENTS LEADING TO THE URGENT INQUIRY

1.3.1 The grounding and subsequent events

At approximately 2.14 am on 5 October 2011, the container ship *MV Rena* struck Otaiti at maximum speed en route from Gisborne to Tauranga. At the time of its grounding, the *Rena* was carrying 1,368 containers and 1,733 tonnes of oil.⁷ Eight hundred and twenty-one containers were loaded below deck and 547 were stowed on deck.⁸ Thirty-seven of those containers were identified as containing 'potentially harmful cargo', including cryolite (a by-product of aluminium smelting), copper clove, and plastic beads.⁹

The bow section of the ship wedged on the reef, while the stern section remained afloat, effectively becoming a 'pivot on which the aft section swivelled and rotated in

bad weather.'¹⁰ Severe weather has had a dramatic, ongoing effect on the location and condition of the wreck. During a storm on 7 January 2012, the ship was torn in two. Although the stern section initially remained buoyant, on 10 January it sank on the reef, where it largely remains today. More recently, Cyclone Lusi in March 2014 resulted in the stern section slipping further on the reef to below a depth of 50 metres.¹¹

1.3.2 Environmental effects and Crown response

The grounding of the *Rena* on Otaiti has been referred to as New Zealand's worst marine environmental disaster and the second most expensive salvage operation in maritime history.¹² The incident caused widespread pollution from oil, containers, debris, and other material to the Bay of Plenty, including Motiti Island. Eighty-six containers were lost overboard on the night of the grounding, and more than 350 tonnes of heavy fuel oil leaked from the vessel in the months following.¹³

Māori living on or affiliating to Motiti were particularly affected by the pollution of the island's coastlines, the loss of kaimoana, and the damage to the nearby reef. In the cultural values assessment prepared for the *Rena Long-Term Environmental Recovery Plan* (which we discuss in section 1.3.4) by Buddy Mikaere for Ngai Te Hapū, it was noted that

We [Motiti Māori] are the people most affected by the *Rena* disaster. The sea and its resources are a major part of our lives on the island and the on-going pollution of the resources of the reef and our shoreline and waters has come as a resounding shock to our Motiti community.¹⁴

David Billington, who held the position of *Rena* response and recovery manager at Maritime New Zealand (MNZ), told us that Motiti was the area 'worst affected' by the oil spill and debris release from the *Rena*.¹⁵

MNZ led the Government response to the grounding, taking responsibility for investigating the accident, responding to the oil pollution, and providing oversight and supervision over salvage operations.¹⁶ Between 600 and 800 people were involved in the oil response team.¹⁷

A range of other agencies contributed personnel to the immediate response, including the New Zealand Defence Force, the Department of Conservation, and the National Oiled Wildlife Response Team.¹⁸ The Crown spent a total of \$47 million on the response.

There was also extensive involvement by Bay of Plenty communities, including Motiti Māori, in the clean-up effort.¹⁹ Some 8,000 volunteers helped to collect in excess of 1,000 tonnes of oily waste from the Bay of Plenty coastline.²⁰ Kenneth Manch, the director of MNZ, told us that 'Residents of Motiti both conducted the cleanup and supported others in their activities.'²¹ After training, and in liaison with national on-scene commanders (tasked by MNZ to clean up and prevent further oil pollution), Motiti Māori were involved with the local oil clean-up response.²² Motiti Island was also used as a staging post for helicopters once salvage operations were underway.²³

1.3.3 *Rena* owners: legal position and salvage activities

The default position at law is that the wreck of the *Rena* must be completely removed.²⁴ Resource consent under the Resource Management Act 1991 is required to leave any part of the wreck on the reef.²⁵ Following the grounding, the director of MNZ issued notices under the Maritime Transport Act 1994 that defined the wreck as a hazardous ship (because of leaking oil and other pollution) and as a hazard to navigation. These notices require the complete removal of the wreck and remain in force until either the ship is removed or other lawful means of dealing with the ship are achieved.²⁶

In line with these legal obligations, the *Rena* owners and insurer have been responsible for salvage operations. The initial priority for these operations was to remove the remaining oil from the ship, followed by the cargo, with a focus on hazardous or otherwise damaging cargo. These initial activities meant that, by the time the ship broke in two in January 2012, most of the oil had been removed from the ship, and therefore only a small quantity of diesel leaked. However, a significant quantity of cargo remained, and the entire contents of cargo hold 3 and part of the contents of cargo hold 4 were released.²⁷ Work commenced on reducing the bow section in July 2012; the focus of that

work was to reduce the bow to a minimum of one metre below the lowest astronomical tide, which has now been achieved.²⁸ The next phase of work involved removing the accommodation block of the ship. However, owing to the effect of Cyclone Lusi in March 2014, only the top half of the block was removed before the attempt was abandoned.²⁹ That storm, as we mentioned above, resulted in the stern section slipping more than 50 metres below the surface, meaning that diving has become much more difficult and dangerous.³⁰

Today, parts of the fore section and the whole of the aft section remain on the reef, along with a significant debris field surrounding the wreck.³¹ Mr Billington told us that the owners' efforts were now focused on removing the debris field.³²

The *Rena* owners and crew have also been subject to criminal charges. As a result of MNZ's investigation into the grounding, the master and navigational officer of the *Rena* were convicted in May 2012 of offences under the Maritime Transport Act for operating a vessel in a manner likely to cause danger, under the Resource Management Act for discharging a contaminant, and under the Crimes Act 1961 for altering ship documents.³³ Daina Shipping Company, as the registered owner of the ship, was convicted in October 2012 of an offence under the Resource Management Act for the discharge of harmful substances from a ship in the coastal marine area and was fined \$300,000 of a maximum \$600,000.³⁴

1.3.4 The recovery phase: negotiations and plan

In late 2011, in preparation for the shift from the initial response to the grounding into the recovery phase, the Crown initiated two parallel processes. First, the Crown and MNZ entered into negotiations with the owners and insurers (being the Swedish Club³⁵) of the *Rena* to settle the Crown's claims arising from the grounding, particularly the \$47 million of Crown expenditure that largely resulted from clean-up activities. These negotiations were conducted on a confidential basis over the period of about a year. We examine the Crown's negotiations with the *Rena* owners in further detail in chapter 3.

Secondly, the Ministry for the Environment developed

the *Rena Long-Term Environmental Recovery Plan*. The plan was released in December 2011 after input from key Government agencies, including the Department of Conservation and the Ministry of Transport, councils from the Bay of Plenty and neighbouring regions, and the Moana a Toi Iwi Leaders Forum.³⁶ The stated goal of the plan was to '[r]estore the mauri of the affected environment to its pre-*Rena* state' and to address 'the environmental consequences as far as it is practical to do so'.³⁷ In order to achieve this, the plan established a series of workstreams. At the time of the plan's publication, these were beaches and shorelines, seabed, water quality and the water column, kaimoana, and wildlife.³⁸ The Crown provided \$1.88 million for the first two years of the plan and later provided a further \$542,000 to complete the implementation of the four-year plan.³⁹

The plan was notable for the emphasis that it placed on the relationship between Māori and the affected environment. It highlighted, for instance, the 'strong holistic connection' that iwi and hapū shared with the environment:

As a result of the *Rena* grounding tāngata whenua values have been compromised. That environment is extremely important to providing the cultural, physical and spiritual sustenance to whānau, hapū and iwi. Excluding whānau, hapū and iwi from their traditional and customary resource, and preventing them from exercising their customary practices, has been very difficult for those affected.⁴⁰

The plan also noted the special significance of the reef to Māori:

Although Astrolabe is the common name for the reef; its traditional name as called by Patuwai of Mōtiti is Te Tau o Otaiti, meaning the gateway or waharoa to Mōtiti. The name originates from an historical account whereby it is believed to be the place where Ngatoroirangi performed karakia before proceeding on to Mōtiti.⁴¹

A number of representative roles were reserved for Māori in governance structures set up by the plan, including the governance group and the steering group. These

bodies included representatives from Motiti alongside other affected groups. In addition, iwi coordinators were appointed as part of the recovery team, including a representative from Motiti. Following an operational review undertaken in April 2013, the iwi coordinator roles were disestablished, having 'met their intended purpose', and responsibility for the plan and its implementation was transferred to the Bay of Plenty Regional Council.⁴²

1.3.5 The deeds of settlement

As a result of their negotiations, in October 2012 the Crown and the *Rena* owners signed three related deeds of settlement: a claims deed, an indemnity deed, and the WRD.⁴³ The Crown did not consult with Māori prior to entering into these deeds with the *Rena* owners.

The claims deed settles the Crown's claims against the owners for \$27.6 million.⁴⁴ Through the indemnity deed the Crown has agreed to indemnify the owners against 'certain claims by New Zealand public and local government claimants' to a maximum extent of \$38 million.⁴⁵ Through the WRD, the Crown has agreed that, if the owners apply for resource consent to leave part of the wreck in place, it will 'in good faith' consider making submissions in support. The WRD requires the Crown to decide whether or not to support the owners' application by 'taking into account the environmental, cultural and economic interests of New Zealand and the likely costs and feasibility of complete removal of the Wreck'. If the Crown does not oppose an application for consent ('whether directly or indirectly'), and the application succeeds, with the owners making a 'substantial cost saving', then the owners will pay the Crown an additional \$10.4 million for 'public purposes'.⁴⁶ We understand that a similar deed obliges the Bay of Plenty Regional Council to consider submitting in support of any resource consent application.⁴⁷ This deed has not been placed in evidence before us.

1.3.6 The resource consent process

In November 2013, the Crown began consultation with Māori to seek their views on a possible resource consent application by the *Rena* owners. The Crown met with two groups in February 2014. By this stage, the owners had

confirmed their intention to seek resource consent to leave the wreck on the reef. As we noted above, the owners filed a resource consent application on 30 May. In response, the Crown conducted a final round of consultation with three groups, including the two Wai 2391 claimants, in late June.

After consideration by Cabinet, on 8 August the Crown announced its intention to lodge an all-of-government submission partially in opposition to the *Rena* owners' resource consent application. The Crown has called for the parts of the wreck and debris above 30 metres depth to be removed, with enhanced monitoring and consent conditions for the parts of the wreck remaining below that level. We look at the Crown's submission in more detail in chapter 4.

The Bay of Plenty Regional Council has referred the owners' application directly to the Environment Court, where it is expected to be heard some time in 2015.

1.4 THE INQUIRY PROCESS

The Tribunal received the two claims and applications for urgency in late May 2013. The Crown and interested parties responded to the applications on 27 and 28 June 2013. Response submissions from the Wai 2393 applicants were filed on 9 September. The Wai 2391 application was adjourned *sine die* on 30 September owing to difficulties in gaining legal aid funding, with leave reserved for the application to be revived when the applicants were in a position to proceed.⁴⁸ The Crown filed a further response to Wai 2393 on 2 October, and in reply the applicant filed additional submissions on 16 October. A judicial conference was held in Wellington on 25 October to determine the urgency application. The Wai 2393 applicant, the Crown, and the *Rena* owners presented oral submissions.

Urgency was granted to the Wai 2393 application on 21 January 2014.⁴⁹ On 30 January, the chairperson of the Waitangi Tribunal, Chief Judge Wilson Isaac, appointed Judge Sarah Reeves the presiding officer for the urgent inquiry and Sir Douglas Kidd and Professor Sir Tamati Reedy members of the inquiry panel.⁵⁰ Ronald Crosby was appointed a member on 7 April.⁵¹

After being informed that the Wai 2391 claimants were

in a position to proceed, the Tribunal granted urgency to their application on 7 April.⁵² A judicial conference was held to finalise the statement of issues on 2 May. The Tribunal released its final statement of issues on 6 May, limiting the scope of the inquiry to Crown conduct surrounding the signing of the WRD in October 2012 and the pending Crown decision to support, oppose, or abide by an application for resource consent by the *Rena* owners.⁵³ The statement of issues is attached as appendix 11.

An urgent hearing was held at the Trinity Wharf Hotel in Tauranga from 30 June to 2 July.

Throughout our inquiry, matters of confidentiality and disclosure have been the subject of considerable disagreement, particularly in relation to disclosure of the deeds. We will discuss some of the implications of the Crown's position on confidentiality of the deeds later in our report.

1.5 THE STRUCTURE OF THIS REPORT

In chapter 2, we set out the Treaty principles and duties that are applicable to the circumstances before us. In order to do so, we are required to consider whether Otaiti is a taonga. In chapter 3, we examine the Crown's conduct in entering into the WRD with the *Rena* owners and evaluate whether that conduct breached Treaty principles. Finally, in chapter 4, we turn our attention to developments since our interim report, including the Crown's role in the current resource consent process, and conclude with our findings.

Notes

1. The *MV Rena* is owned by Daina Shipping Company, a Liberian-based one-ship subsidiary of the Costamare Shipping Group. We refer to these companies simply as 'the *Rena* owners' or 'the owners' throughout our report.
2. Submission 3.3.1, p 11
3. Submission 3.3.6, p [10]; submission 3.3.10(a), p 107
4. Submission 3.3.8(b), pp 2–3
5. Graham Hoete, Umuhuri Matahaere, and Jacqueline Taro Haimona, statement of claim concerning Crown conduct in relation to the wreck of the *MV Rena*, 30 May 2013 (Wai 2391 RO1, claim 1.1.1)
6. Claim 1.1.1
7. Document A1(a), p 4

8. Document A19, p 2
9. Document A48, pp 8–9
10. Document A19, pp 1, 3
11. Transcript 4.1.1, pp 138, 146
12. Document A15, p 3
13. Document A1(a), p 5; doc A19, p 1
14. Document A21(a), p 4
15. Document A19, p 4
16. Ibid, p 3. Maritime New Zealand is a Crown entity and therefore not strictly part of the Crown.
17. Document A16, p 4
18. Document A8, p 3
19. Document A16, p 8
20. Document A8, p 3
21. Document A16, p 8
22. Document A19, p 5
23. Document A6(a), p 21
24. Transcript 4.1.1, p 201
25. Document A15, p 2
26. Documents A3(a), (b)
27. Document A9, pp 1–2
28. Ibid, pp 4, 7–8
29. Document A19, pp 7–8
30. Transcript 4.1.1, p 146
31. Document A19, p 9
32. Transcript 4.1.1, p 146
33. Document A19, p 4; ‘MNZ Welcomes Sentencing of *Rena* Officers’, Maritime New Zealand, <http://www.maritimenz.govt.nz/news/media-releases-2012/20120525a.asp>, 25 May 2012
34. Document A19, p 4; ‘*Rena* Owners Fined’, Maritime New Zealand, <http://www.maritimenz.govt.nz/news/media-releases-2012/20121026a.asp>, 26 October 2012
35. The Swedish Club is a leading marine mutual insurer. As a protection and indemnity club, it is owned and controlled by its members.
36. Document A1, p 3; doc A1(a), p ii
37. Document A1(a), p 3
38. Some workstreams have since been merged and other, new, workstreams created. The current workstreams are shorelines, Te Mauri Moana Environmental Monitoring Programme, wildlife, biosecurity, cultural impacts, mauri, matauranga, communications, and administration: see doc A14, pp 4–5.
39. Ibid, pp 3, 7
40. Document A1(a), p 6
41. Ibid, p 4
42. Document A14, pp 5–6
43. The full titles of the deeds are ‘Deed in Relation to Claims Arising from the *Rena* Casualty’ (the claims deed); ‘Deed of Indemnity’ (the indemnity deed); and ‘Deed in Relation to Removing the Wreck Arising from the *Rena* Casualty’ (the wreck removal deed).
44. Document A12, p 4
45. Document A13, p [3]
46. Document A11, pp 3–4
47. Document A26, pp 457–458
48. Memorandum 2.5.14
49. Memorandum 2.5.19
50. Memorandum 2.5.22
51. Memorandum 2.5.29
52. Memoranda 2.5.28, 2.5.30
53. Memorandum 2.5.33

CHAPTER 2

TREATY PRINCIPLES

2.1 INTRODUCTION

The question at the heart of the claims before us is whether the Crown has adequately protected Māori and their relationship to Otaiti in accordance with Treaty principles. The parties have pointed to partnership (particularly the duty to act reasonably, honourably, and in good faith) and active protection as the most relevant Treaty principles to our inquiry. Although the Crown has insisted that its actions have remained in keeping with Treaty principles, both Crown counsel and one of the Crown's key witnesses noted that it was unclear how the Crown could go about fulfilling its duty of active protection in these circumstances.¹ The parties disagree about the degree of action required of the Crown, both in the period before the deeds were signed and afterwards, particularly when the Crown was considering its position on the owners' resource consent application.

The Tribunal's task under section 6 of the Treaty of Waitangi Act 1975 is to determine whether Māori claims of Treaty breach are well founded. In order to determine that a claim is well founded, the Tribunal must find that the claimants have been, or are likely to be, prejudicially affected by Crown legislation, policy or practice, or act or omission that is inconsistent with the principles of the Treaty. Where the Tribunal finds those claims to be well founded, it can then make recommendations to the Crown that action be taken to compensate for or to remove the prejudice suffered.

In this chapter, we set out the Treaty principles and duties that are relevant to the unique set of circumstances before us. To do so, we begin by examining the relevant jurisprudence, both from previous Tribunals and from the courts. We then consider whether the reef is a taonga. We conclude by setting out the Treaty standards by which we will assess the Crown's conduct in this report.

For the most part, this chapter does not diverge significantly from the corresponding section in our interim report (see pages 49 to 52). However, we have expanded our discussion on some points to cover the different set of issues that we are dealing with in this report.

2.2 RELEVANT JURISPRUDENCE

Although the circumstances of this inquiry raise considerations that have not been presented to the Tribunal previously, there is substantial guidance as to the factors that ought to inform the Crown's actions in matters of environmental management, particularly as they relate to the relationship between Māori and taonga that may be in a vulnerable state.

Courts and other Tribunals have emphasised that partnership is at the heart of the Treaty exchange and the relationship that it established between the Crown and Māori.² This relationship gives rise to the principle of partnership and mutual benefit and also creates a duty for the parties to act reasonably, honourably, and in good faith towards each other. This means that the Crown is obliged to make informed decisions about the impact of proposed legislation, policies, actions, or omissions on Māori interests in the environment and natural resources.³

The principle of active protection is derived from the principle of partnership and mutual benefit. The Tribunal's 2008 report on the central North Island (CNI) claims, *He Maunga Rongo*, articulated the two-fold duty that emanates from the principle of active protection: a duty to protect physical resources (lands, estates, and taonga) and a duty to protect rangatiratanga. The fundamental relationship created by the Treaty means that the Crown has a duty to protect the environment itself, as it affects the lands, estates, and taonga of Māori, and to protect Māori in their exercise of rangatiratanga over taonga.⁴

The Privy Council expressed the nature of the Crown's duty to protect taonga in finding that the level of protection required by the Crown may be higher where a taonga is in a vulnerable state.⁵ Tribunal panels have found that the degree of protection needed depends on the nature and value of the taonga.⁶ The CNI Tribunal considered that, while the Crown is not required to go beyond what is reasonable in the circumstances to protect Māori interests, it is required to consult with Māori in circumstances where it is taking or regulating resources or taonga.⁷ However, it is not permissible for the Crown to limit the effect of the principles of the Treaty to consultation alone. Consultation, the Tribunal explained, is a duty derived from the overarching principle of partnership, through which the Crown has responsibility for ensuring that proper arrangements for the conservation, control, and management of resources are in place. Consultation is not open-ended, and the Crown may act if it has sufficient information on which to make an informed decision. The test of what consultation is reasonable in the prevailing circumstances depends not only on the nature

of the resource or taonga but also on the likely effects of the policy, action, or legislation.⁸ We would add that, in any situation that requires robust consultation, the Crown is required to ensure that Māori are 'adequately informed so as to be able to make intelligent and useful responses', as was found in the *Wellington Airport* case.⁹

We note the Crown's submission that our interim report, from which the previous paragraph is largely drawn, overstated the duty of consultation as expressed by the CNI Tribunal. The Crown pointed out that the Tribunal there stated that consultation was required only where the Crown was planning to 'take or regulate resources or taonga'. The Crown further submitted that the Tribunal was wrong to insist that,

on the basis that consultation is mandatory, the Crown must ensure Māori are adequately informed so as to be able to make intelligent and useful responses, as found in the *Wellington International Airport* case.¹⁰

Although we have clarified the statement from CNI above to address the Crown's submission, we would note that, on a cumulative reading of the jurisprudence cited, our position on the broad principle surrounding consultation appears to be generally consistent with the Crown's position. Consultation is not, as a general rule, mandatory. Instead, the duty to consult is dependent on the circumstances of the particular case.

The second element of the Crown's twofold duty of protection concerns the protection of Māori rangatiratanga over resources. The CNI Tribunal explained that this article 2 duty requires the Crown to provide ways for Māori to fulfil their obligations as kaitiaki, or guardian communities, over their taonga. This aspect of active protection has been more recently expressed by the Tribunal in *Ko Aotearoa Tēnei*, the report on the Wai 262 claim. Taonga, the Tribunal explained, include particular iconic sites, such as mountains or rivers. Whether a resource or a place is a taonga is a matter that can be tested by establishing the nature of the relationship that Māori have with the resource or place. The Tribunal set out the relevant tests as follows:

Taonga have mātauranga Māori relating to them, and whakapapa that can be recited by tohunga. Certain iwi or hapū will say that they are kaitiaki. Their tohunga will be able to say what events in the history of the community led to that kaitiaki status and what obligations this creates for them. In sum, a taonga will have kōrero tuku iho (a body of inherited knowledge) associated with them, the existence and credibility of which can be tested.¹¹

Taonga are not only property and possessions and can be both tangible and intangible.¹² In the past, the Tribunal and courts have identified rivers, fisheries, and te reo Māori as taonga.¹³ Of particular relevance to the situation before us, the Tribunal has also identified reefs and the mauri of a river as taonga.¹⁴

Where it is established that a place, resource, or thing is a taonga, the Wai 262 Tribunal explained that ‘it is the degree of control exercised by Māori and their influence in decision-making that needs to be resolved in a principled way’.¹⁵ It considered that the principled way to decide these questions was through the concept of kaitiakitanga, or guardianship. The Tribunal considered that the degree of control that should be exercised by Māori will differ widely according to the circumstances, including the importance of the taonga in question, the health of that taonga, and any competing interests in it. In general, however, the Tribunal found that the Treaty requires the Crown to provide for fuller expression of kaitiakitanga, so that Māori can meet the obligations that arise from the rights of rangatiratanga.¹⁶

2.3 HE TAONGA

The matters we are addressing in this report require us to consider the nature of the relationship of Māori to Otaiti and how that relationship has been affected by the *Rena* grounding in order to establish how the Crown’s Treaty duties apply in the current circumstances.

As we set out in our interim report, there is no question that Otaiti is a taonga of considerable importance to the claimants, one that is covered by the plain meaning of article 2. This was accepted by the Crown in our inquiry:

The Crown does not seek to challenge the relationship of tangata whenua to the reef in the Tribunal. The Crown accepts the reef is a taonga for the tangata whenua and, with that, the duty of active protection arises.¹⁷

We do note that the Crown’s acceptance of the taonga status of the reef came very late in our inquiry, the implications of which we explore more fully in chapter 3. Other than this, the taonga status of the reef has been unchallenged in our inquiry and no evidence to the contrary has been presented.

During our hearing, we received evidence that clearly points towards Otaiti being a site of significant cultural, spiritual, and historical importance to a range of hapū and iwi groups. The reef was named by Ngātoroirangi as the Te Arawa waka arrived in the Bay of Plenty. Traditions recite that, as the crew of the waka rested at the reef, Ngātoroirangi performed karakia rendering the reef tapu and named it ‘Te taunga o ta iti te tangata’, meaning ‘the resting place of the people’.¹⁸ (We note that there are other variations of the name of the reef, such as Te Taunga o Taupo Iti o te Tangata and Te Tau o Taiti.¹⁹) Schools of fish are said to have appeared as Ngātoroirangi recited his karakia; this was viewed as an omen of good fortune and motivated the crew to journey on.²⁰ The reef was subsequently used as a navigational point for journeys to and from Hawaiki.²¹ Dr Grant Young, in the customary interests report that he prepared for the Crown, noted that these traditions are ‘consistent with other off shore islands along the East Coast which were the initial points of landfall for the waka after long voyages from the Pacific’.²²

We also received evidence about the specific significance that Otaiti holds for the people of Motiti Island. Dr Desmond Kahotea, in the interim cultural values report that he prepared for the *Rena* owners in February 2013, noted that Otaiti is the equivalent of a maunga for the people of Motiti:

Otaiti is a significant cultural icon as a reef, a feature in the surrounding seascape which is ingrained in the essence of being Patuwai on Motiti. It is a tipua which signifies its spiritual qualities, the source of its naming, the equivalent

of a maunga or awa to people on the mainland. It is a visible marker that defines the relationship between people and place (the moana [ocean]) and it forms a setting to their everyday lives on the island.²³

Motiti people believe that

Otaiti and the other islands, surface breaking reefs and rock outcrops are stepping stones for the wairua of our deceased, back across the sea to Hawaiki, the ancestral homeland.²⁴

Elaine Butler of the Ngāi Te Hapū Incorporated Society told us that Motiti people have continued to offer karakia to the reef in ‘acknowledgement of our taonga and our sure belief that when the time comes for us to leave this life Otaiti is the beginning of our pathway home to our ancestors.’²⁵

In addition to its cultural and spiritual significance, Otaiti has long been utilised by a range of hapū and iwi groups as a traditional hapuka fishing ground and as a valuable traditional kaimoana gathering resource for other species, such as pāua, kina, and koura.²⁶ Our hearing provided us with a strong impression of the Motiti people’s continued use of the reef up until the *Rena* grounding. Those who fished on the reef would offer karakia to ‘acknowledge and preserve the life force or mauri of the reef [so] that it may continue to be a source of sustenance.’²⁷ After performing karakia, the first fish would be released as a ‘thank you to the mauri of the reef.’²⁸ These karakia would be offered as an acknowledgement of their kaitiaki obligations to Otaiti.

The kaitiaki obligations of Motiti people in respect of Otaiti are evident in the ways in which they have managed the kaimoana resources on and around the reef. In the past, individuals exercised rights over certain areas of the reef or over certain species, on behalf of their wider whānau and hapū groups.²⁹ This has continued in recent times, though the use of the reef has changed to reflect the fact that fishing is no longer needed for survival. Motiti Māori gave evidence of ‘sharing the catch around to maintain whanau links, giving thanks to Tangaroa for the bounty, and having hapū rights to the Otaiti fishing

ground.’ These activities ‘embed the people in their rohe.’³⁰ These rights also created a responsibility to ensure that resources were preserved for the future. In practice, this meant that

there were seasons – such as breeding times – when a resource might not be taken or used. Or when the numbers of a particular resource were down and needed time to recover. There was also a management regime for the use of a resource. Normally sufficient of a resource might be taken to satisfy the immediate need thereby preventing over exploitation – akin to the numbers restrictions used now. This might also mean that the taking of shellfish might be restricted to those of a particular size to preserve breeding stock. The resource might be communally shared as a means of managing a resource ie catches would be whanau or hapu catches and the entire catch would be laid out and distributed evenly.³¹

In the present circumstances, the claimants feel that their kaitiaki responsibility is clear: ‘we inherited a pristine reef and we have an obligation to pass that same pristine reef on to our children and our children’s children and beyond.’³²

The evidence we received demonstrates that the extent of physical damage caused to the reef by the *Rena* grounding has had significant effects on the state of Otaiti. The *Rena* remains a significant presence on the reef. The bow section of the wreck is wedged on the top of the reef, one metre below the low-tide mark, while the balance of the hull and superstructure is situated further down the reef, subject to strong ocean currents. There is also a large debris field (of up to 3,000 tonnes of material) on and around the reef.³³

The presence of the wreck on the reef and the damage that it has caused has also had implications for Māori, including the claimants, and their ability to carry out their kaitiaki obligations. Perhaps the most tangible impact has been that the claimants have been unable to use their fishing grounds near Otaiti because of the exclusion zone that has been in place over the wreck since the grounding. That exclusion zone, managed by the Bay of Plenty Regional Council harbour master, covers a radius of two nautical

miles from the wreck (having originally been much larger: see the map on page 2).³⁴ Monitoring of the wider Bay of Plenty environment has determined that it is recovering well and that there should be ‘no long-lasting negative effects on Bay of Plenty beaches and coastal fisheries’. However, Motiti Māori continue to have concerns about the safety of the seafood that they gather in the vicinity of the reef and of Motiti.³⁵ They say that these factors have prevented them from meeting their manaakitanga obligation to provide their manuhiri with kaimoana. They have accordingly suffered a diminishment of their mana.³⁶

In addition, the presence of the *Rena* wreck on Otaiti has had more intangible effects, both for the reef and for Māori. The Tribunal has previously considered the wider harm that can result from environmental damage, including damage to mauri. In the *Report on the Muriwhenua Fishing Claim*, the Tribunal explained how damage to the natural environment can affect Māori:

The fisheries taonga includes connections between the individual and tribe, and fish and fishing grounds in the sense not just of tenure, or ‘belonging’, but also of personal or tribal identity, blood and genealogy, and of spirit. This means that a ‘hurt’ to the environment or to the fisheries may be felt personally by a Maori person or tribe, and may hurt not only the physical being, but also the prestige, the emotions, and the mana.

The fisheries taonga, like other taonga, is a manifestation of a complex Maori physico-spiritual conception of life and life’s forces. It contains economic benefits, but it is also a giver of personal identity, a symbol of social stability, and a source of emotional and spiritual strength.³⁷

For the claimants, the effect of the *Rena* in this regard is that they ‘cannot protect the taonga and the resources that have been passed to us by our ancestors’. There is a ‘running sore’ on the reef and they ‘do not have the means to heal it’. The continued presence of the wreck has accordingly reduced them as a people.³⁸

The claimants also emphasise the effect that the presence of the wreck is having on the mauri, or life force, of the reef, the principle which Buddy Mikaere said

‘envisages a pristine state’ where all elements are ‘perfectly in balance’.³⁹ The evidence prepared for the *Rena* owners’ resource consent application also acknowledges the existence and significance of the mauri of the reef. In his cultural assessment report, Dr Kahotea noted that there are two aspects to the mauri of Otaiti:

nga tamariki o Tangaroa (the food resource) and te ao wairua (the spiritual element). They are both intertwined but Otaiti has a special spiritual mauri or mana atua relating to Ngātoroirangi the tohunga of the Te Arawa waka.⁴⁰

In terms of the effect of the wreck on the mauri of the reef, Mr Mikaere told us that ‘The mauri or spiritual essence of our reef is unquestionably compromised by the *Rena* wreck’, which means that Motiti Māori are ‘unable to properly discharge’ their kaitiaki obligations.⁴¹ Similarly, Dr Young’s report states that, ‘Without taking into account any other factors, the cultural values attached to the reef require the removal of the wreck.’⁴² As we outlined above, the Tribunal has previously found that taonga can be both tangible and intangible and can include the mauri of a river. Having regard to the evidence, in particular the reef’s cultural, spiritual, and historical significance to the people of Motiti, we consider that the mauri of Otaiti can also be regarded as a taonga. Mr Mikaere told us that the effects that the wreck is having on the reef and Māori interests informs the claimants’ view that it must be removed in its entirety in order to restore the mauri of the reef.⁴³

2.4 THE CROWN’S DUTIES IN THE CIRCUMSTANCES

The grounding of the *Rena* presents a unique set of circumstances for the Crown in exercising its duty of active protection. This is not a situation where a taonga has been damaged or depleted by Crown actions. Nor are we considering how to balance Treaty interests against other interests so as to provide appropriate kaitiaki influence. Rather, significant damage has been caused to the taonga by a third party, and the Crown’s duty of active protection is invoked directly within this context, after the damage

has been caused. It has not been seriously suggested by any party that the Crown should fulfil its duty of active protection by taking steps to remove the *Rena* itself, at least not at this time. All parties accept that it is the *Rena* owners' responsibility at law to remove the wreck. However, the owners also have a legal right to pursue a resource consent application to leave the wreck, in part or whole, on the reef. It would also be unreasonable to expect the Crown to expend more public funds at a point when the *Rena* owners and insurer have entered into a process to have their application determined, which will affect whether the default legal position should be enforced at the *Rena* owners' expense. As the resource consent application has been referred to the Environment Court for a first-instance hearing, those issues will be for the court to decide, based on the facts of the case.

However, the Crown's Treaty duties exist equally outside the resource management process as they do inside it. They also existed prior to and following the grounding of the *Rena*, including when the Crown was negotiating its settlement with the *Rena* owners. Those duties, particularly in relation to active protection, may change and take on different emphases depending on the context, but they should be an ever-present consideration. We note that the duty to act reasonably, honourably, and in good faith is particularly central to the partnership between the Crown and Māori.

We consider that the unique circumstances of the *Rena* grounding required and continue to require the Crown to have taken more robust action than usual, not less, and to do more than simply take action without talking to Māori. As the Crown submits, consultation will not always be necessary or practical, and there may be circumstances where the Crown can proceed without consultation if it has enough information to make an informed decision. However, in these circumstances, we consider that early and ongoing engagement was needed. Consultation is not only a way to adequately inform the Crown before it makes decisions; it also serves as a tool to engage with Māori and to demonstrate good faith. This applies particularly in the context of confidential commercial negotiations, where Crown engagement with Māori so as to be

adequately informed of Māori interests might differ from consultation on the terms of negotiations or proposals for agreement.

It appears to us that, prior to the signing of the WRD, the situation required the Crown to take the following steps in order to fulfil its Treaty duties, including the duty of active protection of rangatiratanga and of the taonga itself and the duty to act reasonably, honourably, and in good faith:

- recognise which hapū and iwi have interests in Otaiti;
- identify the nature of the relationship of these hapū and iwi to Otaiti and the interests that arise from that relationship, paying particular regard to the cultural and historical significance of the reef and whether the hapū or iwi say that the reef is a taonga and that they are kaitiaki;
- understand how the *Rena* grounding has affected that relationship;
- consult on important issues concerning taonga if Māori interests were likely to be affected and if it was reasonable to do so in the circumstances, having regard to the nature of the resource or taonga and the likely effects of the policy, action, or legislation; and
- ensure that any actions, policies, or agreements were informed by, and took proper account of, Māori interests, where those interests were potentially affected.

We now turn to consider whether the Crown fulfilled these duties in its conduct prior to the signing of the WRD.

Notes

1. Submission 3.3.3(b), p 1; transcript 4.1.1, pp 128, 261
2. *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 (CA) at pp 664, 667; Waitangi Tribunal, *Report of the Waitangi Tribunal on the Manukau Claim*, 2nd ed (Wellington: Waitangi Tribunal 1989), p 70; Waitangi Tribunal, *Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim*, 2nd ed (Wellington: Government Printing Office, 1989), p 192
3. Waitangi Tribunal, *He Maunga Rongo: Report on Central North Island Claims, Stage One*, revised ed, 4 vols (Wellington: Legislation Direct, 2008), p 1236
4. *Ibid*, pp 1243–1245

5. *New Zealand Maori Council v Attorney-General* [1994] 1 NZLR 513 (PC) at 517
6. Waitangi Tribunal, *Ngawha Geothermal Resource Report 1993* (Wellington: Brooker and Friend Ltd, 1993), p 152; Waitangi Tribunal, *Preliminary Report on the Te Arawa Representative Geothermal Resource Claims* (Wellington: Brooker and Friend Ltd, 1993), p 40; Waitangi Tribunal, *He Maunga Rongo*, p 1243
7. Waitangi Tribunal, *He Maunga Rongo*, p 1243
8. *Ibid*, pp 1236–1237
9. *Wellington International Airport Ltd v Air New Zealand* [1993] 1 NZLR 671 (CA) at 676
10. Submission 3.3.10(b), pp 6–7, 38
11. Waitangi Tribunal, *Ko Aotearoa Tēnei: A Report into Claims concerning New Zealand Law and Policy Affecting Māori Culture and Identity, Te Taumata Tuarua*, 2 vols (Wellington: Legislation Direct, 2011), vol 1, p 269
12. Waitangi Tribunal, *Report of the Waitangi Tribunal on the Orakei Claim*, 2nd ed (Wellington: Brooker and Friend Ltd, 1991), p 188
13. Waitangi Tribunal, *Report of the Waitangi Tribunal on the Motunui–Waitara Claim*, 2nd ed (Wellington: Government Printing Office, 1989), p 50; Waitangi Tribunal, *Report of the Waitangi Tribunal on the Te Reo Maori Claim*, 3rd ed (Wellington: Brooker's Ltd, 1993), p 20; *New Zealand Maori Council v Attorney-General* [1994] 1 NZLR 513 (PC) at 517
14. Waitangi Tribunal, *Report on the Motunui–Waitara Claim*, p 50; Waitangi Tribunal, *Manukau Report*, p 67
15. Waitangi Tribunal, *Ko Aotearoa Tēnei*, p 270
16. *Ibid*, pp 269–273
17. Submission 3.3.3(b), p 1
18. Document A21(a), p 7; doc A14(a), p 278
19. Document A14(a), p 278; doc A21(a), p 3
20. Document A14(a), p 278
21. *Ibid*
22. *Ibid*, p 279
23. Document A6(a), p 2
24. Document A39, p [3]
25. Document A41, p [3]
26. Document A21(a), pp 15–16
27. Document A39, p [3]
28. Document A41, p [3]
29. Document A21(a), p 20
30. *Ibid*
31. *Ibid*, p 23
32. *Ibid*
33. Transcript 4.1.1, p 137
34. Document A30, pp 2–3
35. Document A14, pp 7–8
36. Document A21(a), pp 23–24
37. Waitangi Tribunal, *Report on the Muriwhenua Fishing Claim*, p 180
38. Document A21(a), p 25
39. Document A39, p [4]
40. Document A47, p [817]
41. Document A39, p [4]
42. Document A14(a), p 297
43. Transcript 4.1.1, p 48

CHAPTER 3

THE WRECK REMOVAL DEED

3.1 INTRODUCTION

As we set out in chapter 1, in late 2011 the Crown and the *Rena* owner and insurer entered negotiations to settle the Crown's claims relating to the *Rena* grounding. Those negotiations concluded with the signing of the three deeds of settlement in October 2012. Of these deeds, the wreck removal deed (WRD) is most relevant to the claims before us. Under that deed, the Crown entered into obligations with the *Rena* owners. These obligations concerned the Crown's approach to the resource consent process that would decide whether or not the wreck would be left on Otaiti and if the Crown would receive an additional \$10.4 million from the owners. As such, the Crown's conduct before and since the signing of the WRD has been the focus of our inquiry.

In this chapter, we are concerned with the events prior to the signing of the WRD and whether the Crown's conduct during this time was Treaty compliant. The claimants submitted that,

in agreeing to a payment to the Crown of \$10.4 million if consents to leave a substantial part of the wreck on the reef are obtained on conditions acceptable to the owner, the Crown has created a powerful new incentive, in the national interest, not to remove a substantial part of the wreck.¹

Claimant counsel further submitted that Treaty principles required that the Crown consult Māori about that new incentive but that such consultation did not occur.² The result of the Crown incurring the obligations under the WRD, the claimants argued, is that Māori would be prejudiced because:

If the Crown decides that it will submit and will not pick up the \$10.4mn fee, the public may reasonably perceive that Maori issues have caused the 'loss' of compensation.

If the Crown decides not to submit, Maori may consider that the national interest in the compensation has overridden their interest.³

The Crown submitted that its settlement with the owners was a commercial settlement that did not impact Māori interests and that consultation prior to the signing of the deeds was therefore not necessary. Counsel for the Crown further submitted that the settlement preserved the ability of Māori claimants to pursue their own claims against the *Rena*

owners and to participate in the resource consent process if the owners decided to seek consent to leave all or part of the wreck on the reef.⁴

In determining whether the Crown's conduct in incurring the obligations under the WRD was Treaty compliant and whether the claimants have been thereby prejudiced, we seek to answer two questions that broadly encompass the issues set out in the Tribunal's statement of issues. First, we consider whether the obligations incurred by the Crown under the WRD affected, or had the potential to affect, Māori interests in the reef. Secondly, we consider whether the Crown discharged its Treaty obligations prior to entering into the WRD. In particular, we focus on whether Treaty principles required consultation with Māori, including the claimants, before the Crown entered into the deeds with the *Rena* owners.

We note at the outset that we are now in the situation where, as a result of the release of the Crown's decision to partially oppose the *Rena* owners' resource consent application, we have more information about how the Crown has interpreted its obligations under the WRD than we did at the time of our hearing. That information has necessarily informed our interpretation of the effect of the clauses of the WRD. However, the Treaty compliance of the deed remains relevant to our inquiry because the claimants have alleged that prejudice will occur regardless of the position that the Crown has arrived at on the owners' resource consent application.

3.2 BACKGROUND

The negotiations between the Crown and the *Rena* owners were conducted on the basis of commercial confidentiality. As such, we have very little information regarding both the instructions guiding the negotiations and the content of the negotiations. This is particularly so because the Crown has refused to waive privilege to documents detailing those matters. Nonetheless, the context in which the deeds were agreed is an important factor in our consideration of whether the Crown's conduct in entering into the deeds was Treaty compliant. In particular, we need to

assess the extent to which the Crown was properly cognisant of, and acting in accordance with, its Treaty obligations during the negotiations, as well as its cognisance of Māori interests in the reef. Our account here relies largely on the evidence of Dr Matthew Palmer (then Deputy Solicitor-General at the Crown Law Office), who led the negotiations for the Crown, as well as evidence from MNZ and submissions from the Crown.

A wide range of Crown agencies had some level of involvement in, or input into, the negotiations. Dr Palmer received instructions from the Ministry of Transport, the Ministry for the Environment, and MNZ, and he also consulted with the Department of Conservation, the Department of Internal Affairs, and the Treasury, as well as the respective Ministers of those departments.⁵ He did not, however, consult with Te Puni Kōkiri.⁶

There is very little information on the record about the course of the negotiations. Dr Palmer told us that he travelled to Singapore twice in early 2012, but we do not know how many other meetings were held between the Crown and the owners.⁷ However, the evidence indicates that by late September 2012 an agreement had been struck, and Ministers were by that time being asked by officials to sign the deeds. A briefing paper to the Minister of Local Government dated 21 September, for example, recommended that he sign the claims deed and advised him that Cabinet would be making a decision on whether to sign the three deeds on 24 September. The paper noted that there was 'some time pressure on the settlement process'.⁸ A later briefing paper indicated that the claims deed would be finalised by 28 September. The settlement was eventually signed on 1 October.

We must first consider why the Crown entered into negotiations with the *Rena* owners and what it was seeking to achieve. There appear to have been two main factors that motivated the Crown's decision. First, Dr Palmer told us, there were the 'strong and consistent public and political calls for the public not to have to bear the cost of clean-up or removal'.⁹ The Crown had spent more than \$47 million in response to the grounding. However, the owners' liability to compensate those affected by the grounding

was limited to \$11.3 million under New Zealand law and by international agreement, unless ‘recklessness on the part of the owner itself could be proved’. That, Dr Palmer told us, had not happened anywhere worldwide, creating a problem for the Crown negotiators.¹⁰ By entering into negotiations with the *Rena* owners, the Crown was thus seeking to maximise the compensation that it received. MNZ had a similar motivation. Stephanie Winson, the general manager (legal and policy) at MNZ, confirmed to us in evidence that

MNZ’s involvement in the negotiations with the owner was aimed at ensuring that the maximum compensation for the costs incurred by MNZ could be recovered directly from the owners.¹¹

The second factor was the Crown’s apparent concern that the owners might walk away from their legal obligation to remove the wreck. Dr Palmer noted that the potentially high costs of wreck removal, along with the fact that the *Rena* was owned by a one-ship Liberian company, created a ‘risk that the company will be insolvent and unable to meet its obligations to compensate or to remove a wreck.’¹² The Crown evidently did not regard this risk as being mitigated by the fact that Daina Shipping (the Liberian company) was owned by Costamare, a substantial and respected international shipping firm,¹³ nor by the fact that the company was insured by the Swedish Club, a blue-chip marine mutual insurer. These concerns continued to be a factor for the Crown throughout the negotiations, as Dr Palmer revealed in cross-examination by claimant counsel:

Mr Bennion: So you’re saying that when you were negotiating there was a real possibility that Costamare and the Swedish Club would simply walk away and leave the wreck where it was?

Dr Palmer: That was our concern.

Mr Bennion: The wreck was still high on the – there were still parts of the wreck visible from Motiti Island?

Dr Palmer: Well, it was for a substantial period of time, yes.

Mr Bennion: Yes, and through, up to and including and after the signing of the deed?

Dr Palmer: Look, I don’t know when it was cut down to below high water mark or low water mark.

Mr Bennion: Well, if you take—

Dr Palmer: But I will take your word for it.

Mr Bennion: If you accept that it’s sitting high and dry and high on the reef and very, very visible, you’re seriously saying that the Swedish Club and Costamare, there was a concern that they would walk away and leave a standing symbol on New Zealand’s coast, this wreck high on the reef, so that everybody could point to it internationally and say they don’t do the right thing? Is that legitimate?

Dr Palmer: I am seriously saying that that was a concern.¹⁴

It therefore seems that the negotiations and the deeds were designed to minimise the possibility of the owners and insurers walking away without substantially reimbursing the Crown for the expenses that it had incurred in a manner enforceable in the New Zealand courts. Dr Palmer emphasised that the overall settlement secured a ‘formally expressed intention, in an enforceable contractual document signed by the owner . . . to remove the wreck to the extent required by New Zealand law.’¹⁵ He also referred several times to how the deeds secured the ‘commercial reputation’ of the owners and insurer, indicating that this was a motivation for the owners to go over and above what they argued were their normal legal obligations.¹⁶

We must next consider the extent to which the Crown took Māori interests into account during the negotiations and in the lead-up to the signing of the deeds in October 2012. The Crown has affirmed that it was ‘aware of its Treaty obligations when entering into the WRD.’¹⁷ Dr Palmer emphasised that this was also the case throughout the negotiations:

Of course, the Crown, MNZ and other agencies sought to achieve . . . [their] objectives through outcomes that were consistent with their legal obligations, including statutory obligations and the obligation to act consistently with the principles of the Treaty of Waitangi.¹⁸

However, Dr Palmer explained that ‘going into these negotiations the Crown was not intending to and did not negotiate about anything that it considered was going to impact on Māori interests in the reef’.¹⁹

That view might explain why the Crown does not seem to have actively investigated Māori interests in Otaiti before or during the negotiations. Dr Palmer confirmed under questioning from claimant counsel that the Crown received no specialist advice regarding Māori values and tikanga around the reef, nor had any contact with Te Puni Kōkiri officials during the course of the negotiations.²⁰ He stated that he received a copy of the *Rena Long-Term Environmental Recovery Plan*, which he ‘probably read . . . on the way to Singapore’ in January 2012.²¹ The plan, as we explained in chapter 1, emphasised the ‘strong holistic connection’ that iwi and hapū shared with the environment, as well as the significance of Otaiti to local Māori. Dr Palmer also consulted a copy of a ‘Waitangi Tribunal report into claims in this area to review what was said in that about the reef’.²² He told us that his personal understanding was that ‘the reef was likely to be regarded by Māori as a taonga’.²³ As we have noted previously, however, the Crown did not unequivocally confirm its acceptance that the reef was a taonga until our hearing in June 2014.

3.3 THE EFFECT OF CROWN OBLIGATIONS UNDER THE WRD ON MĀORI INTERESTS IN THE REEF

In order to determine whether the Crown’s conduct in relation to the WRD was Treaty compliant, we need to first establish what obligations the Crown incurred under the clauses of the WRD and whether those obligations affected, or had the potential to affect, Māori interests in the reef. If they did, and did so in a significant way, then the Crown had Treaty obligations at the time that it was negotiating and signing the deeds. As we set out below, the effect of the clauses of the deed and the obligations that they create has been the subject of considerable disagreement between the parties. We do not intend to consider the individual effect of each clause in detail. Instead, we will focus on the clauses that seem to have the most contentious effect. To provide context for that discussion, however, we begin by

briefly introducing the relevant clauses and summarising the Crown’s and claimants’ submissions on their effect. The full text of the WRD is attached as appendix III.

3.3.1 Relevant clauses and submissions

The Tribunal statement of issues identifies six clauses and subclauses of the WRD as being particularly relevant to the claims before us:

- *Clause 1(a)*: Clause 1(a) provides that the applicant (defined as the owner or its nominee) will, within 12 months of the execution of the deed (or such longer period as the Crown may agree), ‘advise the Crown and MNZ of the Owner’s intention to re-commence removal of the Wreck as, and to the extent, required by New Zealand law’. The Crown submitted that, ‘[w]hile the clause carries with it the notion of a potential hiatus, such a pause is a practical step in any salvage context’ and that ‘[t]he clause itself does not drive the hiatus’.²⁴ The claimants submitted that the clause ‘demonstrates clearly’ that the Crown was not enforcing its Maritime Transport Act 1994 notices and was instead ‘condoning a significant delay’ for the owners to decide whether or not to apply for resource consent to leave all or part of the wreck on the reef.²⁵
- *Clause 2(a)*: Clause 2(a) commits the Crown and MNZ to providing ‘all assistance reasonably required by the Applicant to facilitate the preparation, lodging and progressing’ of an application for consent to leave part of the wreck in place. The Crown argued that this provision simply provides comfort that ‘the owner’s application would not be indirectly blocked’. Counsel for the Crown pointed out that the owners have made only one request for assistance under the clause.²⁶ The claimants, however, rejected the Crown’s interpretation and submitted instead that the clause imposes a ‘positive obligation on the Crown to assist the Wreck Owner with the progression of the RC [resource consent] Application’.²⁷
- *Clause 2(b)*: Clause 2(b) commits the Crown to give written notice to the owners of claims for ‘recognition of customary marine title or protected

customary rights under the Marine and Coastal Area (Takutai Moana) Act 2011 in relation to the location of the Wreck' and to recognise that 'the Owner would be directly affected by a recognition agreement or recognition order' under that Act. The Crown submitted that this clause is intended to 'give the owner notice if customary rights or title claims were made that might impact on the wreck'. It also recognises the owners' statutory entitlement under section 97 of the Marine and Coastal Area (Takutai Moana) Act to be provided with any agreement recognising a protected customary right of Māori.²⁸ The claimants argued that this clause privileges the interests of the owner over Motiti Māori, whose efforts to have their rights in the marine and coastal area have thus far been rebuffed by the responsible Minister. Claimant counsel submitted that this clause provides the *Rena* owners with a formal instrument in which their interest in the reef is agreed, while Māori continue to have no enforceable legal consideration.²⁹

- ▶ *Clause 2(c)*: Clause 2(c) commits the Crown and MNZ to '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'. The Crown submitted that this clause is 'intended to give the owner comfort that the Crown was not going to attempt "two bites at the compensation cherry"'. Crown counsel further submitted that the clause does not preclude the Crown from seeking greater mitigation conditions, including environmental conditions, in the resource consent process, 'provided those do not provide compensation'.³⁰ The claimants submitted that the clause captures a wider range of costs or compensation than the Crown argued, potentially including non-financial conditions that might indirectly benefit the Crown. Counsel argued that, because the clause applies even if the Crown decides to oppose the application, the Crown might therefore be limited in what conditions it can seek through the resource consent process.³¹
- ▶ *Clause 4*: Clause 4 commits the Crown and MNZ to 'in good faith consider making a submission or

submissions 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'. The Crown submitted that clause 4 is not a 'national interest test' but rather 'simply a list of factors designed to reflect all the things the Crown would consider when making a decision on whether to submit under the RMA [Resource Management Act 1991]'.³² Claimant counsel submitted that 'the likely cost and feasibility of complete removal of the Wreck' is an irrelevant consideration that fetters the relevant Ministers' discretion. It also 'pits Maori interest in protecting a taonga against broader national interests' and the interests of the *Rena* owners.³³

- ▶ *Clause 5*: Clause 5 provides that the owner will pay the Crown \$10.4 million, subject to certain conditions, including that the Crown not oppose the grant of a resource consent either 'directly or indirectly', that the Crown comply with clauses 2 and 4 of the deed, that the consents be granted, and that the owners incur a 'substantial cost saving'. The Crown submitted that the \$10.4 million is 'not significant and would not drive decision making'.³⁴ Instead, clause 5 secured 'the people of New Zealand the potential to share in . . . cost savings as accrued by the owner', were a consent to be granted.³⁵ The claimants disagreed, arguing that \$10.4 million is a significant figure and that it would influence the Crown's decision whether or not to support the owners' resource consent application.³⁶ Claimant counsel submitted that \$10.4 million is significant both in the context of the costs that the Crown was seeking to recover in its negotiations with the *Rena* owners and on a regional basis, were the sum to be applied in that manner.³⁷

The claimants argued that the cumulative effect of the provisions of the WRD is to place the *Rena* owners in a special position as compared to Māori. The result of this, the Wai 2393 claimants argued, is that 'The *Rena* owner is no longer an ordinary private citizen seeking consent'.³⁸ The Crown has therefore favoured the interests of the *Rena* owners above the interests of Māori.³⁹ The Wai

2391 claimants went further and submitted that, when its clauses are considered on a cumulative basis, the WRD is clearly a ‘sham agreement that does not reflect the true agreement between the parties.’⁴⁰

The Crown contested the claimants’ interpretation of the cumulative effect of the WRD and instead submitted:

The WRD does not, when considered in part or as a whole, and whether it is considered on its face, or in light of the documentary record available, prejudice the claimants nor give rise to a breach of the Treaty. The WRD does not put the *Rena* owner in a special position. The impact of the relevant clauses from the WRD . . . do not cause prejudice to the claimants, nor breach Treaty principles.⁴¹

In the event that the owner decided to apply for resource consent to leave the wreck on the reef, counsel for the Crown emphasised that the WRD preserves ‘the Crown’s ability to provide for Treaty interests.’⁴²

3.3.2 Tribunal analysis

As the submissions of the Crown and claimants indicate, there is some room for interpretation as to the effect of the clauses of the deed and the obligations that the Crown has therefore incurred, as well as their impact on Māori interests. The Crown has pointed out that we are in an unusual situation. Typically, disputes over the interpretation of contracts and clauses arise between the parties to the contract. In this instance, however, we are confronted with a situation where the dispute over interpretation has arisen between one of the parties to the deed (the Crown) and a third party (the claimants).⁴³ The case law on interpretation of contracts emphasises that contracts should be read on their face as far as possible, with the intentions of the contracting parties relevant where disputes arise. Interpretations should not, however, be ‘commercially absurd.’⁴⁴ In our context, that also seems to be the appropriate approach.

(1) Overview

For the most part, we are satisfied that the provisions of the WRD are largely benign when considered individually.

Generally, the effect of the clauses seems to be to recognise pre-existing rights or obligations or to create new, but minor, obligations. The way that the clauses have been interpreted by the Crown and the *Rena* owners in practice has reassured us that many of the possible interpretations suggested by the claimants were not intended by the parties to the deed or have at least not come to pass. For example, the claimants argued that on its face clause 2(a) contemplates a wide range of potential assistance by the Crown. But, in practice, very little assistance has been requested by the owners (indeed, just one request for publicly available information had been made at the time of our hearings).⁴⁵ Similarly, clause 2(c) could be interpreted as limiting the possible conditions that the Crown might seek in the resource consent process. As we will discuss in chapter 4, however, the Crown’s submission on the owners’ resource consent application has asked for enhanced monitoring conditions to be imposed. This indicates to us that the clause was not meant to exclude such conditions, especially as clause 2(c) applies regardless of whether the Crown supports or opposes the owners’ application.

The claimants placed a great deal of emphasis on the effect of clause 2(b) in submissions. However, we are not convinced that it has any particular effect beyond what is already provided for in the Marine and Coastal Area (Takutai Moana) Act 2011. That legislation is not at issue before us in this inquiry.

(2) Clause 4

However, the effect of clause 4 does not seem to be so minor. The claimants have suggested that this clause, in combination with clause 5, establishes a process that constrains the discretion of the Crown and incentivises it to make a submission in support on a potential resource consent application. In that process, the interests of Māori are subsumed under the broader ambit of ‘cultural interests’ and pitted against the interests of the owners (being the cost and feasibility of complete removal of the wreck).⁴⁶ The Crown has rejected this suggestion and submitted that the clause simply ‘makes provision for a step that the Crown would have to take in any event . . . namely, consider whether to make a submission.’⁴⁷ The Crown further

submitted that the factors listed in clause 4 would guide its consideration of any resource consent application.⁴⁸

In considering the effect of clause 4, there are two questions that must be answered in order to determine whether it affected, or had the potential to affect, Māori interests. First, do the obligations created by clause 4 go over and above the Crown's typical response to a resource consent application? Secondly, do the obligations created by clause 4 have the potential to impact the interests of Māori in the reef, particularly their exercising of kaitiakitanga? We now consider these questions in turn.

(a) *Do the obligations created by clause 4 go beyond the Crown's typical response to a resource consent application?* We received conflicting evidence about the Crown's typical approach to resource consent applications of this nature, both whether it would normally contemplate making a submission as a matter of course and the factors that it would consider in deciding to make a submission. Graeme Lawrence, the planner for the Motiti Rohe Moana Trust, told us that, in his experience, the Crown typically 'seeks to remain neutral and separate from the entire process'.⁴⁹ Mark Sowden, the deputy secretary for the Ministry for the Environment, however, suggested that the Crown at least considers its position on resource consent applications much more frequently and that clause 4 merely reflects the factors that it would consider relevant for 'any resource consent application'.⁵⁰

It should be noted that the resource management regime does not preclude Crown involvement in the process. Further, sections 143 and 149ZA of the Resource Management Act 1991 specifically grant the Minister for the Environment (and, in some cases, the Minister of Conservation) the power to intervene in matters of national significance. Those interventions can include 'calling in' an application (with the result that an application is referred directly to the Environment Court or a board of inquiry for determination) or making a Crown submission on an application. Cabinet guidelines are that, when the Minister for the Environment is considering whether to make a submission, the Minister should have regard to factors, such as 'the national significance

of the proposal, the level of public interest and whether other portfolios might be affected'. If the Minister decides to make a submission, then it should represent a whole-of-government view and needs to be approved by Cabinet before being lodged.⁵¹ However, the Crown does not consider the *Rena* owners' resource consent application to be a matter of national significance.⁵² While the Crown followed a process 'consistent with the process for nationally significant issues', it was 'the particular legal and Treaty obligations to be considered' that motivated the Crown's consideration of the owners' application here.⁵³

The 'legal obligation' referred to appears to be clause 4 of the WRD, which created a 'good faith' obligation on the Crown, vis-à-vis the *Rena* owners, to consider whether to support a resource consent application to leave the wreck on the reef. This obligation, particularly its 'good faith' aspect, arose only because of the deed: it would not exist otherwise. Both Dr Palmer and Crown counsel argued that 'good faith' here was simply a 'necessary form of reassurance to the owner that it would robustly consider its position'.⁵⁴ However, 'good faith' has a specific meaning in the private-law contractual context, emphasising 'faithfulness to an agreed common purpose and consistency with the justified expectations of the other party'.⁵⁵ This must be distinguished from the duty to act reasonably, honourably, and in good faith, which the Crown owes Māori at public law and which emanates from the principle of partnership and mutual benefit. It is difficult to see how a contractual obligation of good faith to the *Rena* owners can be reconciled with the Crown's duty of good faith to Māori, particularly when the interests of those two parties seem to be wholly opposed in the present circumstances.

In addition to obligating the Crown to consider whether to make a submission in support, clause 4 also establishes a test by which the Crown is to make its determination. Under the clause, the Crown must take into account 'the environmental, cultural and economic interests of New Zealand and the likely cost and feasibility of complete removal of the Wreck'. The first three of these criteria – 'the environmental, cultural and economic interests of New Zealand' – can be said to be very similar to a national interest test. However, the final criterion – 'the likely cost

and feasibility of complete removal’ – is more novel. The claimants submitted that it appears to mostly contemplate the interests of the owners.

We have some concerns about the construction of this test. The inclusion of ‘cultural interests’ in clause 4, Dr Palmer told us, was intended to be read as – and understood by the *Rena* owners to mean – ‘Treaty of Waitangi considerations and Māori interests.’⁵⁶ If that was the case and it was not intended to include other ‘cultural interests’, such as recreational fishing or diving, we do not understand why clause 4 could not expressly refer to Treaty interests. The WRD is concerned with the process by which the *Rena* will either be removed from or remain on Otaiti – a taonga in a vulnerable state that the Crown has a Treaty duty to actively protect. That significance should have been expressly acknowledged, rather than subsumed within the general language of ‘cultural interests’.

We are also concerned with the apparent inclusion of the interests of the *Rena* owners in the clause 4 test. The Crown submitted that there is ‘no in-built weighing of one set of factors against another’ and that the words ‘costs and feasibility of complete removal’ are also capable of being viewed as being ‘in the interests of the reef’.⁵⁷ For example, the Crown suggested that costs are relevant, because

if . . . the Crown did not consider what the costs were in removing the wreck . . . there is a possibility that the *Rena* owner could seek to avoid their obligations, leaving New Zealanders with the liability of the wreck.⁵⁸

Such an outcome would also be relevant to ‘the wellbeing of Otaiti and those with connections to it’.⁵⁹ Similarly, the Crown argued that the feasibility of complete wreck removal is relevant if such an approach were to ‘endanger the reef further, and/or human life’.⁶⁰

We do not challenge the Crown’s view that these factors are relevant considerations. However, we do question whether they could be considered only under the category of ‘costs and feasibility’. Indeed, they seem much more relevant to ‘the environmental, cultural and economic interests of New Zealand’. If they were not to be

considered under some of those categories, it is difficult to imagine what might be, particularly in terms of the economic interests of New Zealand. Ultimately, we are not convinced that the category of ‘costs and feasibility of complete removal’ was intended to contemplate anything other than the interests of the *Rena* owners. Whether or not any weighting is specifically attributed to the factors in the test, the inclusion of the interests of the owners introduced a new factor into the Crown’s decision-making on its position on a resource consent application. That created the potential for Māori interests either to receive less weight than would otherwise be the case or to be considered as only one factor, deserving of no more consideration than the private interests of the *Rena* owners. We note that, although clause 5 has proven not to be a determinative consideration in the Crown’s decision-making, its inclusion in the deed has much the same effect for Māori. The evidence provided to us indicates that the possibility of receiving \$10.4 million was clearly a consideration in the Crown’s decision-making.⁶¹ That represents a further departure from the typical situation.

We therefore consider that clause 4 does represent a departure from the typical situation for Crown considerations as to whether to lodge a submission in respect of a resource consent application, in terms of both the obligation of ‘good faith’ to the owner that it creates for the Crown when considering whether to make a submission in support and the inclusion of the interests of the owners in the test by which the Crown is to reach its position.

(b) *Do the obligations created by clause 4 have the potential to impact the interests of Māori in the reef, particularly their exercising of kaitiakitanga?* Our second question relating to clause 4 is concerned with the extent to which its operation could potentially impact the interests of Māori in the reef, particularly their exercising of kaitiakitanga. That the Crown has agreed to incur obligations to the owners over and above the typical legal position is not conclusive proof of a Treaty breach. For Māori interests to be affected by the operation of the clause, the Crown’s potential support for the owners’ resource consent application would need

to be influential. Crown counsel emphasised to us that the Crown is not the decision maker in the resource consent process. Counsel argued that the Crown, were it to make a submission, would just be a submitter and that its 'decision to submit will not be determinative of the outcome'.⁶² Crown counsel therefore seeks to downplay the influence that a Crown submission may have in the resource consent process.

Strictly speaking, it is true that the Crown will be just one submitter in the resource consent process. However, in reality, an all-of-government submission has the potential to be very influential. This was acknowledged by the Attorney-General in his 8 August 2014 press conference announcing the Crown's decision to submit in partial opposition to the owners' resource consent application. Asked how persuasive he thought the Crown's submission would be, he responded:

Well, I would have thought that it would carry quite a lot of weight. It should do because it's a very carefully considered submission prepared over quite some time.⁶³

There are two factors that distinguish the Crown from other submitters in the resource consent process and that lend its submissions greater persuasive power and weight. First, there is the fact that the Crown, when making an all-of-government submission, does not approach a resource consent application in the same fashion as most submitters. As we discussed in section 3.3.2(2)(a), rather than considering the impact of a proposal largely in terms of its own interests, the Crown instead engages in a weighing exercise of different considerations in the national interest and comes to a position that attempts to reconcile those competing considerations. Secondly, the Crown is able to approach a resource consent application in such a way, and then prepare a 'carefully considered submission', because of the significant resources that are available to it, particularly compared to the claimants. For instance, in determining its position on the owners' resource consent application, the Crown conducted desktop reviews of the technical reports filed by the owners. In doing so, it

appears to have undertaken a reasonably thorough review of the owners' resource consent application – certainly one far more comprehensive than the claimants would have been able to with the limited resources available to them at such an early stage in the process. If the Crown continues to play an active role throughout the hearing of the application in the Environment Court, it seems likely that it will be one of the most well-resourced participants.

These resources place the Crown in a potentially powerful position in the resource consent process. In general, if it supports an application or remains neutral, it would be unlikely to bring its available resources to bear as the application is heard, leaving those submitters opposing the application alone to do so. But if the Crown opposes an application and decides to take an active part in the process, the applicant has a powerful, well-resourced submitter to contend with. The *Rena* owners were surely aware of the potential for the Crown to play such a role in the resource consent process. The commercially sensible option in such circumstances would be to encourage or oblige the Crown to consider making a submission in support of their application. That is a possible advantage that clause 4 sought to secure for the owners.

(3) Conclusion

Seen in these terms, the position that the Crown takes in the resource consent process clearly can be powerful and persuasive. The Environment Court decision will in turn have implications for the claimants, their taonga, and their exercising of rangatiratanga and kaitiakitanga over the reef – matters in which the Crown has a duty of active protection. Clause 4 does not guarantee that the Crown will support the owners' resource consent application. That option was of course always open to the Crown if it considered that the national interest required it. But clause 4 does go beyond the Crown's typical position, committing it to consider 'in good faith' whether to support an application with regard to the interests of New Zealand (which in this case includes 'cultural interests'), as well as the interests of the *Rena* owners. When considered alongside the other clauses of the deed, we agree with

the claimants that the deed on its face appears to place the owners in a special position in relation to a potential resource consent application. Given the resources that the Crown can bring to the resource consent process, we find that there was potential for the operation of the WRD to significantly affect the interests of Māori, including their exercising of kaitiakitanga.

3.4 DID THE CROWN DISCHARGE ITS TREATY OBLIGATIONS BEFORE ENTERING INTO THE WRD?

In chapter 2, we outlined the Treaty obligations that the Crown owed Māori prior to entering into its settlement with the *Rena* owners. We now move on to assess the Crown's conduct in entering into the WRD against these standards.

3.4.1 Submissions

Claimant counsel submitted that, in signing the WRD,

the Crown felt that it did not need to know if the reef was a taonga or not. . . . The implication of this is that the Crown, in its negotiations with the owner, to the extent that it did consider its obligations under the Treaty, did so on the basis that it did not need to know if the reef was a taonga or not and therefore whether Article 2 was positively engaged.⁶⁴

The claimants argued that, in not consulting with Māori before it entered into the deed with the *Rena* owners, the Crown has failed to discharge its duty of active protection. Wai 2393 claimant counsel submitted that the WRD represented a change in Government policy 'from "complete removal" to either complete removal or less than complete removal and \$10.4m to recover some of the public costs from the wreck'.⁶⁵ Counsel argued that it should have been obvious to the Crown that such a sharp alteration 'would come as an unpleasant surprise to Maori'.⁶⁶

The Crown submitted that its settlement with the *Rena* owners did not impact Māori interests. Counsel submitted that it would be only 'when facing an application for consent, that any obligations of good faith [would] arise'.⁶⁷ Moreover, the Crown argued:

Under the WRD the Crown retained to itself full capacity to meet its Treaty obligations and protect Treaty interests when determining its substantive position on the consent application.⁶⁸

In these circumstances, Crown counsel submitted that consultation was not necessary prior to entering into the WRD. The Crown also argued that, in the circumstances of confidential without-prejudice negotiations, 'Consultation could have been very damaging to obtaining a successful settlement'.⁶⁹

3.4.2 Tribunal analysis

The Crown has emphasised several times during our inquiry that the context in which its settlement with the *Rena* owners was negotiated is critical to understanding its actions. Crown counsel has pointed to the need to recover compensation and ensure removal of the wreck to the extent required by New Zealand law against the backdrop of a contestable legal situation and a foreign-owned one-ship company that the Crown perceived to pose a risk of abandoning its legal obligation to remove the wreck.

We are sympathetic to the position that the Crown found itself in and can understand its motives for negotiating a settlement with the owners. The Crown's right to govern in the interests of New Zealand must include entering into commercial settlements with third parties to recover expenditure arising from situations like the grounding of the *Rena*. This was clearly a particularly complex situation, with a delicate balancing of numerous – and frequently competing – interests. On the one hand, the Crown was exercising kawanatanga on behalf of New Zealanders as a whole in an international negotiation with foreign shipowners. On the other hand, the Crown also had a duty to protect specific Māori interests in line with its Treaty obligations. Although we are here assessing the Crown's Treaty conduct, we are entirely aware of the wider context in which the Crown was operating.

To determine whether the Crown discharged its Treaty obligations prior to entering into the WRD, we need to ask two questions. First, was the Crown adequately informed of Māori interests when it entered into the WRD? Secondly,

was consultation necessary prior to entering into the WRD for the Crown to discharge its Treaty obligations?

(1) Was the Crown adequately informed of Māori interests when it entered into the WRD?

At the most fundamental level, in order for the Crown to fulfil its duty of active protection, it needed to be aware of the interests and resources that it had an obligation to protect, particularly when it entered into the WRD. We consider that there is a distinction to be drawn between the extent of knowledge of Māori interests in the reef that was required when the Crown entered into negotiations and when it entered into the WRD. As we noted above, Dr Palmer explained that ‘going into these negotiations the Crown was not intending to and did not negotiate about anything that it considered was going to impact on Māori interests in the reef’.⁷⁰ However, the Crown also submitted that it ‘was aware of its Treaty obligations when entering into the WRD’.⁷¹

We understand that, when the Crown first entered into negotiations with the owners, it may have been purely a cost-recovery exercise in which Treaty interests did not appear to be directly relevant. Nonetheless, the circumstances were that the *Rena* was lodged very prominently on the reef and a Māori community was in close proximity on Motiti Island. That situation required the Crown to at least be aware of its Treaty obligations and to have a general understanding of Māori interests in the reef. That would include an appreciation of who had interests in the reef, as well as the likely nature and extent of those interests.

The evidence suggests that the Crown, and those involved in the negotiations, likely did have a general understanding of Māori interests in the reef and its significance to Māori. Around the same time as the negotiations commenced, the process of putting together the *Rena Long-Term Environmental Recovery Plan* was concluding. That strategy recognised the connection that Māori have to the local environment and to Otaiti in particular, and it involved Māori in the governance structures of the recovery process. The Ministry for Transport, the Ministry for the Environment, and the Department of Conservation

were all involved in the drafting of the recovery plan; they also all had at least some role in the negotiations with the *Rena* owners. As we noted above, the recovery plan was sufficiently clear on the matter to inform Dr Palmer’s personal view that ‘the reef was likely to be regarded by Māori as a taonga’, though we do not know how widely shared his view was within the Crown negotiating team.

In the context of commercial negotiations that sought the recovery of expenditure, we consider that the Crown’s general understanding of Māori interests in the reef and its significance to Māori was sufficient for these purposes. However, when the negotiations turned to the possibility of the ship remaining on the reef – and the role that the Crown could play in supporting any efforts by the owners for that to happen – the position changed. At that point, the Crown needed to be able to assess the potential effects that such an agreement might have on Māori interests. What was then required was a more thorough assessment of whose interests were affected by the presence of the wreck on the reef, the nature of those interests, and the potential effects that a successful resource consent application to leave the wreck on the reef could have on those interests. The negotiations were conducted over the period of nearly a year, so it is likely that there was sufficient time for the Crown to conduct such an assessment. This is particularly so given the amount of information already available to the Crown.

Instead, as we outlined in section 3.2, the Crown received no specialist advice or information on the significance of Otaiti or the nature or extent of Māori interests in the area during the course of its negotiations with the owners. The Crown apparently did not receive any advice along these lines until June 2014, when it received Dr Grant Young’s customary interests report, produced in preparation for the Crown’s decision on whether to support the owners’ resource consent application.⁷² That report, as we noted in our interim report, included an assessment of the groups with interests in the reef, the values held in the reef, and the impact in cultural terms of either full or partial wreck removal. It was this information that we consider the Crown needed to have before it entered into the WRD. The result of receiving this information at such a late

stage was that, even though Dr Palmer had formed a personal view during the negotiations that the reef was likely to be a taonga, the Crown did not formally accept that it was until after having received Dr Young's report.

The level of awareness that the Crown had of Māori interests in the reef goes to the heart of the Crown's duty of active protection, as well as its duty to make informed decisions about taonga. The Crown has argued that there was 'no decision at the time the Deed was entered into, or later, that contemplated exercising Article 1 powers inconsistent with Article 2 interests at stake'. Thus, it submitted, no Treaty obligations were engaged or breached.⁷³ In our view, by continuing negotiations beyond the issue of compensation to encompass terms that address in detail the possible response of the Crown to a resource consent application to leave the wreck in whole or in part on the reef, the Crown was venturing into obligations that could potentially alter or constrain its typical response to such an application. To make an informed decision in those circumstances, as Treaty principles demand, it had to have a reasonably thorough understanding of the nature and extent of Māori interests that might be affected by a resource consent application, and how those interests might be affected, before incurring the obligations contemplated by the WRD. The evidence suggests, however, that at the time that it entered into the WRD the Crown had taken no further steps to inform itself and had no more than a general understanding of those issues.

(2) Was consultation prior to entering into the WRD needed for the Crown to discharge its Treaty obligations?

With that in mind, we next need to consider whether Treaty principles required the Crown to consult with Māori prior to entering into the WRD. As we set out in chapter 2, the duty to consult is not absolute, and the test of what consultation is reasonable in the prevailing circumstances depends on the nature of the resource or taonga and the likely effects of the policy, action, or legislation. Consultation is not open-ended, and the Crown can act if it has sufficient information to make an informed decision.⁷⁴ The duty to consult is not just relevant to active protection; the Court of Appeal has remarked that

consultation is also an effective way for the Crown to demonstrate that it is acting reasonably, honourably, and in good faith.⁷⁵ We have also found that in the special circumstances of this case, where the reef was in a vulnerable state due to the actions of a third party, the Crown needed to undertake more robust action than usual, not less.

The Crown argued that consultation was not necessary when entering into the WRD because Māori interests were not being impacted by the settlement with the *Rena* owners and because, in any case, the WRD preserved its ability to meet its Treaty obligations once a resource consent application had been filed. In the Crown's view, consultation with Māori at the time that it came to make its decision on whether or not to submit in support of an application would be sufficient to discharge its Treaty obligations. The Crown further argued that, in the circumstances, consultation would not have been practicable and could have imperilled its objectives of receiving compensation and having the wreck removed to the extent required by New Zealand law. Dr Palmer told us:

if there had been public consultation, which I would have thought you would need in a proper Treaty compliant consultation process, then I would have expected that the public nature of that consultation would have undermined the negotiating environment and potentially fatally imperilled it.⁷⁶

Dr Palmer also suggested that 'the owner's delicacy' may have caused them to take fright if the Crown had pressed for consultation with Māori, particularly in circumstances where the owners had not then even been on a marae.⁷⁷

The first question we need to consider is whether the circumstances were such that some form of consultation with Māori was necessary prior to the Crown entering into the WRD with the owners. To do so requires an evaluation of the nature of the taonga, as well as the likely effects of the policy, action, or legislation. We have already expressed the view that the Crown needed to undertake more robust action than usual. Furthermore, we have found that the WRD had the potential to significantly affect Māori interests in the reef by contractually obliging the

Crown to an agreement that altered its typical approach to resource consent applications. Those obligations did not preclude the Crown from opposing the owners' resource consent application, as has been demonstrated nor from consulting Māori in coming to that decision. However, they did introduce new considerations into the Crown's decision-making process on the owners' resource consent application, including the interests of the *Rena* owners and the opportunity for the Crown to gain an additional \$10.4 million. The *Rena* owners were therefore in a special position compared to a normal applicant, and vis-à-vis Māori. Consultation after the signing of the WRD had to occur within those constraints and so could not inform the Crown's decision before incurring the obligations under the WRD. Given the potential for those obligations to affect Māori interests, the Crown needed to have more than a general understanding of the nature and extent of Māori interests and how they might be affected by the obligations contemplated under the WRD.

The Crown can make decisions without having consulted Māori if it has sufficient information to do so. However, as our discussion above indicates, we seriously doubt that the Crown had sufficient specific information about the nature and extent of Māori interests in and around the reef to make an informed decision here. We note in particular that Dr Young's report – which led to the Crown's eventual acceptance of the taonga status of Otaiti – draws on material from the cultural values assessments prepared by iwi and hapū as part of the process set out in the *Rena Long-Term Environmental Recovery Plan*.⁷⁸ Those assessments were not completed at the time that the deeds were signed. That indicates that some of the information necessary for the Crown to form an understanding of the nature and extent of Māori interests in the reef and of their significance was not easily available to it at the time that it entered into the deeds other than by talking to Māori. Those reports similarly detailed the impacts that the grounding of the *Rena* had had on the ability of Māori to exercise their interests, information that would also have been important for the Crown as it made its decision on whether to enter into the WRD.

We consider that these circumstances indicate that

some form of consultation with Māori was necessary prior to entering into the WRD in order for the Crown to be adequately informed. We next need to consider what level of consultation would have been reasonable in the circumstances. As noted above, Dr Palmer suggested that

public consultation, which I would have thought you would need in a proper Treaty compliant consultation process . . . would have undermined the negotiating environment and potentially fatally imperilled it.

We consider that Dr Palmer's interpretation of 'Treaty compliant' consultation, although only vaguely expressed, is much too narrow. We note again that the level of consultation required in Treaty terms depends on the prevailing circumstances. Consultation needs to be meaningful and useful, but there is no prescribed form that it must take. The circumstances here, in particular, required a flexible and 'fit for purpose' approach from both the Crown and Māori. We do not, however, consider that the circumstances justified not undertaking any form of consultation at all.

In determining the level of consultation reasonable in the circumstances, we need to consider both the practicality and the purpose of consultation. In terms of practicality, the Crown has asserted that the owners might have walked away from the negotiations and their legal obligations to remove the wreck if the Crown had conducted consultation with Māori. Ultimately, we do not have enough evidence before us to assess this assertion. Removal of the wreck has certainly been a costly operation – the second most expensive of its kind in history. On the other hand, the owners of the *Rena* are insured. Their insurer, the Swedish Club, is regarded as 'one of the world's leading marine liability insurers', and it committed in October 2011 to meet the owners' obligations in relation to the *Rena* 'in full'.⁷⁹ Further, as Dr Palmer told us, the owners have been particularly concerned about protecting their 'commercial reputation'.

However real the risk of the owners walking away was, we are, as we have stated above, aware of the difficult balancing of interests that the Crown had to undertake in

these negotiations. We accept that those circumstances would have made it difficult for consultation to include reference to the precise terms of the deeds prior to their signing, as that may have imperilled any settlement being reached at all. However, we consider that there was a reasonable and practical alternative to the kind of wide-ranging consultation that the Crown dismissed as impracticable.

That alternative was consultation designed to determine the extent of Māori interests in the reef and to identify Māori concerns about the possible impacts of a resource consent application to leave the wreck *in situ* in whole or in part. We consider that consultation on such general terms as to a process that was always available at law to the *Rena* owners would not have required the Crown to breach commercial confidence as to the detail of the clauses under negotiation. If the possibility of the owners walking away from the negotiations remained a concern, the Crown could have drawn on the relationships that it had built up with Māori in the region through the settlement of historic Treaty claims, the *Rena Long-Term Environmental Recovery Plan* process, or Te Moana a Toi Iwi Leaders Forum in order to conduct consultation on a more informal basis.

Consultation along these lines would have provided the Crown with the information it needed to make an informed decision before incurring the obligations under the WRD, namely the nature and extent of Māori interests in Otaiti, as well as their general responses to the possibility of the wreck remaining or to possible conditions to be imposed if parts of the wreck could not be safely removed. In that way, Māori could have had a role in informing the Crown's decision on whether to enter into the WRD, rather than being entirely excluded. Such consultation, for example, would have almost certainly revealed that Māori did not share the Crown's confidence as to the benign nature of the type of obligations being considered under the WRD. That may have given the Crown pause before it entered into the WRD or at least the opportunity to formulate a better strategy for how it would act once the deeds had been signed. Finally, we also consider that consultation of this nature would have demonstrated that

the Crown was acting in good faith and seeking to make an informed decision before entering into any settlement with the *Rena* owners, therefore discharging its Treaty obligation of good faith in these unusual circumstances.

We therefore find that, before the Crown entered into the WRD, a broader consultation in the terms described above was both necessary and practical. By not undertaking any consultation prior to signing the WRD, the onus was on the Crown to demonstrate utmost good faith in its dealings with Māori, and in its efforts to actively protect their rangatiratanga and the taonga of Otaiti, in the subsequent period. That required both open disclosure of the relevant parts of the settlement when it was announced and active protection in the time leading up to, and including, the resource consent process. We assess the Crown's conduct on those measures in chapter 4.

Notes

1. Submission 3.3.1, pp 1–2
2. Ibid, p 2
3. Ibid, p 11
4. Submission 3.3.8(b), p 8; paper 3.1.50, pp 15–16
5. Document A15, p 3
6. Transcript 4.1.1, pp 214–215
7. Ibid, pp 252–252
8. Document A25, p 406
9. Document A15, p 3
10. Transcript 4.1.1, p 201
11. Document A3, p 3
12. Document A15, p 3
13. Costamare is described on its website as 'one of the largest independent owners of containerships in the world': 'Background', Costamare Incorporated, <http://www.costamare.com/aboutus/background>, accessed 3 November 2014.
14. Transcript 4.1.1, p 218
15. Document A15, p 7
16. Transcript 4.1.1, p 202
17. Submission 3.3.8(b), p 8
18. Document A15, p 4
19. Transcript 4.1.1, p 215
20. Ibid, pp 214–215
21. Ibid, p 212
22. Ibid, p 215
23. Document A15, p 9
24. Submission 3.3.8(b), p 26
25. Submission 3.3.10(a), p 66; submission 3.3.1, pp 12–13

26. Submission 3.3.8(b), pp 18–19
27. Submission 3.3.10(a), p 34; submission 3.3.11(a), p 11
28. Submission 3.3.8(b), pp 27–28
29. Submission 3.3.10(a), pp 69–70; submission 3.3.11(a), p 32–33
30. Submission 3.3.8(b), p 19–20
31. Submission 3.3.10(a), pp 37–39; submission 3.3.11(a), pp 7–9
32. Submission 3.3.8(b), p 21
33. Submission 3.3.11(a), p 15
34. Submission 3.3.8(b), p 24
35. Submission 3.3.3, p 11
36. Submission 3.3.10(a), p 62
37. Ibid; submission 3.3.11(a), pp 17–19
38. Submission 3.3.1, p 12
39. Submission 3.3.4, p 3
40. Ibid; submission 3.3.10(a), p 5
41. Submission 3.3.8(b), p 12
42. Ibid, p 17
43. Transcript 4.1.1, p 126
44. *Vector Gas Ltd v Bay of Plenty Energy Ltd* [2010] NZSC 5 at paras 8–9, 66
45. Document A20, p 7
46. Submission 3.3.1, pp 2–3
47. Submission 3.3.3, p 10
48. Submission 3.3.8(b), p 21
49. Document A17, p 4
50. Document A7, pp 5–6
51. Document A14(a), pp 327–328
52. Document A20(b), p 3; paper 3.4.10(a), p 5
53. Document A20(c), p 2
54. Submission 3.3.8(b), p 23; transcript 4.1.1, p 205
55. Bryan Garner, ed, *Black's Law Dictionary* (St Paul: West, 2009), p 762
56. Transcript 4.1.1, p 224
57. Submission 3.3.8(b), pp 21–22
58. Ibid, p 22
59. Ibid, p 23
60. Ibid
61. For instance, Mr Sowden stated that the Crown was receiving advice as to whether it could seek conditions on the owners' resource consent application without breaching clause 5's restriction on 'indirect' opposition: see transcript 4.1.1, pp 176–177. See also doc A25, p 608, whereby the Minister of Local Government is advised by officials that 'The Deed does not prevent the Crown opposing the application. However, if the Crown does oppose the owner's consent application, the Crown will not receive the additional payment of \$10.4 million.' This indicates that the possibility of receiving \$10.4 million from the owners was to be a consideration in the Crown's decision-making process.
62. Submission 3.3.8(b), p 40
63. Attorney-General's press conference, video, 8 August 2014, <http://www.sunlive.co.nz/news/79258-governments-rena-stance-revealed.html>
64. Submission 3.3.1, pp 6–7
65. Submission 3.3.6, p [3]
66. Ibid, p [5]
67. Submission 3.3.8(b), p 12
68. Ibid, p 3
69. Ibid, p 8
70. Transcript 4.1.1, p 215
71. Submission 3.3.8(b), p 8
72. Document A14(a), pp 275–300. Although Dr Young's report is dated 12 June 2013, we believe this to be an error, because the instructions for Dr Young to prepare the report were not sent until 8 April 2014: see doc A14(a), p 269.
73. Submission 3.3.8(b), p 22
74. Waitangi Tribunal, *He Maunga Rongo: Report on Central North Island Claims, Stage One*, revised ed, 4 vols (Wellington: Legislation Direct, 2008), pp 1236–1237
75. *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 641 at 693
76. Transcript 4.1.1, p 208
77. Ibid
78. Document A14(a), pp 276–277
79. 'Rena Insurance Agreements', Swedish Club, <http://www.swedishclub.com/main.php?mcid=1&mid=111&pid=19&newsid=1004>, 17 October 2011

CHAPTER 4

THE CURRENT SITUATION AND OUR FINDINGS

4.1 INTRODUCTION

In this chapter, we turn our attention to consider developments since we released our interim report, including the resource consent process that is underway as we write this present report. We then make our findings on the Crown's conduct in signing the WRD and assess whether the claimants have suffered prejudice, particularly in light of the Crown's conduct in the time since the signing of the WRD and the release of our interim report. We conclude with our recommendations to the Crown.

4.2 DEVELOPMENTS SINCE OUR INTERIM REPORT

In this section, we consider what has happened in the four months since our interim report of 18 July 2014. We provide an update on the Crown's involvement in the resource consent process, consider the extent to which the Crown's submission on the owners' resource consent application has addressed the recommendations we made in our interim report, consider the Crown's conduct in relation to the release of expert reports prepared by London Offshore Consultants, and briefly comment on the Tribunal's findings in the recently released stage 1 Te Raki report.

In doing so, we draw upon both the Crown's submission on the *Rena* owners' resource consent application and the official advice that was provided to Cabinet in order to decide its stance on that application. These documents were supplied by the Crown on the request of the Tribunal after we received final closing submissions from the parties at the end of July. We did not seek further submissions from either the Crown or the claimants on these documents, though we did receive submissions on issues related to the disclosure of expert reports prepared for MNZ in preparation for the Crown's decision-making on the owners' resource consent application. We discuss those submissions in section 4.2.3.

4.2.1 The Crown's submission on the *Rena* owners' resource consent application

On 8 August, the Attorney-General announced that the Crown had decided to make a submission partially in opposition to the *Rena* owners' resource consent application to leave the wreck on the reef. The Crown submission calls for the removal of the bow section of the *Rena* and other associated parts and debris to a depth of 30 metres. For the parts of the wreck remaining below that level, the Crown proposes enhanced monitoring

and consent conditions. The Attorney-General said that the Crown had come to this decision by considering

the environmental, cultural and economic interests of New Zealand and the likely cost and feasibility of the complete removal of the wreck, including international comparisons.

Health and safety concerns and the ‘effect of the proposed consent on the social environment’ were also considered.¹

In his media statement, the Attorney-General emphasised that the Crown had ‘carefully considered through this process the principles of the Treaty of Waitangi’.² The covering letter attached to the Crown’s submission notes that the owners’ proposal to leave the wreck *in situ* is a ‘significant regional issue, including for Maori with strong cultural connections to the Reef, which they consider a taonga’.³ The submission contains one short section dedicated to ‘cultural values’, which in its entirety reads:

The owner’s assessment in relation to tangata whenua values records that tangata whenua consider the reef is a taonga, but currently focuses mainly on the value of Otaiti (Astrolabe Reef) as a food gathering resource. The limited focus is an insufficient acknowledgment of wider cultural values, including the values of tangata whenua living on Motiti Island, which is closest to the reef.

The Crown supports the ongoing involvement of iwi throughout the duration of the consent and the establishment of the proposed Kaitiakitanga Reference group.⁴

The submission also calls on the decision maker to seek further information from the applicant concerning, among other things, its ‘[a]ssessment of tāngata whenua values’.⁵

The rest of the submission is largely a technical assessment of the owners’ application, with a particular focus on the effects of leaving the wreck on the reef on marine and bird life, the natural character, and recreational values. The Crown considered that there were several points in the application requiring further clarity. It also sought enhanced monitoring conditions related to the effects of further ‘more than minor’ discharges and storm events.

4.2.2 The Crown’s response to our recommendations

In our interim report (see page 58), we made the following recommendations to the Crown:

Having regard to the factors outlined above, and the Crown’s duty to actively protect Māori and their taonga, the Tribunal:

1. Recommends that, in considering whether to make a submission in respect of the *Rena* owners’ application, the Crown should take into account the following matters:
 - (a) The adverse effects of the continued presence of the *Rena* in its rapidly degrading form on the reef, including: the bow section, which is wedged on the top of the reef, one metre below the low tide mark; the balance of the hull and superstructure, situated further down the reef, which is subject to strong ocean currents; the large debris field on and around the reef; and the potential for continued discharge as containing structures break down further, potentially releasing further contaminants.
 - (b) The effects on Māori as to the limitations on use of their taonga, which are significant either in direct physical terms, potentially from further discharges, and in perception terms, knowing of the existence of the vast debris tonnage lying in, on, and around the reef.
 - (c) The fact that the grant of a resource consent in these circumstances imposes solely adverse effects on the environment, including the affected community on Motiti.
 - (d) That the feasibility of removal or mitigation of adverse effects may be different depending on which part or parts of the wreck or its former contents are under consideration for retention, that is: the bow section, the balance of the hull and superstructure, or the large debris field on and around the reef.
2. Recommends that, in the event that the Crown decides to make a submission in respect of the owners’ application, whether in support, in opposition, or neutral:

- (a) It should submit that the decision maker accept that Otaiti is a taonga.
 - (b) It should submit to the decision maker that, as a consequence of the reef being a taonga, that status elevates the protection of Otaiti to be a matter of national importance in terms of section 6(e) of the Resource Management Act 1991.
 - (c) It should ensure that a Crown submission seeks that, if any consent were to be granted, monitoring and mitigating conditions be imposed to reduce to a sustainable level, as far as is possible, the effects on the taonga of Otaiti and on the coastal environment of Motiti and its community.
3. Recommends that, in the event that the Crown has not made all of its expert reports available to Māori, it do so immediately.
 4. Recommends that, given the unique nature of these circumstances and that the claimants are in a vulnerable position, the Crown consider how it can actively assist Māori to make their own submission on the resource consent application, beyond the limited contestable legal aid fund administered by the Ministry for the Environment.
 5. Suggests that the Minister of Local Government make her own submission on the resource consent application in her capacity as the territorial authority of Motiti.

The Crown's submission appears to have addressed several of these recommendations, noting the proximity of Motiti to the reef, recognising the three distinct sections of the wreck remaining on the reef, and calling for enhanced monitoring conditions. In addition, the Crown has also made available its expert reports to the claimants.⁶

However, as yet the Crown has not responded substantively to all of our recommendations, including some matters that we consider especially important. We will address these matters further in our recommendations in section 4.4, but we also wish to briefly comment on the advice that Ministers received in respect of these recommendations.

In our interim report, we recommended that the Crown submit that the decision maker in the resource consent process accept that the reef is a taonga. However, the

Crown's submission only goes so far as noting that Māori have 'strong cultural connections to the Reef, which they consider a taonga' and that 'The owner's assessment in relation to tangata whenua values records that tangata whenua consider the reef is a taonga'. One interpretation is that the Crown could be pointing out that the status of the reef as a taonga is beyond dispute, to the extent that even the owners accept that status. However, we consider that the Crown still needs to make its own position clear. It is important that, after having vacillated on the issue for so long, the Crown does not retreat from its acceptance before us of the taonga status of the reef. The Crown needs to be seen to be providing active protection of the reef in this regard.

We also recommended that the Crown consider how it could provide additional support to Māori in the resource consent process. It appears that the Crown does not intend to act on this recommendation. Official advice provided to Cabinet emphasised that the environmental legal assistance fund was available to the claimants and would provide adequate financial support for the resource consent process.⁷ Officials also raised concerns about the potential precedent effect of providing further funding.⁸ Our recommendation to the Crown was made with full awareness of the existence of the assistance fund. Indeed, we stated in our interim report (see page 55) that the amount of resourcing available under the fund would 'fall far short of the actual amount required', and we expressed concern at when in the process it would become available. We also addressed the question of precedent effect, noting that the combination of highly unique factors in this situation is unlikely to be repeated, and therefore unlikely to create any precedent. Resourcing was a particular concern for the claimants, and we believe that the Crown has a responsibility, particularly in light of its Treaty duty to actively protect Māori rangatiratanga, to ensure that Māori are able to fully participate in the resource consent process. We do not consider that the current resourcing framework allows for that degree of participation.

Finally, we note that the Minister of Local Government, in her capacity as the territorial authority of Motiti, ultimately decided not to make a submission in respect of the

owners' resource consent application. She instead encouraged members of the Motiti community to make their own submissions.⁹

4.2.3 London Offshore Consultants' expert reports

In mid-October 2014, as we were writing our report, counsel for the Wai 2391 claimants requested that the parties be permitted to file supplementary submissions concerning the Crown's conduct in relation to reports prepared by London Offshore Consultants (LOC) for the Crown's decision-making process on the *Rena* owners' resource consent application.¹⁰ These reports, commissioned by MNZ, relate to the feasibility, costs, and risks of full wreck removal and include an assessment of the owners' consideration of alternative methods for removal.¹¹ The Crown released the LOC reports to the claimants in September.¹²

The claimants submitted that the information contained in the LOC reports was directly relevant to the issues at question in our inquiry and should have been disclosed to the claimants and the Tribunal during hearings or before closing submissions.¹³ Counsel noted in particular that some of the information in the LOC reports directly contradicts submissions and evidence presented by the Crown during our inquiry, including where LOC cast doubt on the *Rena* owners' claims of the potential costs and danger of a wreck removal operation.¹⁴ Claimant counsel further submitted that the Crown's submission on the owners' resource consent application showed that it had failed to properly take into account its own expert advice, indicating that its position was predetermined by the WRD.¹⁵

The Crown rejected the claimants' arguments, submitting that the LOC reports were not 'relevant to the focus of the issues and the direction of the Tribunal on disclosure'.¹⁶ Moreover, the evidence and submissions presented by the Crown as to the costs and safety of wreck removal were not inconsistent with the LOC reports. Rather, its evidence and submissions were directed to explaining the Crown's reasons for entering into the WRD and responding to the claimants' submission that the Crown had reached a predetermined view on the owners' resource consent application in entering into the WRD.¹⁷ The Crown argued that it

reached a 'balanced decision' after 'considering all relevant matters' in making its submission on the owners' application. The 'environmental impact to Otaiti from removal or partial removal, and health and safety issues for divers, are matters to be tested by the Environment Court'.¹⁸

We are sympathetic to the claimants' concerns that the information contained in the LOC reports could have been disclosed at an earlier stage. Although the claimants only received the LOC reports in September, the evidence provided by the Crown indicates that the reports were available in draft form at the time of our hearing in late June and had been finalised by the time of closing submissions at the end of August.¹⁹ In this regard, the Crown's conduct in respect of the LOC reports reflects its overall reluctance with regard to issues of disclosure throughout our inquiry. The Crown's approach to disclosure has at times been resistant as well as selective in the nature and timing of the information released. We further note that, as we were finalising our report, the Crown, on 25 November, filed an additional expert report by Dr Grant Young assessing the owners' cultural report. The Crown originally received that report on 4 July 2014, but it was 'inadvertently overlooked' in the Crown's earlier release of expert reports.²⁰

However, in this case, we are not convinced that the LOC reports would have been especially relevant to our inquiry. The issues considered in the reports are ultimately for the Environment Court to assess, not us. Furthermore, we do not consider that the Crown's assessment of the LOC reports indicates a predetermined position on the owners' resource consent application. We are aware that the Crown engaged a number of experts in addition to LOC to review the owners' application. We do not expect that all of those experts would have arrived at the same conclusions on the different aspects of the application. In such circumstances, we consider that it was the Crown's prerogative to weigh the information that it had, and to have some level of confidentiality, as it decided its position on the owners' resource consent application.

4.2.4 The stage 1 Te Raki report

We have one final development to address before we move on to make our findings. As we were finalising the text

of our report in November 2014, the Tribunal released *He Whakaputanga me te Tiriti/The Declaration and the Treaty: The Report on Stage 1 of the Te Paparahi o Te Raki Inquiry*. In that report, the Tribunal found that the rangatira who signed the Treaty of Waitangi in February 1840 did not cede sovereignty to the British Crown. We note, however, that the Tribunal also made ‘no conclusions about the sovereignty the Crown exercises today’ and that the claims before us are contemporary claims, meaning that they are concerned with Crown acts or omissions that have occurred since 21 September 1992.²¹

4.3 OUR FINDINGS

In determining whether the claims before us are well founded, we need to consider whether the Crown breached Treaty principles in a way that was prejudicial to Māori or is likely to be prejudicial to Māori in the future. We have already made findings of Treaty breach in respect of the Crown’s failure to consult adequately with Māori as it considered whether to make a submission on the owners’ resource consent application. At issue in this report is whether the Crown’s conduct in entering into the WRD was in breach of Treaty principles and prejudicial to the claimants. In order to reach a determination on that point, and particularly on whether Māori were prejudiced by the Crown’s pre-deed conduct, we need to consider the complete context of the situation, including the events that occurred subsequent to the Crown entering into the WRD.

4.3.1 The Crown’s conduct in entering into the WRD

In our interim report (see page 57), we prefaced our findings with the following statement:

Although it is an unavoidable reality that this situation came about due to the actions of a third party, there is also a taonga in a vulnerable position and Māori whose kaitiaki obligations have been damaged. The Crown owes a duty of active protection to both. The extent of damage caused by the *Rena* to Otaiti and to the wider environment, it appears to us, should have placed the Crown on notice to approach its task with the utmost vigilance.

While that statement addresses the Crown’s consultation process on its resource consent submission, the same considerations should have guided its conduct prior to, and when entering into, the WRD with the *Rena* owners.

In chapter 3, we outlined the circumstances in which the Crown came to enter into the WRD, as well as the obligations that it incurred under that deed. Although the Crown’s negotiations with the *Rena* owners began as a cost-recovery exercise, the final agreement went further, with the Crown binding itself to consider, in good faith, making a submission in support of an application to leave the wreck on the reef. We have found that those obligations had the potential to significantly affect Māori interests, particularly if they resulted in the Crown making a submission in support of the owners’ resource consent application. We also found that, in incurring those obligations, the Crown was not adequately informed of the nature and extent of Māori interests in the reef. For the Crown to make an informed decision and actively protect Māori interests while incurring the obligations under the WRD, we consider that it was necessary and practical in the circumstances for the Crown to first consult with Māori on the nature and extent of their interests in Otaiti and their views on general resource management related issues. The Crown’s failure to consult with Māori in these circumstances had implications both for the extent to which it was informed as it entered into the deeds and for its relationship with Māori.

4.3.2 The Crown’s post-deed conduct

We consider that, although the Crown was not adequately informed of Māori interests when it entered into the WRD, due in part to its failure to consult with Māori, there remained an opportunity for the Crown to meet some of its Treaty obligations in the period after it had signed the WRD. In doing so, it could also have avoided or mitigated any potential prejudice arising from its conduct in the period before entering into the deed. The Crown put a great deal of emphasis on its ability to meet its Treaty obligations after the WRD was signed and, in particular, through the resource consent process. We therefore need to briefly assess the Crown’s conduct on this basis before

we move to make our findings on the period before the WRD was signed.

In terms of the Crown's duty of active protection, we consider that the Crown needed to be seen to take active steps to protect Māori and their taonga in the time leading up to, and including, the resource consent process. This included the period in which it was coming to make its decision on whether to support the owners' resource consent application, as informed by the test in clause 4 of the WRD.

In our interim report, we examined the Crown's consultation process prior to making this decision. We found (see page 57) that that process was inadequate and in breach of Treaty principles:

From the evidence that we have related above, it is clear to us that the Crown has failed to undertake meaningful engagement or robust consultation with Māori in relation to the *Rena* owners' resource consent application. As such, the consultation process has neither adequately informed the Crown of relevant Māori views on all aspects of the *Rena* owners' application nor adequately equipped Māori to participate usefully or with informed insight in the resource consent process themselves. We therefore find that the Crown's consultation has not fulfilled its duty to actively protect Māori in the use of their lands and waters, especially their taonga, and to actively protect Māori in the exercise of rangatiratanga over their taonga. The Crown has accordingly breached the Treaty principles of good faith and partnership.

As a result of these breaches, we found that the claimants had suffered, or were likely to suffer, the prejudice of the Crown not being fully informed of Māori views and values in respect of their taonga and of directly affected Māori not being adequately equipped to meaningfully engage in the resource consent process themselves. We further said (see pages 57 and 58) that:

Motiti Māori now know that the Crown has bound itself to consider, in good faith, supporting the application for resource consent to leave the wreck in place. If the application for resource consent is granted – and especially if it has the

powerful support of the Crown through an all-of-government submission – then Motiti Māori might well feel themselves forsaken by the Crown, and by the Minister charged with acting as their territorial authority. On the evidence before us, it is clear that they will consider themselves to have been left alone to suffer the consequences of a decision in which they played no meaningful part and through which they were rendered powerless to protect their taonga.

However, it appears that this situation has been avoided. We now know that the Crown decided to partially oppose the *Rena* owners' resource consent application. As we will explore further in section 4.4, that means that the Crown still has the opportunity to take further meaningful steps to demonstrate that it is actively protecting Māori and their taonga, Otaiti.

In terms of the Crown's duty to act reasonably, honourably, and in good faith after entering into the WRD, the Crown needed to ensure that it was open with Māori about the relevant terms of the WRD when its settlement with the *Rena* owners was announced. That does not appear to have happened. What we have seen of the Crown's conduct during the course of our inquiry has left us concerned about how it is approaching its Treaty partnership with the claimants.

It is clear that some form of consultation prior to the signing of the deeds would have done much to prevent the damage that has been caused to the relationship between the Crown and Māori. Dr Palmer acknowledged during our hearing that the terms of the WRD had 'clearly upset people' and had given rise to a perception that the Crown was not acting in good faith in incurring its obligations to the *Rena* owners.²² That perception could have easily been avoided, either by undertaking consultation prior to entering into the deeds or through a more open, free, and frank communication subsequent to the signing of the deeds. Such an approach would have done much to mitigate the damage caused by the Crown's failure to consult.

Both before and throughout our inquiry, the Crown relied on commercial confidentiality to attempt to limit the information available to Māori about its settlement with the *Rena* owners. Even though clause 13(e) of the

WRD provides for any of the parties to ‘disclose the Deed in legal proceedings as evidence of its response’ to the grounding, the Crown refused to release the deed until it was compelled to do so by the Tribunal.²³ Yet, previously, both the Crown and the *Rena* owners had selectively released significant details about the effect of the deeds publicly through the media. For example, the Minister of Transport’s September 2012 media statement announcing the deal with the owners gave the following details:

Under the agreements Daina Shipping will pay compensation of \$27.6 million to the Crown for costs incurred in clean-up after the ship grounded off Tauranga last October. A further \$10.4 million will be paid if Daina Shipping and The Swedish Club (the *Rena*’s insurers) decide to apply for, are granted, and use a resource consent to leave part of the wreck in place, reflecting their reduced salvage costs.²⁴

While the Crown released information about details which might normally be kept confidential, such as the monetary amounts involved in the settlement, it did not disclose the mechanism by which it could obtain the \$10.4 million from the owners. If, as the Crown submitted, the mechanisms set out in the WRD in no way altered its obligations in the Resource Management Act process or its Treaty obligations, then why was this a matter that needed to be kept confidential? In these circumstances, we understand why the claimants were both concerned about the Crown’s motivations in relation to the WRD and suspicious of the deed’s impacts. We do not consider that the Crown’s conduct in this regard was in accord with its duty as Treaty partner to act reasonably, honourably, and in good faith.

Similarly, we consider that the Crown has taken a narrow and pragmatic approach to other issues presented by this situation, which has only exacerbated the tensions that exist between it and the claimants. This approach was especially evident in the Crown’s consultation process with Māori as it came to make its decision whether or not to make a submission on the *Rena* owners’ resource consent application. That process was narrowly defined to inform only the Crown’s decision-making process. The

Crown then devoted minimal effort to achieve that task. The result of the consultation process was not the meaningful engagement that the Crown repeatedly told us it was seeking throughout our inquiry. The Crown’s conduct in this regard did not demonstrate a commitment to the Treaty partnership.

The Crown’s conduct in the period which followed its entry into the WRD has had a dramatic effect on its relationship with the claimants. At the same time as the Crown was building and maintaining a relationship with the *Rena* owners, which included its ‘good faith’ commitment to consider supporting the owners’ resource consent application, the Crown’s conduct was causing damage to its relationship with its Treaty partner. As we have said, we understand the Crown’s motivations for seeking the settlement with the *Rena* owners and the need to establish some degree of trust to ensure that they comply with their legal obligations to remove the wreck. However, those efforts should not have been at the expense of the Crown’s Treaty relationship with Māori. It is clear that the Crown is now faced with a lot of work in order to rebuild its relationship with the claimants.

4.3.3 Conclusion on breaches and prejudice arising from the Crown’s conduct in entering into the WRD

Having regard to the factors outlined above, we now need to determine whether the Crown’s conduct in entering into the WRD caused, or is likely to cause, prejudice to the claimants.

The potential primary prejudice resulting from the Crown’s conduct both before and after entering into the WRD concerned the decision whether to support the *Rena* owners’ resource consent application. If the Crown had chosen to support that application, it would have done so having incurred obligations to the *Rena* owners that had the potential to significantly affect Māori interests in Otaiti without having adequate knowledge of those interests, and having then failed to properly inform itself of Māori views prior to making its decision on whether to support the owners’ application. If the Crown had opted to support the *Rena* owners’ resource consent application in these circumstances, we have no doubt that the result

would have been prejudicial to Māori. As we said in our interim report (see pages 57 and 58), Māori would have justifiably considered themselves to have been 'left alone to suffer the consequences of a decision in which they played no meaningful part and through which they were rendered powerless to protect their taonga'.

However, in the time since we issued our interim report, the Crown has submitted in partial opposition to the *Rena* owners' resource consent application. By doing so, we consider that the Crown has avoided the primary prejudice that could have arisen as a result of the WRD and that caused concern in our interim report in relation to the Crown's post-deed consultation process. Although we have found many aspects of the Crown's conduct in relation to the WRD wanting, we find that the primary prejudice that could have arisen from the WRD has not occurred.

It is also clear that, on some other measures, the Crown's conduct both before and after it entered into the WRD has caused ongoing prejudice to the claimants. That is particularly so in terms of the effect of its conduct on its relationship with Māori. The relationship between the Crown and the claimants has clearly suffered, and we consider that the Crown's conduct is largely responsible. By failing to consult prior to entering into the deed, the Crown denied Māori the opportunity to inform its decision-making on an agreement that had the potential to significantly affect their interests, and it did so without being adequately informed about those interests. The Crown then exacerbated this failure by not releasing relevant parts of the WRD to Māori as soon as possible and by conducting an inadequate consultation process as it decided whether to make a submission on the owners' resource consent application. The Crown's conduct is especially concerning when we consider the work that it had put into building relationships with Māori through the *Rena Long-Term Environmental Recovery Plan* process and the settlement of historic Treaty claims in the Bay of Plenty region more generally. The Crown's conduct in this regard has diminished the Treaty partnership to the detriment of Māori and so has prejudicially affected the claimants.

We find that the Crown, in entering into the WRD

without having consulted Māori, failed in its duty to act reasonably, honourably, and in good faith. The Crown has breached the principle of partnership and mutual benefit and we find that the claims are well founded.

4.4 OUR RECOMMENDATIONS

In this report, we have been largely concerned with the Crown's conduct in the period prior to it entering into the WRD. However, our recommendations must take account of the prejudice suffered, or likely to be suffered, by the claimants as a result of the Crown's conduct throughout all the periods at issue in our inquiry. Some of the potential prejudice that we identified in our interim report has not arisen, largely as a result of the Crown's decision to submit in partial opposition to the *Rena* owners' resource consent application. However, other prejudice or likely prejudice that was identified remains: namely, the damage that the Crown's conduct has caused to the Treaty partnership, as well as the risk that the claimants will not be adequately equipped to meaningfully engage in the resource consent process.

We consider that the best way for the Crown to mitigate the prejudice and to begin to rebuild its relationship with the claimants is to fulfil its Treaty duty of active protection in the resource consent process, and so demonstrate that it is acting reasonably, honourably, and in good faith. Looking forward to the remainder of the resource consent process, we said in our interim report (see page 57) that:

whatever action the Crown now takes in respect of the resource consent process, it is incumbent upon it to actively protect Māori and their taonga. Given the inadequacy of its consultation to date, the Crown must ensure that it very visibly protects Motiti Māori interests in the forthcoming process.

The resource consent process is ongoing and at only a very early stage. Crown counsel emphasised in closing submissions that 'the filing of a submission is usually the start, not end, of the consent process for submitters, providing jurisdiction to later develop further and argue the

substance of the points raised.²⁵ It is unclear as yet what kind of role the Crown intends to play in the resource consent process, though it appears that the Attorney-General, Minister of Conservation, and Minister for the Environment have been delegated authority to decide on the extent of the Crown's involvement.²⁶

We consider it vital that the Crown now play an active role in the resource consent process. As discussed in chapter 3, with the resources available to it the Crown has the greater ability to call evidence on the wider range of the issues that will be before the Environment Court. It has already produced expert reviews of the reports submitted by the owners. Some of those experts, notably those employed by LOC, seem to be based in Singapore, adding to the cost and practicality of making them available as witnesses before the Environment Court. The Crown now needs to be an active and engaged participant in the remainder of the process. That will include calling its experts for questioning, rigorously testing the evidence produced by the owners in support of their submission, and continuing to press for enhanced monitoring conditions in the event that the application is approved. We also consider that the Crown needs to make clear to the Environment Court its acceptance of the significance of Otaiti to Māori and the implications that its taonga status should have for the resource consent process, something currently missing from the Crown's submission.

We consider that it is also important for the Crown to provide Motiti Māori with adequate support to participate in the resource consent process themselves. Māori will bring a unique voice and set of concerns to the process. Motiti Māori, as the community most directly affected by the grounding of the *Rena* on Otaiti, have a particular stake in the fate of the wreck. Given the complexity of the application and the issues that will be before the court, as well as the likely cost of producing evidence, we remain concerned that the current resourcing available to the claimants under the environmental legal assistance fund will be insufficient to ensure full and active involvement by Motiti Māori. We do not consider that the Crown has grasped the resourcing difficulties faced by the claimants. Having regard to the Crown's conduct in relation to

the *Rena* thus far, the prejudice suffered by the claimants as a result of its Treaty breaches, and its duty to actively protect Māori rangatiratanga, we think that it is incumbent upon the Crown in this highly unique set of circumstances to consider how it can actively assist Māori to participate in the resource consent process and to exercise their rangatiratanga.

In order to mitigate the prejudice suffered by the claimants, the Tribunal recommends that the Crown:

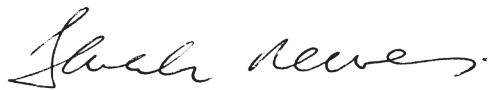
- ▶ participate actively in the resource consent process, paying particular regard to how it can protect Māori interests in that process, which may include calling its experts for questioning, rigorously testing the evidence produced by the owners in support of their submission, and seeking enhanced monitoring conditions in the event that the application is approved;
- ▶ in the hearing of the resource consent application, submit that the Environment Court accept that Otaiti is a taonga and that, as a consequence, the protection of the reef is a matter of national importance in terms of section 6(e) of the Resource Management Act 1991; and
- ▶ given the unique circumstances and the vulnerable position of the claimants, consider how it can actively assist Māori to participate in the resource consent process, beyond the limited contestable legal aid fund administered by the Ministry for the Environment.

Notes

1. Paper 3.4.10(a), p 1
2. Ibid
3. Ibid, p 5
4. Ibid, p 8
5. Ibid, p 11
6. Paper 3.4.14(a), p 61
7. Ibid, p 18
8. Ibid
9. Ibid, pp 58–59
10. Paper 3.4.20, pp 1–3. The presiding officer granted the leave sought: memo 2.7.10.
11. Paper 3.4.23, p 3
12. Paper 3.4.20(a)

13. Paper 3.4.24, p 12
14. Paper 3.4.21, pp 1, 8–9
15. Ibid, pp 1, 18–19
16. Paper 3.4.23, p 1
17. Ibid, pp 1–2
18. Ibid, p 2
19. Paper 3.4.25, pp 1–3
20. Paper 3.4.26, p 1; paper 3.4.26(a), p 1
21. Waitangi Tribunal, *He Whakaputanga me te Tiriti / The Declaration and the Treaty: The Report on Stage 1 of the Tē Paparahi o Tē Raki Inquiry* (Wellington: Legislation Direct, 2014), pp xxii–xxiii
22. Transcript 4.1.1, p 251
23. Document A11, pp 6–7
24. Document A24(a), p 202
25. Submission 3.3.8(b), p 42
26. Paper 3.4.14(a), p 30

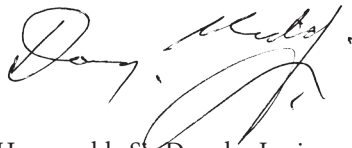
Dated at Wellington this 28th day of November 2014



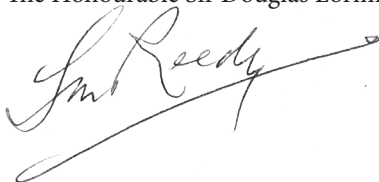
Judge Sarah Reeves, presiding officer



Ron Crosby, member



The Honourable Sir Douglas Lorimer Kidd KNZM, member



Emeritus Professor Sir Tamati Muturangi Reedy, KNZM, PhD, member



APPENDIX I

THE INTERIM REPORT ON THE MV RENA AND MOTITI ISLAND CLAIMS

1. INTRODUCTION

This interim report is the result of an urgent inquiry by the Waitangi Tribunal into Crown conduct following the grounding of the container ship the *mv Rena* (the *Rena*) on Otaiti (Astrolabe Reef) near Motiti Island on 5 October 2011.

The grounding of the *Rena* on Otaiti has been referred to as New Zealand's worst marine environmental disaster and the second most expensive salvage operation in maritime history.¹ The incident caused widespread pollution from oil, containers, debris, and other material to the Bay of Plenty, including Motiti Island. Māori living on or affiliating to Motiti were particularly affected by the pollution of the island's coastlines, the loss of kaimoana, and the damage to the nearby reef.

Maritime New Zealand led the Government response to the grounding, and the Crown spent \$47 million on that response.² Motiti Māori were among the Bay of Plenty communities that also contributed significantly to the clean-up effort.³

Following the grounding, the director of Maritime New Zealand issued notices under the Maritime Transport Act 1994 that defined the wreck as a hazardous ship (because of leaking oil and other pollution) and as a hazard to navigation. These notices require the complete removal of the wreck. They remain in force until either the ship is removed or other lawful means of dealing with the ship are achieved.⁴ Resource consent under the Resource Management Act 1991 is required to leave any part of the wreck on the reef.⁵

In late 2011, the Crown entered into negotiations with the owners and insurers of the *Rena* to settle the Crown's (and specific Crown agencies') claims arising from the grounding, particularly the \$47 million of Crown expenditure. Three related deeds of settlement resulted, which were signed in October 2012: the claims deed, the indemnity deed, and the wreck removal deed.⁶ Our inquiry has focused on the Crown's conduct in entering into these three deeds, in particular the wreck removal deed.

The claims deed settles the Crown's claims against the owners for \$27.6 million.⁷ Through the indemnity deed, the Crown has agreed to indemnify the owners against 'certain claims by New Zealand public and local government claimants' to a maximum extent of \$38 million.⁸ Through the wreck removal deed, the Crown has agreed that, if the owners apply for resource consent to leave part of the wreck in place, then it will 'in good

faith' consider making submissions in support. The wreck removal deed requires the Crown to decide whether or not to support the owners' application by 'taking into account the environmental, cultural and economic interests of New Zealand and the likely costs and feasibility of complete removal of the Wreck'. If the Crown does not oppose an application for consent ('whether directly or indirectly'), and the application succeeds, with the owners making a 'substantial cost saving', then the owners will pay the Crown an additional \$10.4 million for 'public purposes'.⁹ We understand that a similar deed obliges the Bay of Plenty Regional Council to consider submitting in support of any resource consent application.¹⁰ This deed has not been placed in evidence before us.

In late May 2013, the Waitangi Tribunal received two claims and applications for urgent hearings from the Ngāi Te Hapū Incorporated Society (Wai 2293), and the Motiti Rohe Moana Trust and the Mataatua District Māori Council (Wai 2291). Both claims relate to alleged Crown conduct in relation to the removal of the *Rena* from Otaiti. Both claims state that the complete removal of the wreck is necessary to restore the mauri of the reef.¹¹ Each claim was lodged in the understanding that the *Rena* owners would seek resource consent to leave the wreck on the reef.¹² The applicants shared concerns about whether the Crown would ensure that the wreck was removed and how the Crown was consulting with them.

Urgency was granted to both claims on 21 January 2014,¹³ and an urgent hearing was held in Tauranga from 30 June to 2 July 2014. It was necessary to expedite our hearing date because on 30 May 2014 the Astrolabe Community Trust, on behalf of the *Rena* owners, lodged a resource consent application seeking to leave part of the wreck on the reef. The closing date for submissions on that application was fixed at 8 August. During our hearing, Crown counsel informed us that Cabinet will meet on 28 July to decide whether the Crown will make a submission on the owners' resource consent application.

As signalled at the conclusion of the hearing, we considered it necessary to release this interim report in order to inform the Crown's imminent decision. This interim

report addresses two matters: first, the consultation process that has taken place subsequent to the signing of the wreck removal deed and, secondly, issues relevant to Resource Management Act matters that the Crown will take into account when making its decision whether to submit in support or in opposition or to abide the decision in the resource consent application.

We will consider the broader issues raised about Crown conduct during our inquiry in a substantive report to be released at a later date.

2. SUBMISSIONS

2.1 Claimant submissions

The claimants submitted that the Crown's consultation process subsequent to the signing of the wreck removal deed has been 'hollow', 'tick-box', and mere 'window-dressing'.¹⁴ They criticised the 'rushed' timeframes of the consultation process and the Crown's failure to provide them with the resources necessary to form an informed view on the owners' resource consent application.¹⁵ They submitted that the Crown's actions have been in breach of Treaty principles, including the Crown's duty to act honourably and in good faith and the duty of active protection. They further submitted that the Crown ought to be taking action of a more substantial nature and degree in order to fulfil its obligations under the Treaty. The claimants asked for recommendations that the Crown should not submit in favour of the *Rena* owners' resource consent application and that it provide resourcing for them to participate in the resource consent process themselves.¹⁶

2.2 Crown submissions

The Crown considered that its actions have been consistent with Treaty principles. Counsel submitted that the Crown's engagement with Māori began early and has not been passive.¹⁷ They argued that the 'essence of a duty of consultation is ensuring that the claimants and other affected Māori had the opportunity to make the Crown aware of their views' and that this has occurred.¹⁸ Although it had focused its efforts on conducting its own expert

assessment of the resource consent application, the Crown had offered to have experts present at hui.¹⁹ As a result of the clean-up process, consultation process, and Tribunal hearings, ‘the Crown’s view is that it should be well-informed of the perspective of local Māori communities.’²⁰

3. THE DUTY OF ACTIVE PROTECTION

The question at the heart of the claims is whether the Crown has adequately protected Māori and their relationship to their taonga, Otaiti, in accordance with Treaty principles. Our immediate task in this interim report is to determine whether the Crown has fulfilled its obligations under the Treaty during the consultation with Māori that has taken place since the signing of the wreck removal deed and to consider the circumstances that relate immediately to the Crown’s decision-making on the resource consent process as it stands.

The claimants have pointed to active protection as the most relevant Treaty principle to this stage of the inquiry, as it is to the wider inquiry as a whole. While the claimants have put their arguments in terms of a breach of the duty of active protection, we note that the duty arises from the principles of good faith and partnership. We do not consider the distinction determinative for our purposes. Although the Crown has insisted that its actions have remained in keeping with Treaty principles, both Crown counsel and one of the Crown’s key witnesses also noted that it was unclear how the Crown could go about fulfilling its duty of active protection in these circumstances.²¹ The parties disagree about the degree of action required of the Crown in the period under consideration in this report: whether the nature and extent of the Crown’s consultation has been sufficient and whether active assistance that went beyond consultation was required.

3.1 Relevant jurisprudence

Other Tribunals and courts, in considering how the duty of active protection applies to environmental issues, provide guidance in our consideration of the circumstances of this case. The Tribunal’s 2008 report on the central

North Island claims, *He Maunga Rongo*, articulated a two-fold duty of active protection: a duty to protect physical resources (lands, estates, and taonga) and a duty to protect rangatiratanga. The fundamental relationship created by the Treaty means that the Crown has a duty both to protect the environment itself and to protect Māori in their exercise of rangatiratanga over taonga.

The Privy Council expressed the nature of the Crown’s duty to protect taonga in finding that the level of protection required by the Crown may be higher where a taonga is in a vulnerable state.²² Tribunals since that decision have found that the degree of protection needed would depend on the nature and value of the taonga.²³ The central North Island Tribunal also considered that, while the Crown is not required to go beyond what is reasonable in the circumstances to protect Māori interests, it is required to consult with Māori.²⁴ Consultation, the Tribunal explained, is a duty derived from the overarching principle of partnership, through which the Crown has responsibility to ensure that proper arrangements for the conservation, control, and management of resources are in place. While consultation is not open-ended and the Crown may act if it has sufficient information on which to make an informed decision, it is not permissible for the Crown to limit the effect of the principles of the Treaty to consultation alone. The test of what consultation is reasonable in the prevailing circumstances depends on the nature of the resource or taonga and the likely effects of the policy, action, or legislation.²⁵ We would add that, in any situation that requires robust consultation, the Crown is required to ensure that Māori are ‘adequately informed so as to be able to make intelligent and useful responses’, as was found in the *Wellington Airport* case.²⁶

The central North Island Tribunal explained that the Crown’s duty of protection of Māori rangatiratanga over resources arises from article 2, which requires the Crown to provide ways for Māori to fulfil their obligations as kaitiaki, or guardian communities, over their taonga. This aspect of active protection has been more recently expressed by the Tribunal in *Ko Aotearoa Tēnei*, the report on the Wai 262 claims. Taonga, the Tribunal explained,

include particular iconic sites, such as mountains or rivers. Whether a resource or a place is a taonga is a matter that can be tested by establishing the nature of the relationship that Māori have with the resource or place. The Tribunal set out the relevant tests as follows:

Taonga have mātauranga Māori relating to them, and whakapapa that can be recited by tohunga. Certain iwi or hapū will say that they are kaitiaki. Their tohunga will be able to say what events in the history of the community led to that kaitiaki status and what obligations this creates for them. In sum, a taonga will have kōrero tuku iho (a body of inherited knowledge) associated with them, the existence and credibility of which can be tested.²⁷

Where it is established that a place or a resource is a taonga, then, the Tribunal continued, ‘it is the degree of control exercised by Māori and their influence in decision-making that needs to be resolved in a principled way.’²⁸ The Tribunal considered that the principled way to decide these questions was through the concept of kaitiakitanga, or guardianship. It considered that the degree of control that should be exercised by Māori will differ widely according to the circumstances, including the importance of the taonga in question, the health of that taonga, and any competing interests in it. In general, however, the Tribunal found that the Treaty requires the Crown to provide for fuller expression of kaitiakitanga, so that Māori can meet the obligations that arise from the rights of rangatiratanga.²⁹

3.2 He taonga

The matters that we are addressing in this interim report require us to consider the nature of the relationship of Māori to Otaiti, and how that relationship has been affected by the *Rena* grounding, in order to establish how the Crown’s duty of active protection applies in the current circumstances.

There is no question that Otaiti is a taonga of considerable importance to the claimants, one that is covered by the plain meaning of article 2. This was accepted by the Crown in our inquiry. During our hearing, we received

evidence that clearly points towards Otaiti being a site of significant cultural, spiritual, and historical importance to a range of hapū and iwi groups. The reef was named by Ngātoroirangi as the Te Arawa waka arrived in the Bay of Plenty. He is said to have performed karakia rendering the reef tapu and naming it ‘te taunga o ta iti te tangata’, meaning ‘the resting place of the people.’³⁰ We also received evidence about the specific significance that Otaiti holds for the people of Motiti Island, who believe that

Otaiti and the other islands, surface breaking reefs and rock outcrops are stepping stones for the wairua of our deceased, back across the sea to Hawaiki, the ancestral homeland.³¹

Elaine Butler told us that Motiti people have continued to offer karakia to the reef in ‘acknowledgement of our taonga and our sure belief that when the time comes for us to leave this life Otaiti is the beginning of our pathway home to our ancestors.’³²

In addition to its cultural and spiritual significance, Otaiti has long been utilised by a range of hapū and iwi groups as a traditional hapuka fishing ground and as a valuable traditional kaimoana gathering resource for other species, such as pāua, kina, and koura. Our hearing provided us with a strong impression of how Motiti people continued to use the reef until the *Rena* grounding. Those who fish on it would offer karakia to ‘acknowledge and preserve the life force or mauri of the reef [so] that it may continue to be a source of sustenance.’³³ After performing karakia, the first fish would be released, ‘as a thank you to the mauri of the reef.’³⁴ The karakia would be offered as an acknowledgement of their kaitiaki obligations to Otaiti.

The evidence that we received also demonstrated that the extent of damage caused to the reef by the *Rena* grounding has had significant effects on both the state of Otaiti and the ability of the claimants to carry out their kaitiaki obligations. The *Rena* remains a significant presence on the reef. The bow section of the wreck is wedged on the top of the reef, one metre below the low-tide mark, while the balance of the hull and superstructure is situated further down the reef, subject to strong ocean currents. There is also a large debris field (of up to 3,000 tonnes

of material) on and around the reef.³⁵ Buddy Mikaere emphasised the impact of this on the mauri of the reef, the principle which he said ‘envisages a pristine state’ where all elements are ‘perfectly in balance’. ‘The mauri or spiritual essence of our reef’, he said, ‘is unquestionably compromised by the *Rena* wreck’, which means that they are ‘unable to properly discharge’ their kaitiaki obligations.³⁶ The claimants have also been unable to use their fishing grounds near Otaiti because of the exclusion zone that has been in place over the wreck since the grounding. Mr Mikaere told us about how these effects inform the view of the claimants that the wreck must be removed in its entirety in order to restore the mauri of the reef.³⁷

3.3 The Crown’s duty in the circumstances

The current situation presents a unique set of circumstances for the Crown in exercising its duty of active protection. This is not a situation where a taonga has been damaged or depleted by Crown actions. Nor are we considering how to balance Treaty interests against other interests so as to provide appropriate kaitiaki influence. Rather, significant damage has been caused to the taonga by a third party, and the Crown’s duty of active protection is invoked directly within this context, after the damage has been caused. It has not been seriously suggested by any party that the Crown fulfil its duty of active protection by taking steps to remove the *Rena* itself, at least not at this time. All parties accept that it is the *Rena* owners’ responsibility at law to remove the wreck. However, the owners also have a legal right to pursue a resource consent application to leave the wreck, in part or whole, on the reef. It would also be unreasonable to expect the Crown to expend more public funds at a point when the *Rena* owners and insurer have entered into a process to have their application determined, which will affect whether the default legal position should be enforced at the *Rena* owners’ expense. As it appears likely that the resource consent application is to be referred to the Environment Court for a first-instance hearing, those issues will be for the court to decide, based on the facts of the case.

However, the Crown’s Treaty duties exist equally outside the resource management process as they do inside it.

It appears to us that the present situation has required and will require the Crown to take the following steps:

- To fulfill its duty of active protection of rangatira-tanga, at least so far as the resource consent process is concerned, the Crown must:
 - recognise which hapū and iwi have interests in the taonga;
 - recognise the nature of their relationship to their taonga and how the *Rena* grounding has affected that relationship;
 - ensure robust consultation, by providing information on the particularly complex resource consent application and the process itself, so that Māori are adequately informed and able to make ‘intelligent and useful responses’;³⁸ and
 - ensure meaningful engagement, by providing Māori with active support that will allow them to articulate the nature of their relationship with Otaiti and how the grounding of the *Rena* has affected their relationship, so as to allow full expression in the consent process of the interests affected and the reasons why Māori wish the wreck to be removed.
- To fulfill its duty of active protection so far as the taonga itself is concerned and the impact of a consent on affected Māori, the Crown must:
 - do as much as is reasonable to test the evidence on the feasibility of the removal of the wreck, cargo, and debris in order to form a view on whether to make a submission on the consent application and the nature of the submission;
 - seek the imposition of monitoring and mitigation conditions to protect the environment of the reef and Motiti Island on an ongoing basis from the effects of any material left *in situ*; and
 - seek that, in the event that a resource consent is granted, some positive and worthwhile reasonable mitigation offset is provided by the consent holder to affected Māori.
- Take active steps to look beyond the current process, taking into account the possible outcomes in the event of success or failure of the resource consent

application, and begin considering how the Crown's duties – both in relation to the taonga and in relation to Māori and their exercise of rangatiratanga – might be fulfilled.

We now turn to consider whether the Crown has fulfilled these duties in consulting Māori after the signing of the wreck removal deed.

4. TRIBUNAL ANALYSIS

The Crown began a process for seeking Māori views on a possible resource consent application in November 2013, when it was becoming clear that the *Rena* owners would lodge an application in the coming months, and it continued through to June 2014, following the lodging of the owners' application in late May 2014. In opening submissions, the Crown reassured the Tribunal that it had been 'undertaking a process of meaningful engagement with iwi' on the owners' resource consent application.³⁹ Our task is to assess if the Crown has achieved active protection in light of the obligations that it owes to Māori, as we have outlined above.

4.1 Important factors for consideration

There are several important factors, known to the Crown, which should have shaped how it went about consultation, particularly with the claimants.

First, there is the widely acknowledged fact that Motiti is an isolated and under-resourced island community. A briefing paper to the Minister of Local Government in March 2013 noted:

The only public infrastructure [on Motiti] is a telephone installation. There is no road network, water supply, sewerage system, public roads or footpaths, power or wired phone system. There are three private airfields and limited coastal access.⁴⁰

Such a situation obviously presents practical and logistical hurdles for robust consultation. Secondly, there is the fact that the Crown was well aware of the extent of Māori

concerns about the *Rena* and any plans to leave the wreck on Otaiti and the role that the Crown might play in facilitating that possibility. The Crown was particularly aware of these concerns after the claimants lodged their claims with the Tribunal in May 2013. Those concerns were heightened after the release of the three deeds of settlement to the claimants on a confidential basis in August 2013.⁴¹ Finally, there is the fact that, once the application was lodged, a very tight timeframe of only 40 working days would be available for the consideration of what was likely to be a lengthy and complex application, opportunity for meaningful consultation, and the lodging of submissions. The Crown knew by 31 January 2014 that the *Rena* owners were going to apply for a resource consent in the near future, but the likely possibility had long been signalled.⁴² This set of circumstances presented the Crown with a challenging, but by no means insurmountable, task.

4.2 The Crown's consultation process

Despite the fact that these obstacles were known, the Crown approached its task with what we consider to be minimal effort. The Ministry for the Environment sent letters to around 20 Māori groups (including the Motiti Rohe Moana Trust and Ngāi Te Hapū) inviting consultation on just three occasions: on 29 November 2013, 29 April 2014 (three months after the Crown knew that a resource consent application was imminent), and 6 June 2014 (a week after the application had been lodged).⁴³ In addition, the Minister of Local Government, in her capacity as the territorial authority for Motiti, wrote to iwi and hapū groups on 22 May to encourage them to participate in the consultation process.⁴⁴ This appears to have been the sum total of the Minister of Local Government's involvement, despite having been advised by officials in March 2013 that she would need to 'carefully consider [her] consultation obligations . . . if the Crown proposes to support the resource consent application'.⁴⁵

Throughout this period, the Crown approached the consultation process only as a means to ascertain the views of Māori to inform the Crown's decision-making. We do not have a copy of the letter that the Ministry for

the Environment sent to Māori on 29 November 2013, but its content is described in the letter sent on 29 April 2014 as having invited affected groups

to meet with Crown officials to discuss the future of the *MV Rena*, and to assist in formulating a Crown position in anticipation of a resource consent application by the *Rena* owners.⁴⁶

Following the lodging of the *Rena* owners' resource consent application, the focus of the process became more targeted. The Crown's May 2014 consultation plan outlined the purpose of the June consultation as being to 'ensure that the Crown obtains an understanding on how the interests of iwi/hapū, including Treaty of Waitangi Interests can best be provided for and protected'.⁴⁷ The Crown's 6 June letter sought 'further consultation with iwi on the consent application' on both general and specific matters arising from the application. The letter further noted that the two-week timeframe of the Crown's consultation process provided 'an opportunity for iwi to assess information in the consent application and assist providing detailed feedback to the Crown on the *Rena* owners' proposal'.⁴⁸ The clear message from all of these communications is that the consultation process was not designed to adequately inform Māori in a manner that would enable them to assist the Crown's decision-making process.

The Crown has met with just five groups. Ngāti Awa and Ngāi Te Rangi met with the Crown in early February 2014 in response to the Ministry for the Environment's first letter.⁴⁹ The Tapuika Iwi Authority, the Mataatua District Māori Council, and the Motiti Rohe Moana Trust (the latter two groups being the Wai 2391 claimants) met with the Crown in late June in response to its more recent letters.⁵⁰ The last of these meetings, with the Motiti Rohe Moana Trust, occurred on 27 June, just three days before our hearing began. Mark Sowden, the deputy secretary for the Ministry for the Environment, told us during our hearing that other groups had refused to meet on the basis that their views were already known by the Crown.⁵¹ Ngāi Te Hapū expressed interest in meeting with the Crown but

were unable to agree with the Ministry on who should pay transport costs.⁵²

In closing submissions, Crown counsel submitted that 'the Crown would have preferred to have had more significant engagement in the Bay of Plenty with a wider range of Māori groups'.⁵³ The implication of this submission is that, while the Crown conducted a robust process and gained the views of Māori, any deficiencies in that process were the responsibility of Māori for failing to engage. We do not consider that a fair assessment. It is hardly surprising that Māori were reluctant to engage. As we outlined above, by the time the Crown initiated its consultation process, the claimants had lodged their claims with the Tribunal and had had access to the text of the deeds of settlement that the Crown had signed with the *Rena* owners. A considerable sense of mistrust had therefore arisen by the time the Crown started its consultation. This is evident in a letter from Mr Mikaere to Mr Sowden in March 2014:

We are at a loss to understand why the Crown should now wish to consult when – as the existence and content of the deeds show – it has already developed a position on the proposed resource consent application.⁵⁴

Dr Matthew Palmer, who led the Crown negotiations with the *Rena* owners, acknowledged during our hearing that the content of the deeds could give rise to a perception that the Crown's ability to act in good faith towards Māori had been compromised.⁵⁵ We note that the Crown also acknowledged in its November 2013 and April 2014 letters to Māori that 'iwi/hapū may . . . [be] averse to engaging with the Crown, and we acknowledge the sentiments and reasons for this position'.⁵⁶ Such a situation required active efforts by the Crown to rebuild its relationship with iwi and hapū, but this did not occur, despite the poor response from Māori.

Further, the meetings that were held with Māori seem to have been brief, perfunctory affairs that would have done very little to reassure Māori that their views were being taken seriously and did little to meaningfully inform them of the situation. Hugh Sayers, the project manager

of the Motiti Rohe Moana Trust, decried the ‘last-minute’ nature of their 27 June 2014 meeting with the Crown and told us that it seemed the Crown had flown ‘all the way up [to Tauranga] with 8 people for a 1½ hour meeting just so you can go back and say, yeah, we went there.’⁵⁷ Despite the Crown writing that it wanted ‘detailed feedback’ on the resource consent application, meeting notes from the Crown’s February meetings with Ngāti Awa and Ngāi Te Rangi and evidence presented by Maanu Paul indicate that Crown officials simply turned up and told Māori that they wanted to ‘hear your story.’⁵⁸ It is hard to reconcile this rather informal approach with the level of detail that the Crown was apparently seeking from these meetings, let alone the requirement to ensure that Māori were sufficiently informed. That needed to be to a level where they were able to provide informed insight not only on the issue of whether parts of the wreck should stay but also in relation to the complex issues of potential conditions of any consent.

The fact that the Crown’s consultation process has proceeded quickly since the application was lodged further suggests that the Crown views consultation narrowly as a prerequisite to arriving at its own view on the application rather than assessing the capability of Māori to participate in that process themselves. While it is reasonable that the Crown’s consultation process began in November last year, there was very little progress until recent times. Despite receiving only a few responses to the November 2013 letter and knowing by 31 January 2014 that a resource consent application was imminent, the Ministry for the Environment did not send a follow-up letter until 29 April 2014. In other words, of the 20 or so groups that had not responded to the Crown’s initial November letter, all but two heard nothing from the Crown in the months after it became clear that there would be an application.

Only after the owners’ application was lodged in late May did the Crown send its third and final letter, dated 6 June, to Māori. However, by that stage, Māori were presented with extremely tight timeframes for the remainder of the process. The letter informed groups that they needed to advise the Crown by 13 June of their interest in meeting with the Crown and that the engagement

would need to occur no later than the week of 23 June.⁵⁹ Meaningful engagement could occur in such a timeframe only if the proper groundwork had been laid in the period prior, but it is clear that it had not been in this instance.

We also do not consider that the Crown’s consultation process has adequately taken into account the resourcing difficulties faced by the claimants, particularly in light of the tight timeframes set out above and the length and complexity of the owners’ resource consent application. The Crown has not provided any assistance to Māori for the consultation process beyond flying Crown officials to Tauranga for meetings. The Wai 2391 claimants told us during our hearing that the Crown had refused to pay for kaumatua Graeme Hoete to travel from Motiti to Tauranga or for the professional and travel fees of their planner, Graeme Lawrence, to attend the meeting.⁶⁰ As we mentioned above, Ngāi Te Hapū were unable to meet with the Crown because the Ministry for the Environment refused to pay for their travel to Wellington or their lawyers’ travel to Tauranga.⁶¹ Mr Sowden responded that the Ministry had limited resources and funding Motiti groups in such a manner could set a precedent for others.⁶² The Crown instead ‘sought to minimise costs on all parties by seeking to compromise on where the parties met.’⁶³

We consider that the special and unique circumstances that apply here are so unusual that they are most unlikely to have any precedent effect. In addition, we consider that the Crown is failing to properly appreciate the practical difficulties faced by these claimants in responding to the resource consent application. These include, for example, the very real problems that Motiti Māori face in even getting a copy of the 1,600-page application on to the island, given that the mail arrives just once a week, let alone copying it to distribute it amongst themselves.

The claimants further point out that no funding has been made available for their own expert reviews of the resource consent application. No funding is available from the environmental legal assistance fund at the consultation stage (or, indeed, until the application is formally referred to the Environment Court).⁶⁴ In the absence of independent expert advice, it is difficult to imagine what kind of ‘detailed feedback’ could be provided on

a 1,600-page document of expert evidence in just two weeks, as the Crown's 6 June letter suggested. We have already established that, to ensure robust consultation, the Crown needed to provide information to Māori to ensure that they were adequately informed. This is a view shared by Dr Grant Young, who was contracted by the Crown to prepare a customary interests report on Otaiti. In his report to the Crown, he noted:

Understanding the impact of any proposal on cultural values associated with Otaiti (Astrolabe Reef) will require options for future disposition of the wreck to be reviewed in discussion with well-informed tangata whenua who have access to impartial and robust scientific and engineering expertise.⁶⁵

The Crown has pointed out that officials from the Ministry for Primary Industries attended some meetings with Māori in June to discuss kaimoana safety.⁶⁶ Mr Sowden told us that other experts were on hand if Māori asked for them to attend.⁶⁷ We do not consider that simply having experts and Crown officials present at consultation meetings could have provided the useful or meaningful information needed by Māori to ensure that they were adequately informed. Such advice would have been both too little, given the forum of a short meeting at which many matters may have needed to be discussed, and too late in the process.

We consider it clear that the Crown should have been on notice that the particular circumstances of the situation before it required a more active approach to consultation. If its engagement with Māori was to be truly meaningful, the Crown needed to do more than simply turn up and ask Māori for their views. It needed to ensure that Māori had the information before them – in good time – that was necessary for them to make a well-informed contribution. Officials should have been providing information, in advance of any meeting, on the resource consent process, the areas that Māori might most be concerned about, and the opportunities that they would have to make their concerns known. They should also have been engaging with Māori as to any potential monitoring conditions

or mitigation aspects attached to the application. In the absence of these kinds of discussion or of the resources to otherwise inform them, Māori were not in a position to meaningfully engage with the Crown on the full range of aspects of this complex resource consent application that required consideration.

4.3 Māori capacity to engage in the consent process

Our concerns about the capacity of Motiti groups to meaningfully engage with the *Rena* owners' application extend to the resource consent process, particularly because the Crown has advanced this process as an alternative avenue for claimants to express their views. The Tribunal has in several reports highlighted the difficulties that Māori face in engaging with the resource management process. In the *Tauranga Moana* report, for instance, the Tribunal referred to fighting resource consents as a 'costly and ineffective way to try and shape planning processes', and it noted that Māori were frequently unsuccessful in their efforts to do so.⁶⁸ That Tribunal, as others have done, made recommendations that better resourcing needed to be made available to Māori for resource management processes.⁶⁹ We see no reason not to accept the evidence presented by the claimants that engaging with the owners' application will require significant effort and incur considerable expense well beyond their capacity and means.⁷⁰ The funding available under the environmental legal assistance fund to submit is limited to \$40,000, an amount that will fall far short of the actual amount required, but again we observe that it is a funding resource that is not even available at this stage of the process. We are also aware of the particular challenges that an Environment Court hearing will bring if Māori do not have sufficient resources.⁷¹

The local government support available for Motiti Māori to engage in such a process also appears inadequate. Because Motiti is not part of the district of any other territorial authority, its territorial authority is the Minister of Local Government.⁷² A witness for the Department of Internal Affairs, the department responsible for the administration of the island, acknowledged during our hearing that the relationship between the department and

Motiti residents ‘isn’t good.’⁷³ That poor relationship has not been helped by the fact that the person charged by the Minister of Local Government with the role of effectively being the local planning officer to protect the environment of Motiti and its community, Keith Frentz (a contractor employed by Beca), is also working on the *Rena* owners’ behalf to advance their resource consent application.⁷⁴ Whereas citizens on the mainland might turn to their local planning officer for advice on how to respond to a resource consent application of this nature, Motiti Māori are unable to do so.

There is a possibility that the Minister of Local Government may make a submission on behalf of Motiti residents in her capacity as the territorial authority.⁷⁵ However, that is by no means guaranteed, and the person providing planning advice to the Minister on that issue is the same person who acts for the resource consent applicant. Beyond the letter sent by the Minister encouraging Motiti Māori to be involved in the Crown’s consultation process, the evidence presented to us indicates that the Department of Internal Affairs does not yet have a process in place for deciding whether the Minister will make a separate submission.⁷⁶ We cannot make a recommendation to the Minister in her capacity as a territorial authority. But we do note that it would be unusual for a territorial authority not to submit on an issue of direct relevance to a local community, particularly where the local community is so staunchly opposed to the application in question. This is even more so where the coastal environment of Motiti itself, as well as Otaiti, continues to be exposed to the adverse effects of a wreck that is continuing to break down. We note that officials have advised the Minister that ‘[t]he grounding of the *Rena* has had a strong impact on the island’s environment and people.’⁷⁷ We were certainly struck by the images of a wreck and debris field strewn across the reef and seafloor, described to us at our hearing as akin to a ‘junk yard.’⁷⁸

4.4 The current situation

The cumulative effect of the issues outlined above is that Motiti Māori are left in an extremely vulnerable position. They are faced with a situation where they lack the

resources to properly engage with the owners’ resource consent application, both during the Crown’s consultation process and in the upcoming resource consent process. Minimal, contestable funding will become available only after the application has been referred to the Environment Court, by which time they will have already been expected to submit and begin to engage experts. We acknowledge that the resource consent process provides only a brief window in which a submission can be made on an application and that the Crown is not responsible for the timing of the application. However, the Crown was always aware that these time pressures would exist, and it should have been aware of the pressures that these timeframes would place on Motiti Māori. It was also aware that the normal objective safeguard of a territorial planning overview to protect Motiti community interests was not available, as the consultant planner charged with advising the Minister in relation to Motiti interests under the Resource Management Act (which by virtue of the definition of ‘environment’ under the Act includes ‘people and communities’) was actually acting for the resource consent applicant. Such a situation, given those special circumstances, required more than a business-as-usual consultation process.

We do not have all the information available to us that the Crown will have as it decides whether or not to make a submission on the resource consent application. That decision will be made at an all-of-government level and will consider a wide range of issues, including:

- ▶ The Crown’s relevant Treaty obligations, including feedback from local iwi;
- ▶ Factors specifically provided for in the Wreck Removal Deed;
- ▶ The views of all agencies with an interest in the matter;
- ▶ The threshold for Crown submissions in resource management consent processes.⁷⁹

To inform the decision-making process, the Crown has also engaged a series of experts to conduct desktop reviews of the technical reports submitted by the owners, including the report by Dr Grant Young on cultural

matters relating to Otaiti. The cultural matters canvassed by Dr Young included an assessment of the groups with interests in the reef, the values held in the reef, and the impact in cultural terms of either full or partial wreck removal.⁸⁰

Crown counsel has emphasised in closing submissions that the Crown is aware, as are we, of the strong sentiment expressed by the claimants throughout our inquiry that they want the wreck to be completely removed from the reef.⁸¹ Mr Mikaere told us:

The mauri or spiritual essence of our reef is unquestionably compromised by the *Rena* wreck. It is out of place, it is a source of on-going environmental damage and it is culturally offensive because it demonstrates to us that we are not in charge of our taonga. We are unable to properly discharge our kaitiaki responsibilities which oblige us to guard and protect our inheritance and maintain it in the same state that it came to us.⁸²

The effects on the local community of a grant of consent in this instance would be wholly adverse in nature and would involve none of the economic and employment benefits for the local or national community that are commonly asserted as arising from potential developments normally driving such a major resource consent application.

5. FINDINGS AND RECOMMENDATIONS

Our findings are informed by how the Crown has approached its Treaty obligations in these unique circumstances. Although it is an unavoidable reality that this situation came about due to the actions of a third party, there is also a taonga in a vulnerable position and Māori whose kaitiaki obligations have been damaged. The Crown owes a duty of active protection to both. The extent of damage caused by the *Rena* to Otaiti and to the wider environment, it appears to us, should have placed the Crown on notice to approach its task with the utmost vigilance.

From the evidence that we have related above, it is clear to us that the Crown has failed to undertake meaningful

engagement or robust consultation with Māori in relation to the *Rena* owners' resource consent application. As such, the consultation process has neither adequately informed the Crown of relevant Māori views on all aspects of the *Rena* owners' application nor adequately equipped Māori to participate usefully or with informed insight in the resource consent process themselves. We therefore find that the Crown's consultation has not fulfilled its duty to actively protect Māori in the use of their lands and waters, especially their taonga, and to actively protect Māori in the exercise of rangatiratanga over their taonga. The Crown has accordingly breached the Treaty principles of good faith and partnership.

We have made it very clear that leaving the wreck on the reef will harm Motiti Māori. We have found that the Crown's conduct to date in the process that will determine whether the wreck will be left on the reef is in breach of Treaty principles. The prejudice that is or is likely to be suffered by the claimants is, first, that the Crown is not fully informed of Māori views and values in respect of their taonga and, secondly, that Māori are not adequately equipped to meaningfully engage in the resource consent process.

We consider that, whatever action the Crown now takes in respect of the resource consent process, it is incumbent upon it to actively protect Māori and their taonga. Given the inadequacy of its consultation to date, the Crown must ensure that it very visibly protects Motiti Māori interests in the forthcoming process. The problem that it faces in addressing likely prejudice in the current situation is as much one of overcoming perception as of reality. Motiti Māori now know that the Crown has bound itself to consider, in good faith, supporting the application for resource consent to leave the wreck in place. If the application for resource consent is granted – and especially if it has the powerful support of the Crown through an all-of-government submission – then Motiti Māori might well feel themselves forsaken by the Crown, and by the Minister charged with acting as their territorial authority. On the evidence before us, it is clear that they will consider themselves to have been left alone to suffer the consequences of a decision in which they played no meaningful

part and through which they were rendered powerless to protect their taonga.

Having regard to the factors outlined above, and the Crown's duty to actively protect Māori and their taonga, the Tribunal:

1. Recommends that, in considering whether to make a submission in respect of the *Rena* owners' application, the Crown should take into account the following matters:
 - (a) The adverse effects of the continued presence of the *Rena* in its rapidly degrading form on the reef, including: the bow section, which is wedged on the top of the reef, one metre below the low tide mark; the balance of the hull and superstructure, situated further down the reef, which is subject to strong ocean currents; the large debris field on and around the reef; and the potential for continued discharge as containing structures break down further, potentially releasing further contaminants.
 - (b) The effects on Māori as to the limitations on use of their taonga, which are significant in either direct physical terms, potentially from further discharges, or perception terms, knowing of the existence of the vast debris tonnage lying in, on, and around the reef.
 - (c) The fact that the grant of a resource consent in these circumstances imposes solely adverse effects on the environment, including the affected community on Motiti.
 - (d) That the feasibility of removal or mitigation of adverse effects may be different depending on which part or parts of the wreck or its former contents are under consideration for retention, that is: the bow section, the balance of the hull and superstructure, or the large debris field on and around the reef.
2. Recommends that, in the event that the Crown decides to make a submission in respect of the owners' application, whether in support, in opposition, or neutral:

- (a) It should submit that the decision maker accept that Otaiti is a taonga.
 - (b) It should submit to the decision maker that, as a consequence of the reef being a taonga, that status elevates the protection of Otaiti to be a matter of national importance in terms of section 6(e) of the Resource Management Act 1991.
 - (c) It should ensure that a Crown submission seeks that, if any consent were to be granted, monitoring and mitigating conditions be imposed to reduce to a sustainable level, as far as is possible, the effects on the taonga of Otaiti and on the coastal environment of Motiti and its community.
3. Recommends that, in the event that the Crown has not made all of its expert reports available to Māori, it do so immediately.
 4. Recommends that, given the unique nature of these circumstances and that the claimants are in a vulnerable position, the Crown consider how it can actively assist Māori to make their own submission on the resource consent application, beyond the limited contestable legal aid fund administered by the Ministry for the Environment.
 5. Suggests that the Minister of Local Government make her own submission on the resource consent application in her capacity as the territorial authority of Motiti.

Our final report will deal with these and other issues in more detail and will provide further recommendations.

Notes

1. Document A15, p 3
2. Maritime New Zealand is a Crown entity and therefore not strictly part of the Crown.
3. Document A16, p 8
4. Document A3(a); doc A3(b)
5. Document A15, p 2
6. The full titles of the deeds are 'Deed in Relation to Claims Arising from the *Rena* Casualty' (the claims deed); 'Deed of Indemnity' (the indemnity deed); and 'Deed in Relation to Removing the Wreck Arising from the *Rena* Casualty' (the wreck removal deed).

7. Document A12, p 4
8. Document A13, p [3]
9. Document A11, pp 3–4
10. Document A26, pp 457–458
11. Claim 1.1.1, p 1; Graham Hoete, Umuhuri Matahaere, and Jacqueline Taro Haimona, statement of claim concerning Crown conduct in relation to the wreck of the *MV Rena*, 30 May 2013 (Wai 2391 RO1, claim 1.1.1), p 15
12. Claim 1.1.1, p 4; Hoete, Matahaere, and Haimona, statement of claim, p 9
13. Paper 2.5.19
14. Submission 3.3.6, p [6]; submission 3.3.7, pp 7, 13–14
15. Submission 3.3.6, pp [3], [6]; submission 3.3.7, pp 15–22
16. Submission 3.3.6, p [10]; submission 3.3.7, p 52
17. Submission 3.3.5, p 7
18. *Ibid*, p 11
19. *Ibid*
20. *Ibid*, pp 3, 14
21. Submission 3.3.3, p 1; draft transcript, day 2, sess 2, p 31; draft transcript, day 3, sess 2, p 47
22. *New Zealand Maori Council v Attorney-General* [1994] 1 NZLR 513 (PC) at 517
23. Waitangi Tribunal, *Ngawha Geothermal Resource Report 1993* (Wellington: Brooker and Friend Ltd, 1993); Waitangi Tribunal, *Preliminary Report on the Te Arawa Representative Geothermal Resource Claims* (Wellington: Brooker and Friend Ltd, 1993); Waitangi Tribunal, *He Maunga Rongo: Report on Central North Island Claims, Stage One*, revised ed, 4 vols (Wellington: Legislation Direct, 2008), vol 4, p 1243
24. Waitangi Tribunal, *He Maunga Rongo*, vol 4, p 1243
25. *Ibid*, pp 1236–1237
26. *Wellington International Airport Ltd v Air New Zealand* [1993] 1 NZLR 671 (CA) at 676
27. Waitangi Tribunal, *Ko Aotearoa Tēnei: A Report into Claims concerning New Zealand Law and Policy Affecting Māori Culture and Identity, Te Taumata Tuarua*, 2 vols (Wellington: Legislation Direct, 2011), vol 1, p 269
28. *Ibid*, p 270
29. Waitangi Tribunal, *Ko Aotearoa Tēnei*, pp 269–273
30. Document A14(a), p 278
31. Document A39, p [3]
32. Document A41, p [3]
33. Document A39, p [3]
34. Document A41, p [3]
35. Draft transcript, day 2, sess 2, p 43
36. Document A39, p [4]
37. Draft transcript, day 1, sess 1, p 63
38. *Wellington International Airport Ltd v Air New Zealand* [1993] 1 NZLR 671 (CA) at 676
39. Submission 3.3.3, p 4
40. Document A49, p [61]
41. Paper 2.5.11
42. Submission 3.3.5, p 2
43. Document A33, pp 9–10
44. Document A33(a), pp 143–148
45. Document A49, p [52]
46. Document A33(a), p 109
47. Document A14(a), p 265
48. *Ibid*, p 225
49. Document A14, p 12; doc A14(a), pp 209–224
50. Submission 3.3.5, pp 8–9
51. Draft transcript, day 2, sess 4, p 61
52. *Ibid*, day 1, sess 1, pp 57, 62
53. Submission 3.3.5, p 14
54. Document A14(a), pp 213–214
55. Draft transcript, day 3, sess 2, p 28
56. Document A33(a), p 109
57. Draft transcript, day 2, sess 1, p 8
58. Document A14(a), pp 215–224; draft transcript, day 1, sess 4, p 9
59. Document A14(a), pp 225–226
60. Draft transcript, day 2, sess 1, p 9; submission 3.3.7, p 16; doc A38(a), p 81
61. Draft transcript, day 1, sess 1, pp 57, 62
62. Draft transcript, day 2, sess 3, p 35
63. Submission 3.3.5, p 11
64. Submission 3.3.7, pp 21–22; submission 3.3.6, p [10]
65. Document A14(a), p 298
66. Submission 3.3.5, p 11
67. Draft transcript, day 2, sess 4, p 63
68. Waitangi Tribunal, *Tauranga Moana, 1886–2006: Report on the Post-Raupatu Claims*, 2 vols (Wellington: Legislation Direct, 2010), vol 2, p 588
69. *Ibid*, p 862; Waitangi Tribunal, *Ko Aotearoa Tēnei*, p 706; Waitangi Tribunal, *The Report on the Management of the Petroleum Resource* (Wellington: Legislation Direct, 2011), pp 182, 184; Waitangi Tribunal, *Te Tau Ihu o te Waka a Maui: Report on Northern South Island Claims*, 3 vols (Wellington: Legislation Direct, 2008), vol 3, p 1445
70. See, for example, doc A17, p 4
71. Submission 3.3.6, pp [7–8]
72. Local Government Act 2002, s 22(1)
73. Draft transcript, day 3, sess 3, p 23
74. *Ibid*, day 2, sess 1, pp 5–6; submission 3.3.5, pp 12–13
75. Draft transcript, day 3, sess 3, p 39
76. *Ibid*, pp 39–40
77. Document A49, p [61]
78. Draft transcript, day 2, sess 2, p 40
79. Submission 3.3.5, p 13
80. Document A14(a), p 272
81. Submission 3.3.5, p 3
82. Document A39, p [4]

APPENDIX II

TRIBUNAL STATEMENT OF ISSUES

Note: The following is reproduced from memorandum 2.5.33.

1. Is the reef a taonga covered by Article 2 of the Treaty of Waitangi?
2. In terms of the Wreck Removal Deed ('WRD'):
 - 2.1 Does the Crown's conduct, in incurring the obligations under the clauses of the WRD set out below, whether considered individually and/or cumulatively, give rise to prejudice to the claimants, and is it inconsistent with Treaty principles?
 - 2.2 In particular:
 - (a) Clause 2(a) of the WRD providing for 'all assistance reasonably required by the applicant to facilitate the preparation, lodging and progressing' of an application for consent to leave part of the wreck in place.
 - (b) Clause 2(c) – limitation as to recovery of payment or compensation costs from consent process.
 - (c) Clause 4 of the WRD, including the list of factors the Crown will consider when forming a view on whether to become a submitter.
 - (d) Clause 5 – the provision for payment.
 - 2.3 As drafted, is clause 1(a) of the WRD in principle prejudicial to the Claimants? If so, is it in breach of the Treaty?
 - 2.4 As drafted, is clause 2(b) of the WRD in principle prejudicial to the Claimants? If so, is it in breach of the Treaty?
 - 2.5 Prior to entering into the WRD, did the Crown discharge its Treaty obligations, and did Treaty principles require consultation with Māori, including the claimants?
3. As to remedies:
 - 3.1 If there is prejudice arising from the Crown's conduct, can that prejudice be remedied through the Crown's consultation with tangata whenua on whether or not to make a submission to the consent process, and the participation of tangata whenua in the RMA [Resource Management Act 1991] process?
 - 3.2 If not, what other recommendations can be made as to remedy?
 - 3.3 If there is prejudice arising from clauses 1(a) and 2(b) of the WRD, what recommendations can be made as to remedy?

APPENDIX III

DEED IN RELATION TO REMOVING
THE WRECK ARISING FROM THE *RENA* CASUALTY

Note: The following is reproduced from document A11.

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DEED IN RELATION TO REMOVING THE WRECK ARISING FROM THE RENA CASUALTY

Dated 1 October 2012

PARTIES

Between:

1. DAINA SHIPPING COMPANY of 80 Broad Street, Monrovia, Republic of Liberia; and
 2. HER MAJESTY THE QUEEN IN RIGHT OF NEW ZEALAND (but in the case of the Minister of Conservation, subject to clause 11 of this Deed); and
 3. MARITIME NEW ZEALAND and THE DIRECTOR OF MARITIME NEW ZEALAND; and
- (each a 'Party' and together the 'Parties').
Party (1) shall be referred to as the 'Owner'.
Party (2) shall be referred to as the 'Crown'.
Party (3) shall be referred to as 'MNZ'.

THE PARTIES record, acknowledge and agree as provided in this Deed.

BACKGROUND

- A. On 5 October 2011 the Liberian Flag containership 'RENA' (Vessel), with IMO No 8806802, ran aground on Astrolabe (Otaiti) Reef off Tauranga, New Zealand with the subsequent escape of oil, containers, debris and other material from the Vessel (*Casualty*).
- B. At the time of the grounding, the Owner was the registered owner of the Vessel.
- C. The Vessel has broken into two sections and, together with its equipment and cargo remaining on the Vessel, is referred to as the Wreck in this Deed.
- D. Under the Maritime Transport Act 1994 (MTA) and the Resource Management Act 1991 (RMA) the Crown and MNZ have various statutory powers, duties and

discretions in relation to the removal of the Wreck and protection of the marine environment.

- E. Since the grounding the Owner has complied with all notices, instructions and orders from the Crown and MNZ and has undertaken all necessary activities to date to secure and remove the Wreck and has confirmed its intention to continue to do so as, and to the extent, required by New Zealand law.
- F. The Owner has commenced a process of consultation and assessment so as to determine what further measures to take in relation to the removal of the Wreck including (but not limited to) the removal of part only of the Wreck. No decision has yet been made by the Owner as to any preferred measure.
- G. Following the process referred to the Owner may (at its sole discretion) apply for such consents, authorisations and permissions under the RMA and other legislation, including (but without limitation) the Marine and Coastal Area (Takutai Moana) Act 2011, as may be required to leave all or such part or parts of what will remain of the Wreck following completion of the bow reduction work currently under way as the Owner may choose and for any incidental activities, including without limitation those relating to the occupation of, and dumping, discharging and related activities within, the coastal marine area (*Consents* or, individually, *Consent*, the meaning of these terms being extended by clause 3).

COVENANTS

Consents

1. The Applicant (as defined in clause 2) will, within 12 months of the execution of the Deed or such longer period as the Crown may agree (which agreement will not unreasonably be withheld):
 - (a) advise the Crown and MNZ of the Owner's

intention to re-commence removal of the Wreck as, and to the extent, required by New Zealand law; or

(b) apply for one or more of the Consents.

2. In the event the Owner, either directly or through a nominee (together the *Applicant*), decides to apply for one or more of the Consents the Crown and MNZ will:
 - (a) provide all assistance reasonably required by the Applicant to facilitate the preparation, lodging and progressing of an application or applications for the Consents 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 or applications; and
 - (b) 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 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 the Marine and Coastal Area (Takutai Moana) Act 2011 that relates to the location of the Wreck; and
 - (c) 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.
3. The Applicant may apply for further or additional consents and may amend or withdraw any application for anyone or more of the Consents provided it gives the Crown and MNZ not less than 10 days' notice of its intention to do so. Any further or additional consent that the Applicant applies for is included within the term "Consents" and is a Consent for the purposes of this Deed. In the event that the Applicant withdraws

any application for a Consent the notice shall advise the Crown and MNZ of the Owner's intention with regard to removal of the Wreck as, and to the extent, required by New Zealand law.

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 interests of New Zealand and the likely cost and feasibility of complete removal of the Wreck.

Payment

5. Subject to the conditions in the following paragraphs of this clause 5 the Owner will pay to the Crown NZ\$10,400,000 in accordance with clause 6. Payment is conditional on:
 - (a) The Crown (including the Minister of Conservation) and MNZ not opposing the grant of any of the Consents whether directly or indirectly;
 - (b) The Crown and MNZ having complied with clauses 2 and 4 of this Deed;
 - (c) 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;
 - (d) The Applicant's intention being to commence and carry out the activities authorised by the Consents;
 - (e) 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 New Zealand law.
6. The Owner will make the payment under clause 5 within 14 days of the later of:
 - (a) the Owner notifying the Crown in writing that the conditions in clause 5 have been satisfied

which notice shall be given not later than the 14 days after the latest of following dates, provided that if the Owner gives the notice prior to the latest of those dates then clause 9 shall apply:

- (i) Where there is no right of appeal or challenge against the grant of any of the Consents then the day all the Consents have been granted;
 - (ii) Where there is a right of appeal or other challenge against the grant of any of the Consents, and no such appeal or challenge is made, then the last day on which any appeal or challenge could have been made against any of the Consents;
 - (iii) Where any appeal or challenge is made against any of the Consents then the day on which the last remaining appeal or challenge is withdrawn or finally resolved; and
- (b) the Crown nominating the public purposes for which the payment to be made by the Owners under clause 5 shall be used so that the people of New Zealand can enjoy the benefit of such payment.
7. The payment under clause 5 shall be made to the New Zealand bank account 03-0251-0037983-00 (Ministry of Transport – *Rena* Settlement Proceeds Trust Account). Payment to a bank account in accordance with this clause shall constitute performance of the Owner's payment obligation and shall be net of any bank charges. If the whole or any part of the payment is not paid by the due date for payment, the Owner will pay interest at the rate prescribed in the Judicature Act 1908.
 8. The Owner's payment obligation under clause 5 will be guaranteed by The Swedish Club pursuant to a letter of guarantee in the form attached in Schedule 1.
 9. If an appeal or challenge to a Consent is made or resolved after any sum has been paid pursuant to clauses 5 and 6, and such appeal or challenge is successful, the monies paid shall be repaid to the Owner

by the Crown without set-off or deduction immediately upon demand by the Owner, together with interest at the rate provided in the Judicature Act 1908 from the date on which it was paid to the Crown.

Acknowledgment of ending of obligations or liabilities in relation to the Casualty

10. The Crown and MNZ agree and acknowledge that, upon the Owner complying with its payment obligations under clause 6 and upon the Applicant carrying out such activities as may be authorised by the Consents, or (at the Owner's option) removing the Wreck as, and to the extent, required by New Zealand law, the Owner will have satisfied all the requirements of New Zealand law and will have no further obligation or liability (whether present or future, actual or contingent) to the Crown or MNZ, or that might be enforceable by them, arising out of or in connection with the Casualty.

Minister of Conservation as a Party

11. Notwithstanding the definition of Crown and except as otherwise expressly indicated, the Minister of Conservation is excluded as a party to this Deed in respect of the exercise of her powers, duties and discretions in Part 6AA of the RMA.

Tax

12. The Crown agrees and confirms that the payment to be made under clause 5 is not subject to goods and services tax under section 8(1) of the Goods and Services Tax Act. In the event GST is payable in respect of the payment to be made under clause 5, a valid tax invoice must be provided by the Crown to the Owner, before the date on which the GST amount is payable by the Owner.

Confidentiality

13. This Deed and all communications between the Parties and information in respect of the settlement negotiations must be kept confidential and must not be disclosed except to the extent:

- (a) required by law; or
- (b) necessary for the Parties to disclose details to shareholders, financiers, insurers, legal, accounting or banking advisors, auditors, and any regulatory authority all of whom, in turn, must be required to keep the terms of this Deed strictly confidential as required by any statutory or regulatory obligation or requirement and such information is to be used by the recipient solely for the purposes for which it was provided; or
- (c) necessary for the Owner's parent company to disclose to the US Security and Exchange Commission, the New York Stock Exchange and any other regulatory or stock exchange authority relevant for the Owner's parent; or
- (d) necessary for giving effect to or enforcing this Deed, whether through litigation or otherwise; or
- (e) any of the Parties wishes to disclose the Deed in legal proceedings as evidence of its response to the Casualty; or
- (f) disclosed in the discharge of Ministerial responsibilities to the House of Representatives; or
- (g) agreed to in writing between the Parties.

Entire agreement

14. This Deed sets out the entire agreement and understanding of the Parties in relation to the matters in it. No Party has entered into this Deed in reliance on any representation, warranty, assurance or undertaking that is not set out in this Deed and any liability that might otherwise arise from any such representation, warranty, assurance or undertaking is hereby excluded.

Costs

15. The Parties agree that they will bear their own costs in relation to this Deed.

Notices

16. Each notice or other communication under this Deed is to be made in writing and delivered by post (by airmail post if the address is outside the country in

which the notice or other communication is posted), personal delivery, facsimile or email to the addressee at the addressee's physical address, facsimile address or email address (as applicable) marked for the attention of the person or office holder (if any) from time to time designated for that purpose by the addressee. Each Party's initial physical address, facsimile address or email address is set out below.

The Crown

Notices to: Crown Law Office
 Attention: Deputy Solicitor-General (Public Law)
 Address: Level 10 Unisys House, 56 The Terrace,
 P O Box 2858 Wellington 6140
 Facsimile: +64 4 473 3482
 Email: DSG-PublicLaw@crownlaw.govt.nz

[Maritime New Zealand]

Notices to: Maritime New Zealand
 Attention: The Chief Executive
 Address: Level 10, 1 Grey Street, P O Box 27006,
 Wellington 6141
 Facsimile: +64 4 494 1264
 Email: Keith.Manch@maritimenz.govt.nz

Daina Shipping Company

Notices to: Daina Shipping Co
 Attention: K Zacharatos
 Address: C/o Costamare Shipping Company SA,
 60 Zephyrou Street and Syngrou Avenue,
 Athens, 17564, Greece
 Facsimile: +302109409051
 Email: info@costamare.com

- (a) This contact information may be amended by written notice to the other Party.
- (b) A notice or other communication will be deemed to be received:
 - (i) in the case of a letter sent to the addressee's postal address, on the second business day after posting or, if the postal address is outside of the country from which it is sent,

- seven business days after posting by airmail post; and
- (ii) in the case of a facsimile or email:
- if sent by facsimile, on production or a transmission report by the machine from which the facsimile was sent which indicates that the facsimile was sent in its entirety to the addressee's facsimile number,
 - if sent by email, at the time the email leaves the communications system of the sender, provided that the sender does not receive any error message relating to the email at the time of sending or any 'out of office' message or equivalent relating to the recipient,
- on the business day on which it is dispatched or, if dispatched after 5.00 pm (in the place of receipt) on the next business day after the date of dispatch; and
- (iii) in the case of personal delivery, when delivered.

Waiver

17. No Party will be deemed to have waived any right under this Deed unless the waiver is in writing and signed by the Parties. Any failure or delay by a party to exercise any right or power under this Agreement will not operate as a waiver of that right or power. Any waiver by a Party of any breach, or failure to exercise any right, under this Deed will not constitute waiver of all subsequent breach or continuing of that right.

Severability

18. If any provision of this Deed is held by a court of competent jurisdiction to be illegal, void, or unenforceable, that determination is not to impair the enforceability of the other provisions of this Deed which are to remain in full force and effect.

Amendment

19. This Deed may be amended only by agreement in writing signed by all Parties.

Execution

20. The execution (and transmission of a facsimile copy of this Deed to the other Parties) by a Party shall be sufficient to bind that Party to the terms of this Deed.

Joint and Several Liability

21. Despite anything to the contrary in this Deed, the agreements, obligations and liabilities of the Crown and MNZ herein contained are joint and several and shall be construed accordingly. In this respect it is agreed and acknowledged by the Parties that
- (a) any representation and agreement by the Crown and MNZ hereunder shall be deemed to be made separately by each of them; and
 - (b) the occurrence of a breach of this Deed with respect to either of the Crown or MNZ shall be deemed to have occurred with respect to both of them.

Deed binding despite invalidity

22. Each of the Crown and MNZ agrees and consents to be bound by this Deed despite the other of them not being effectually bound and despite this Deed being invalid or unenforceable against anyone or both of the Crown and MNZ whether or not the deficiency is known to the Owner.
23. The Owner may release either or the Crown and MNZ from this Deed, and compound with, or otherwise vary the liability, or grant time or indulgence to, or make other arrangements with, either of them without prejudicing or affecting the rights and remedies of the Owner against the other.

Construction

24. Headings are not to affect the interpretation of this Deed.

25. In this Deed, unless the context otherwise requires, references to clauses and Schedules, are to be construed as references to clauses of, and Schedules to, this Deed and references to this Deed includes its Schedules.

New Zealand law and jurisdiction

26. This Deed shall be governed by New Zealand law and the Courts of New Zealand shall have exclusive jurisdiction to settle any claim or difference which may arise out of or in connection with this deed.

EXECUTION

Signed for and on behalf of Daina Shipping Company

[Konstantinos Zacharatos]

Konstantinos Zacharatos
Attorney in fact

Before:

Witness Signature	[Dimitrios Sofianopoulos]
Name	[Dimitrios Sofianopoulos]
Occupation	[Solicitor]
Address	[126 Kolokotroni, Piraeus, Greece]

Signed for and on behalf of the Her Majesty the Queen in Right of New Zealand by:

[Maria Deligiannis]

Maria Deligiannis
Deputy Solicitor-General (Acting)
Crown Law Office

Before:

Witness Signature	[Matthew Andrews]
Name	[Matthew Andrews]
Occupation	[Crown counsel]
Address	[Crown Law Office, Wellington]

Signed for and on behalf of Maritime New Zealand:

[David Ledson]

David Ledson
Chairman
Maritime New Zealand

Before:

Witness Signature	[SP Jeresine]
Name	[SP Jeresine]
Occupation	[Solicitor]
Address	[Wellington]

[David Morgan]

Dave Morgan
Member
Maritime New Zealand

Before:

Witness Signature	[SP Jeresine]
Name	[SP Jeresine]
Occupation	[Solicitor]
Address	[Wellington]

Signed by the Director of Maritime New Zealand

[Keith Manch]

Keith Manch
Director of Maritime New Zealand

Before:

Witness Signature	[Stephanie Wilson]
Name	[Stephanie Wilson]
Occupation	[Solicitor]
Address	[1 Grey Street, Wellington]

**SCHEDULE 1: THE SWEDISH CLUB LETTER OF
GUARANTEE (CLAUSE 8)**

[To] Ministry of Transport – *Rena* Settlement Proceeds
Trust Account, as agent for: The Crown and MNZ (as
defined in the Deed referred to below).

[Date]

Dear Sirs

Rena – grounding on Astrolabe Reef on 5 October 2011

In consideration of (a) your executing a deed of settlement in relation to removing the wreck of the *Rena* of even date between Daina Shipping Company (*Owner*) and Her Majesty the Queen in right of New Zealand and others (*Deed*), and (b) your complying with your obligations therein, *we hereby undertake* to pay to you on demand the following sum when and if due to you from the Owner pursuant to the provisions of the Deed, namely, NZ\$10,400,000 (ten million and four hundred thousand New Zealand Dollars), as referred to in clause 5 of the Deed, *provided always that*:

- (i) our liability hereunder shall not exceed NZ\$10,400,000, exclusive of interest and costs, and
- (ii) such liability shall be reduced by the amount of any payment(s) hereinafter made to you in respect or the said sum NZ\$10,400,000 either by us, or by the Owner.

This undertaking shall be discharged and extinguished when payment under clause 6 of the Deed has been made or upon the sum payable under clause 5 ceasing to be payable. Upon the undertaking being discharged the original of this Letter of Guarantee shall be returned to The Swedish Club forthwith.

This undertaking shall be governed by New Zealand law and any dispute arising hereunder shall be submitted to the exclusive jurisdiction of the High Court of New Zealand.

The terms of this undertaking shall be read and interpreted in conjunction with the Deed.

Yours faithfully

APPENDIX IV

SELECT INDEX TO THE WAI 2393 RECORD OF INQUIRY

RECORD OF HEARINGS

TRIBUNAL MEMBERS

The Tribunal constituted to hear the *mv Rena* and Motiti Island urgent claims comprised Judge Sarah Reeves (presiding), Ronald Crosby, the Honourable Sir Douglas Lorimer Kidd KNZM, and Professor Sir Tamati Reedy KNZM PhD.

COUNSEL

Counsel who appeared at the hearing were:

- Janet Mason and Alice Shelton for the Motiti Rohe Moana Trust and the Mataatua District Māori Council.
- Tom Bennion and Lisa Black for the Ngāi Te Hapū Incorporated Society.
- Karen Clark QC, Jeremy Prebble, and Rohan Wanigasekera for the Crown.
- Spencer Webster and Joshua Gear for the Te Runanga o Ngāi Te Rangi Trust, Ngāti Whakahemo, and Te Whānau a Tauwhao.
- Jason Pou for the Ngāti Makino Heritage Trust.

Counsel who were involved in the interlocutory process but did not appear at the hearing were:

- Matthew Casey QC and Stuart Ryan for the *Rena* owners.
- Paul Cooney and Sharron Wooler for the Bay of Plenty Regional Council.
- Awhi Awhimate for the Ngāti Makino Heritage Trust.
- Nathan Milner for Ngāti Whakae ki Maketu.

THE HEARING

The hearing was held from 30 June to 2 July 2014 at the Trinity Wharf Hotel, Tauranga.

RECORD OF PROCEEDINGS

1. STATEMENTS

1.1 Statements of claim

1.1.1 Elaine Rangi Butler, statement of claim concerning Crown conduct in relation to the wreck of the *mv Rena*, 8 May 2013

2. PAPERS IN PROCEEDINGS: TRIBUNAL MEMORANDA, DIRECTIONS, AND DECISIONS

2.1 Registering new claims

2.1.1 Judge Stephanie Milroy, memorandum registering statement of claim, 10 June 2013

2.5 Pre-hearing stage

2.5.1 Judge Stephanie Milroy, memorandum directing Crown and interested parties to file responses to application for urgent hearing, 10 June 2013

2.5.5 Judge Stephanie Milroy, memorandum directing claimants to file submissions in reply to responses from Crown and interested parties, 28 June 2013

2.5.6 Chief Judge Wilson Isaac, memorandum delegating Judge Sarah Reeves task of determining application for urgency, 2 July 2013

2.5.7 Judge Sarah Reeves, memorandum concerning release of 2012 deeds of settlement and extending filing dates for applicant replies to Crown and interested parties submissions, 8 July 2013

2.5.8 Judge Sarah Reeves, memorandum directing Crown to disclose deeds to counsel for applicants and extending filing dates for applicant replies to Crown and interested parties submissions, 17 July 2013

2.5.9 Judge Sarah Reeves, memorandum addressing requests by applicant counsel for additional disclosure of deeds and setting new filing date for applicant submissions in reply, 12 August 2013

2.5.10 Judge Sarah Reeves, memorandum directing Crown, *Rena* owners, and claimants to file further submissions concerning disclosure of memorandum 2.5.9, 19 August 2013

2.5.11 Judge Sarah Reeves, memorandum directing release of memorandum 2.5.9, 23 August 2013

2.5.14 Judge Sarah Reeves, memorandum adjourning *sine die* Wai 2391 application for urgent hearing and directing *Rena* owners to file memorandum concerning preparation of resource consent application, 30 September 2013

2.5.15 Judge Sarah Reeves, memorandum convening judicial conference on 25 October 2013 to determine urgency application

and directing parties to file on confidentiality restraints, 3 October 2013

2.5.16 Judge Sarah Reeves, memorandum concerning confidentiality of recent submissions and evidence, 2 October 2013

2.5.18 Judge Sarah Reeves, memorandum concerning confidentiality of documents, 2 December 2013

2.5.19 Judge Sarah Reeves, memorandum granting Wai 2393 urgency, 21 January 2014

2.5.20 Judge Sarah Reeves, memorandum convening 4 February 2014 teleconference, 24 January 2014

2.5.21 Judge Sarah Reeves, memorandum granting leave to parties to participate in teleconference and requiring filing of confidentiality undertakings, 31 January 2014

2.5.22 Chief Judge Wilson Isaac, memorandum appointing Judge Sarah Reeves presiding officer for urgent inquiry and appointing Professor Sir Tamati Reedy and the Honourable Sir Douglas Kidd panel members, 30 January 2014

2.5.24 Judge Sarah Reeves, memorandum directing counsel to file submissions in reply to counsel for *Rena* owners' submissions concerning confidentiality restrictions, 17 February 2014

2.5.25 Judge Sarah Reeves, memorandum setting out decision in respect of confidentiality and how inquiry will proceed, 13 March 2014

2.5.27 Judge Sarah Reeves, memorandum providing interested parties opportunity to provide input into draft statement of issues and convening 8 April judicial conference, 19 March 2014

2.5.28 Judge Sarah Reeves, memorandum directing counsel for Wai 2391 to address insufficiency of interested party status, 28 March 2013

2.5.29 Chief Judge Wilson Isaac, memorandum appointing Ronald Crosby panel member, 7 April 2014

2.5.32 Judge Sarah Reeves, memorandum directing addition of wreck removal deed and relevant sections of claims deed and deed of indemnity to record of inquiry, 17 April 2014

2.5.33 Judge Sarah Reeves, memorandum confirming scope of inquiry and directing Crown to indicate broad categories of relevant documents for disclosure, 6 May 2014

2.5.35 Judge Sarah Reeves, memorandum concerning disclosure of documents and proposing timeframes for filing of evidence and submissions in advance of hearings, 30 May 2014

2.5.36 Judge Sarah Reeves, memorandum concerning hearing location, timetable, and disclosure and directing Crown to update Tribunal of outcome of disclosure process, 11 June 2014

2.5.37 Judge Sarah Reeves, memorandum concerning decision of Williams J in *Baker v Waitangi Tribunal* [2014] NZHC 1176, 13 June 2014

2.5.38 Judge Sarah Reeves, memorandum directing Crown to clarify stance in relation to urgent hearing, 19 June 2014

2.5.40 Judge Sarah Reeves, memorandum concerning *Baker v Waitangi Tribunal*, issues of disclosure, and hearing, 25 June 2014

2.7 Post-hearing stage

2.7.1 Judge Sarah Reeves, memorandum directing Crown and counsel for Wai 2391 to update Tribunal on privilege and disclosure issues, 7 July 2014

2.7.3 Judge Sarah Reeves, memorandum confirming requests for further information made during urgent hearing, 17 July 2014

2.7.4 Judge Sarah Reeves, memorandum concerning Crown disclosure and matters arising from interim report, 28 July 2014

2.7.7 Judge Sarah Reeves, memorandum directing Crown to specify actions taken concerning recommendations and suggestions in interim Tribunal report, 21 August 2014

2.7.9 Judge Sarah Reeves, memorandum advising parties to file amended closing submissions, 8 October 2014

2.7.10 Judge Sarah Reeves, memorandum directing counsel to file supplementary submissions, 22 October 2014

2.7.11 Judge Sarah Reeves, memorandum requesting clarification from Crown counsel as to receipt of draft LOC reports, 11 November 2014

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3.1.1 Sharron Wooler, memorandum responding to memorandum 2.5.1, 13 June 2013

3.1.2 Jeremy Prebble, memorandum responding to memorandum 2.5.1 and seeking leave to file joint response to urgency applications, 18 June 2013

3.1.3 Matthew Casey, memorandum responding to memorandum 2.5.1 and seeking leave to file joint response to urgency applications, 20 June 2013

3.1.8 Awhi Awhimate, memorandum notifying Tribunal of Ngāti Makino Heritage Trust's interest in urgency applications, 27 June 2013

3.1.9 John Koning, memorandum advising Tribunal that Ngāi Te Rangi neither supports nor opposes urgency applications, 28 June 2013

3.1.10 John Koning, memorandum advising Tribunal that Ngāti Whakahemo neither supports nor opposes urgency applications, 28 June 2013

3.1.11 Janet Mason, memorandum responding to memorandum 2.5.1, 28 June 2013

3.1.12 John Koning, memorandum advising Tribunal that Te Whanau a Tauwhao neither supports nor opposes urgency applications, 28 June 2013

3.1.13 Matthew Andrews and Jeremy Prebble, memorandum responding to Wai 2391 and Wai 2393 urgency applications, 28 June 2013

3.1.14 Paul Cooney, memorandum responding to Wai 2391 and Wai 2393 urgency applications, 28 June 2013

3.1.15 Matthew Casey, memorandum responding to Wai 2391 and Wai 2393 urgency applications, 28 June 2013

3.1.16 Nathan Milner, memorandum responding to memorandum 2.5.1 and seeking filing extension, 1 July 2013

3.1.17 Tom Bennion and Lisa Black, memorandum requesting Crown release deeds, 4 July 2013

3.1.18 Matthew Casey, memorandum responding to memorandum 3.1.17, 8 July 2013

3.1.19 Tom Bennion and Lisa Black, memorandum responding to memorandum 3.1.18, 10 July 2013

3.1.20 Matthew Andrews and Jeremy Prebble, memorandum responding to memorandum 2.5.7, 12 July 2013

3.1.21 Matthew Casey, memorandum responding to memorandum 2.5.7, 12 July 2013

3.1.24 Matthew Andrews and Jeremy Prebble, memorandum concerning applicants' request for additional disclosure of deeds, 25 July 2013

3.1.25 Tom Bennion and Lisa Black, memorandum concerning additional disclosure of deeds, 29 July 2013
(a) Jeremy Prebble and Tom Bennion, printout of email correspondence concerning disclosure of deeds, 24–26 July 2013

3.1.26 Matthew Andrews and Jeremy Prebble, memorandum responding to memorandum 3.1.25, 29 July 2013

3.1.27 Matthew Casey, memorandum concerning disclosure terms, 30 July 2013

3.1.28 Tom Bennion and Lisa Black, memorandum responding to memorandum 3.1.26, 31 July 2013

3.1.29 Jeremy Prebble, memorandum responding to memorandum 2.5.10, 21 August 2013

3.1.30 Stuart Ryan and Matthew Casey, memorandum responding to memorandum 2.5.10, 21 August 2013

3.1.31 Tom Bennion and Lisa Black, memorandum responding to memorandum 2.5.10, 21 August 2013

3.1.32 Stuart Ryan and Matthew Casey, memorandum responding to memorandum 3.1.31, 23 August 2013

3.1.33 Matthew Andrews and Jeremy Prebble, memorandum responding to memorandum 2.5.11, 28 August 2013

3.1.34 Tom Bennion and Lisa Black, memorandum concerning legal aid services and seeking filing extension, 3 September 2013

3.1.35 Tom Bennion and Lisa Black, submission responding to memorandum 3.1.12, 9 September 2013
(a) *In Tandem Marine Enhancement Ltd v Waikato Regional Council* Environment Court Thames, A58/2000, 10 May 2000

3.1.39 Matthew Andrews and Jeremy Prebble, further submissions concerning application for urgency, 2 October 2013

3.1.40 Matthew Casey and Stuart Ryan, further submissions concerning application for urgency, 2 October 2013

3.1.41 Paul Cooney, memorandum advising of Bay of Plenty Regional Council's interest but non-participation at judicial conference, 4 October 2013

3.1.45 John Koning, memorandum responding to memoranda 2.5.15 and 2.5.17 and advising that Te Whanau a Tawhao do not wish to be heard on urgency application, 15 October 2013

3.1.46 John Koning, memorandum responding to memoranda 2.5.15 and 2.5.17 and advising that Ngāi Te Rangi do not wish to be heard on urgency application, 15 October 2013

3.1.47 John Koning, memorandum responding to memoranda 2.5.15 and 2.5.17 and advising that Ngāti Whakahemo do not wish to be heard on urgency application, 15 October 2013

3.1.48 Tom Bennion and Lisa Black, further submissions responding to submission 3.1.39, 16 October 2013

3.1.49 Tom Bennion and Lisa Black, submissions for judicial conference, 25 October 2013

3.1.50 Matthew Andrews and Jeremy Prebble, further submissions concerning urgency application, 30 October 2013

3.1.51 Paul David, submission outlining oral points made at judicial conference, 31 October 2013

3.1.52 Matthew Andrews and Jeremy Prebble, memorandum concerning progress, 29 November 2013

(a) Mark Sowden to Buddy Mikaere / Roku Mihinui / Taria Tahana / Enid Ratahi-Pryor / Kahuariki Handcock / Carol Biel / David Taipari / Dickie Farrar / Yvette Callaghan / Umuhuri Matehaere / Marama Smith / Rikirangi Gage / Josie Anderson / Muna Wharawhara / Brian Dickson / Kimiora Rawiri / Rehua Smallman, form letter, 29 November 2013

(b) Matthew Casey and Stuart Ryan, memorandum updating Environment Court on prospective applications for resource consent concerning *MV Rena* by Lowndes Associates, 26 November 2013

3.1.53 Paul Cooney, memorandum responding to memorandum 2.5.20, 28 January 2014

3.1.54 Matthew Andrews and Jeremy Prebble, submissions concerning confidentiality, 30 January 2014

3.1.55 Spencer Webster and John Koning, submissions concerning confidentiality, 30 January 2014

3.1.56 Matthew Casey and Stuart Ryan, submissions concerning confidentiality, 30 January 2014

3.1.57 Janet Mason and Alice Shelton, submissions concerning confidentiality, 30 January 2014

3.1.58 Tom Bennion, submissions concerning confidentiality, 30 January 2014

3.1.60 Matthew Casey and Stuart Ryan, further submissions concerning confidentiality, 17 February 2014

3.1.61 Matthew Andrews and Jeremy Prebble, memorandum concerning Crown consultation and acting counsel and responding to submission 3.1.60, 20 February 2014

(a) Jeremy Prebble to Tom Bennion, letter, 12 February 2014

3.1.62 Matthew Andrews and Jeremy Prebble, memorandum concerning Crown consultation and revised timeline for *Rena* owners' resource consent application, 21 February 2014

3.1.63 Tom Bennion, memorandum responding to submission 3.1.60, 21 February 2014

3.1.64 Tom Bennion, memorandum concerning joint statement of issues and related matters, 21 February 2014

3.1.65 Janet Mason and Alice Shelton, memorandum responding to submission 3.1.60, 21 February 2014

(a) *Peters v Birnie* [2010] NZAR 494

3.1.68 Mathews Andrews, Jeremy Prebble, and Tom Bennion, joint statement of issues, 17 March 2014

3.1.69 Matthew Casey, memorandum concerning statement of issues and advising of *Rena* owners non-participation and non-representation in inquiry, 25 March 2014

3.1.70 Tom Bennion and Lisa Black, memorandum responding to memorandum 2.5.25, 26 March 2014

3.1.71 Janet Mason and Alice Shelton, memorandum responding to memorandum 2.5.27 and seeking filing extension, 30 March 2014

3.1.72 Janet Mason and Alice Shelton, memorandum concerning statement of issues, 8 April 2014

3.1.74 Jason Mason and Alice Shelton, memorandum concerning statement of issues and seeking filing extension, 23 April 2014

(a) 'Annex A: Draft Joint Statement of Issues', printout of word processor document, not dated

3.1.75 Matthew Andrews and Jeremy Prebble, memorandum concerning statement of issues, timetabling, and document disclosure, 23 April 2014

3.1.76 Tom Bennion and Lisa Black, memorandum concerning statement of issues, timetabling, and document disclosure, 23 April 2014

3.1.77 Janet Mason and Alice Shelton, memorandum concerning statement of issues, timetabling, and document disclosure, 25 April 2014

(a) 'Annex A: Draft Joint Statement of Issues', printout of word processor document, not dated

3.1.78 Tom Bennion and Lisa Black, memorandum concerning proposed timetable, 9 May 2014

3.1.79 Matthew Andrews and Jeremy Prebble, memorandum concerning document disclosure, timeframes, Crown representation, and hearing dates, 9 May 2014

3.1.79—continued

(a) ‘Document Type and Quantity Received following Crown Request on 20 February 2014,’ printout of word processor table, not dated

3.1.80 Colin Reeder, memorandum seeking addition of Nga Potiki a Tamapahore Trust as interested party, 14 May 2014

3.1.81 Jeremy Prebble, memorandum concerning document disclosure, timeframes, and counsel acting, 23 May 2014

(a) Printout of word processor tables of discoverable, irrelevant, and privileged key documents pre- and post-execution of WRD, not dated

3.1.83 Virginia Hardy and Jeremy Prebble, memorandum updating Tribunal on resource consent, document disclosure, and timeframes, 3 June 2014

3.1.85 Jeremy Prebble, memorandum concerning scope of document disclosure, refined lists, and irrelevant documentation, 6 June 2014

(a) Printout of word processor tables of discoverable, irrelevant, and privileged key documents concerning WRD, not dated

(a)(i) Revised copy of memorandum 3.1.85(a), not dated

(b) Printout of word processor tables of discoverable, irrelevant, and privileged documents post-execution of WRD, not dated

(b)(i) Revised copy of memorandum 3.1.85(b), not dated

3.1.87 Jeremy Prebble, memorandum concerning disclosure of privileged documents and implications for urgent hearing, 16 June 2014

3.1.90 Jeremy Prebble, submissions concerning *Baker v Waitangi Tribunal*, 18 June 2014

3.1.91 Tom Bennion and Lisa Black, submissions concerning *Baker v Waitangi Tribunal*, 18 June 2014

3.1.94 Jeremy Prebble, memorandum responding to memoranda 2.5.25 and 2.5.38, 20 June 2014

(a) Printout of word processor table of Tribunal decisions considered invalid by Crown, not dated

3.1.95 Janet Mason, memorandum seeking disclosure of Crown documents, 23 June 2014

3.1.96 Tom Bennion and Lisa Black, memorandum seeking disclosure of Crown documents, 24 June 2014

(a) Printout of word processor table listing documents for which discovery is sought, not dated

3.1.99 Jeremy Prebble, memorandum concerning privileged status of specified documents, 25 June 2014

3.1.104 Janet Mason, memorandum filing proposed timetable, 27 June 2014

(a) ‘Wai 2391/2393 – The Motiti Island/MV *Rena* Urgent Hearing Hearing Timetable,’ printout of word processor table, not dated

3.3 Submissions: opening, closing, and in reply

3.3.1 Tom Bennion and Lisa Black, opening submissions, 26 June 2014

(a) Supporting documents to submission 3.3.1, various dates *pp 1–11: Tsilhqot’in Nation v British Columbia* [2014] SCC 44, headnote, paras 72–94

pp 12–17: Vector Gas Ltd v Bay of Plenty Energy Ltd [2010] NZSC 5

pp 18–21: Marine and Coastal Area (Takutai Moana) Act 2011, ss 11, 62, 95, 96

3.3.2 Janet Mason, opening submissions, 27 June 2014

3.3.3 Karen Clark and Jeremy Prebble, opening submissions, 27 June 2014

(a) Supporting documents to submission 3.3.1, various dates *pp 1–2: Secretary of the Cabinet, ‘All-of-Government Process for Possible Crown Submission on *Rena* Resource Consent’, minute of Cabinet decision, CAB Min (14) 21/11, 23 June 2014*
*pp 3–4: Secretary of the Cabinet, ‘All-of-Government Process for Possible Crown Submission on *Rena* Resource Consent’, summary of Cabinet paper, CAB Min (14) 339, 20 June 2014*
*pp 5–8: Minister for the Environment, ‘All-of-Government Process for Possible Crown Submission on *Rena* Resource Consent’, Cabinet paper, 19 June 2014*

(b) Karen Clark and Jeremy Prebble, Crown opening (oral) submission concerning Otaiti, 4 July 2014

3.3.4 Janet Mason, amended opening submissions, 30 June 2014

3.3.5 Jeremy Prebble and Rohan Wanigasekera, closing submissions, 9 July 2014

(a) Printout of word processor table listing Crown engagement with Māori concerning *Rena*, not dated

3.3.6 Tom Bennion and Lisa Black, closing submissions concerning resourcing issues, 9 July 2014

(a) *Verseput v Tauranga City Council* [2013] NZEnvC 251

(b) *Land Air Water Association v Waikato District Council* Environment Court Auckland A143/2002, 5 July 2002

(c) Acting Principal Environment Judge, 'Environment Court of New Zealand Practice Note 2011', 1 October 2011

3.3.7 Janet Mason and Alice Shelton, interim closing submissions, 10 July 2014

3.3.8 Jeremy Prebble and Rohan Wanigasekera, closing submissions, 31 July 2014

(a) Jeremy Prebble and Rohan Wanigasekera, amended closing submissions, 19 September 2014

(b) Jeremy Prebble and Rohan Wanigasekera, amended closing submissions, 13 October 2014

3.3.10 Janet Mason and Alice Shelton, closing submissions, 1 August 2014

(a) Janet Mason and Alice Shelton, amended closing submissions, 15 October 2014

3.3.11 Tom Bennion and Lisa Black, closing submissions, 1 August 2014

(a) Tom Bennion and Lisa Black, amended closing submissions, 15 October 2014

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3.4.5 Jeremy Prebble and Rohan Wanigasekera, memorandum concerning request for further discovery, 15 July 2014

(a) Matthew Casey, memorandum updating Environment Court on prospective applications for resource consent concerning *MV Rena* by Lowndes Associates, 31 January 2014

3.4.7 Buddy Mikaere, oral presentation, 21 July 2014

3.4.10 Jeremy Prebble, memorandum concerning Crown submission on resource consent application, 8 August 2014

(a) Supporting documents to memorandum 3.4.10, various dates

pp 1–2: Attorney-General, 'Crown Submission on *Rena* Wreck Consent Application', media statement, 8 August 2014

pp 3–4: Bay of Plenty Regional Council, 'Submission on Applications for Resource Consent: Astrolabe Community Trust – *MV Rena*', submission form, 2014 (completed by Matthew Andrews, Crown Law Office, 8 August 2014)

pp 5–6: Attorney-General, Minister of Conservation, and Minister for the Environment to Bay of Plenty Regional Council, 'Application for Resource Consent *MV Rena*', letter, 8 August 2014

pp 7–14: Crown submission to Bay of Plenty Regional Council concerning *Rena* resource consent application, 8 August 2014

3.4.11 Tom Bennion and Lisa Black, memorandum concerning event chronology, disclosure of documents, and section 9 of the Law Reform Act 1936, 11 August 2014

(a) 'Overview Chronology', printout of word processor table listing response to *Rena* grounding, not dated

(b) Supporting documents to memorandum 3.4.11, various dates

pp 1–5: Printout of word processor table listing documents for which discovery is sought, not dated

pp 6–14: *Bridgecorp Ltd v Certain Lloyd's Underwriters* [2014] NZHC 842

p 15: Managing director, Swedish Club, '*Rena* Insurance Arrangements', media statement, 17 October 2011

3.4.13 Jeremy Prebble and Rohan Wanigasekera, memorandum responding to document A51 and memorandum 3.4.11, 14 August 2014

(a) Rohan Wanigasekera and Lisa Black, printout of email correspondence concerning outstanding documents for discovery, 11 July 2014

3.4.14 Jeremy Prebble and Rohan Wanigasekera, memorandum responding to memorandum 2.7.7, 26 August 2014

(a) Supporting documents to memorandum 3.4.14, various dates

pp 1–53: Office of the Attorney-General, 'Crown Position on the Resource Consent Application for the *Rena* Wreck', Cabinet paper, 31 July 2014

pp 54–57: Secretary of the Cabinet, 'Crown Position on the Resource Consent Application for the *Rena* Wreck', minute of Cabinet decision, CAB Min (14) 26/18, 4 August 2014

pp 58–59: Jo Gascoigne to Nepia Ranapia, letter, 31 July 2014

p 60: Jo Gascoigne to Umuhuri Matehaere, letter, 3 July 2014

p 61: Printout of word processor table listing documents uploaded to Crown Law Office website, not dated

3.4.20 Janet Mason and Alice Shelton, memorandum concerning new information released by Maritime New Zealand, 17 October 2014

(a) Matthew Andrews to Umuhuri Matahaere, letter, 10 September 2014

3.4.21 Janet Mason and Alice Shelton, supplementary closing submissions concerning reports released by Maritime New Zealand, 29 October 2014

3.4.22 Tom Bennion and Lisa Black, supplementary closing submissions concerning reports released by Maritime New Zealand, 30 October 2014

3.4.23 Jeremy Prebble and Rohan Wanigasekera, memorandum responding to memoranda 3.4.21 and 3.4.22, 5 November 2014

3.4.24 Janet Mason and Alice Shelton, memorandum responding to memorandum 3.4.23, 7 November 2014

3.4.25 Jeremy Prebble and Rohan Wanigasekera, memorandum responding to memorandum 2.7.11, 14 November 2014

3.4.26 Jeremy Prebble and Rohan Wanigasekera, memorandum filing report by Dr Grant Young, 25 November 2014

(a) Supporting documents to memorandum 3.4.26, various dates

pp 1: Matthew Andrews to Te Pio Kawe, letter, 25 November 2014

pp 2–11: Dr Grant Young, 'Commentary on Dr Kahotea's Cultural Interests Assessment', printout of word processor document, not dated

4. TRANSCRIPTS AND TRANSLATIONS

4.1 Transcripts

4.1.1 National Transcription Services, transcript of urgent hearing, 30 June – 2 July 2014

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A1 Mark Muirhead Sowden, brief of evidence, 28 June 2013

(a) Ministry for the Environment, *Rena Long-Term Environmental Recovery Plan* (Wellington: Ministry for the Environment, 2011)

(b) *Rena* Steering Group, minutes of 9 April 2013 meeting, not dated

(c) Motiti Rohe Moana Trust, minutes of 6 March 2012 meeting, not dated

A2 David Billington, brief of evidence, 28 June 2013

A3 Stephanie Winson, brief of evidence, 28 June 2013

(a) Maritime New Zealand, 'Notice under Section 248 of the Maritime Transport Act 1994', 9 August 2012

(b) Maritime New Zealand, 'Notice under Section 100A of the Maritime Transport Act 1994', 9 August 2012

A4 Marian Ruth Smith, brief of evidence, 1 July 2013

A5 Umuhuri Matahaere, brief of evidence, 28 June 2013

A6 Elaine Rangi Butler, brief of evidence, 13 September 2013

(a) Supporting documents to document A6, various dates
pp 1–39: Dr Desmond Kahotea, 'Rena Recovery – Cultural Values', interim research report, February 2013

A7 Mark Muirhead Sowden, brief of evidence, 2 October 2013

(a) Michael McCarthy to Matthew Andrews, letter, 12 September 2013

(b) Una Jagose to Michael McCarthy, letter, 27 September 2013

A8 Reece Stuart Golding, brief of evidence, 2 October 2013

A9 Roger Charles King, brief of evidence, 2 October 2013

A10 Key authorities and relevant documents, various dates

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pp [2]–[16]: *In Tandem Marine Enhancement Ltd v Waikato Regional Council* Environment Court Thames, A58/2000, 10 May 2000

pp [17]–[30]: *McGuire v Hastings District Council* PC43/2000, 1 November 2001

pp [31]–[66]: *Ngati Ruahine v Bay of Plenty Regional Council* [2012] NZHC 2407

pp [67]–[72]: *Norris v Northland Regional Council* [2012] NZEnvC 124

pp [73]–[90]: *New Zealand Maori Council v Attorney-General* PC14/93, 13 December 1993

pp [91]–[112]: *New Zealand Maori Council v Attorney-General* CA54/87, 20 March 1989

pp [113]–[134]: Watercare Services Ltd v Minhinnick CA221/97, 17 November 1997

pp [135]–[139]: Chief Judge Joe Williams, memorandum declining application for urgency by Ngati Koroki Kahukura, 31 August 2005 (Wai 1294 ROI, memo 2.8.2)

pp [140]–[165]: Waitangi Tribunal, ‘Guide to the Practice and Procedure of the Waitangi Tribunal’ (practice note, Wellington: Waitangi Tribunal, May 2012), pp i–iv, 1–20

pp [166]–[184]: Local Government Act 1974, ss 650A–650K, 684B–684F

pp [185]–[326]: Maritime Transport Act 1994

pp [327]–[384]: Marine and Coastal Area (Takutai Moana) Act 2011

pp [385]–[402]: Resource Management Act 1991, ss 5–8, 15A, 15B, 104, 108

A11 Daina Shipping Company, Her Majesty the Queen in Right of New Zealand, Maritime New Zealand, and the director of Maritime New Zealand, ‘Deed in Relation to Removing Wreck Arising from the *Rena* Casualty’, 1 October 2012

A12 Daina Shipping Company, Her Majesty the Queen in Right of New Zealand, Maritime New Zealand, New Zealand Transport Agency, Environmental Protection Authority, Bay of Plenty District Health Board, and the Minister of Local Government, ‘Deed in Relation to Claims Arising from the *Rena* Casualty’, 1 October 2012, pp 1–4

A13 Her Majesty the Queen in Right of New Zealand and Daina Shipping Company, ‘Deed of Indemnity’, 1 October 2012, cls A–E, 7

A14 Mark Muirhead Sowden, brief of evidence, 16 June 2014
(a) Supporting documents to document A14, various dates
pp 209–210: Deliah Balle to Mark Sowden, email, 13 December 2013

pp 211–212: Penetaka Dickson to Mark Sowden, email, 14 January 2014

pp 213–214: Buddy Mikaere to Mark Sowden, email, 22 March 2014

pp 215–220: ‘Initial Consultation with Ngāti Awa on Potential *Rena* Consent Application for Leaving Wreck of *MV Rena* on Otaiti Reef’, meeting notes, 4 February 2014

pp 221–224: ‘Initial Consultation with Ngāi Te Rangi on Potential *Rena* Consent Application for leaving wreck of *MV Rena* on Otaiti Reef’, meeting notes, 11 February 2014

pp 225–258: Mark Sowden to Māori groups, letter, 6 June 2014

pp 265–268: Ministry for the Environment, ‘*Rena* Consent Application – Iwi Consultation; Consultation Plan May 2014’, internal document, May 2014

pp 269–274: Jeremy Prebble to Dr Grant Young, letter, 8 April 2014

pp 275–300: Dr Grant Young, ‘Otaiti (Astrolabe Reef): Report on Customary Interests and Other Matters’, report, 12 June 2014

pp 325–332: Cabinet Office, ‘Ministerial Interventions under the Resource Management Act 1991’, Cabinet Office Circular CO (06) 7, 14 December 2006

A15 Matther Palmer, brief of evidence, 16 June 2014

A16 Keith Richard Manch, brief of evidence, 16 June 2014

(a) ‘*Maritime New Zealand v Daina Shipping Co* Summary of Facts’, printout of word processor document, not dated

(b) Keith Richard Manch, supplementary brief of evidence, 7 July 2014

A17 Graeme James Lawrence, brief of evidence, 17 June 2014

(a) Supporting documents to document A17, various dates
pp 1–2: Printout of word processor table listing qualifications and experience of Graeme Lawrence, not dated

pp 3–25: *Motiti Rohe Moana Trust v Bay of Plenty Regional Council* [2014] NZEnvC 125

A18 Cletus Maanu Paul, brief of evidence, 16 June 2014

(a) Supporting documents to document A18, various dates

A19 David Billington, brief of evidence, 17 June 2014

(a) Simon Murdoch, *Independent Review of Maritime New Zealand’s Response to the MV Rena Incident on 5 October 2011* (commissioned review report, Wellington: Maritime New Zealand, 2013)

(b) Dave Billington, ‘*Rena* Salvage Update’ (PowerPoint presentation, Wellington: Maritime New Zealand, 2014)

A20 Matthew Andrews, brief of evidence, 17 June 2014

(a) Supporting documents to document A20, various dates

(b) Matthew Andrews, supplementary brief of evidence, 7 July 2014

(c) Secretary of the Cabinet, ‘All-of-Government Process for Possible Crown Submission on *Rena* Resource Consent’, minute of Cabinet decision, CAB Min (14) 21/11, 23 June 2014

A20—continued

(d) Matthew Andrews, second supplementary brief of evidence, 31 July 2014

(e) Supporting documents to document A20, various dates
pp 1–2: Managing director and director, risk and operations, Swedish Club, to Ministry of Transport, letter, 3 October 2012
pp 3–4: Managing director and director, risk and operations, Swedish Club, to Ministry of Transport, letter, 3 October 2012

A21 Buddy Mikaere, brief of evidence, 17 June 2014

(a) Ngāi Te Hapū Incorporated Society, comp, 'Cultural Values Assessment of the Wreck of the mv *Rena* on Te Tau o Taiti (Astrolabe Reef)' (Papamoa: Ngāi Te Hapū Incorporated Society, [2014])

A22 Umuhuri Matahaere, brief of evidence, 17 June 2014

A23 Jacqueline Taro Haimona, brief of evidence, 17 June 2014

A24 Hugh Sayers, brief of evidence, 17 June 2014

(a) Supporting documents to document A24, various dates
pp 202–203: Minister of Transport, 'Rena Compensation Agreed', media statement, 2 October 2012

A25 Key Crown documents concerning wreck removal deed, various dates

pp 405–411: Department of Internal Affairs, 'Policy Briefing: Settlement Agreement for *Rena* Grounding Claims', briefing paper, 21 September 2012

pp 605–616: Department of Internal Affairs, 'Information Briefing: Application to Leave *Rena* on the Otaiti Reef', briefing paper, 16 May 2014

A26 Key Crown documents post-execution of wreck removal deed, various dates

pp 455–456: Matthew Andrews to Jeremy Prebble and Rohan Wanigasekera, email, 20 May 2014

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A27 Alexander Gillespie, brief of evidence, 23 June 2014

(a) Lloyd's, *The Challenges and Implications of Removing Shipwrecks in the 21st Century* (London: Lloyd's, 2013)

A28 Brendon Heremia Taingahue, brief of evidence, 23 June 2014

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pp 1–77: Richard Boast, 'Confiscation and Regrant, Matakana, Rangiwaia, Motiti and Tuahua: Raupatu and Related Issues' (commissioned research report, Wellington: Waitangi Tribunal, 2000)

pp 78–80: Certificate of title for lot 6 deposited plan South Auckland 78765, SA 62C/333, 20 April 1998

p 81: 'Notice Setting Apart General Land as a Maori Reservation', not dated, *New Zealand Gazette*, 1994, no 124, p 3663

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(a) Te Rūnanga o Ngāti Whakahemo, 'Ngāti Whakahemo Iwi Cultural Values Assessment' (cultural values assessment, Te Puke: Te Rūnanga o Ngāti Whakahemo, 2014)

A30 David Billington, supplementary brief of evidence in reply, 23 June 2014

A31 Keith Richard Manch, supplementary brief of evidence in reply, 23 June 2014

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A32 Joanna Louise Gascoigne, brief of evidence, 23 June 2014

(a) Supporting documents to document A32, various dates

A33 Mark Muirhead Sowden, supplementary brief of evidence in reply, 23 June 2014

(a) Supporting documents to document A33, various dates
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A36 Marian Ruth Smith, brief of evidence, 24 June 2014
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A37 Jacqueline Taro Haimona, brief of evidence in reply, 23 June 2014
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