IN THE WAITANGI TRIBUNAL **WAI 2607**

IN THE MATTER OF The Treaty of Waitangi Act 1975

AND IN THE MATTER OF A claim by **Cletus Maanu Paul**, and **David Potter** on behalf of the **Mataatua District Māori Council** that the Crown is acting in breach of Treaty of Waitangi obligations towards Māori as a result of the New Zealand Government failing to implement adequate policies to address the threats posed by global climate change.

MEMORANDUM OF COUNSEL FOR THE APPLICANT IN SUPPORT OF URGENCY APPLICATION

Dated 4 July 2017

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MEMORANDUM OF COUNSEL FOR THE APPLICANT IN SUPPORT OF URGENCY APPLICATION

MAY IT PLEASE THE COURT:

Background

1. This memorandum is filed in support of the claimants' application for an urgent inquiry into the claim brought on behalf of the Mataatua District Māori Council alleging that the Crown has breached its Treaty obligations to Māori in general, in failing to implement adequate policies to address ongoing detriment and future threats posed by global climate change ("the claim").

2. The claim was filed on 1 June 2016 however, it was not registered with the Tribunal until 22 February 2017.

3. Indications from the Tribunal Registry are that upon the current scheduling of inquiries as contained within the *Kaupapa Inquiry Programme* the present claim, as relating to natural resources and environmental management which are 7th in priority for hearing, would not be heard until well after 2020.

4. The urgency application is made upon the basis that the claim needs to be heard and reported upon prior to 2020. If that does not occur, the claimants and Māori in general will be likely to suffer significant and irreversible prejudice as a result of the Crown's actions and policies.

The claim

5. The statement of claim alleges that the Crown has breached Treaty obligations towards the claimants and Māori in general as a result of the New Zealand government failing to implement adequate policies to deal with the threats posed by global climate change.

6. The claim is brought by the claimants on behalf of the Mataatua District Māori Council and on behalf of Māori in that district and New Zealand in

general. Under the *Māori Community Development Act 1962,* district Māori Councils have the same functions in each district as conferred on the New Zealand Māori Council[1] which includes assisting Māori in conserving and advancing their physical, economic and spiritual wellbeing.[2]

7. The New Zealand Māori Council has brought claims before this tribunal in the past on behalf of Māori in general with regards to government policy.[3]

8. Although the claim will focus on the effects of climate change in the Mataatua District Māori Council's Bay of Plenty centred district there will be a wider reference to the effect on Māori in general in Aotearoa.

Climate change

9. In referring to *climate change,* the claim refers to the increases in global temperatures which have been taking places over recent decades as a result of increased levels of greenhouse gases in the atmosphere that have been caused by human activity (anthropogenic greenhouse gases).

10. The main increases in greenhouse gases have been through increased levels of carbon dioxide caused by the burning of fossil fuels however methane and nitrous oxide from agricultural activities and hydrofluorocarbons (HFCs) have also been contributors.

11. Greenhouse gas levels are measured by CO_2 equivalent parts per million (ppm). At the start of the industrial revolution (1850) these levels were estimated to be 280ppm. At present they are approaching the level 400ppm – this being a level that has not been seen for approximately 3 million years.[4]

12. It is widely accepted by scientists that this increased level of greenhouse gases has been the major contributor in global average surface

[1] Section 10.
[2] Section 18(1)(c).
[3] Such as WAI 2357, *The Sale of Power-Generating State-Owned Enterprises Claim* and WAI 2358, *The National Fresh Water and Geothermal Resources Claim*
[4] Affidavit of James A Renwick at [26(g)].

temperatures increasing by 1.2°C since pre-industrial times.[5] It is also accepted that if this global temperature increase reaches 2°C it will result in irreversible changes to the environment that will be dangerous to the environment and humans.[6] There is scientific consensus that in order to avoid the more extreme effects of climate change global temperature rises should be kept to below 1.5°C.[7]

13. To keep global temperature increases below this 2°C level it is scientifically considered that greenhouse gas concentrations need to stay below the level of 450ppm.[8] This is only approximately 50ppm above present levels.

14. The effects of climate change around the world, and specifically in New Zealand, are many and varied. Apart from the direct effect of increased temperatures (mainly through warming of the oceans), climate change also causes an increase in extreme weather patterns leading to droughts and flooding as well as sea level rises. The resulting social and economic impacts upon people are likely to be greater upon disadvantaged people and communities.[9]

15. These climate change effects are and will increasingly impact on Māori in New Zealand. For example:

16. There will be dramatic effects on natural eco-systems over which Māori exercise kaitiakitanga.[10]

17. Increased water scarcity will impact upon Māori communities, and Māori agricultural, horticultural and commercial end users;

18. Warming temperatures will impact upon non-commercial and commercial fisheries over which Māori hold significant quota;

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[5] At [26(f)].
[6] At [19].
[7] At [24] and [28].
[8] At [21].
[9] At [16(c)]
[10] Waitangi Tribunal *Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity* (Wai 262, 2011) vol 1 at 366.

19. The forestry industry in which Māori have a significant stake will be increasingly impacted;

20. Māori coastal communities and cultural sites will be affected by rising sea levels.[11]

21. By means of further example, one of the claimants, **Cletus Maanu Paul** has discussed in his affidavit filed in support of the urgency application his perception of how climate change has affected the environment within the Mataatua District.

New Zealand Government policy response to climate change

22. The global effort to contain the effects of climate change have been led by the United Nations through the International Panel on Climate Change (IPCC).

23. To date, the New Zealand response to the threat of climate change has been largely limited to setting emission reduction targets under the IPCC treaties and establishing an 'emissions trading scheme' (ETS) to facilitate the meeting of these targets.

24. New Zealand signed the United Nations Framework Convention on Climate Change (UNFCCC) in 1992. This Treaty included a requirement for the parties to take precautionary measures to prevent dangerous levels of greenhouse gas concentrations occurring and also committed developed countries (including New Zealand) to take the lead in this regard.[12]

25. New Zealand has subsequently attended a number of conferences of parties under the UNFCCC and made various climate change commitments.

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[11] D King and others "The climate change matrix facing Māori society" in Nottage, R.A.C., Wratt, D.S., Bornman, J.F., Jones, K. (eds) *Climate change adaptation in New Zealand: Future scenarios and some sectoral perspectives* (New Zealand Climate Change Centre, Wellington 2010).

[12] United Nations Framework Convention on Climate Change (opened for signature 20 June 1992, entered into force 21 March 1994) arts 2, 3 and 4.

26. Under the *Kyoto Protocol* to the UNFCC, New Zealand committed to keeping greenhouse gas emissions during the 2008-12 first commitment period (CP1) to levels not exceeding those in the 1990 baseline.

27. The accounting and measuring system under the *Kyoto Protocol* allowed countries to meet their commitments by:

    a) Accumulating removal units (RMUs) from the growth of post 1990 forestry; and
    b) Purchasing removal units through international carbon markets (overseas units).

28. The *Climate Change Response Act 2002* was enacted to facilitate New Zealand commitments under the Kyoto Protocol. This included the establishment of an emissions trading scheme (ETS) which issued New Zealand units (NZUs) and allowed for the purchase and surrender of overseas units.

29. Greenhouse gas emitters, with the exception of agriculture, are currently required to surrender one emission unit for every 2 tonnes of reported carbon dioxide equivalent (CO_2e)[13] and post-1990 forest owners have the option of receiving NZUs annually for every tonne of CO_2e removed by growing trees (which would have to be surrendered once the forest was harvested). NZUs can be purchased from the government at a price of $25.

30. At the end of CP1, annual greenhouse gas emissions in New Zealand had actually increased by some 21% from 1990 levels.[14] However, New Zealand was able to claim compliance with its Kyoto Protocol commitment through reliance on forestry RMUs and the purchase of overseas removal units of dubious quality.[15]

[13] "**Carbon dioxide** equivalent" or "**CO2e**" is a term for describing different greenhouse gases in a common unit. For any quantity and type of greenhouse gas, **CO2e** signifies the amount of **CO2** which would have the equivalent global warming impact.
[14] Report by New Zealand on expiration of additional period for fulfilling commitments for the first commitment period under the Kyoto Protocol, 16 December 2015.
[15] Simmonds & Young "*Climate Cheats – How New Zealand is Cheating on Climate Change Commitments and What We Can Do to Set it Right?*" The Morgan Foundation April 2016.

31. On 31 March 2011, the New Zealand Government pursuant to *s 224 of the Climate Change Response Act 2002* gazetted a target to reduce greenhouse emissions by 50% from 1990 levels by 2050.

32. The New Zealand government decided that it would not sign up to the second commitment period under the Kyoto Protocol, for the period 2013-2020 (CP2). This meant that from 1 June 2015, New Zealand could not purchase overseas removal units to meet any emissions reduction commitments.

33. Rather than making a commitment under CP2, in 2013 New Zealand made a commitment under the Copenhagen Accord. The commitment is to reduce emissions by 5% from 1990 levels by 2020. There are no mechanisms or penalties to ensure compliance with this commitment.

34. By 2015, New Zealand's gross emissions had risen by 24.1% from 1990 levels.[16]

35. As stated by the Ministry of Business, Innovation and Employment in its Aide Memoire to the incoming Minister of Energy and Resources in December 2016, "evidence suggests that [the ETS] has not significantly reduced domestic emissions…".[17]

36. It is expected by 2020 emissions will increase by 30%; the New Zealand Government expects to meet its target under the Copenhagen Accord by the use of RMU's and overseas units carried over from CP1. This is despite the fact that New Zealand having not signed up to the second Kyoto commitment period is not technically allowed to make these adjustments.[18]

37. New Zealand has entered into the 2015 *Paris Agreement* under which member nations were to make 'ambitious' nationally determined contributions (NDCs) to reduce emissions for the period 2021 to 2030 in

[16] Ministry for the Environment: New Zealand's Greenhouse Gas Inventory 1990- 2015 (26 May 2017).
[17] Ministry of Business Innovation and Employment, *Aide Memoire to Minister of Energy and Resources,* 21 December 2016, at 4.
[18] Above n 4 exhibit JAR-N *New Zealand Climate Action Tracker* at 2.

an effort to limit global temperature increases to 1.5 °C.[19] To date, the New Zealand government has committed to an NDC of reducing emissions by 2030 to 30% below 2005 levels (being equivalent to a reduction of 11% below 1990 levels).

38. Under the Paris Agreement, it was agreed that more work would need to be done by the parties to set NDCs at levels that would hold global temperature increases to below 2°C by 2030. There would therefore be a facilitated dialogue in 2018 to review and inform the setting of final NDCs (to apply from 2021) which will be reviewed in 2025.[20]

39. On the government's current projections, New Zealand's actual greenhouse gas emissions will continue to increase up to 2030. The government's plan is to meet its NDC commitments under the Paris Agreement through significant purchases of overseas removal units (the government assumes that New Zealand will be able to access international carbon markets during that period).[21]

Treaty breaches

40. The claimants' position is that in order to satisfy the Crown's Treaty obligations of active protection towards Māori[22] the New Zealand government needs to bear its fair share as a developed nation in reducing global greenhouse emissions so as to keep global temperature rises below dangerous levels that would threaten Māori and their use of their land and resources. It is the claimants' position that the government has failed to meet these obligations in a number of respects.

41. Firstly, the ETS, which the government largely relies on to deal with climate change, has been ineffective and has not provided an incentive for emitters to take action to reduce their emissions.[23] In particular:

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[19] Above n.4 at [31-32] and exhibits JAR-H to I.
[20] Above n.4, see exhibit **JAR**-I *Adoption of Paris Agreement FCCC/ CP 2015/L.9/REV.1* at clauses 17, 20 and 24.
[21] Above n 17 at 4 and 5.
[22] *New Zealand Maori Council v Attorney General* [1987] 1 NZLR 641.
[23] Ministry for the Environment: The New Zealand Emissions Trading Scheme's Valuation (2016).

(a) There has been little or no control over the purchase of overseas units by New Zealand emitters (to meet their surrender obligations);

(b) The New Zealand market has therefore been flooded with dubious quality overseas units (which other Kyoto countries have banned);

(c) The flood of cheap and dubious overseas units collapsed the price of New Zealand emission units;

(d) New Zealand land and forestry owners have not been incentivised to grow forests (post-1990) in order to trade units, given the low unit prices;

(e) Over recent years most of the units surrendered have been overseas units[24] rather than relying on domestic reductions;

(f) The agricultural sector, which is the main source of greenhouse gas emissions in New Zealand, has been omitted from the Emissions Trading Scheme.

42. Secondly, the government has in the past and for the future set inadequate emission reduction targets. In particular:

43. The current target of reducing emissions by 5% from 1990 levels by 2020 is well below the targets set by the United Nations for developed countries of 25% to 40% reductions below 1990 levels;[25]

44. The future target of reducing emissions by 11% from 1990 levels by 2030 under the Paris Agreement, will mean that New Zealand is well off track for meeting the recommended target by the United Nations for developed countries of 80% to 90% by 2050;[26]

45. The gazetted target of reducing emissions by 50% from 1990 levels by 2050 (no international commitment has been made in respect of this

[24] Above n 15.
[25] Climate Change 2007: Mitigation Report, Contribution of Working Group III to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change, Cambridge University Press, p 776 (AR 4).
[26] Above n 25.

target) will be well short of the recommended target by the United Nations for developed countries of 80% to 90% by 2050;[27]

46. To meet these targets the New Zealand government proposes to rely on carrying forward surplus units from the first Kyoto period and continuing to generate Kyoto Protocol removal units, despite the fact that under the Kyoto Protocol, countries such as New Zealand who do not commit to the second commitment period, are not allowed to do this;[28]

47. Overall New Zealand targets have been rated as being inadequate when compared with those set by other developed nations[29] and the target for the 2021-2030 period falls short of New Zealand's obligations under the Paris Agreement to set an 'ambitious' target.

48. Thirdly, beyond the ineffective ETS, the New Zealand government has failed to develop policies for effectively addressing greenhouse gas emissions. In particular:

49. The government encourages oil and gas exploration;

50. Government owned Solid Energy produces the bulk of New Zealand's coal production, the combustion of which is a significant producer of emissions;

51. Government owned Landcorp has carried out the bulk of recent deforestation of land and conversion to dairy farms;

52. There are few incentives for individuals to reduce emissions such as investing in electric vehicles and solar power and there has been underinvestment in public transport.

Basis of Treaty breaches

53. Climate change has the potential for widespread impacts upon Māori communities culturally, socially, economically, physically and spiritually.

[27] Above n 25.
[28] Above n 4 exhibit JAR-N *New Zealand Climate Action Tracker* at 2.
[29] Climate Change Tracker Report: New Zealand deploys creative accounting to allow emissions rise, 15 June 2015.

54. The Crown is obliged to deal with the threat of global climate change as part of its overall obligations to actively protect Māori from these negative impacts and to actively protect Māori kaitiaki relationships with the environment.

55. In *New Zealand Māori Council v Attorney General* [1987] 1 NZLR 641 ("the Lands Case"), Cooke P expressed the obligations of active protection in the following terms:[30]

> What has already been said amounts to an acceptance of the submission for the applicants that the relationship between the Treaty partners creates responsibilities analogous to fiduciary duties. Counsel are also right, in my opinion, in saying that the duty of the Crown is not merely passive but extends to active protection of Māori people and the use of their lands and waters to the fullest extent practicable. There are passages in the Waitangi Tribunal's Te Atiawa, Manukau and Te Reo Māori reports which support the proposition and are undoubtedly well founded. I take it as implicit in the proposition that, as usual, practicable means reasonably practicable.

56. The obligation of active protection stems from Article 2 of the English version of the Treaty by which the Crown guaranteed to Māori:

> The full exclusive and undisturbed possession of their lands and estates, forests, fisheries and other properties which they may collectively or individually possess as long as it is their wish and desire to retain the same in their possession.

57. In the abovementioned *Lands* case it was noted by Bisson J that within the context of Article 2:[31]

> It can be accepted that the English expression "and other properties" as translated in Māori include all things highly prized such as their customs and culture.

58. In the context of the present claim it is clear that climate change poses an ongoing and increasing threat to Māori and the use of their lands and

[30] 664 at [38].
[31] 715 at [16].

resources under their direct ownership as well as the exercise of their customs and culture over the local environment in general.

59. It is also clear that government policy with regards to climate change presently influences how climate change affects Māori and will continue to do so in the future.

60. In this respect it is accepted that climate change is a global issue and the amount of manmade greenhouse emissions emanating from New Zealand is only a small proportion of global emissions. However, under the United Nations Conventions that New Zealand is a signatory to, it has responsibilities as a developed nation to take a lead in setting an example of what each individual nation needs to do to bear its fair share of the overall burden of reducing emissions. As such, if New Zealand government policies do make a valid and substantive contribution to the reduction of greenhouse gas emissions (and it is the claimants' view that they do not at present) then the policies can make a real difference in a global context.

61. It is also accepted that the present claim differs from other claims brought before this Tribunal, based upon the principle of active protection, which tend to focus on government policies impacting particularly on Māori. By contrast the government's climate change policies impact on all New Zealanders.

62. However, the obligations of active protection arising under the Treaty of Waitangi only pertain to Māori and not the population in general. As such, there is nothing prohibiting this Tribunal from inquiring into government policy which impacts on Māori despite that it also impacts on the population in general. For example, in the recent *Horowhenua, Muaupoko Priority Report* the tribunal found that the Crown was in breach of treaty obligations in allowing local lakes and streams to be polluted.[32]

63. It is also accepted that it is not necessarily the case that every government policy which detrimentally impacts upon Māori represents a breach of the

[32] Waitangi Tribunal *Horowhenua, Muaupoko Priority Report* (Wai 2200, 2017) at 585 although it is accepted that the Crown had in the past given undertakings to care for these environments.

Treaty. As noted in the *Lands Case*, the obligations of active protection are to take steps that are 'reasonably practicable' in the circumstances.

64. In some cases it may be that general government policy which detrimentally affects Māori is warranted given the government's other policy objectives however the claimants submit that this exception does not apply in the present case.

65. A determinative factor which elevates the climate change issue to that of a breach of the Crown's duty of active protection is that climate change represents a serious and immediate threat to Māori. If the Crown does not meet its duty of active protection in dealing with climate change, the consequences will likely be irreversible.

66. The Privy Council noted that the duty of active protection requires vigorous action where a taonga is threatened, especially where its vulnerability can be traced to earlier breaches of the Treaty: [33]

> *… if as is the case with the Māori language at the present time, a taonga is in a vulnerable state, this has to be taken into account by the Crown in deciding the action it should take to fulfil its obligations. This may well require the Crown to take especially vigorous action for its protection. This may arise, for example, if the vulnerable state can be attributed to past breaches of the Crown of its obligations, and may extend to the situation where those breaches are due to legislative action.*

67. Climate change presents the most serious threat to humanity and the environment of our time and the Crown's duty to actively protect Māori from the threat of climate change requires vigorous action. This vulnerable state can be attributed to past breaches by the Crown of its obligations, in legislating to usurp the ability for Māori to exercise kaitiakitanga and furthermore in implementing an emissions trading scheme that falls short of protecting Māori and the environment from irrevocable harm.

68. The Crown's current scheme further undermines the ability of Māori to meet the kaitiakitanga obligation to protect current resources for future generations. In this respect, of relevance, are proceedings brought in the

[33] *New Zealand Māori Council v Attorney-General* [1994] 1 NZLR 513 Broadcasting Assets (PC) at 517.

United States of America against the government alleging that it has permitted greenhouse gas emissions to escalate to dangerous levels. The claim was based upon American common law principles and, in particular, the 'public trust doctrine'. The American government's attempt to strike out these proceedings has been recently refused.[34]

69. The 'public trust doctrine' argued in *Juliana v United States of America* relates to *common property* which "*remain common to all citizens, who take of them and use them, each according to his necessities, and according to the laws which regulate their use*".[35] The nature of the "trust" or "fiduciary obligations" of the State towards natural resources common property is described as follows: [36]

> The natural resources trust operates according to basic trust principles, which impose upon the trustee a fiduciary duty to 'protect the trust property against damage or destruction'. George G. Bogert et al, Bogert's Trust and Trustees, § 582 (2016). The trustee owes this duty equally to both current and future beneficiaries of the trust. Restatement (Second) of Trusts § 183 (1959). In natural resources cases, the trust property consists of a set of resources important enough to the people to warrant public trust protection. See Mary C. Wood, A Nature's Trust: Environmental Law for a New Ecological Age 167-75 (2014). The government, as trustee, has a fiduciary duty to protect the trust assets from damage so that the current and future trust beneficiaries will be able to enjoy the benefits of the trust.

70. One of the grounds raised in the strike out application in *Juliana v United States of America* was that the public trust doctrine claim was no different to any other complaint that government policies were not doing enough to protect the environment. The Court rejected this argument on the following basis: [37]

> Throughout their objections, defendants and intervenors attempt to subject a lawsuit alleging constitutional injuries to case law

[34] *Juliana v United States of America* Case 6:15-CV-01517-TC Opinion and Order 11/10/16 in the United States District Court for the District of Oregon Eugene Division.
[35] At 38.
[36] At 39.
[37] At 51- 52.

> governing statutory and common-law environmental claims. They are correct that plaintiffs likely could not obtain the relief they seek through citizens suits brought under the Clean Air Act, the Clean Water Act, or other environmental laws. But that argument misses the point. This action is of a different order than the typical environment case. It alleges that defendants' actions and inactions – whether or not they violate any specific statutory duty – have so profoundly damaged our home planet that they threaten plaintiffs' fundamental constitutional rights to life and liberty.

71. These comments have relevance to the claimants' claim before this Tribunal in a number of respects.

72. The public trust doctrine as recognised in American common law has parallels with the Crown's obligations of active protection to Māori in the use of their land and resources. Although the Treaty obligation of active protection pertains only to Māori and not the public in general, within this more limited context, the same type of obligations recognised under the public trust doctrine fall upon the Crown in New Zealand. That is to take reasonable steps to preserve natural resources for future generations of Māori.

73. Further, the approach taken in the *Juliana* case to jurisdiction is apposite here. The claimants' position is that the present claim is different from any general concern that Māori may have about the government's environmental policy in that the Crown's climate change policy so 'profoundly' puts at risk Māori land, resources and the environment that the situation is elevated to a breach of the duty of active protection as a result.

Relief sought

74. Given these breaches of Treaty obligations the claimants seek the following relief :

    (a) A finding that the New Zealand Government's inadequate response to the threat of Climate Change is in breach of the Crown's

obligations under the Treaty of Waitangi and Māori have and will continue to suffer prejudice as a result;

(b) A recommendation that the New Zealand Government set targets for the reduction of greenhouse gas emissions that will meet New Zealand's international obligations to take the lead as a developed country and make a valid and substantive contribution to keeping global temperature rises below the 2 degrees above pre- industrial levels threshold;

(c) A recommendation that the New Zealand Government introduce policies that will be effective in reducing greenhouse gases and meeting those new targets, including restructuring or replacing the present New Zealand Emissions Trading Scheme;

(d) A recommendation that the New Zealand Government specifically introduce policies that will mitigate the ongoing effects of climate change on Māori and their use of their lands and resources; and

(e) Costs.

Principles relating to urgency applications

75. Pursuant to s.7(1)(A) of the Treaty of Waitangi Act 1975 "the Tribunal may, from time to time, for sufficient reason, defer, for such period or periods as it thinks fit, its inquiry into any claim made under s.6 of this Act".

76. The Supreme Court in *Haronga v Waitangi Tribunal* [2011] NZSC 53 commented in regards to s.7(1)(A) that: [38]

> While this provision does not excuse the Tribunal from its duty to inquire, it does permit it to defer commencing an inquiry (and to adjourn it after it has commenced) for a period or periods. This can only be done 'for sufficient reason'. When the power is exercised, the Tribunal must inform the claimant of its discussion and state its reasons for its decision. The power always looks to

[38] At [83].

> commencement or recommencement of the inquiry once sufficient reasons for the deferral cease to exist.

77. The Supreme Court in *Haronga* also went on to note that the Tribunal, under clause 5(9) of the second schedule of the Act, has power to regulate its own procedure in the manner it thinks fit but that "these powers however, are administrative in nature only."[39]

78. Further, pursuant to clause 5(10) of the second schedule of the Act the Chairperson of the Tribunal may issue practice notes as to the practice and procedure of the Tribunal.

79. The Tribunal's 2009 practice note *Guide to the Practice and Procedure of the Waitangi Tribunal* sets out the criteria that the Tribunal is to consider when determining applications for an urgent inquiry. These guidelines state that, "The Tribunal will grant an urgent inquiry only in exceptional cases and only once it is satisfied that adequate grounds for according priority have been made out".[40]

80. The guidelines set out that the Tribunal can have regard to a number of factors, and of particular importance is whether: [41]

> The claimants can demonstrate that they are suffering, or likely to suffer, significant and irreversible prejudice as a result of current or pending Crown actions or policies;
>
> There is no alternative remedy that, in the circumstances, it would be reasonable for the claimants to exercise; and
>
> The claimants can demonstrate that they are ready to proceed urgently to a hearing.

81. Other factors that the Tribunal may consider include whether "the claim or claims challenge an important current or pending Crown action or policy".[42]

[39] At [85].
[40] Clause 2.5(1).
[41] Clause 2.5(1)(a).
[42] Clause 2.5(1)(a).

82. The Tribunal in its Decision on an Application for Urgent Hearing 28 March 2012 WAI 2357 (The Sale of Power-Generating State-Owned Enterprises claim) and WAI 2358 (National Fresh Water and Geothermal Resources claim) noted some 'useful precedent' generated from past decisions of the Tribunal on urgency applications as being: [43]

> (a) Urgency should only be afforded where there is a genuine need to receive a report and irreversible consequences may flow from any delay in processing the claim. These consequences must lead to a result that is likely to be so important or notable, that it causes unalterable or irrevocable detriment to or disregard for the claimants' rights;
>
> (b) In establishing that they are 'likely' to suffer significant and irreversible prejudice, the claimants must show that it is more probable than not that they will suffer this prejudice;
>
> (c) The significance of the prejudice must be such that it justifies the reallocation of Tribunal resources so an urgent hearing can take place.

83. In the above mentioned fresh water inquiry decision the Tribunal afforded urgency in the circumstances that:

(a) On the proposed scheduling for an urgent inquiry the Tribunal could report back to the government before the subject share sales in Mighty River Power took place;

(b) The report could also be delivered before the government made its decision on fresh water management reforms.

84. In these circumstances the Tribunal found that "the denial of a hearing to prove a right was tantamount to a denial of a right".[44]

85. More recently the Tribunal has issued the Decision of the Chairperson on Applications for an Urgent Hearing Concerning the Marine and Coastal area (Takutai Moana) Act 2011, 16 March 2007 WAI 2577, 2579 – 88. In this decision the Tribunal refused urgency on the basis that the claimants

[43] At [79].
[44] At [1]–[7] and [130].

could avoid the deadline for notifying customary interest claims under the Act by providing the Minister with notice of their claims.[45] The decision went on to note that the applicants had an opportunity since the legislation was put in place in 2011 to bring a claim. In this regard the Tribunal commented that:[46]

> This lack of action, in my view, cannot be used to justify a claim for urgency. Delay is a relevant consideration when determining whether an application for urgent hearing should be granted. In 2016 the Court of Appeal upheld the reasoning of the High Court in *Turahui v Waitangi Tribunal* (Turahui v Waitangi Tribunal [2015] NZAC 1624), at [89], where Williams J stated:
>
> > "It (the applicant) would be expected to set out the steps it has taken to avoid suffering significant and irreversible prejudice. The more extensive these steps, the more powerful the applicant's case. The reverse will also be true. An applicant that has sat on its hands is less likely to succeed."

Urgency in the present case

86. In the circumstances it is the applicants' submission that the urgency criteria are satisfied in the present case upon the basis set out below.

Significant and irreversible prejudice

87. It is submitted that if the claim is not heard and reported upon prior to 2020 the claimants, and Māori on whose behalf they claim, will suffer significant and irreversible prejudice as a result of the current and future government policies relating to climate change. This is upon the basis that:

    (a) The Crown owes Māori Treaty obligations to put in place policies to reduce future greenhouse gas emissions in New Zealand to levels that are required from developed countries to keep global

[45] At [39].
[46] At [40].

temperature increases below the level that will threaten Māori and their lands and resources in the future;

(b) Current government policies are failing to meet that obligation. The current emission reduction targets applying until 2020 fall well short of the required threshold, are not bringing about real reductions in emissions and are not supported by effective emission reduction policies;

(c) As such, Māori are suffering ongoing prejudice as a result of the deficient government climate change policies. That prejudice is evidenced in the ongoing impact on Māori from rising temperatures, the effects of droughts, extreme weather patterns and warming oceans.

(d) As such, if urgency is not granted and this claim is not heard in the Court's ordinary scheduling for 5 years or more, then an irreversible tipping point could be reached, without the Tribunal having the opportunity to inquire into government policies and potentially make recommendations for them to be changed to become compliant with the Crown's obligations under the Treaty;

(e) Further, if urgency is not granted the Tribunal will be unable to hear and report on the claim prior to the government confirming its 'Nationally Determined Contribution' (NDC) under the Paris Agreement by 2020 to apply in the period 2021 and 2030;

(f) As a result Māori will lose the opportunity to influence New Zealand's commitments for the 2021-2030 period and will continue to be prejudiced by the irreversible effects of climate change over this period.

88. Overall, it is the claimants' position that they, and Māori in general, will increasingly suffer from the effects of climate change under current government policy and there is an urgent need to attempt to address this through recommendations by the Tribunal that the government should immediately adopt more Treaty compliant policies.

No alternative remedy

89. In the claimants' submission there is no alternative remedy available to them.

90. In the circumstances, it is unrealistic to say that they or Māori in general could engage in direct dialogue with the government to change its climate change policies. These are policies in general that impact throughout New Zealand and the government has determined to continue with its current policies despite widespread criticism that they are deficient and do not meet New Zealand's international obligations. Further, dialogue with Māori along these lines will not change the government's position on their policies.

91. Judicial review proceedings have been brought against the Minister for Climate Change Issues challenging the setting of emission reduction targets. Those proceedings were heard from 26-28 June 2017 and Justice Mallon has reserved her decision.[47] The Crown may argue that the claimants or other representatives of Māori could have themselves brought similar proceedings or that they could join the judicial review proceedings. However, the judicial review proceedings are (because of the jurisdictional limits on judicial review) limited to challenging the basis upon which the Minister (as opposed to the government as a whole) made decisions. As such, the scope of the judicial review proceedings is far narrower than the claimants' claim to the Tribunal which challenges the substantive basis of all aspects of government policy relating to climate change (and not just the targets set by the Minister for Climate Change Issues) and specifically relates to how these impact upon Māori.

92. In any case, reference is made to the comments made by the Tribunal in the decision on the urgency application in the WAI 2357, 2358 Fresh Water Claims urgency inquiry, to the effect that civil court litigation cannot be considered as a substitute for Māori bringing claims before the Waitangi Tribunal, alleging that there have been breaches by the Crown of Treaty obligations.[48]

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[47] *Thompson v Minister for Climate Change Issues* High Court Wellington Registry, CIV 2015-485-919.

[48] At [107]–[109].

93. It may be that this Tribunal proves the only effective forum in which the government's climate change policies can be reviewed by a Court or Tribunal in New Zealand.

94. There have been various attempts around the world to judicially review governments' climate change policies. Some of these have encountered success but these have been within different jurisdictional environments than we have in New Zealand.

95. The public trust doctrine upon which the *Juliana v United States of America* litigation referred to above is based has not been recognised in New Zealand common law. As such, a similar claim in New Zealand Civil Courts will be unlikely to succeed.

96. In Holland, in the Hague District Court decision in *Urgenda v Kingdom of Netherlands* C/09/456689\HA ZA 13-1396 (24 June 2015), the Court ruled that the Dutch government should take more action to reduce greenhouse gas emission to ensure that emissions in the year 2020 will be at least 25% lower than those in 1990. The Court upheld the claim that the Dutch government's target of reducing emissions by 17% below 1990 levels by 2020 was below the range of 25% to 40% expected of developed countries, necessary to avoid the dangerous effects of climate change. The finding was made upon the basis that the Dutch government had a duty of care to avoid 'unlawful hazardous negligence' towards the citizens and to take adequate steps to address climate change.[49]

97. It is likely that a similar duty of care would not be found to be owed by the New Zealand Government. Under the *Crown Proceedings Act 1950* a tortious claim can only be brought against the Crown in very limited circumstances.[50]

98. As such in the end it appears likely that a claim before this tribunal will be the only way that Maori can challenge the substance of the government's climate change policies.

[49] At [4.53].

[50] Committed by servants, as an employer or as an owner of property, ss.3(2)(b) and 6(1).

Importance to Māori

99. The claimants' position is that they are challenging Crown policy that is of vital importance to all Māori and indeed to all New Zealanders. Global climate change is presently perhaps the most important single issue potentially impacting upon Māori and the environment in which they live. Further, there is a significant difference between present government policies and those that the claimants consider should be put in place to meet the Crown's Treaty obligations. As such, it is submitted that this is clearly a challenge to important Crown policy.

Readiness to proceed

100. The claimants' position is that they will be ready to proceed on the suggested timetable that the claim be heard in the latter part of 2018 or early 2019. In this respect, the claimants' position is that:

(a) The hearing can be tightly focused. The bulk, if not all, of the scientific evidence should not be in dispute. As such, many of these facts should be able to be provided to the Tribunal by way of agreed facts and accompanying background technical reports;

(b) It is expected that the ongoing effects of climate change on Māori should be in dispute to any great extent. It is intended that the claimants will call sample evidence of Māori who have been affected, especially from the Bay of Plenty area which the Mataatua Māori District Council represents, to illustrate these impacts. An affidavit of one of the claimants **Cletus Maanu Paul** filed in support of this application describes some recent local extreme weather events, including the recent flooding in the Eastern Bay of Plenty;

(c) Expert evidence on this issue will also be called.

(d) Specifically, Professor **James Renwick**, a prominent climate scientist from Victoria University, has agreed to provide expert evidence explaining the dynamics of and the ongoing impacts that climate change will have in New Zealand. His affidavit has been filed so that it can be considered in support of the urgency application.

(e) It is also intended that there will be called expert evidence on the specific impact of climate change on Maori. The article *The climate change matrix facing Maori Society*[51] filed with this application, was written some years ago and an up to date report of this type will be produced.

(f) It is suggested that the main focus of the hearing will be on the adequacy of the government's policy response to the threat of climate change. **James Renwick's** affidavit evidence will address this issue. It is also intended call other relevant witnesses, including the economist **Geoff Simmons** on a recent critique he has co-authored on the adequacy of government climate change policy[52]. It is also anticipated there will be specific analysis from the point of view of policy affecting Māori;

101. Overall it is estimated at this stage that the matter may only take a week or two to hear.

Concluding submissions

102. It is submitted that if urgency is not granted, and there is a significant delay before the claim is heard, then this will in effect amount to a denial of the claimants' rights to seek a determination as to whether the Crown current actions and its ongoing impacts are Treaty compliant resulting in serious and irreversible harm to the claimants and Māori in general.

103. The Tribunal's refusal to inquire into a claim was criticised by the Supreme Court in *Haronga v Waitangi Tribunal* [2011] NZSC 53. As stated by the Tribunal in the WAI 2357, 2358 *Fresh Water Inquiry* urgency application, "the denial of a hearing to prove a right was tantamount to denial of the right."[53]

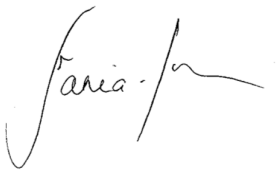
104. Also, if the claimants do not apply for urgency now they may be later criticized for 'sitting on their hands' if they later attempt to obtain a hearing

[51] Above n 11.
[52] Above n 15.
[53] At [130].

before the New Zealand government finalises its target under the Paris Agreement prior to 2021.

105. Following the comments by the Supreme Court in *Haronga v Waitangi Tribunal,* leaving to one side whether the claim is allocated an urgent hearing, given the ongoing impact of the government's climate change policies upon Māori, there should at the very least be some definite scheduling of the claim within the Tribunal's Kaupapa Inquiry Programme.

DATED this 4th day of July 2017



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MJ Sharp/T Te Whenua
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