IN THE WAITANGI TRIBUNAL
WELLINGTON

WAI-

IN THE MATTER OF the Treaty of Waitangi Act 1975

AND

IN THE MATTER OF The Māori Community Development Act Claim, being a claim by Cletus Maanu Paul and Sir Edward (Taihākurei) Durie co-chairs of New Zealand Māori Council ("Māori Council") and chair of Mataatua and Raukawa District Māori Councils respectively; Desma Kemp Ratima, chair of the Takitimu District Māori Council and chair of the New Zealand Māori Council's Wardens Committee; and Anthony Toro Bidois chair of the Te Arawa District Māori Council and co-claimant for Ngāti Rangiwewehi in the New Zealand Māori Council's Water Claim (Wai 2358), on behalf of the New Zealand Māori Council and Māori generally

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MEMORANDUM OF COUNSEL FOR CLAIMANTS SUPPORTING:
(1) APPLICATION SEEKING URGENT INQUIRY ON MĀORI COMMUNITY DEVELOPMENT ACT CLAIM;
(2) INTERIM RECOMMENDATION/DIRECTION THAT THE CROWN PAUSE CONSULTATION ON REFORM OF MĀORI COMMUNITY DEVELOPMENT ACT UNTIL RECEIVING THE TRIBUNAL'S REPORT AND RECOMMENDATIONS

Dated: 2 October 2013

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MAY IT PLEASE THE TRIBUNAL:

(A) Overview of the Claim

1. The Claimants challenge the current consultation on reform of the Māori Community Development Act 1962 (**1962 Act**), with prospective damage to the Māori Council system, including the loss of the Māori Wardens to that system, by a consultation process led exclusively by the Crown (**the consultation process**). The Claimants contend that the history behind the 1962 Act, read with the Treaty and the United Nations Declaration on the Rights of Indigenous Peoples (**UNDRIP**), call for an interactive process for reform according to protocols outlined by UNDRIP.

2. There are three aspects to the Claimants' challenge in this regard:[1]

   2.1 **The first claim** refers to the Crown's consultation process for the reform of the New Zealand Māori Council and the Māori Wardens established under the 1962 Act. The claim is that this is a Crown led and controlled process for the reform of Māori institutions which are of such significance as to call for direct Crown and Māori negotiations.

   2.2 **The second claim** refers to the Māori Wardens Project established by the Crown in 2007 to support and develop the capacity of the Wardens constituted under the 1962 Act. The claim is that in administering this Project, the Crown has acted inconsistently with the principles of the Treaty by diminishing or excluding the authority of the New Zealand Māori Council to administer the Wardens in terms of the 1962 Act.

   2.3 **The third claim** is that the timing of the consultations was and is prejudicial to the New Zealand Māori Council's business, for the benefit of Māori, especially in relation to the New Zealand Māori Council's conduct of the *Water Claim* (Wai 2358). The claim is that the timing of the consultation process demonstrates a lack of good faith

[1] As set out in the Statement of Claim dated 27 September 2013.

towards the New Zealand Māori Council, and that good faith is required in terms of the Treaty.

3. The prejudice associated with each of these aspects is separately pleaded.[2]

4. Against this background, the Claimants' position is that the Tribunal's intervention is necessary to ensure that the reform process, which the Claimants say is inconsistent with the principles of the Treaty in the circumstances of the case, is made Treaty-compliant and in that way that any reforms which come to be made to the 1962 Act, including by way of legislation, are consistent with the principles of the Treaty, and in particular with Māori rights to rangatiratanga/self-government and self-determination guaranteed by the Treaty and recognised in UNDRIP.

5. The Claimants consider that it is better for the Tribunal to consider the reform process in a timely way, before that process has been completed and officials have reported back to Cabinet on it. This is to ensure that minds remain open to identifying the best process for determining the statutory framework for Māori self-governance in New Zealand today, and that it is feasible to introduce that process. Where Tribunal findings and recommendations are made after the consultation process ends, it will be too late to consider an alternative process, minds might well be closed to optimal reform options, and the 1962 Act may possibly be amended.

6. The further consideration is the efficacy of the current process for reform of the 1962 Act given the short timelines for the consultation process, the fact that the Crown has not disclosed its own intentions for the New Zealand Māori Council or the Māori Wardens, and the prospect that the Crown will make proposals without the opportunity for Māori to respond to them.

(B) Interim orders sought by Claimants

7. To resolve their Claims in a timely way, the Claimants now seek:

   7.1 first, that their Claim be given urgent consideration by the Tribunal (**application for urgency**);

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[2] See paras 9, 12 and 14 of the Statement of Claim dated 27 September 2013.

7.2 second, that the Tribunal make an interim recommendation/direction that the Crown pause the consultation process it is leading on reform of the 1962 Act until it has received the Tribunal's report and recommendations on its consistency with the principles of the Treaty including the principles implicit in the Treaty through UNDRIP (**application for interim recommendation/direction**).

8. These applications are supported by the affidavit of Karen Waterreus dated 2 October 2013.

(C) <u>Application for urgency</u>: Why urgency should be granted

(C1) Applicable legal principles

9. The Tribunal's discretion to grant an urgent inquiry is informed by the criteria it has identified in its "Practice Note – Applications Seeking Urgent Tribunal Consideration". The Practice Note relevantly provides:

> **Applications for an urgent inquiry**
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> In deciding an urgency application, the Tribunal has regard to a number of factors. Of particular importance is whether:
> - the claimants can demonstrate that they are suffering, or are likely to suffer, significant and irreversible prejudice as a result of current or pending Crown actions or policies;
> - there is no alternative remedy that, in the circumstances, it would be reasonable for the claimants to exercise; and
> - the claimants can demonstrate that they are ready to proceed urgently to a hearing.
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> Other factors that the Tribunal may consider include whether:
> - the claim or claims challenge an important current or pending Crown action or policy;
> - an injunction has been issued by the courts on the basis that the claimants have submitted to the Tribunal the claim or claims for which urgency has been sought; and
> - any other grounds justifying urgency have been made out.
>
> Prior to making its determination on an urgency application, the Tribunal may consider whether the parties or the take or both are amenable to alternative resolution methods, such as informal hui or formal mediation under clause 9A of schedule 2 to the Treaty of Waitangi Act 1975.

10. Each criterion is addressed in turn below.

(C2) Significant and irreversible prejudice

11. This is addressed in the affidavit of Karen Waterreus in support, particularly at paras 9, 16-31 (defects in Crown reform consultation process, including consultation materials) and 32-34 (resulting prejudice).

12. In summary, the Claimants say that any reform of a constitutional agreement (the 1962 Act) between the Crown and Māori on Māori rangatiratanga/self-governance structures at the local (Māori Committees), regional (District Māori Councils) and national (New Zealand Māori Council) levels, and the provisions for community officers and Wardens, must be undertaken consistently with the principles of rangatiratanga/self-government and self-determination guaranteed by the Treaty and UNDRIP. They say that the Crown's reform process breaches these principles, as it involves the Crown deciding how Māori are to be organised, not Māori themselves or Māori and the Crown by negotiation, and as key consultation material does not contain accurate or adequate information relevant to reform of the 1962 Act.

13. In that context the significant and irreversible prejudice justifying the Tribunal's urgent intervention is twofold. First is the prospective loss or modification of self-governing rights secured in 1962, in the form of the New Zealand Māori Council and the Wardens, without adequate awareness of the historical and current facts, without adequate consideration of the appropriate process, and without adequate dialogue with the New Zealand Māori Council. Second is the prospective loss of an opportunity to negotiate with the Crown for recognition of those institutions as presently or prospectively constituted and the support of them. For that, an interactive process is required.

14. In relation to the significance and irreversibility of this prejudice, the Crown's actions in:[3]

    14.1 commencing a consultation process for potentially significant reform of the New Zealand Māori Council at a time which will be prejudicial to the Māori Council's business, for the benefit of all Māori, especially in

[3] Summarising para 9 of Karen Wattereus' affidavit in support.

relation to the New Zealand Māori Council's conduct of the *Water Claim*;[4]

14.2 its exclusion of the New Zealand Māori Council from participating as an equal partner in that process, despite the official status and functions that Parliament has given to the New Zealand Māori Council under the 1962 Act;

14.3 its publication of consultation materials containing inaccurate or inadequate information on the 1962 Act and the context for its reform;

14.4 its setting of short timeframes for written submissions to be made on reform options (2 months);

14.5 its restriction of official kanohi-ki-te-kanohi (face-to-face) dialogue on reform options to 19 short hui held during working hours likely to be inconvenient to many otherwise interested consultees;

14.6 its lack of neutrality in the conduct of the public consultations;

14.7 its administration of the Māori Wardens including the provision of funding in apparent contradiction of the provisions of the 1962 Act;[5] and

14.8 the seemingly unfettered discretion the Crown has reserved to itself to determine the changes it will make by legislation to the 1962 Act, potentially as early as the new year;

– together justify the conclusion that the Crown is not playing the neutral "facilitating role"[6] it should be on reform of the 1962 Act, in light of the constitutional status of the 1962 Act as a rangatiratanga/self-government 'agreement' between Māori and the Crown.

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4 See also paras 91-98 of the Statements on the Basis for the Claim, appended to the Statement of Claim dated 27 September 2013.

5 See also para 9 of the Statement of Claim dated 27 September 2013.

6 See by analogy *The Ngati Tuwharetoa ki Kawerau Settlement Cross-Claim Report* (Wai 996, 2003), at section [4.6] ("This is not the Crown in a consulting, facilitating role. This is the Crown as judge and jury.").

15. This is important to the present applications because the Tribunal in allowing the consultation process to conclude, notwithstanding the problems just noted, will be allowing a significant precedent to be set for how the Crown can consult with Māori on matters of constitutional significance to and for Māori.

16. Finally on prejudice, note by analogy the successful Wai 996 application for urgency in 2002, as summarised in *The Ngati Tuwharetoa ki Kawerau Settlement Cross-Claim Report* (Wai 996).[7] There urgency was granted in part so that the claim did not potentially become moot through the enactment of (settlement) legislation. That approach has relevance here too, as officials have been directed to report back to Cabinet on the consultation process by November 2013, with change to the 1962 Act being on "the legislative programme" after that report back.[8] An added point is that the Claim becomes moot with the introduction of a Bill.

(C3) Alternative remedies

17. Direct negotiation is not an available remedy. As explained in paras 10-12 of the affidavit of Karen Waterreus in support, the Claimants have tried unsuccessfully to address the issues which are the subject of this Claim in a timely way with the Crown. Cabinet rejected the Claimants' overtures.

18. In that context, the Tribunal's functions and expertise make it the body to provide recommendations and directions on a Treaty-compliant process for reform of the 1962 Act, and in doing so to articulate practical implications of the Treaty and UNDRIP rights to rangatiratanga/self-government and to self-determination.

19. On the need for timely intervention to correct an ongoing consultation process which is misfiring, note by analogy the *Breckland* holding that:[9]

> … if it is arguable that a consultation is proceeding on a false basis which is justiciable in law, there is every reason to lean in favour of deciding the issue sooner rather than later.

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7 See *The Ngati Tuwharetoa ki Kawerau Settlement Cross-Claim Report* (Wai 996, 2003), at section [1.5].

8 See paras 12-15 of Karen Wattereus' affidavit in support (quoting Cabinet decisions).

9 *R (o.a.o. Breckland District Council) v The Boundary Committee* [2009] EWCA Civ 239 (Eng. CA), at para [109].

20. So too here. The Tribunal should intervene to correct the misfiring consultation process before it has been completed and decisions made on it.

(C4) Claimants are ready to proceed urgently to a hearing

21. The Claim will be ready to be heard urgently by the Tribunal in March 2014.

22. The fixing by the Tribunal of a timetable for that urgent hearing is based on:

    22.1 the Claimants receiving legal aid funding for expert historian and UNDRIP witnesses,[10] and those experts being briefed and providing their reports, by not later than 5pm on Friday 13 December 2013;

    22.2 the Claimants filing an amended statement of claim, particularising their Claim in light of that expert evidence (and further narrowing the issues in dispute), by not later than 5pm on Friday 17 January 2014;

    22.3 the Crown filing a statement of defence to the amended statement of claim by not later than 5pm on Friday 31 January 2014;

    22.4 the Claimants filing any affidavits/briefs of evidence they seek to rely on, by not later than 5pm on Friday 14 February 2014;

    22.5 the Crown filing any affidavits/briefs of evidence it seeks to rely on, by not later than 5pm on Friday 28 February 2014.

23. The Claimants anticipate that the expert reports envisaged for filing in December 2013, and the amended pleadings envisaged for filing in January 2014, will significantly reduce the facts in issue, and mean that only minimal additional evidence will be required for the urgent hearing. It is, moreover, possible that the need for further evidence can be reduced if not eliminated entirely by the Claimants and the Crown agreeing on a statement of facts, and bundle of associated documents, relevant to the Claim being advanced.

(C5) Claim challenges an important current/pending Crown action

24. As set out above, this Claim relates to the right of Māori to lead the process for determining the officially recognised bodies through and by which Māori are

[10] See para 24 of the Statement of Claim dated 27 September 2013.

to govern themselves, including the officially recognised body through and by which pan-Māori interests are promoted to and against the State. The Crown's position – that it can exclusively lead the process for reforming the existing constitutional framework for Māori rangatiratanga/self-government rights (the 1962 Act) – raises an important point of principle: do Māori have the right to develop their own institutions for themselves, and if so practically how does that right affect the design and implementation of a process to reform a statute of constitutional significance which provides for Māori self-governance?

25. This Claim also raises unique and important questions about the nature and extent of the rights to rangatiratanga/self-government and self-determination guaranteed by the Treaty and UNDRIP. The intersection between those rights, on the one hand, and the Crown's position that it can consult as it sees fit on how Māori rangatiratanga/self-government structures should be reformed, on the other hand, is an important contemporary matter the Tribunal should inquire into and report on in a timely way.

(C6) No relevant court injunctions have been issued

26. No injunction has been issued by the Courts relating to the urgency sought.

27. However, the urgent hearing of this Claim will avoid the need for the Claimants to give consideration to seeking declaratory relief against the Crown in the High Court in relation to the Crown-led process to reform the 1962 Act. It may also alleviate the need for declaratory relief to be sought against the Crown in relation to the lawfulness of the Crown's action in administering the Māori Wardens,[11] and assist the Crown in its duty to consider the compliance of draft legislation with human rights, including cultural rights guaranteed to Māori by s 20 of the New Zealand Bill of Rights Act 1990.

(D) <u>Application for interim recommendation/direction</u>: Why an interim recommendation/direction should also be made

(D1) Applicable legal principles

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[11] See paras 69-70 of the Statements on the Basis for the Claim, appended to the Statement of Claim dated 27 September 2013.

28. The Tribunal's power to make an interim recommendation/direction that the Crown not take particular action until it has received a Tribunal report and recommendations on the consistency of that action with Treaty principles, was confirmed in Memorandum-Directions issued in the *Water Claim*:[12]

> 21. Our powers relevant for this memorandum-directions are to be found in s 8(2)(a) of the second schedule of the [Treaty of Waitangi] Act, which enables the Tribunal to make directions of the type sought by the claimants.
> …
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> 25. In deciding whether the interim direction sought by the claimants should be made, we consider that the principles applied by the courts of general jurisdiction in determining an application for an interim injunction… are relevant. There is no single test, but adopting these principles, the considerations for the Tribunal are:
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> > a) Whether there is a serious question to be tried or inquired into;
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> > b) Whether the balance of convenience favours making an interim direction that the Crown should preserve the status quo until the release of the Tribunal's report and recommendations.
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> 26. The overarching consideration for the Tribunal must be that, if there is a reasonably arguable case, then the position of the parties should be preserved.
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> 27. If there is a serious question raised by the claim, and if the balance of convenience favours maintaining the status quo, then in our view this would make out a sufficient basis for an interim direction concluding that the Crown ought to delay any sale of shares in the Mixed Ownership Companies until it has had the opportunity to receive the Tribunal's stage one report and consider its findings.

(D2) There is a serious question to be inquired into

29. As set out above, this Claim raises unique and important issues of whether Māori have the right to develop their own governing institutions for themselves, and if they do have that right, practically how does it shape the design and implementation of a process to reform a constitutional statute (the 1962 Act) which provides for Māori self-governance? At the heart of these issues are questions about the nature and scope of the rights to rangatiratanga/self-government and self-determination guaranteed by the Treaty and UNDRIP.

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[12] Memorandum-Directions of the Tribunal dated 30 July 2012 in the Water Claim (Wai 2358, 2012) (#2.7.2).

30. On this, the Claimants' position is that the 1962 Act is no ordinary statute but, when seen in the context of a century old search for rangatiratanga/self-government rights, it is an agreement to recognise a structure that contributes to the exercise of self-government. Consequentially, any change to that agreement requires an agreement, not a one-sided consultation. Therefore Māori should first consult with Māori on the particular changes required and then discuss/negotiate these with the Crown. This approach gives effect to UNDRIP and the right of indigenous peoples to develop their own institutions.

31. The following UNDRIP rights, which also inform rangatiratanga/self-government rights under the Treaty, have particular relevance in this regard:

> **Article 3**
> Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
>
> **Article 5**
> Indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State.
>
> **Article 18**
> Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decisionmaking institutions.
>
> **Article 19**
> States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.

32. These UNDRIP rights confirm that the Claimants' position is "not an implausible one".[13] As in the *Water Claim*, the issues raised by this Claim are "of substance and warrant[] serious inquiry" by the Tribunal, which tells in favour of making the interim recommendation/direction sought.[14]

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13 See similarly Memorandum-Directions of the Tribunal dated 30 July 2012 in the Water Claim (Wai 2358) (#2.7.2), at para [47].

14 See Memorandum-Directions of the Tribunal dated 30 July 2012 in the Water Claim (Wai 2358) (#2.7.2), at para [48].

33. The Claimants' reliance on UNDRIP also suggests that their Claim raises issues of "national importance", in relation to the interpretation and practical application of UNDRIP rights in New Zealand. This too supports the Tribunal making the interim recommendation/direction the Claimants seek.[15]

(D3) Balance of convenience favours interim recommendation/direction

34. As set out above, conclusion of the consultation process, potentially involving legislative changes to the 1962 Act, despite inadequacies in the design of the process (Crown not Māori-led), in the consultation materials produced by the Crown (containing inaccurate or inadequate information) and in the timeframes set by the Crown (too short), risks a significant adverse precedent being set for Māori on how the Crown should consult on Māori rangatiratanga/ self-government structures; a matter of constitutional significance to Māori. It also risks changes being made to existing Māori self-government structures through an inadequately informed, inadequately interactive process.

35. These risks can be averted by the Tribunal making an interim recommendation/direction that the Crown pause the consultation process on reform of the 1962 Act until it has received the Tribunal's report and recommendations. This pause will enable the Crown and Māori to ensure that an important consultation process has been conducted in a Treaty-compliant manner and, by that means, that the outcome(s) of the process are also Treaty-compliant. On this, note by analogy the position of the Courts that good process (in this instance, a Treaty-compliant reform process) is important in facilitating the making of better quality and more highly respected substantive decisions (in this instance, decisions on how to reform the 1962 Act).[16]

36. It also tells in favour of the interim recommendation/direction sought that there is no pressing need for consultation to be concluded by November 2013, the deadline currently set for officials to report back to Cabinet.[17] The 1962 Act was an end-product of over a century of Māori-led efforts to establish

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15 See similarly Memorandum-Directions of the Tribunal dated 30 July 2012 in the Water Claim (Wai 2358) (#2.7.2), at para [58].

16 See, e.g., *Taito v R* [2003] 3 NZLR 577 (PC), at para [19] (*per* Lord Steyn); *Discount Brands Ltd v Westfield (N.Z.) Ltd* [2005] 2 NZLR 597 (SC), at para [149] (*per* Tipping J).

17 See paras 12-14 of of Karen Wattereus' affidavit in support.

officially recognised rangatiratanga/self-government structures and bodies; efforts which began in the 1840s with Māori initiatives to adapt the customary Runanga (or hapū and iwi councils) to form Committees and Councils to regulate local conduct and to manage local disputes.[18] Delaying modernising reform to the 1962 Act for a short time, to ensure a Treaty-consistent process, is a justified step when viewed in the context of this history to the rangatiratanga/self-government 'agreement' struck between the Crown and Māori in 1962 and reflected in the bodies, structures and functions set out in the 1962 Act.

37. Finally, it is relevant to the balance of convenience that a short delay in the process for reform of the 1962 Act while the Tribunal urgently inquires into and reports on the Treaty-conformity of the reform process, will not have significant fiscal and related implications for the Crown. Contrast a delay in the IPO of MOM company shares, although recall that delay in that context, where the Crown's policy initiative was also a key election promise by the Government, did not prevent the Tribunal from making the same interim recommendation/direction as the one sought by the Claimants here.[19]

Dated: 2 October 2013.

Matthew S Smith
Counsel for the Claimants

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18 See para 6 of the Statements on the Basis for the Claim, appended to the Statement of Claim dated 27 September 2013.

19 See Memorandum-Directions of the Tribunal dated 30 July 2012 in the Water Claim (Wai 2358) (#2.7.2), at paras [53]-[57].