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Hon Tama Potaka

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To: Mr Calí Tzay and Professors Xanthaki and Satterthwaite

Ref: AL NZL 1/2024

Tēnā koutou

Response to Joint Communication

Thank you for your joint communication dated 1 July 2024. The New Zealand Government recognises the important role that the United Nations Special Procedures play in the international human rights framework.

We welcome the opportunity to respond to the concerns raised in your joint communication. In particular we welcome the opportunity to provide you with information regarding the processes used in New Zealand for reconciliation of claims of historical breaches of the Treaty of Waitangi | Te Tiriti o Waitangi (**Treaty**).¹

- In Appendix One, we provide an overview of the processes for the reconciliation of historical Treaty claims in New Zealand.
- In Appendix Two and Appendix Three, we provide information relating to the concerns you raise regarding Wairarapa Moana ki Pouākani Incorporation (**Wairarapa Moana Incorporation**) and the Proprietors of Wakatū (**Wakatū Incorporation**) respectively.

A number of the matters raised in your joint communication relate to two matters currently at issue before the New Zealand Courts:

- ██████████ claim, currently before the New Zealand High Court, regarding fiduciary duties owed by the Crown in relation to the reservation of land in Te Tau Ihu;² and
- an application by Wairarapa Moana Incorporation seeking a declaration of inconsistency with the Bill of Rights Act 1990 (NZ), currently before the New Zealand Court of Appeal.

¹ Pre-21 September 1992.

² Wakatū Incorporation is no longer a party to those proceedings as the New Zealand Supreme Court found that it did not have standing.

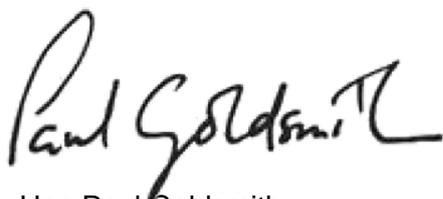
Under New Zealand constitutional conventions Ministers of the Crown must exercise judgment before commenting on matters before Courts, whether generally or in relation to the specifics of an individual case.³ Consistent with that convention, in Appendices Two and Three we have provided factual descriptions of particular matters relevant to the concerns you have raised in connection with Wairarapa Moana Incorporation and Wakatū Incorporation.

In relation to other constitutional matters raised in your joint communication:

- New Zealand's constitution is located in various sources rather than in a single document. These sources include the Treaty, legislation, the common law, constitutional convention, and Parliamentary customs.
- The doctrine of separation of powers requires the legislature, executive, and judiciary to be kept separate from each other to provide checks and balances within the system.
- Within New Zealand's constitutional arrangements, Parliament is the supreme law-making body of New Zealand and the New Zealand Courts cannot strike down any provision of an Act of Parliament.
- The Courts in New Zealand have held that, owing to the Treaty's constitutional significance, there is a presumption of statutory interpretation that, in the absence of clear words to the contrary, Parliament intends to legislate in a manner that is consistent with the Treaty.

Other matters raised in your joint communication relate to environmental, economic, social, cultural or spiritual impacts on Māori and inclusion of Māori in decision-making on projects affecting them. In addition to the processes for the reconciliation of historical Treaty claims discussed in Appendix One, there are a range of mechanisms through which iwi, hapū and Māori interests are taken into account in New Zealand Government environmental regulation, and economic and social policy and processes.

Nā māua noa, nā



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³ Cabinet Manual 2023, para. 4.12 (<https://www.dpmc.govt.nz/sites/default/files/2023-06/cabinet-manual-2023-v2.pdf>).

Appendix One – The reconciliation of historical Treaty claims

This section of the response discusses:

- a. the role of the Waitangi Tribunal and nature of ‘historical’ and ‘contemporary’ Treaty claims;
- b. the established framework for the negotiation of settlements of historical Treaty claims (**Settlements**) including:
 - i. the Crown objectives and principles that inform Settlements;
 - ii. the acknowledgement that the Crown is not in the position to meet the cost of putting right all wrongs that Māori groups have experienced;
 - iii. why Settlement negotiations occur between the Crown and large natural groupings of tribal interests;
 - iv. how the representatives of claimant groups negotiating Settlements obtain a mandate to negotiate;
 - v. how claimant groups ratify a proposed Settlement; and
 - vi. what happens when two or more Māori groups hold customary interests or cultural or historical associations in relation to the same area;
- c. the different types of Settlement redress; and
- d. how Settlements are comprehensive and final, and aim to restore relationships.

1.1 The Waitangi Tribunal and ‘historical’ and ‘contemporary’ Treaty claims

The Waitangi Tribunal, established by the Treaty of Waitangi Act 1975 (NZ), plays a significant role in New Zealand’s constitutional framework. It is a permanent commission of inquiry.

The Waitangi Tribunal makes recommendations on claims brought by Māori individuals or groups relating to legislation, policies, actions, or omissions of the Crown in right of New Zealand that are alleged to breach the Treaty. If the Waitangi Tribunal finds that any claim submitted to it is well-founded it may, if it thinks fit having regard to all the circumstances of the case, recommend to the Crown that action be taken to compensate for or remove the prejudice, or to prevent other persons from being similarly affected in the future.

Since 2 September 2008, no new claims can be made to the Waitangi Tribunal arising out of Crown acts or omissions that occurred before 21 September 1992 (‘historical Treaty claims’). However ‘contemporary claims,’ claims that arise out of Crown acts or omissions from 21 September 1992 can be made. A ‘cut-off’ date for historical Treaty claims was needed so that the Crown could make consistent comparisons between the redress provided to different claimant groups in relation to historical claims.

Subject to the exceptions discussed below, Waitangi Tribunal recommendations do not bind the Crown or any other party, and the Tribunal cannot recommend the return to Māori ownership of any private land or the acquisition by the Crown of any private land.

The exceptions are that the Tribunal may recommend the return ('resumption') of certain types of land and those recommendations can become binding on the Crown. The types of land in relation to which the Tribunal may make such a binding recommendation are:

- a. Crown forest land that is subject to a Crown forestry licence;⁴ and
- b. in certain circumstances land, or some interests in land, transferred to a State-owned enterprise⁵ or a public tertiary education institution, or previous Crown railway land.

Waitangi Tribunal reports often inform negotiations to settle historical Treaty claims. However, the Tribunal is not involved in settlement negotiations, which are carried out between the representatives of claimant groups (usually iwi (tribes))⁶ and the Crown.

1.2 Framework for the reconciliation of historical Treaty claims

As at the end July 2024, one hundred deeds of settlement of historical Treaty claims (Settlements) had been signed between iwi or groups of hapū (broadly 'sub-tribes') and the Crown.

There is an established framework for the negotiation of Settlements. Crown policies and practices for the settlement of historical Treaty claims are set out in the publication *Ka tika ā muri, ka tika ā mua: Healing the past, building a future, A Guide to Treaty of Waitangi Claims and Negotiations with the Crown (Claims and Negotiations Guide)*.⁷ That framework includes:

- a. the Crown objectives and principles that inform Settlements;
- b. the acknowledgement that the Crown is not in the position to meet the cost of putting right all wrongs that Māori groups have experienced;
- c. why Settlement negotiations occur between the Crown and large natural groupings of tribal interests;
- d. how the representatives of claimant groups negotiating Settlements obtain a mandate to negotiate;

⁴ Under the Crown Forest Act 1989 (NZ).

⁵ State-owned enterprises are public companies owned by the Crown established under the State-Owned Enterprises Act 1986 (NZ).

⁶ In a number of places this response includes some English translations of te reo Māori terms. We acknowledge that:

(a) providing an English translation of a te reo Māori term cannot capture the full depth of meaning of that term; and (b) different Māori groups may use some terms in different ways and there are differences in te reo Māori across different parts of New Zealand.

⁷ <https://www.tearawhiti.govt.nz/te-kahui-whakatau-treaty-settlements/the-red-book/#RedBookPDF>, commonly referred to as 'the Red Book'.

- e. how claimant groups ratify a proposed Settlement; and
- f. what happens when two or more Māori groups hold customary interests or cultural or historical associations in relation to the same area.

1.2.1 *The Crown objectives that inform Settlements*

Each Settlement is different because the experience of each claimant group, and its claims and interests, differ. However, the Crown seeks:

- a. a comprehensive settlement of all the historical Treaty claims of a claimant group - to ensure all historical grievances have been addressed and enable the Crown and the claimant group to begin a new relationship;
- b. to negotiate Settlements that are durable and acceptable to most New Zealanders; and
- c. to be consistent in its approach to the many claimant groups involved in negotiations to settle historical Treaty claims.

1.2.2 *Settlement principles*

To meet these objectives, principles have been developed. The most relevant of those principles to the factual circumstances relating to Wairarapa Moana Incorporation or Wakatū Incorporation are:

- a. the Crown will explicitly acknowledge historical injustices;
- b. Settlements should not create further injustices, either to claimant groups or anyone else – i.e., in providing Settlement redress to one claimant group, the Crown should not harm the interests of other groups;
- c. Settlement redress should be fair (relating to the nature and extent of Treaty breaches suffered by the group, and fair in relation to the benchmarks set by previous Settlements) and the Crown must deal fairly and equitably with all claimant groups, using a consistent framework for Settlements; and
- d. the Crown must govern in the interests of all New Zealanders. (This includes balancing claimants' aspirations with matters such as continued public access to conservation areas, and the overall management in the national interest of resources such as water, petroleum, and geothermal energy.)

1.2.3 Settlement processes acknowledge that the Crown is not in the position to meet the cost of putting right all wrongs experienced by Māori groups

Because of the nature and size of the losses that Māori have borne, over generations, it is unlikely that a Settlement will fully compensate the claimants financially.

- a. Settlements take into account fiscal and economic constraints and the ability of the Crown to provide redress.
- b. Most of the land previously owned by Māori groups has long since passed into non-Māori, private ownership.
- c. In many cases no economic compensation is possible for the cultural losses experienced by Māori.

1.2.4 How the representatives of claimant groups negotiating Settlements obtain a mandate to negotiate

'Mandating' is the process by which the claimant group chooses representatives and gives them the authority to enter into discussions and agreements with the Crown on their behalf.

Mandated representatives need to demonstrate that they represent the claimant group, and the claimant group needs to feel assured that the representatives legitimately gained the right to represent them. This can only be achieved through a process that is fair and open.

It is the claimant group's decision who represents them and what the appropriate way is to select their representatives. The Crown does not interfere in these matters of tikanga (custom). The Crown does need assurance that the mandate is secure before starting negotiations. That is because mandating is central to the durability of Settlements and because public funds are involved in the Settlement process.

A claimant group confers a mandate and the Crown then 'recognises' that mandate for the purposes of Settlement negotiations. The Crown's recognition process includes steps to verify:

- a. the Crown is dealing with the right claimant group representatives;
- b. the representatives are properly mandated to negotiate an offer for the Settlement of the claimant group's historical Treaty claims;
- c. the mandated representatives have a process in place to ensure they are accountable;
- d. the mandated representatives have developed a process to identify as many claimant group members as possible – this usually involves establishing, if they have not already done so, a register of members; and

- e. the mandated representatives and the claimant group have agreed approaches to keep the wider group informed of progress and issues, for example how often people will be updated, issues or stages in negotiations when the mandated representatives need to seek approval from the wider group and how and when groups, such as whānau or hapū with particular claims, should be kept informed.

The Crown has refined its approach to mandating in response to findings of the Waitangi Tribunal in a number of inquiries into mandating processes.

As in every community, there is often opposition from groups or individuals who reject those claiming to represent them. Sometimes opposing groups or individuals may refuse to participate in the subsequent negotiations. However, the Claims and Negotiations Guide recommends that, once mandated, representatives make it clear that individuals or groups who did not support their mandate have the opportunity to participate in the Settlement process at any stage.

1.2.5 How claimant groups ratify a proposed Settlement

'Ratification' is the process by which a claimant group as a whole consents to a Settlement. The key part of the ratification process is a postal ballot in which all members of the claimant group over the age of 18 are eligible to vote.

The purpose of the ratification process is to ensure that:

- a. members of the claimant group are sufficiently informed about the process for ratifying the Deed of Settlement and the 'post settlement governance entity' (**PSGE**) (the legal entity that will hold and manage the Settlement redress transferred to the claimant group);
- b. members of the claimant group are sufficiently informed about key components of the proposed Settlement and the PSGE; and
- c. the period for voting on whether to ratify a proposed Settlement allows members sufficient opportunity to vote on whether to ratify and accept the Deed of Settlement and the PSGE.

The Crown will not sign a Deed of Settlement if it considers the ratification process used was inadequate, or if the claimant group does not clearly support the proposed Settlement.

1.2.6 What happens when two or more groups hold customary interests or cultural or historical associations in relation to the same area

Overlapping (or shared) interests exist where two or more Māori groups assert customary interests or cultural or historical associations over an area or natural resource that is the subject of Settlement negotiations.⁸

The Crown:

- a. acknowledges that customary interests and associations are complex, and there are different kinds and narratives of customary interests and associations articulated by different groups; and
- b. recognises that multiple groups may have interests or associations in the same area, although the nature of those interests and associations may be different.

The aspirations of each claimant group and the circumstances of each negotiation are considered on a case-by-case basis by the Crown. There is no one-size-fits-all approach to deciding what redress is appropriate to offer to achieve a durable Settlement. The Crown considers a number of factors, including:

- a. how the Crown's decisions to offer redress might affect the customary interests (including ability to exercise tikanga) or associations of a claimant group and overlapping groups to a site, area, or natural resource;
- b. what redress options are available for use in future Settlements with overlapping groups in the relevant area; and
- c. whether it is appropriate to provide exclusive redress to a claimant group or provide non-exclusive redress so as not to preclude similar redress for other claimant groups that have not yet settled their claims over the same area.

Consideration of any overlapping interests is a crucial part of every Settlement. The Crown's preference is that overlapping groups agree solutions to address any issues relating to overlapping interests directly, in accordance with appropriate tikanga.

The Crown will not initial a Deed of Settlement until it is satisfied overlapping interests have been appropriately addressed.

⁸ 'Customary interests' can be described as the expression of the traditional multi-dimensional relationship of a claimant group to an area or natural resource in accordance with their tikanga. 'Association' can be described as the spiritual, cultural, historical and / or traditional relationship expressed by a claimant group to a site, area or natural resource.

1.3 There are different types of Settlement redress

Settlements include different types of redress:

- a. historical redress – typically an agreed historical account of what has occurred, Crown acknowledgement of Treaty breaches and a Crown apology;
- b. cultural redress (such as transfer of culturally important sites, statutory acknowledgements,⁹ reinstatement of te reo Māori place names, and arrangements for ongoing involvement in the management of specified natural resources);
- c. financial redress; and
- d. commercial redress (such as transfer of, or future rights to acquire, property).

1.4 Settlements are comprehensive and final, and aim to restore relationships

The restoration of the relationship between the claimant group and the Crown is a central part of a Settlement.

A key objective of Settlement negotiations is to help claimant groups to put the grievances they have about historical Crown actions behind them. It is in the interests of both the Crown and claimant groups for this to be done as effectively and efficiently as possible. It, therefore, makes sense for Settlements to be comprehensive, providing redress for all the historical wrongs done to a claimant group. Settlements made 'bit by bit' over a long time span would risk leaving the sense of wrong to linger and might never achieve a sense of final resolution. Comprehensive Settlements also reduce the costs and time involved in negotiations and implementation for both the Crown and claimant groups.

Settlements are final. In exchange for the Settlement redress, Settlement legislation prevents the courts, Waitangi Tribunal or any other judicial body or tribunal from re-opening historical claims. This finality enables both the Crown and the claimant group to put historical grievances behind them and seek a new type of relationship.

⁹ A 'statutory acknowledgment' is an acknowledgment by the Crown that recognises the special relationship of a tangata whenua group (iwi or hapū which holds customary authority) in relation to a specified area.

Appendix Two – Information relating to the concerns you raise regarding Wairarapa Moana Incorporation

2.1 The background to Wairarapa Moana Incorporation’s claim regarding land at Pouākani

Pouākani is located in an area in the northern half of the North Island of New Zealand known as the Waikato. ‘Wairarapa Moana’ refers to two bodies of water (Lake Wairarapa and Lake Ōnoke | Ferry) in the south-eastern part of the North Island (the **Wairarapa**), some 400 kilometres south of Pouākani.

When settlers arrived in the Wairarapa, they began to farm and reshape the land and surrounding waterways. During this time, settler actions resulted in Wairarapa Moana rapidly degrading and shrinking. In 1896, after a long-running dispute, Wairarapa Māori gifted Wairarapa Moana and its surrounding reserves to the Crown as a *tuku rangatira* (a chiefly gift). The gifting was intended to provide the Crown with the authority to protect it for future generations. The *tuku rangatira* was accepted by then Premier Richard Seddon and suitable land elsewhere in the Wairarapa was promised in exchange.

It was not until 1916 when the Crown reciprocated the *tuku rangatira*. However, rather than provide suitable land nearby, approximately 30,486 acres of land was provided at Pouākani (400 kilometres away).¹⁰

That land was vested in the Wairarapa Moana Incorporation. The shareholders of the Wairarapa Moana Incorporation affiliate primarily to that part of the [REDACTED] whose traditional lands are in the southern Wairarapa. The lands owned by the Wairarapa Moana Incorporation at Pouākani were, therefore, outside the traditional tribal lands of Wairarapa Māori. Pouākani is within the traditional lands of other tribal groups, particularly Raukawa and Ngāti Tūwharetoa.

Owing to the lack of road access, Wairarapa Māori did not first occupy the land at Pouākani until 1948.¹¹

The Waitangi Tribunal in its *Pouakani Report 1993* noted that:¹²

“...[the] government “settled” [REDACTED] grievances in Wairarapa by granting Crown land in territory well outside their traditional tribal lands. [REDACTED] do not hold any ancestral rights on Pouakani lands. They do have a right of occupation and a title granted by the Crown. They have built a marae at Mangakino and given to their wharehau the ancestral name, Tamateapokaiwhenua, a noted

¹⁰ See , *The Wairarapa ki Tararua Report*, Waitangi Tribunal, 2010, chapter 7.6.4 at page 680, https://forms.justice.govt.nz/search/Documents/WT/wt_DOC_68640217/Wairarapa%20ki%20Tararua%20Vol%20II.pdf.

¹¹ *Ibid*, chapter 7.10.3 at page 700.

¹² *The Pouakani Report 1993*, *Wai 33*, page 302

[https://forms.justice.govt.nz/search/Documents/WT/wt_DOC_92374061/Pouakani%201993%20Part 2.pdf](https://forms.justice.govt.nz/search/Documents/WT/wt_DOC_92374061/Pouakani%201993%20Part%202.pdf).

traveller of Takitimu tradition. ...The nature of their occupation of Pouākani lands has put [REDACTED] in an uneasy relationship with local tangata whenua.”

The Crown has accepted that the gifting in 1916 of 30,486 acres of land at Pouākani, so far away from their ancestral homeland, resulted in generations of disconnection for Wairarapa Māori. It also had a deep impact on mana whenua (Raukawa and Ngāti Tūwharetoa) at Pouākani who were experiencing their own disconnection from their homelands and had to watch as they were then gifted to another iwi. These actions were acknowledged by the Crown in relevant Settlements.¹³

In 1949-50 the Crown took for the construction of hydro-electric generation infrastructure (the Maraetai power station complex) 787 acres of the 30,486 acres provided to Wairarapa Māori by the Crown at Pouākani.¹⁴ The Crown has acknowledged it did not inform the owners or discuss the proposed taking of Pouākani lands for the power scheme prior to the Crown's entry onto that land.¹⁵

Wairarapa Moana Incorporation made a historical Treaty claim to the Waitangi Tribunal seeking the return of land taken for the power station complex (Wai 85).¹⁶ The original application was for the land containing all the power station complex, but the area claimed was subsequently reduced.¹⁷

2.2 In 2016 [REDACTED] and the Crown entered into an Agreement in Principle for a Settlement

In May 2016, [REDACTED] and the Crown entered into an Agreement in Principle for a comprehensive Settlement of the historical Treaty claims of [REDACTED]. The Crown's offer included transferring ownership of the lakebed of Wairarapa Moana and adjoining Crown-owned nature reserves back to the ownership of Wairarapa Māori, along with establishing a statutory board for governing those properties.

¹³ Raukawa Claims Settlement Act 2014 (section 9, clause 11), Rangitāne Tū Mai Rā (Wairarapa Tamaki nui-ā-Rua) Claims Settlement Act 2017 (section 9, clause 9(d)) and the [REDACTED] Claims Settlement Act 2022 (section 9, clause 19(a-g)).

¹⁴ *The Wairarapa ki Tararua Report*, chapter 7.8.3 at page 691.

¹⁵ [REDACTED] Claims Settlement Act 2022 (section 9, clause 21-22).

¹⁶ A claim to the Waitangi Tribunal is registered by the Tribunal with a claim number, prefixed with the Waitangi Tribunal claim identifier 'Wai'. The Maraetai I and II power stations are currently owned by Mercury NZ Limited. Mercury NZ Limited is what is known in New Zealand as a 'mixed ownership model' company - a limited liability company which the Crown must retain at least 51% control of. In July 2024 the Sovereign in right of New Zealand owned 51.5% of the shares in Mercury NZ Limited with the remaining 48.85% of the shares owned by a range of investors.

¹⁷ The reduced claim area included part of the dam and all of the Maraetai II power station, but none of the Maraetai I power station.

In November 2016, the members of [REDACTED]:

- a. ratified a PSGE called the [REDACTED] Settlement Trust (**Settlement Trust**) to receive and manage Treaty settlement redress, with 93% of valid votes in support; and
- b. also voted to transfer the mandate to represent [REDACTED] in Settlement negotiations to the Settlement Trust, with 91% of valid votes in support.

2.3 Waitangi Tribunal Preliminary Determinations and litigation regarding the claim for return of land at Pouākani

In 2017, Wairarapa Moana Incorporation sought a hearing by the Waitangi Tribunal of its claim for the return of land at Pouākani.

In 2020, the Waitangi Tribunal expressed its preliminary views on that claim (**Preliminary Determinations**).¹⁸

In the Preliminary Determinations the Tribunal expressed the view that land at Pouākani containing hydro-electric generation infrastructure should be transferred, but not to Wairarapa Moana Incorporation. The Tribunal indicated an entity that broadly represented [REDACTED], such as the Settlement Trust, should receive the assets (subject to ratification by the iwi). At that time, the Settlement Trust was seeking the transfer of the Pouākani land to itself as a representative of all [REDACTED], rather than to the Wairarapa Moana Incorporation. The Settlement Trust indicated to the Crown it preferred not to do that, but sought the land itself as a defensive position so long as the Incorporation continued its claim.¹⁹

In the Preliminary Determinations, the Tribunal said:

“We understand the tikanga-based argument of Raukawa and Ngāti Tūwharetoa. We absolutely see how the original grant to Wairarapa Māori, and the ongoing presence of the Wairarapa Moana ki Pouākani Incorporation in their rohe, is a thorn in their side and the effects do not diminish with time. However, we can state quite categorically our strong view that ownership of land at Pouākani does not give Wairarapa Māori the status of tangata whenua there: it never can and never will. They are, like Pākehā landowners in the district, manuhiri (visitors) in tikanga terms However, we are not disposed to let the mana whenua arguments influence us against exercising our discretion in favour of recommending the return of the subject land at Pouākani to [REDACTED]

²⁰

¹⁸ *Determinations of the Tribunal Preliminary to Interim Recommendations under Sections 8B and 8hC of the Treaty of Waitangi Act 1975* Wai 863, #2.835, 24 March 2020.

¹⁹ Raukawa and Ngāti Tūwharetoa were involved in the Tribunal and Court proceedings opposing Wairarapa Moana Incorporation’s claim. They could not themselves seek a Tribunal recommendation for transfer of the Pouākani land.

²⁰ Preliminary Determinations at [258]-[259].

“We do not consider we should recommend the return to [the Wairarapa Moana Incorporation shareholders] of the 787 acres ..., because the value of that land and the assets located there is not proportionate to the prejudice they suffered as shareholders in 1949. ...

Even if we considered that the prejudice that the shareholders suffered from the compulsory acquisition alone might justify the return of part of the land to them, we do not favour the exercise of our discretion in that way. At hearing, we learned that there are some very large shareholders in the Wairarapa Moana ki Pouākani Incorporation, and also some very, very small shareholders. That variation means that if land were to return to the Incorporation, the shareholders would benefit in proportion not to the prejudice suffered from the Crown’s breaches, but in proportion to their shareholding in the Incorporation. For shareholders to benefit in proportion to shareholding also provides no scope for taking account of non-material aspects of prejudice, which are always involved in Treaty breach. For all these reasons, we are satisfied that the return of land to the Incorporation would not be a just outcome.”²¹

The Tribunal’s Preliminary Determinations were litigated in the New Zealand Courts by a number of parties. The High Court of New Zealand quashed the Preliminary Determinations, and referred the matter back to the Tribunal for reconsideration.²² Wairarapa Moana Incorporation and the Settlement Trust appealed to the Court of Appeal and, in August 2021, were granted leave for that appeal to be heard directly by the Supreme Court of New Zealand. (We discuss the Supreme Court’s decision below.)

2.4 The Settlement Trust subsequently agreed with the Crown it would withdraw its litigation and return to Settlement negotiations

The Settlement Trust subsequently withdrew its litigation and returned to Settlement negotiations. Those negotiations resulted in an agreed final Settlement package.

This left Wairarapa Moana Incorporation as the only claimant in respect of the Pouākani land. As noted above, in its Preliminary Determinations, the Waitangi Tribunal had indicated that it did not consider return of the land to the Incorporation would be a just outcome.

2.5 The decision to finalise the Settlement

After several years of litigation, with the majority of ██████████ long awaiting a Settlement, and a likelihood that litigation would continue for many years, the then Minister for Treaty of Waitangi Negotiations decided to introduce Settlement legislation for ██████████ (the **Settlement Bill**) on 4 February 2022.

²¹ Preliminary Determinations at [278]-[279].

²² *Mercury NZ Limited & Ors v The Waitangi Tribunal & Ors* [2021] NZHC 654

https://www.justice.govt.nz/jdo_documents/workspace___SpacesStore_ded4f5fe_3d91_4b95_9acd_14200f6b65be.pdf.

The Supreme Court held a hearing into Wairarapa Moana Incorporation's appeal on 9-10 February 2022. The Crown at that time had no knowledge of when a Supreme Court decision would be released. The Supreme Court released a decision on 7 December 2022. That decision referred the matter back to the Waitangi Tribunal.²³

This would have meant further Tribunal hearings and possibly further Court litigation. The Minister made the decision to proceed with the Settlement Bill, a decision supported by the Settlement Trust, the Raukawa Settlement Trust and Te Kotahitanga o Ngāti Tūwharetoa. The Minister said in the New Zealand Parliament, in his third reading speech on the Settlement Bill on 13 December 2022:

“The Treaty process is not a perfect one, and it requires compromise. It often requires painful decisions and tough conversations. It does not and it cannot fully address the pain and suffering that iwi across the country have had to endure at the hands of the Crown. However, the agreements reached, once they are reached, are a step in the right direction. They provide valuable resources, and we have seen over the years how iwi have been able to grow and support their people through the benefits of Treaty redress.

...

I want to take a moment to talk about the challenges of the last few years. Shortly after the settlement trust reached settlement, there was a remedies application by a group, the Wairarapa Moana ki Pouākani Incorporation, for resumption of land, the Pouākani land. That's the land that's in Waikato. Part of the history was that the Crown, having pushed ██████████ off its land and undermined its cultural rights in respect of Lake Wairarapa and Lake Onoke, then having, frankly, nicked land off Raukawa and Tūwharetoa, gifted that land to ██████████ in some sort of compensation, then later, in the 1940s, took a chunk of that land back under the Public Works Act to build the Maraetai hydro power station. The remedies application was to get back the land that the Crown had seized under the Public Works Act and hand it back to at least somebody representing ██████████

The tribunal in March 2020 made some preliminary findings, and those preliminary findings included that it would order resumption—it would order the resumption of the Pouākani land claimed and that it would make sure that ██████████ in that respect was properly compensated for what had happened. But it is interesting to note these comments that the tribunal made in its extensive preliminary determination in March 2020, specifically in relation to one of the then claimants for those remedies, and that was the incorporation, the Wairarapa Moana ki Pouākani Incorporation — bearing in mind that by this time the settlement trust had also replicated the claim for remedies in order to preserve its position. But in relation to the question of who should receive any land ordered back to ██████████, the

²³ *Wairarapa Moana ki Pouākani Incorporation v Mercury NZ Limited & Ors* [2022] NZSC 142 <https://www.courtsofnz.govt.nz/assets/cases/2022/2022-NZSC-142.pdf>.

tribunal said this: "We do not consider we should recommend the return to them"— that is, the Wairarapa Moana Ki Pouākani Incorporation — "of the 787 acres, however, because the value of that land and the assets located there is not proportionate to the prejudice they suffered as shareholders in 1949."

The tribunal went on to say that "Even if we considered that the prejudice that the shareholders suffered from the compulsory acquisition alone might justify the return of part of the land to them, we do not favour the exercise of our discretion in that way." The tribunal goes on to talk about learning about the shareholders of Wairarapa Moana ki Pouākani Incorporation and that there was a variety of size of shareholders but that, in any event, they weren't representative. The tribunal said, for the reasons they've outlined, "We are satisfied that the return of land to the incorporation would not be a just outcome." and went on to say, "The recipient entity of the lands they do award must be demonstrably representative of and exist for the benefit of those who suffered prejudice in respect of the well-founded claims. The incorporation is not that kind of recipient."

It is very clear that the tribunal, when it made its extensive determination ruling, had no intention of returning the land to the incorporation. Nevertheless, the tribunal's decision was the subject of an appeal, or at least a judicial review to the High Court. The High Court focused on a question of mana whenua and whether the lack of it was a disqualifying factor for the order of resumption. The High Court ruled in favour of the Crown and Mercury Energy and Raukawa and a number of others. That decision was then appealed not to the Court of Appeal, as it ordinarily would've been, but to the Supreme Court, and last week the Supreme Court made a decision. Interestingly, the Supreme Court said its decision would not affect the bill before the House, although that is somewhat inconsistent with later statements in the Supreme Court decision. The Supreme Court took a different view on mana whenua and also laid out its expectation about how the tribunal would consider the issue of mana whenua in the future.

Against that, I as Minister have made a judgment about proceeding with the bill, and the reason I've made that judgment is because I, as Minister representing the Crown, have to consider a whole variety of interests, not just the interests of the incorporation, who took the appeal and about whom the tribunal said they would not order resumption, but the interests of [REDACTED], the only mandated entity for Wairarapa, who've gone out to their people, sought their support, had a vote, had not just one ratification vote on settlement but two, after they renegotiated their settlement, had it modified — that is to say, improved — and won the support to proceed. It was [REDACTED] Settlement Trust who has said, "We want to proceed because we want to face the future with certainty and with confidence, and we're confident that we can restore our relationship with the Crown." Raukawa says, "We do not want to be dragged into years and years of litigation defending our mana whenua rights anymore.", and Ngāti Tūwharetoa supports the continuation of the legislation as well.

The bill contains a variety of redress and compensation as well—\$115 million of compensation along cultural revitalisation as well. The time has come to bring the benefits of comprehensive Treaty of Waitangi settlement redress to all of [REDACTED]. On that basis, I commend this bill to the House.”

The New Zealand Parliament unanimously supported the passing of the Bill.

The Settlement Bill passed its Third Reading in the New Zealand Parliament on 13 December 2022 and received Royal Assent (through the New Zealand Governor General) on 16 December 2022. The Settlement Act came into force on 17 December 2022.

As is usual practice in Acts implementing Settlements of historical Treaty claims, the Settlement Act states that from the Settlement date (40 days after the Settlement Act came into force) no court, tribunal or other judicial body had jurisdiction in respect of the historical claims listed in the Act, which includes Wairarapa Moana Incorporation’s claim to land at Pouākani (Wai 85).

2.6 The current Court declaration proceedings

Wairarapa Moana Incorporation then applied to the New Zealand High Court for a declaration that the Settlement Act is inconsistent with the New Zealand Bill of Rights Act 1990.

On 7 August 2023, the High Court dismissed those proceedings.

Wairarapa Moana Incorporation has appealed that decision to the New Zealand Court of Appeal. That appeal is set down to be heard on 22 October 2024.

Appendix Three - Information relating to the concerns you raise regarding Wakatū Incorporation

3.1 The Nelson ‘Tenths’ are areas of land that were set aside as ‘Native reserves’

A private company, the New Zealand Company (**Company**), formed in 1839 with the aim of developing planned settlements in New Zealand for immigrants from Britain. The Company planned to sell allotments to settlers consisting of a one-acre town section, one suburban section of 50 acres, and one rural section of 150 acres. The Company also intended to set aside one tenth of the sections offered to settlers as ‘Native reserves’.

In late October and November 1841, Company officials met with some Māori groups in the north of New Zealand’s South Island (an area known as **Te Tau Ihu**). In November 1841, the Company decided to establish the Nelson settlement in this region, to be centred on the town of Nelson, which was to be founded at a site then known as Wakatū.

Following surveying of the Nelson town and suburban sections:

- a. town sections were selected to be reserved to Māori, known as the ‘town tenths’; and
- b. suburban sections were selected to be reserved to Māori, known as the ‘suburban tenths’,

(together the **Nelson Tenths Land**).

Direct purchases of land from Māori prior to the signing of the Treaty had to be validated by the Crown through commissioners appointed for that purpose. In 1844, the Land Claims Commissioner William Spain investigated the Company’s purchase from Māori of the land comprising the Nelson settlement. His decision was issued on 31 March 1845. Spain recommended that the Company was entitled to a Crown grant of 151,000 acres of land in Te Tau Ihu, from which one tenth (15,100 acres) was to be set aside as ‘Native reserves’, and all pā (villages), urupā (burial grounds) and cultivations within the relevant area were to be excluded.

A Crown grant of the 151,000 acres to the Company was executed by the Governor of New Zealand on 29 July 1845. As a result of the complaints the Company made about this grant, and its refusal to accept it, a new Governor executed a new grant in 1848, which the Company accepted.

3.2 Wakatū Incorporation is the body in which the Nelson Tenth Land is now vested

From 1848 to 1882 the Nelson Tenth Land was managed by a range of Crown bodies and appointees. From 1882 the land was vested in the Public, then Māori, Trustees. During this time some of the Nelson Tenth Land was sold, exchanged for other land, or otherwise alienated.²⁴

In 1893 the then New Zealand Native Land Court issued a determination naming individuals who it found to be the original beneficial owners of the Nelson Tenth Land and in 1895 determined who were the then living successors of those original owners. All of the identified original owners were members [REDACTED]

In August 1977, the successors of the individual original owners identified by the Native Land Court were constituted as an incorporation, to be known as ‘the Proprietors of Wakatū’ (**Wakatū Incorporation**) and the remaining Nelson Tenth Land was vested in the Incorporation.²⁵

3.3 Negotiations to settle historical Treaty claims made by eight iwi with interests in Te Tau Ihu began in 2006

A number of historical Treaty claims were lodged with the Waitangi Tribunal in relation to the Nelson Tenth Land including claims on behalf of four other Te Tau Ihu iwi relating to their exclusion from those reserves (by the Native Land Court’s determination of who the original beneficial owners of the land were and the subsequent vesting of that land in an incorporation only for the benefit of the successors of those identified people).

Crown-iwi negotiations to settle historical Treaty claims made by iwi with interests in Te Tau Ihu began in 2006.

Wakatū Incorporation was originally part of the [REDACTED] historical Treaty claim negotiations. The Incorporation was not linked to other Te Tau Ihu iwi historical Treaty claim negotiations. Wakatū Incorporation approached the Crown early on to seek a separate Settlement for claimed historical Treaty breaches in relation to the Nelson Tenth Land. The Crown declined to negotiate a separate Settlement with Wakatū Incorporation because it wanted to negotiate comprehensive settlements of all historical Treaty claims with each of the iwi with an interest in Te Tau Ihu.

²⁴ *Te Tau Ihu Report on the Northern South Island Claims, Wai 785, 2008, Volume 2, pages 590 to 591.*

https://forms.justice.govt.nz/search/Documents/WT/wt_DOC_68199235/Te%20Tau%20Ihu%20Vol%202.pdf.

²⁵ Wakatū Incorporation Order 1977

<https://www.legislation.govt.nz/regulation/public/1977/0197/latest/whole.html#DLM57453>.

3.4 By the end of the Waitangi Tribunal inquiry into the Te Tau Ihu historical Treaty claims, all parties agreed that the Crown should negotiate the settlement of those claims with iwi and not directly with Wakatū Incorporation

When the Waitangi Tribunal issued its report in relation to the Te Tau Ihu historical Treaty claims in 2008, it acknowledged eight iwi as having customary interests and historical Treaty claims in Te Tau Ihu:

- a. the four [REDACTED];
- b. three [REDACTED] and [REDACTED];
- c. [REDACTED]

The Tribunal expressed the view that the [REDACTED] were wrongly denied a share in the Nelson Tenth Land arrangements.

The Waitangi Tribunal recommended that settlement of historical Treaty claims relating to Te Tau Ihu matters should be resolved between the Crown and the relevant iwi (rather than some being resolved between the Crown and Wakatū Incorporation). However, iwi and the Crown accepted that the Incorporation could support the negotiation process through the appointment of two Wakatū Incorporation members to the board of the mandated negotiation entity for the four [REDACTED].

3.5 Negotiations in relation to [REDACTED] historical Treaty settlement claims were paused when the Wakatū Incorporation, [REDACTED] and another plaintiff issued proceedings in the New Zealand High Court

In February 2009, Wakatū Incorporation wrote to the then Minister for Treaty of Waitangi Negotiations asking that the Crown resolve some outstanding matters relating to one historical Treaty claim (Wai 56) directly with the Incorporation. The Minister advised the Incorporation that the Crown was unwilling to negotiate a separate settlement for that claim and instead all historical Treaty breaches relating to that claim were to be covered by the settlement package negotiated with the mandated negotiation entity for the four [REDACTED].

In response to the Crown's position, the representatives of the Wai 56 claimants sought an urgent hearing in the Waitangi Tribunal seeking a separate settlement for that claim. The Tribunal dismissed that application.

As a consequence, in May 2010, Wakatū Incorporation, [REDACTED] and a third plaintiff initiated litigation in the High Court taking a claim against the Crown for alleged breach of trust and fiduciary duties in relation to the reservation of land in Te Tau Ihu.

In accordance with Crown policy not to negotiate and litigate on the same matters simultaneously, the Crown suspended Treaty settlement negotiations with the relevant four [REDACTED] at that point.

3.6 When the plaintiffs were unsuccessful in the High Court, negotiations resumed

In 2012 the High Court found that Wakatū Incorporation and the other plaintiffs had not established any of the causes of action that they had pleaded and that none of them had standing to bring the claims.²⁶ Wakatū Incorporation (and the other two plaintiffs) appealed the High Court's decision to the New Zealand Court of Appeal.

While the matter was still before the Courts, at the request of the relevant iwi, negotiation of the [REDACTED] historical Treaty claims recommenced and concluded around 2012.

3.7 The historical Treaty claims of all eight Te Tau Ihu iwi were settled by April 2013

By April 2013 each of the eight iwi with interests in Te Tau Ihu identified by the Tribunal (including the [REDACTED]) had signed Deeds of Settlement with the Crown in relation to their historical Treaty claims. Prior to those Deeds being signed they had each been ratified by the relevant claimant groups (section 1.2.5 of Appendix One explains the Settlement ratification process).

Acts of Parliament to enable all of those Deeds of Settlement to fully be given effect were passed in 2014, and all came into force on 23 April 2014.²⁷

In those Settlements:

- a. the allocation of land set aside as 'Native Reserves' and the administration of the Nelson Tenth Land (for the [REDACTED]); and
- b. the exclusion from the Nelson Tenth Land (for the other four Te Tau Ihu iwi),

featured in the historical accounts and Crown acknowledgments in the Settlements, with the Crown apology in each of the Settlements referring to them and the redress provided under those Settlements applying to all relevant historical Treaty breaches (including those relating to the Nelson Tenth Land).

²⁶ [Proprietors of Wakatū Incorporated & Ors v The Attorney-General](#) [2012] NZHC 1461.

²⁷ Ngāti Kōata, Ngāti Rārua, Ngāti Tama ki Te Tau Ihu and Te Ātiawa o Te Waka-a-Maui Claims Settlement Act 2014, Ngāti Apa ki te Rā Tō, Ngāti Kuia and Rangitāne o Wairau Claims Settlement Act 2014; and Ngāti Toa Rangitira Claims Settlement Act 2014.

3.8 The proceedings lodged by Wakatū Incorporation and [REDACTED] proceedings were preserved by the Act in relation to the settlement of the Tainui Taranaki ki te Tonga iwi historical Treaty claims

As noted above, Wakatū Incorporation, [REDACTED], and the other plaintiff appealed the High Court's decision to the New Zealand Court of Appeal.

Normally as part of an agreed Settlement of historical Treaty claims, the relevant Settlement legislation will extinguish the jurisdiction of all Courts and tribunals to inquire further into the settling claimant group's historical Treaty claims. However, the Ngāti Kōata, Ngāti Rārua, Ngāti Tama ki Te Tau Ihu and Te Ātiawa o Te Waka-a-Maui Claims Settlement Act 2014 specifically provided that the passage of that Act did not affect:²⁸

- a. the ability of a plaintiff to pursue the appeal in relation to those proceedings filed in the Court of Appeal;
- b. the ability of any person to pursue an appeal from a decision of the Court of Appeal in those proceedings; and
- c. the ability of a plaintiff to obtain any relief claimed in those proceedings to which the plaintiff was entitled.

The Act explicitly did not preserve any claim by or on behalf of a person who was not a plaintiff in those proceedings.²⁹

In December 2014, the New Zealand Court of Appeal found that [REDACTED] had standing to bring the claims³⁰ but otherwise upheld the High Court's decision and dismissed the plaintiffs' claims.³¹ The plaintiffs sought, and obtained, leave to appeal that Court of Appeal decision to the New Zealand Supreme Court.

3.9 The New Zealand Supreme Court found the Crown owed fiduciary duties but only [REDACTED] had standing and referred the matter back to the High Court

In 2017, a majority of the New Zealand Supreme Court found that, after 31 March 1845, the Crown owed fiduciary duties to:

- a. reserve 15,100 acres of land in the Nelson region; and
- b. exclude the customary owners' pā, urupā, and cultivations from the land obtained by the Crown.³²

²⁸ Ngāti Kōata, Ngāti Rārua, Ngāti Tama ki Te Tau Ihu and Te Ātiawa o Te Waka-a-Maui Claims Settlement Act 2014, s 25(6) and (7).

²⁹ Section 25(7).

³⁰ But Wakatū Incorporation and the third plaintiff did not have standing.

³¹ [Proprietors of Wakatū & Ors v Attorney-General](#) [2014] NZCA 628.

³² [Proprietors of Wakatū & Ors v Attorney-General](#) [2017] NZSC 17.

The Supreme Court also found that [REDACTED] was the only plaintiff with proper legal authority to bring Court proceedings about the reservation of the land and that Wakatū Incorporation did not have the standing to properly bring the proceedings.

In the New Zealand Court system there are no further rights of appeal beyond the New Zealand Supreme Court. However, the Supreme Court made no findings as to whether the Crown had breached its fiduciary duties, and referred issues concerning breach, liability, defences, and remedy back to the High Court.

3.10 The Crown has given a voluntary undertaking not to transfer relevant land still owned by the Crown without notice

In order to preserve his ability to claim the full suite of relief he seeks, [REDACTED] sought that land in the 1845 Spain Award area owned by the Crown, Crown entities, or State-owned enterprises should not be transferred to any third party (including iwi) until the resolution of his substantive claims.³³

The Crown has provided a voluntary undertaking to not transfer any land in the 1845 Spain Award area owned by the Crown itself without giving [REDACTED] notice. Because Crown entities and State-owned enterprises are legally separate to the Crown, that undertaking does not extend to land owned by them.

3.11 The proceedings currently before the New Zealand Courts

Following the Supreme Court's referral of the matter back to the High Court, a further High Court hearing was held between August and October 2023.

The High Court has indicated that it expects to release its judgment in the latter part of 2024. Once the High Court has issued its decision both [REDACTED] and the Crown will have a right, if they choose, to appeal that decision to the New Zealand Court of Appeal.

In June 2024, [REDACTED], on behalf of [REDACTED], wrote to the Attorney-General and [REDACTED], asking to meet. The Attorney-General replied, in August, that the Crown is open to discussing the case outside of Court but that it would be prudent to first wait for the further High Court decision to be released.

³³ In New Zealand: (a) 'Crown entities' are legal entities in their own right owned by the Crown in right of New Zealand. They perform statutory functions when it has been decided that those functions should be carried out 'at arm's length' from the New Zealand Government; and (b) 'State-owned enterprises' are Crown-owned limited liability companies. By statute their principal objective is "to operate as a successful business" (Stated-Owned Enterprises Act 1986, s 4).