NEW ZEALAND
Permanent Mission
TE AKA AORERE

6 November 2012

Mr James Anaya
Special Rapporteur on the Rights of Indigenous Peoples
C/- Ms Maia Campbell
Special Procedures Division
Office of the High Commissioner for Human Rights
Palais de Nations
CH-1211 GENEVA 10

Dear Mr Anaya

I have the pleasure of providing you with the response of the Government of New Zealand to your letter of 16 August concerning the views expressed to you by the Mangakahia Whanau.

I trust you will find this response helpful in your consideration of the issue.

Yours sincerely

Brian Wilson

Brian Wilson
Chargé d'affaires a.i.

OHCHR REGISTRY

06 NOV 2012

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06 NOV 2012

Professor James Anaya
Special Rapporteur on the rights of indigenous peoples
Office of the United Nations High Commissioner for Human Rights
United Nations

Dear Special Rapporteur

Thank you for your letter of 16 August 2012 informing us of communication you have received from Te Whānau a Mangakahia (**Whānau Mangakahia**). You have sought the Government's views on the accuracy of the information provided by Whānau Mangakahia and any additional information deemed relevant. In particular, you have asked:

1. Whether a settlement has been or will be reached with the Hauraki Collective which will include reparations for the claims originally presented by the Mangakahia Whānau before the Waitangi Tribunal. If so, provide information on how the concerns related to the adequate representation and adequate compensation of the claims of the Mangakahia Whānau have been or will be addressed through this particular settlement process.

2. The measures adopted to consult with members of the Mangakahia Whānau regarding the inclusion of their land claim within the group of claims negotiated between the Crown and the Hauraki Collective. In this regard, provide information on any opportunity that the members of the Mangakahia Whānau have had to agree or consent to the incorporation of their claim into the claims that the Hauraki Collective have been negotiating with the Crown;

3. Provide information on what options for reparations are available to those Māori groups who do not wish their claims to be adjudicated as part of a larger collective grouping under the Waitangi Tribunal settlement process;

4. Provide a description of the sources of financial and technical assistance available to the different Māori iwi, whānau and hapū who wish to bring forth a claim as part of the Waitangi Tribunal settlement process, both on an individual group basis and as part of a collective grouping.

To address your questions I have divided my response into two parts. In the first part, I address the specific circumstances of the Whānau Mangakahia claim, and in the second provide you with some information on Crown Treaty settlement policy. A number of attachments are also provided.

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In the context of my response I think it is important I reiterate New Zealand's support of the United Nations Declaration on the Rights of Indigenous Peoples, first announced at the Ninth Session of the United Nations Permanent Forum on Indigenous Issues by New Zealand's Minister for Māori Affairs, the Hon Dr Pita Sharples.

In New Zealand's statement of support, Dr Sharples noted that New Zealand's existing legal and constitutional framework defined the bounds of New Zealand's engagement with the aspirational elements of the Declaration. For example, under the Treaty of Waitangi, which continues to be the central focus for the New Zealand Government's efforts to resolve issues affecting New Zealand's indigenous people, New Zealand has well-established legal processes to address the aspirations for rights to and restitution of traditionally held land and resources. New Zealand has also developed distinct processes and institutions that afford Māori the opportunity to be involved in decision-making and we will continue to rely on these processes.

In our view, the Declaration is consistent with the duties and principles inherent in the Treaty of Waitangi, such as operating in the spirit of partnership and mutual respect. I can reaffirm for you the New Zealand Government's commitment to build and maintain constructive relationships with Māori to achieve better results for Māori, which will benefit New Zealand as a whole. New Zealand's support for the Declaration confirms the special cultural and historical position of Māori as the original inhabitants – the tangata whenua – of New Zealand. It reflects our continuing endeavours to work together to find solutions and underlines the importance of the relationship between Māori and the Crown under the Treaty of Waitangi.

Finally I note with regret Whānau Mangakahia representative, Lucien Mangakahia, passed away on 21 October 2012. Hāere atu rā e te whakatupuranga o tera kuia rongonui, a Meri Mangakahia, moe mai koutou, hāere atu rā.

Yours sincerely

Hon Christopher Finlayson
Minister for Treaty of Waitangi Negotiations

Part 1: Claims by Whānau Mangakahia (Wai 475)

1.1 Summary of Crown position on Whānau Mangakahia

The Whānau Mangakahia claim, Wai 475, was lodged in the Waitangi Tribunal (the **Tribunal**) on 10 October 1994 and is generally understood as a historical claim, that is, a claim relating to Crown actions or omissions before 1992. Whānau Mangakahia assert they hold customary rights in Whangapoua, an area in the north-east of the Coromandel Peninsula, in the Hauraki district.

The specific circumstances of the Whānau Mangakahia claim to the Tribunal are summarised below. This summary references documents filed with the Tribunal from 1994 to 2012 and includes pleadings and affidavits prepared in April and June 2012 for an application for an urgent remedies hearing that the Tribunal has adjourned *sine die* at the request of the whānau. The whānau have leave to approach the Tribunal to reactivate this application should circumstances warrant.

The Whānau Mangakahia claim needs to be understood in terms of the related but separate processes for the resolution of historical grievances against the Crown which consist of:

i. Waitangi Tribunal inquiry hearings and reports on historical claims and its oversight or review of Crown and Maori negotiations through urgent inquiries into claims; and

ii. Treaty of Waitangi settlement negotiations between Māori and the Crown.

These processes exist in a uniquely New Zealand environment of law, Crown policy and complex inter-Māori relationships between iwi (tribes), hapū (broadly "sub-tribes") and whānau (families and extended families).

The Crown's position is the historical grievances of Whānau Mangakahia will be settled through negotiations with the twelve iwi in the Hauraki region. These iwi have formed a Collective to negotiate in respect of their shared interests and are also negotiating specific redress for their specific interests. Redress for the whānau can be provided through these settlements, for example, by provision of important sites (such as burial grounds) in Crown Forest Licence land, and by recognition of specific grievances of the whānau in historical accounts and Crown acknowledgements. In addition members of the whānau will be beneficiaries of and can participate in both the Hauraki Collective settlement and the settlement of the individual iwi to which they affiliate.

A distinction should be made between the settlement of historical grievances of Whānau Mangakahia and questions of representation. In essence Whānau Mangakahia do not object to having their claims settled but they object to the manner in which settlement is taking place. This objection turns on questions of mandate and the Whānau Mangakahia argument that:

i. they are a large group with customary interests distinct from other groups in the Hauraki region; and

ii. the Crown should therefore settle with them separately.

Contrary to this the Crown and the majority of iwi in the Hauraki region do not believe Whānau Mangakahia constitute a large natural group with distinct customary interests that warrant iwi status and a separate seat on the Hauraki Collective.

Furthermore, the whānau in recent times appears to be attempting to revive an older tribal category, Ngāti Huarere, which has not been active as an iwi in Hauraki since around the signing of the Treaty of Waitangi in 1840 and likely earlier. While descent from Ngāti Huarere was argued as a source of customary rights before the Native Land Court in the mid nineteenth century, Whānau Mangakahia are not the only people in Hauraki who can claim such descent.

By choosing to define themselves as Ngāti Huarere, Whānau Mangakahia seek not only a settlement as if they are an iwi, but also underplay the customary interests of other Hauraki iwi in Whangapoua. At Whangapoua is an area of Crown Forest Licence Land which, with other forests in the Hauraki region, has been identified as a commercial property that will transfer to Hauraki iwi on settlement from which all Hauraki iwi will share benefits. Whānau Mangakahia appears to believe that a substantial portion of the Whangapoua Forest should be returned to them and them alone.

As noted, an application to the Waitangi Tribunal for an urgent remedies hearing has been filed by Whānau Mangakahia but is presently adjourned. If Whānau Mangakahia remain dissatisfied with the Crown's Treaty settlement framework in Hauraki and the opportunities available to them they are entitled to seek to reactivate this application. Within the New Zealand legal environment Whānau Mangakahia thus have recourse to a respected and long-standing body, the Waitangi Tribunal, which can adjudicate their claim and provide remedies over Crown Forest Licence Land if appropriate. In addition, Whānau Mangakahia have access to both the Māori Land Court and the general court system.

However, the Crown's strong preference is for the Whānau Mangakahia claim to be settled through direct negotiations and for the whānau to participate in the Hauraki Collective through the constituent iwi to which they affiliate. As noted specific redress for Whānau Mangakahia may, if warranted, be available through such negotiations.

1.2 The Whānau Mangakahia claim to the Waitangi Tribunal and Tribunal findings (1995-2006)

On 2 March 1995 the Waitangi Tribunal registered a claim by members of Whānau Mangakahia against the Crown of historical breach of the principles of the Treaty of Waitangi (**Attachment A**). The Tribunal provided the claim with the registration number "Wai 475".[1] In their statement of claim the Whānau Mangakahia described themselves as the descendants of two nineteenth century Māori leaders, Mohi Mangakahia and Hamiora Mangakahia, and others, and claimed customary interests in the north-east of the Coromandel Peninsula through an area known as Whangapoua.

In September 1998 the Waitangi Tribunal commenced hearings of historical claims in the Hauraki region. Hearings ran for over four years until November 2002, with 27 weeks of

[1] Any individual of Māori descent can lodge a claim with the Waitangi Tribunal. This means that "Wai claims" can be made individually or on behalf of groups as small as an individual and their immediate family. Claims can also be made on behalf of hapū or iwi, or indeed on behalf of all Māori.

hearings in total, making the Hauraki inquiry the longest running Waitangi Tribunal inquiry. In total 56 separate "Wai claims" were heard during the inquiry.[2] These claims ranged in size from a claim by the Hauraki Maori Trust Board on behalf of all Hauraki Māori (Wai 100), to iwi, hapū, whānau and individual claims.

The Waitangi Tribunal heard legal submissions and evidence from Whānau Mangakahia in February 2000. Evidence included historical reports, archaeological and other technical evidence, and briefs of evidence by members of the whānau and technical experts. The Tribunal thus received a considerable body of evidence relating to the claim Wai 475.

The Tribunal issued findings in 2006 in the form of a substantial three volume (1,300 page) report.[3] The Tribunal's report covered the full gamut of the colonial history of the Hauraki region and provided specific findings for all the claims it heard. For the Whānau Mangakahia claim (Wai 475), the Tribunal made the following finding:

> *The issues of claim raised by the Wai 475 claimants are those that have affected Hauraki claimants generally. As such, our findings on these general issues relate to Wai 475 claimants, along with the Wai 100 claimants and other Hauraki groups, and we do not recapitulate them here. We have, however, taken close account of Wai 475 submissions and evidence in relation to transactions at Whangapoua and have included a substantial discussion of this matter in chapter 14 (see secs 14.4.1, 14.4.2). We have also discussed the case of* Mangakahia v The New Zealand Timber Company *in chapter 17 because of its importance in disclosing the nature of titles created under the Native Lands Act 1875 (see sec 17.3.1). In section 20.4.3, we discuss wahi tapu* [sacred sites] *issues of importance to these claimants.*
>
> *We consider that the Wai 475 evidence, taken in conjunction with the evidence submitted by Wai 100 and many other groups in relation to the same issues, establishes that the actions of the Crown prejudiced the Wai 475 claimants, as discussed in the relevant chapters of this report, and their claims are well founded. However, by the claimants' own evidence, they are closely inter-related with Ngati Hei, Patukirikiri and other Hauraki iwi, in Whangapoua in particular, and we are unable to determine any particular portion of injury suffered by the Wai 475 claimants, relative to that of other groups who had interests in the same land.*[4]

This section of the Waitangi Tribunal report is the chapter on individual Wai claims where the Tribunal discusses whether these claims raise specific matters or are matters that affected Hauraki Maori generally i.e. whether or not these claims require additional commentary alongside the Tribunal's consideration of the comprehensive Hauraki claim – Wai 100.

The Waitangi Tribunal then went on to recommend whether or not these Wai claims should "*be included in a comprehensive settlement for the Hauraki inquiry district*".[5] In

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[2] Waitangi Tribunal, *The Hauraki Report* (The Waitangi Tribunal, Wai 686, Wellington, 2006) at p.7

[3] *The Hauraki Report* can be found on the Waitangi Tribunal website: http://www.waitangi-tribunal.govt.nz/reports/

[4] Waitangi Tribunal, *The Hauraki Report* (The Waitangi Tribunal, Wai 686, Wellington, 2006) at p.1244

[5] See Waitangi Tribunal, *The Hauraki Report* (The Waitangi Tribunal, Wai 686, Wellington, 2006) at pp.1233-1250

almost all cases the Tribunal recommended these individual Wai claims be included in a comprehensive settlement for the Hauraki inquiry district. This recommendation was not made for the Whānau Mangakahia claim.

As the findings cited above make clear, the Waitangi Tribunal did not support the Whānau Mangakahia argument they were a distinct community representing a distinct set of customary interest from other recognised Hauraki iwi. Nor did the Tribunal find that Whānau Mangakahia had claims and grievances sufficiently distinct and separate from those iwi to warrant a specific recommendation for redress.

1.3 Negotiations for Treaty settlements in the Hauraki region (2006-2012)

From the conclusion of Waitangi Tribunal hearings in Hauraki, and more particularly from the release of the Tribunal's report in 2006, Māori in Hauraki sought to enter into Treaty Settlement negotiations with the Crown. However, a protracted mandate dispute arose between the Hauraki Māori Trust Board (**HMTB**) and a coalition of iwi representatives called the Marutūāhu Working Group (**MWG**).[6] Both entities claimed to represent essentially the same tribal communities. In addition some iwi sought separate representation altogether.

This dispute significantly delayed the commencement of Treaty settlement negotiations. The Crown did not wish to negotiate a settlement with two representative entities for the same community of iwi as the results would necessarily be divisive and the same grievances would be settled twice. The Crown thus refused to recognise the mandate of either HMTB or MWG and sought various ways to resolve the dispute.

The issue of competing mandates was addressed by the Waitangi Tribunal in May 2009 when it declined an application by the HMTB for a remedies hearing (**Attachment B**). The Tribunal found the Crown had acted as a reasonable Treaty partner in promoting ways to resolve the mandate dispute.[7]

Whānau Mangakahia was not a party to these proceedings and does not appear to have sought to be represented through the HMTB, the MWG, or separately, at that time.

In March 2009 the Crown appointed Sir Douglas Graham, former Minister of Justice and former Minister for Treaty of Waitangi Negotiations, to consider a way to resolve complex and overlapping claims in the Auckland (Tāmaki), Kaipara and Hauraki regions. In particular, Sir Douglas was to seek a solution to an impasse that had been reached in Tāmaki following the Waitangi Tribunal's findings in its 2007 *Tāmaki Makaurau Settlement Process Report*.[8] Because of the customary interests of some Hauraki iwi in the Tāmaki region Sir Douglas was also asked to consider a solution to the protracted mandate dispute in Hauraki.

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[6] The HMTB is a body established in 1988 by the Hauraki Māori Trust Board Act. Iwi membership of the HMTB was determined at the time by Hauraki kaumatua (elders). Contrary to the statement in the Mangakahia Whānau's petition to the Special Rapporteur on the rights of indigenous peoples that the whānau "was one of the iwi that was excluded as a beneficiary" from the HMTB, the Mangakahia Whānau are entitled to be beneficiaries of the HMTB through their membership of a number of Hauraki iwi.

[7] **Attachment B**, p.24

[8] *The Tāmaki Makaurau Settlement Process Report* (2006) can be found on the Waitangi Tribunal website: http://www.waitangi-tribunal.govt.nz/reports/

On 24 June 2009 Sir Douglas provided a report to the Minister for Treaty of Waitangi Negotiations and the iwi / hapū of the Tāmaki, Kaipara and Hauraki regions.[9] The report provided a framework for comprehensive negotiations with all iwi / hapū through the three regions. A particular innovation was the establishment of two "Collective" bodies in the Tāmaki and Hauraki regions respectively.

The process followed by groups in the Hauraki region that led to the resolution of the long-standing dispute between the HMTB and MWG is set out in the 13 April 2012 affidavit of Chief Crown Negotiator Michael Dreaver (**Attachment E**, pp. 3-7) and Crown submissions to the Waitangi Tribunal of the same date (**Attachment D**, pp.3-5). In summary, the Crown offered iwi with disputed mandates the opportunity to hold hui (meetings) individually to decide whether or not to enter into negotiations with the Crown. This offer was extended to all iwi statutorily represented by the HMTB. An extensive mandating process of publicly advertised meetings ensued and, in April 2010, the 12 iwi of Hauraki formed the Hauraki Collective to progress their claims collectively. By the end of June 2012 the Crown had formally recognised the mandates of all 12 Hauraki iwi.

Negotiations between the Crown and the Hauraki Collective are ongoing. Negotiations are underpinned by a policy framework that recognises the benefits of collective action for the resolution of shared interests, the likelihood of shared ownership of key commercial assets after settlement (such as Crown Forest Licence lands) where overlapping claims would make it unfeasible to apportion the redress, and the need to provide redress specific to individual iwi. In short, the Crown and iwi seek a balance between shared and individual iwi interests, although the question of how exactly this will be manifest remains subject to ongoing consideration and negotiation.[10] The Crown hopes to reach a deed of settlement with the Hauraki Collective and its constituent iwi by mid-2013.

It should be noted that, under the 2006 New Zealand Census, approximately 15,000 Māori identified with one or more of the twelve Hauraki iwi belonging to the Hauraki Collective. This is likely to be a conservative indication of iwi affiliation.

1.4 Crown engagement with Whānau Mangakahia 2010-2012

At the beginning of 2010 Whānau Mangakahia sought to participate in the then developing Hauraki Collective. Chief Crown Negotiator, Michael Dreaver, met with representatives of the whānau in March 2010. The Crown took the view that Whānau Mangakahia did not appear to fit the "large natural grouping" criteria for settlement negotiations, as indeed it described itself as a whānau, commonly understood to be an extended family. This view was informed by the findings of the Waitangi Tribunal which, as a neutral third-party, had considered the extensive evidence put to it by the whānau and by other claimants in the Hauraki region (see Tribunal findings cited above). The whānau were advised they should engage with the Hauraki Collective and relevant iwi to ensure the specifics of their claims were addressed.

The Hauraki Collective subsequently considered a request for representation by Whānau Mangakahia. The Crown has been informed that some iwi in the Hauraki Collective invited the whānau to take a seat on their negotiations teams. Whānau

[9] A copy of this report is in **Attachment E**, Exhibit 1

[10] See **Attachment E**, pp.8-9

Mangakahia declined these invitations and instead sought separate membership on the Collective as an iwi in its own right. The Crown understands the offer of a seat on a negotiations team remains open as do other offers of engagement from individual iwi on the Hauraki Collective (**Attachment E**, pp.10-14).

In early 2011 a group of Hauraki claimants informed the Crown they had formed a "*large natural grouping of claimants in the Hauraki rohe, who are not represented by the structure and activities of the Hauraki Collective*".[11] Whānau Mangakahia were among the six "Wai claims" represented in this entity, which took the name "Mauru o Hauraki". Formal meetings took place between Mauru o Hauraki and the Hauraki Collective in late 2011. The Collective decided that Mauru o Hauraki should not be represented on the Collective as a separate entity (**Attachment G**, pp.3-4; **Attachment E**, pp.14-16).

The Crown understands Mauru o Hauraki is not a natural tribal grouping but rather is an assemblage of "Wai claimants" that includes claims by whānau and individuals that generally object to the mandate of the Hauraki Collective. As with the claim by Whānau Mangakahia, these Wai claims can be catered for through the Crown's negotiations with the Hauraki Collective and individual Hauraki iwi.

1.5 Whānau Mangakahia application to the Waitangi Tribunal for urgency and remedies (2012)

On 29 September 2011 counsel for Whānau Mangakahia filed an application for an urgent remedies hearing with the Waitangi Tribunal. After some delay the Tribunal sought further particulars from counsel, which were provided on 20 February 2012 (**Attachment C**).

The application sought an order under section 8H (2) of Treaty of Waitangi Act to remove the prejudice Whānau Mangakahia had allegedly suffered through Crown actions by returning some or part of the Whangapoua Crown Forest Licence lands. The application was said to be urgent because of a pending settlement between the Hauraki Collective and the Crown, from which the whānau had allegedly been excluded, "*even though they constitute a hāpu within Hauraki and despite the fact that the Waitangi Tribunal held that the Wai 475 claim was well founded*".[12] In effect the application alleged that any transfer of Whangapoua Forest land to the Hauraki Collective would deprive the Crown of the capacity to provide the forest land as redress to Whānau Mangakahia.

The Crown responded to the application on 13 April 2012, opposing it on the grounds that are fully set out in **Attachment D**. In summary, grounds for urgency were not made out, including that the Mangakahia Whānau had not demonstrated significant and irreversible prejudice, and that alternative remedies were available in that the Mangakahia Whānau could participate in the negotiation and ratification of any settlement, and will be able to share in any redress in relation to the Hauraki Collective and individual iwi settlements.

An affidavit by the Chief Crown Negotiator, Michael Dreaver, was filed to provide further details (as above, **Attachment E**).

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[11] See **Attachment E**, Exhibit 8, pp.1-2

[12] See Brief of Evidence of Lucien Mangakahia, 20 January 2012, para 17, included in **Attachment C**

Crown submissions to the Tribunal stressed the importance of the wider context in which the application had been made, including the rationale for the establishment of the Hauraki Collective and the decision by Hauraki iwi to negotiate a settlement that will contain both collective and iwi-specific components.

More specifically the Crown rejected the Whānau Mangakahia argument that they had been unfairly excluded from the Collective (**Attachment D**, para 41-47):

> *Te Whānau a Mangakahia are able to participate in the Collective and in the relevant individual iwi settlement(s). It seems that what the applicant really seeks is a place at the Collective negotiating table for the whānau itself. The applicant is effectively saying that not having a place is tantamount to exclusion from the Collective and the redress that the Collective negotiates.*
>
> *The iwi of Hauraki have decided to seek a comprehensive, collective settlement of their historical Treaty grievances. They have chosen to pursue that settlement through the Hauraki Collective, which is comprised of negotiators from each of the Hauraki iwi. Those negotiators have been elected by the members of their respective iwi following a publicly notified and robust mandating process. Te Whānau a Mangakahia, like all groups and individuals that affiliate to Hauraki iwi, were entitled to participate in the mandating process for their respective iwi representatives in the Hauraki Collective. Similarly, Te Whānau a Mangakahia, like all groups and individuals that affiliate to Hauraki iwi, are entitled to participate in the negotiation process through the Hauraki Collective and their specific iwi, and share in redress that may result from any settlement.*
>
> *To date, persons purporting to represent Te Whānau a Mangakahia have chosen not to avail themselves of opportunities to participate in settlement negotiations through the Hauraki Collective or their respective iwi, despite the recommendations of the Crown and Sir Douglas Graham that this would be an appropriate course of action for them to take, and despite invitations to do so from members of the Collective. The Crown notes that representatives of Te Whānau a Mangakahia did not make any submissions during the mandating of iwi negotiators for the Hauraki Collective, and have turned down offers from members of the Hauraki Collective for a seat on their negotiations team.*
>
> *Accordingly, the Crown submits that the real dispute does not concern any exclusion from the Hauraki Collective, but rather centres on the following issues:*
>
> > *The applicant considers the whānau to represent a distinct grouping within Hauraki with whom the Crown should treat individually as an 'iwi' of Hauraki.*
> >
> > *That status justifies a separate seat for the whānau on the Hauraki Collective.*
> >
> > *Presumably, that status would also justify a separate individual settlement for the whānau.*
> >
> > *The applicant does not want Wai 475 to be settled in accordance with the current Collective/individual iwi framework.*

The applicant disputes the mandate of the Collective and relevant individual iwi to settle the Wai 475 claim.

In short this application is not about exclusion. It concerns disagreement with the manner of inclusion of the whānau claim in the Hauraki settlement framework.

The Crown's view, based on the report of the Waitangi Tribunal and its own understanding of the iwi relationships in respect of Hauraki, is that the claim is a Hauraki claim and will be properly settled by the Hauraki Collective and relevant iwi settlements.

The Crown does not accept that the whānau represents a separate 'iwi' grouping within Hauraki. The Waitangi Tribunal in its Hauraki report makes the point that, by its own evidence, the whānau is closely interrelated with the iwi Ngāti Hei and Patukirikiri and the hāpu Ngāti Karaua. In terms of Treaty settlement policy, the whānau is not a large natural grouping, and must therefore come with the grouping of the iwi with whom it relates.

Alternative remedies available to the Mangakahia Whānau were also set out (**Attachment D**, para 54-57). The whānau was again encouraged to take up offers to participate in negotiations through one of the mandated iwi to which the whānau affiliates. Redress options were also described, such as the provision of specific cultural redress in forest land that was of importance to the whānau, and which was subject to the application for remedies. In addition the whānau would be able to participate in the Hauraki Collective settlement itself as recipients of redress through both the collective and relevant individual iwi.

On 23 May 2012 counsel for Whānau Mangakahia responded to the Crown's and the Hauraki Collective's submissions opposing the application for remedies and urgency (**Attachment H**). These submissions made a strong argument that the Mangakahia Whānau was a unique and autonomous group that had been denied proper recognition. Counsel summarised: "*This is a case about how a small iwi is being subsumed by a supposedly larger iwi or a number of iwi for the purposes of a negotiated settlement of historical claims in Hauraki*".[13]

On 20 June 2012 the Crown and the Hauraki Collective filed a further response to these submissions (**Attachment I** and **Attachment K**). A second affidavit by Chief Crown Negotiator Michael Dreaver was also filed (**Attachment J**), as was a second submission by David Taipari, General Manager of the Hauraki Collective (**Attachment L**).

On 26 June 2012 counsel for Whānau Mangakahia sought an adjournment of the application for urgency and remedies *sine die*, explaining the whānau "*intend to apply themselves to the representational and other issues in the context of their historical claims against the Crown*" (**Attachment M**, para 5). The Waitangi Tribunal subsequently adjourned the application, with leave reserved for the applicants to revive the application, should the circumstances require (**Attachment N**, para 10).

In addition, Whānau Mangakahia have recently lodged an application with the Māori Land Court under section 30 of Te Ture Whenua Māori Land Act 1993, "*to determine the appropriate representation of the Whānau Mangakahia for the purpose of negotiations*

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[13] **Attachment H**, para 53

between the Crown and the Hauraki Collective regarding the settlement of claims concerning the Whangapoua Forests".

1.6 What is the representational status of Whānau Mangakahia?

In *The Hauraki Report* of 2006 the Waitangi Tribunal described the Whānau Mangakahia claim (Wai 475) as a claim by an extended family, consistent with the statement of claim originally lodged by the whānau in 1995:

> ... *The claimants have stressed they claim as a whanau, 'not on behalf of any wider group, whether Ngati Pare or Ngati Huarere'.*[14]

Between 2010 and 2012, however, Whānau Mangakahia stated they were in fact an iwi ("Ngāti Huarere" or "Ngāti Huarere ki Whangapaoa"), which was said to represent around 6,000 people.[15] (Note the information provided to the Special Rapporteur by Whānau Mangakahia includes a statement that the whānau represents around 1,000 people.)

The whānau also adopted an argument, contrary to the evidence they put to the Waitangi Tribunal in 2000, that they do not whakapapa (or descend) from any of the eponymous ancestors of the twelve iwi on the Hauraki Collective. As discussed above, one of the key Crown contentions is that Whanau Mangakahia are not unduly prejudiced by the approach to settlement negotiations in Hauraki as they are able to claim affiliation to a number of the iwi on the Collective and are able to benefit from settlements with the Collective and its constituent iwi (**Attachment H**, para 10-11).[16]

The argument that Whānau Mangakahia are the iwi Ngāti Huarere also appears at odds with the understanding of the majority of iwi on the Hauraki Collective. For example, in his 20 June 2012 statement to the Waitangi Tribunal on behalf of the Hauraki Collective, David Taipari (General Manager) questioned the argument that Whānau Mangakahia represented the iwi Ngāti Huarere:

> *There are many within Pare Hauraki who are descendants of the tupuna Huarere (myself included), but such descent does not equate to membership of "the Whanau".*
>
> *The reality is that Ngati Huarere has not been a functioning and recognised tribal entity in Hauraki for centuries. That is why the kaumātua and kuia [elders] of Hauraki did not include that former iwi as one of the 12 iwi of Hauraki in the Hauraki Māori Trust Board Act 1988. Nor, was it included as an iwi of Hauraki in the Māori Fisheries Act 2004.*
>
> *I have never seen an official census result for the entities promoted by Mr Mangakahia, being:*

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[14] Waitangi Tribunal, *The Hauraki Report* (The Waitangi Tribunal, Wai 686, Wellington, 2006) at p.16

[15] see **Attachment C**, letter Hirschfeld to The Registrar, Waitangi Tribunal, 20 June 2012, p.2; and **Attachment H**, para 17

[16] See also supporting briefs of evidence by Lucien Mangakahia and Joseph Davis. The latter is a representative of the iwi Ngāti Hei, which is one of the 12 iwi on the Hauraki Collective. Ngāti Hei shares older whakapapa (kinship) relationships with the ancestor Huarere and are generally supportive of the argument for inclusion by Whānau Mangakahia as descendants as Huarere. See also **Attachment J**, para 15

(a) Whānau Mangakahia as a whānau.
(b) Whānau Mangakahia as a hāpu.
(c) Whānau Mangakahia as an iwi (aka "Ngāti Huarere ki Whangapoua").

I am aware that in other urgency application proceedings, the Waitangi Tribunal has invited applicants asserting 'large grouping status' to tender evidence supporting their claim. I have seen no such evidence in this instance.

Moreover, to put this claim into perspective, as at the 2006 census, the largest population among the iwi of Hauraki rests with Ngāti Maru having an official population of over 3,500. (**Attachment L**, p.2)

Mr Taipari also responded to the argument by Whānau Mangakahia that, while it did not dispute the mandate of the Hauraki Collective, the Collective "*cannot speak for identifiable Whānau interests*":

First, we could all disperse into whānau groups if we wanted. However, we all whakapapa [trace descent] to recognised iwi of Hauraki and that is the manner in which the 12 iwi of Hauraki have agreed to proceed with direct Treaty negotiations with the Crown since 2009.

And, so it is with the Whānau Mangakahia. Their whakapapa [genealogy] is well known within Pare Hauraki – they whakapapa [trace descent] to Ngāti Whanaunga, Ngāti Tamaterā, Ngāti Maru, Te Patukirikiri and Ngāti Hei.

Thus, the Whānau Mangakahia is not being excluded from the Treaty settlement redress that is being negotiated for. The real issue is that some of the whānau's representatives want a separate seat at the negotiation table and a separate source of Treaty redress. (**Attachment L**, p.3)

Finally, Mr Taipari responded to the Whānau Mangakahia assertion that they are the sole holders of customary rights in the Whangapoua area:

This is incorrect. For example, one of the iwi I belong to, Ngāti Whanaunga, maintains mana whenua mana moana [rights over land and sea] at Whangapoua. I am aware of other iwi who also share customary interests at Whangapoua. These various iwi interests are reflected in Figure 3, Volume 1 of the Waitangi Tribunal's Hauraki Inquiry Report 2006. (**Attachment L**, p.3)[17]

The Crown nevertheless accepts an argument can be made that, as a whānau, Whānau Mangakahia are a distinct group, with specific lines of descent and customary interests. In this Whānau Mangakahia are no different from other whānau in the Hauraki region and indeed elsewhere in New Zealand – all whānau are in some ways distinct, reflecting the complexities of their whakapapa.

Therefore, as much as the whānau may now wish to accentuate old ancestral lines to ancestors of Ngāti Huarere to the exclusion of their ancestral lines to recognised Hauraki iwi, that is their choice. But that choice does not necessarily elevate the whānau to a size and status that meets the Crown's long running policy of reaching Treaty

[17] See also **Attachment O** for a copy of Figure 3 showing Hauraki iwi locations

settlements with large natural groups of tribal interests. The Crown memorandum of 20 June 2012 records:

> *Counsel for the Crown submits that it is clear that many (if not all) persons of Māori descent can, through whakapapa [genealogy], chose one or more of among ways of identifying with and through iwi, hāpu and whānau groupings.*
>
> *The Crown acknowledges the right and privilege of members to choose the manner of their affiliations within their own whakapapa. This does not, and cannot, however, determine the manner in which the Crown negotiates Treaty settlements. There are multiple permutations of affiliation groupings within and across iwi. It would be impossible for the Crown to treat with all such permutations and settle Treaty claims. Rather, the Crown looks to groups that are large and natural, mandated from within, and recognised from without. It is submitted that this is reasonable and proper. This is the only basis on which fair and durable settlements can be concluded.*
>
> *Counsel is instructed that the Crown acknowledges that there are members of the Whānau who wish to be seen as a separate group. The Crown does not deny this, and respects this choice. The Crown says, though, that does not properly extend to requiring the separate treatment contended for by the applicant in terms of Treaty settlement negotiations in light of:*
>
> - *interrelationship of the whānau with iwi of the collective; and*
> - *the ability of the collective and individual iwi settlement processes to be able to provide for the specific issues and concerns of whānau members as part of the collective and iwi settlement frameworks.*
>
> *This matter is not one of "picking winners", or "air brushing" others out. Rather, this is a difference of opinion as to the appropriate definitions of Hauraki groupings. The Crown is dealing with groupings that are supported by the majority of the iwi themselves and others, are supported by history at the relevant times, and that leave nobody out. While acknowledging that this does not satisfy all members of the Whānau who hold a contrary view, it is submitted that it is the most appropriate manner in which to negotiate the Treaty claims of Hauraki iwi in light of the complexities outlined ... above.* (**Attachment I**, para 14-17)

In his affidavit of 21 June 2012, filed with the Waitangi Tribunal, Chief Crown Negotiator Michael Dreaver commented on the solution, in negotiations terms, for the whānau:

> *The members of Whanau Mangakahia are able to be beneficiaries of the Collective settlement as well as one or more of the individual iwi settlements contemplated between the Crown and Hauraki iwi. I am aware that the Collective has considered the representations of Whānau Mangakahia and have confirmed their view that the Whānau members are represented by iwi already in the Collective. Several iwi within the Hauraki Collective have advised me they consider Whānau Mangakahia to be part of their iwi. I believe the Crown's obligation to the Whānau Mangakahia is to ensure that the mandated representatives of the 12 iwi negotiate settlements that address the full scope of Hauraki claims, including those of Whānau Mangakahia. (**Attachment J**, para 12)*

The option of participating in settlement negotiations thus remains for Whānau Mangakahia, as does the option for the whānau to seek specific redress, such as over wāhi tapu (sacred sites) in the Whangapoua Crown Forest Licence lands, through the negotiations of the mandated Hauraki iwi or through the Hauraki Collective. The Crown, however, cannot force the whānau to participate in this manner.

Part 2: Crown Treaty settlement policy

2.1 Settlements with large natural groups and options for groups who do not wish their claims to be settled through larger collective groupings

The Crown prefers to negotiate settlements with large natural groups of tribal interests rather than individual hapū or whānau within a tribe. This makes the process easier to manage and work through and helps deal with overlapping customary interests.

Under the 2006 New Zealand Census 643,977 people of Māori descent provided information about iwi affiliation. Typically Māori whānau, or extended families, can range in size from a dozen or so persons to some few hundreds. It would be impractical, indeed impossible, for the Crown to reach meaningful and durable Treaty settlements at a whānau level. This is additionally so when whānau often also affiliate to multiple hāpu and iwi, which on the whole are the main political and social bodies in Māori society.

Settlements with large natural groupings have the advantage of allowing the Crown and mandated representatives to work out a settlement package that increase a wide range of redress. For instance, many of the Statutory Instruments are only workable and cost effective for large natural groupings.

In some circumstances it is possible to deal with distinct hapū or whānau interests that are separate from the main tribal claims within a settlement. Distinct recognition for these groups can and has been part of wider settlement packages. Redress has included cultural recognition over specific sites, Crown acknowledgement and apology for breaches of the principles of the Treaty of Waitangi that impacted on distinct groups, and specific relationship instruments with Crown agencies.

Both the Waitangi Tribunal and the High Court have rejected claims attempting to challenge the Crown's preference for negotiating with large natural groupings, and to require negotiations with specific hapū and whānau. In its *Pakakohi and Tangahoe Settlement Claims Report* (2000) the Waitangi Tribunal says of the Crown's preference for dealing with large natural groupings, that "*this is an approach with which we have considerable sympathy. There appear to us to be sound practical and policy reasons for settling at iwi or hapū aggregation level where that is at all possible*".

At least four other Tribunal reports have endorsed the Crown's policy of settling with large natural groups, including *The Mohaka Ki Ahuriri Report*, *The Tamaki Makaurau Settlement Process Report*, *The Te Arawa Mandate Report* and *The Whanganui River Report*.[18] In addition, numerous Tribunal decisions declining applications for urgency opposing collective-level or iwi settlements by whānau and hāpu have made reference to and generally endorsed this policy.

2.2 Funding for claimant groups in settlement negotiations

The Crown contributes towards certain expenses for mandated groups. The Crown's claimant funding process has evolved as it has because of the public accountability issues and to comply with the Public Finance Act. There is flexibility in terms of how payments are linked to negotiation milestones. The Crown does not necessarily provide

[18] These reports can be found on the Waitangi Tribunal website, www.waitangi-tribunal.govt.nz/reports

funding for all costs that a claimant group has to meet when negotiating its historical claims. The Crown will contribute to the following expenses for mandated groups:

- *the costs of pre-negotiations* - obtaining a mandate (payable once the Crown recognises the mandate), agreeing Terms of Negotiation, and starting formal negotiations;

- *the costs of negotiations* - reaching a draft Deed of Settlement. This funding may also be used to develop a post-settlement governance entity; and

- *the costs of ratification* – carrying out a process for the claimant group to confirm a Deed of Settlement.

This funding is over and above any money or assets eventually given to the claimant group as redress.

There are two additional categories of funding available outside of the funding outlined above:

Pre-mandate funding

In 2010 Cabinet agreed the Crown should supplement its existing claimant funding policy by providing funding for claimant groups in the pre-mandate phase. The pre-mandate phase is the period between beginning the mandating process and having a Deed of Mandate recognised by the Crown.

The Crown will consider funding requests from claimants requiring assistance with the costs associated with the pre-mandate process. Funding of up to a maximum of $50,000 per any one group is available as a contribution towards set activities in the pre-mandate phase.

The provision of pre-mandate claimant funding does not pre-determine a claimant group is a Large Natural Grouping with whom the Crown will negotiate or guarantee the Crown will recognise the mandate sought by a claimant group. A claimant group's mandate can only be recognised after the required steps and processes have been completed.

Sub-group funding

In 2010 Cabinet agreed the Crown should supplement its existing claimant funding policy by providing sub groups within mandated entities funding to assist with legal or specialist assistance needed to resolve issues and advance the progression of settlement negotiations. The Crown will make funding up to a maximum of $150,000 per any one sub group available as a contribution towards the cost of specific legal or specialist advice for this purpose.

Funding for specific legal or specialist advice is available for sub groups unable to access funding for this purpose under the existing Crown claimant funding policy. For example legal or specialist assistance may be required for:

- separately mandated groups within a region to come together as a forum or collective to make decisions about overlapping claims; or

- a hapū, whānau or WAI claim based group within a mandated entity may need to resolve issues about internal representation in order to maintain a mandate

List of Attachments

Attachment A – Statement of Claim for Mangakahia Whānau by Remehio Te Maunga Mangakahia & others, 4 October 1994

Attachment B – Decision of the Tribunal concerning the Wai 100 and Wai 110 remedies applications, 29 May 09 (Wai 686 # 2.682)

Attachment C – Application to Waitangi Tribunal for urgency and remedies by counsel for Wai 475, 20 February 2012

Attachment D – Memorandum of counsel for the Crown filed in response to Wai 475 application for urgency and remedies, 13 April 2012

Attachment E – Affidavit of Michael Dreaver, Chief Crown Negotiator, affirmed 13 April 2012 and filed with the Waitangi Tribunal in response to Wai 475 application for urgency and remedies (including supporting documents)

Attachment F – Memorandum on behalf of the Hauraki Collective, filed with the Waitangi Tribunal in response to Wai 475 application for urgency and remedies, 13 April 2012

Attachment G – Statement of David Taipari on behalf of the Hauraki Collective, 13 April 2012, filed in response to Wai 475 application for urgency and remedies (including supporting documents)

Attachment H – Memorandum by applicant (Wai 475) in reply to the Crown memorandum in response, 23 May 2012, including supporting evidence by Lucien Mangakahia and Joe Davis

Attachment I – Memorandum of counsel for the Crown, filed with the Waitangi Tribunal in further response to Wai 475 application for urgency and remedies, 20 June 2012

Attachment J – Affidavit of Michael Dreaver, Chief Crown Negotiator, affirmed 21 June 2012 and filed with the Waitangi Tribunal in response to Wai 475 application for urgency and remedies

Attachment K – Memorandum on behalf of the Hauraki Collective, filed with the Waitangi Tribunal in response to Wai 475 application for urgency and remedies, 20 June 2012

Attachment L – Statement by David Taipari on behalf of the Hauraki Collective, 20 June 2012

Attachment M – Memorandum by applicant (Wai 475) in reply and application for adjournment sine die, 26 June 2012

Attachment N – Memorandum and Directions by Waitangi Tribunal adjourning application, 27 June 2012

Attachment O – Figure 3: Hauraki tribes, circa 1840, in *The Hauraki Report*, (The Waitangi Tribunal, Wai 686, Wellington, 2006), p.36