

THE
INTERIM REPORT ON THE
MV *RENA* AND MOTITI ISLAND CLAIMS

THE
INTERIM REPORT ON THE
MV RENA AND MOTITI ISLAND CLAIMS

PRE-PUBLICATION VERSION



WAI 2391, WAI 2393

WAITANGI TRIBUNAL REPORT 2014

The image on the title page showing the *mv Rena*'s aground on Otaiti
(the Astrolabe Reef) is reproduced courtesy of Maritime New Zealand

National Library of New Zealand Cataloguing-in-Publication Data
Data available from the National Library of New Zealand

ISBN 978-0-908810-78-9

Published 2013 by the Waitangi Tribunal, Wellington, New Zealand

Printed by the Waitangi Tribunal, Wellington, New Zealand

17 16 15 14 13 5 4 3 2 1

Set in Adobe Minion Pro and Cronos Pro Opticals

CONTENTS

Letter of transmittal	vii
Preface	ix
1 Introduction	1
2 Submissions	3
2.1 Claimant submissions	3
2.2 Crown submissions	3
3 The duty of active protection	4
3.1 Relevant jurisprudence	4
3.2 He taonga	6
3.3 The Crown's duty in the circumstances	7
4 Tribunal analysis	8
4.1 Important factors for consideration	9
4.2 The Crown's consultation process	9
4.3 Māori capacity to engage in the resource consent process	14
4.4 The current situation	16
5 Findings and recommendations	17

The Honourable Dr Pita Sharples
Minister of Māori Affairs

The Honourable Amy Adams
Minister for the Environment

The Honourable Paula Bennett
Minister of Local Government

The Honourable Gerry Brownlee
Minister for Transport

and

The Honourable Christopher Finlayson
Attorney-General

Parliament Buildings
WELLINGTON



The Waitangi Tribunal
141 The Terrace
WELLINGTON

17 July 2014

E ngā Minita, tēnā koutou

We enclose our interim report on the *mv Rena* and Motiti Island claims, which concern the Crown's response to the wreck of the *mv Rena* on Otaiti (Astrolabe) Reef. We release this interim report to inform the pending all-of-government response to the resource consent application, lodged on behalf of the *mv Rena* owners, which seeks to leave some or all of the wreck on the reef.

This interim report focuses on the Crown's consultation with Māori after the Crown signed three deeds with the *Rena* owners. These deeds settle the Crown's claims against the owners, and oblige the Crown to consider, in good faith, supporting an application by the owners for resource consent to leave the wreck on the reef.

We have determined that Otaiti Reef is a taonga to the claimants, who are Māori living on or affiliating to Motiti Island. Motiti Māori are an isolated island community in an especially vulnerable position. They will bear the brunt of what seem likely to be significant adverse cultural and environmental effects if the wreck is allowed to remain on the reef. It is in this light that we consider that the Crown's consultation with them has been neither robust nor meaningful. The consultation process has neither adequately informed the Crown of Māori views, nor adequately equipped Māori to participate usefully or with informed insight in the resource consent process. Submissions on the resource consent close on 8 August. The

Crown faces a significant if not insurmountable challenge to remedy the situation within the resource consent process given the Crown's actions to date and the time available.

We have therefore found that the Crown's consultation process has breached the principles of good faith and partnership. The Crown has failed in its duty to actively protect Māori in the use of their lands and waters, especially their taonga, and in the exercise of tino rangatiratanga over their taonga. We have made recommendations and suggestions designed to remedy the prejudice that this is likely to cause the claimants. Our full report on the Crown's conduct in responding to the wreck of the *mv Rena* will follow at a later date.

Heoi anō

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

Judge Sarah Reeves
Presiding Officer

PREFACE

This is a pre-publication version of the *Interim Report on the MV Rena and Motiti Island Claims*. As such, parties should expect that in the published version headings and formatting may be adjusted, typographical errors rectified, footnotes checked (and corrected where necessary), and maps modified, added, or replaced.

ABBREVIATIONS

AIP	agreement in principle
app	appendix
CA	Court of Appeal
ch	chapter
comp	compiler
doc	document
ed	edition, editor
fn	footnote
fol	folio
ltd	limited
MNZ	Maritime New Zealand
no	number
NZLR	New Zealand Law Reports
p, pp	page, pages
para	paragraph
pt	part
RMA	Resource Management Act 1991
ROI	record of inquiry
s, ss	section, sections (of an Act of Parliament)
SC	Supreme Court
sec	section (of this report, a book, etc)
vol	volume

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

Unless otherwise stated, footnote references to claims, documents, memoranda, and papers are to the Wai 2391 record of inquiry, a copy of which is available on request from the Waitangi Tribunal.

THE INTERIM REPORT ON THE
MV *RENA* AND MOTITI ISLAND CLAIMS

1 INTRODUCTION

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

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

Maritime New Zealand (MNZ) led the government response to the grounding.² The Crown spent \$47 million on the response. Motiti Māori were among the Bay of Plenty communities who also contributed significantly to the clean-up effort.³

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

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

1. Document A15, p 3

2. MNZ is a Crown entity and therefore not strictly part of the Crown.

3. Document A16, p 8; doc A1(a), pp 12–30

4. Document A3(a); doc A3(b)

5. Document A16, p 9

6. The full titles of the deeds are 'Deed in relation to claims arising from the *Rena* Casualty' (the Claims Deed); 'Deed of Indemnity' (the Indemnity Deed); 'Deed in relation to removing the Wreck arising from the *Rena* Casualty' (the Wreck Removal Deed)

THE INTERIM REPORT ON THE MV *RENA* AND MOTITI ISLAND CLAIMS

1

The Claims Deed settles the Crown's claims against the owners for \$27.6 million.⁷ Through the Indemnity Deed the Crown has agreed to indemnify the owners against 'certain claims by New Zealand public and local government claimants' to a maximum extent of \$38 million.⁸ Through the Wreck Removal Deed, the Crown has agreed that, if the owners apply for resource consent to leave part of the wreck in place, then it will 'in good faith' consider making submissions in support. The Wreck Removal Deed requires the Crown to decide whether or not to support the owners' application by 'taking into account the environmental, cultural and economic interests of New Zealand and the likely costs and feasibility of complete removal of the Wreck'. If the Crown does not oppose an application for consent ('whether directly or indirectly'), and the application succeeds, with the owners making 'a substantial cost saving', then the owners will pay the Crown an additional \$10.4 million for 'public purposes'.⁹ We understand that a similar deed obliges the Bay of Plenty Regional Council to consider submitting in support of any resource consent application.¹⁰ This deed has not been placed in evidence before us.

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

Urgency was granted to both claims on 21 January 2014.¹³ An urgent hearing was held in Tauranga from 30 June to 2 July 2014.

It was necessary to expedite our hearing date because on 30 May 2014 the Astrolabe Community Trust, on behalf of the *Rena* owners, lodged a resource consent application seeking to leave part of the wreck on the reef. The closing date for submissions on that application was fixed at 8 August. During our hearing, Crown counsel informed us that Cabinet will meet on Monday 28 July to decide whether the Crown will make a submission on the owners' resource consent application.

As signalled at the conclusion of the hearing, we consider it necessary to release this interim report in order to inform the Crown's imminent decision. This interim report addresses two matters: first, the consultation process that has taken place subsequent to the

7. Document A12, p 4

8. Document A13, p [3]

9. Document A11, pp 3–4

10. Document A26, pp 456–457

11. Wai 2393 ROI, claim 1.1.1, p 1; Wai 2391 ROI, claim 1.1.1, p 15

12. Wai 2393 ROI, claim 1.1.1, p 4; Wai 2391 ROI, claim 1.1.1, p 9

13. Paper 2.5.19

signing of the Wreck Removal Deed; and secondly, issues relevant to Resource Management Act matters that the Crown will take into account when making its decision whether to submit in support, opposition, or to abide the decision in the resource consent application.

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

2 SUBMISSIONS

2.1 Claimant submissions

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

2.2 Crown submissions

The Crown considers that its actions have been consistent with Treaty principles. Counsel submit that the Crown's engagement with Māori began early and has not been passive.¹⁷ They argue that the 'essence of a duty of consultation is ensuring that the claimants and other affected Māori had the opportunity to make the Crown aware of their views' and that this has occurred.¹⁸ Although it has focused its efforts on conducting its own expert assessment of the resource consent application, it has offered to have experts present at hui.¹⁹ As a result of the clean-up process, consultation process and Tribunal hearings, 'the Crown's view is that it should be well-informed of the perspective of local Māori communities'.²⁰

14. Submission 3.3.6, p [6]; submission 3.3.7, pp 7, 13–14;

15. Submission 3.3.6, pp [3], [6]; submission 3.3.7, pp 15–22

16. Submission 3.3.6, p [10]; submission 3.3.7, p 52

17. Submission 3.3.5, p 7

18. Ibid, p 11

19. Ibid

20. Ibid, pp 3, 14

3 THE DUTY OF ACTIVE PROTECTION

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

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

3.1 Relevant jurisprudence

Other Tribunals and courts, in considering how the duty of active protection applies to environmental issues, provide guidance in our consideration of the circumstances of this case. The Tribunal's 2008 report on the central North Island claims, *He Maunga Rongo*, articulated a two-fold duty of active protection: a duty to protect physical resources (lands, estates and taonga) and a duty to protect rangatiratanga. The fundamental relationship created by the Treaty means that the Crown has a duty to protect both the environment itself, and to protect Māori in their exercise of rangatiratanga over taonga.

The Privy Council expressed the nature of the Crown's duty to protect taonga in finding that the level of protection required by the Crown may be higher where a taonga is in a vulnerable state.²² Tribunals since that decision have found that the degree of protection needed would depend on the nature and value of the taonga.²³ The Central North Island Tribunal also considered that while the Crown is not required to go beyond what

21. Submission 3.3.3, p 1; draft transcript, day 2, sess 2, p 31; draft transcript, day 3, sess 2, p 47

22. *New Zealand Maori Council v Attorney-General* [1994] 1 NZLR 513 (PC), 517

23. Waitangi Tribunal, *Ngawha Geothermal Resource Report 1993* (Wellington: Brooker and Friend Ltd, 1993); Waitangi Tribunal, *Preliminary Report on the Te Arawa Representative Geothermal Resource Claims* (Wellington: Brooker and Friend Ltd, 1993); Waitangi Tribunal, *He Maunga Rongo: Report on Central North Island Claims, Stage One*, revised ed, 4 vols (Wellington: Legislation Direct, 2008), vol 4, p 1243

is reasonable in the circumstances to protect Māori interests, it is required to consult with Māori.²⁴ Consultation, the Tribunal explained, is a duty derived from the overarching principle of partnership, through which the Crown has responsibility to ensure that proper arrangements for the conservation, control, and management of resources are in place. While consultation is not open-ended, and the Crown may act if it has sufficient information on which to make an informed decision, it is not permissible for the Crown to limit the effect of the principles of the Treaty to consultation alone. The test of what consultation is reasonable in the prevailing circumstances depends on the nature of the resource or taonga, and the likely effects of the policy, action, or legislation.²⁵ We would add that in any situation that requires robust consultation, the Crown is required to ensure that Māori are ‘adequately informed so as to be able to make intelligent and useful responses’, as was found in the Wellington Airport case.²⁶

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

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

Where it is established that a place or a resource is a taonga, then, the Tribunal continued, ‘it is the degree of control exercised by Māori and their influence in decision-making that needs to be resolved in a principled way.’²⁸ It considered that the principled way to decide these questions was through the concept of kaitiakitanga, or guardianship. The Wai 262 Tribunal considered that the degree of control that should be exercised by Māori will differ widely according to circumstances, including the importance of the taonga in question, the health of that taonga, and any competing interests in it. In general, however, the Tribunal

24. Waitangi Tribunal, *He Maunga Rongo*, vol 4, p 1243

25. Ibid, pp 1237–1238

26. *Wellington International Airport Ltd v Air New Zealand* [1993] 1 NZLR 671 (CA), 676

27. Waitangi Tribunal, *Ko Aotearoa Tēnei: A Report into Claims concerning New Zealand Law and Policy Affecting Māori Culture and Identity, Te Taumata Tuarua*, 2 vols (Wellington: Legislation Direct, 2011), vol 1, p 269

28. Ibid, p 270

THE INTERIM REPORT ON THE MV *RENA* AND MOTITI ISLAND CLAIMS

3.2

found that the Treaty requires the Crown to provide for fuller expression of kaitiakitanga, so that Māori can meet the obligations that arise from the rights of rangatiratanga.²⁹

3.2 He taonga

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

There is no question that Otaiti Reef is a taonga of considerable importance to the claimants, one that is covered by the plain meaning of article 2. This was accepted by the Crown in our inquiry. During our hearing, we received evidence that clearly points towards Otaiti being a site of significant cultural, spiritual, and historical importance to a range of hapū and iwi groups. The reef was named by Ngatoroirangi as Te Arawa waka arrived in the Bay of Plenty. He is said to have performed karakia rendering the reef tapu, and naming it 'Te taunga o ta iti te tangata', meaning the resting place of the people.³⁰ We also received evidence about the specific significance Otaiti holds for the people of Motiti Island. Motiti people believe that 'Otaiti and the other islands, surface breaking reefs and rock outcrops are stepping stones for the wairua of our deceased, back across the sea to Hawaiki, the ancestral homeland.'³¹ Elaine Butler told us that Motiti people have continued to offer karakia to the reef in 'acknowledgement of our taonga and our sure belief that when the time comes for us to leave this life Otaiti is the beginning of our pathway home to our ancestors.'³²

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

The evidence we received also demonstrates that the extent of damage caused to the reef by the *Rena* grounding has had significant effects on both the state of Otaiti and the ability of the claimants to carry out their kaitiaki obligations. The *Rena* remains a significant

29. Waitangi Tribunal, *Ko Aotearoa Tēnei*, pp 269–273

30. Document A6(a), p 64; doc A14(a), p 278

31. Document A39, p [3]

32. Document A41, p [3]

33. Document A39, p [3]

34. Document A41, p [3]

presence on the reef. The bow section of the wreck is wedged on the top of the reef, one metre below the low tide mark, while the balance of the hull and superstructure is situated further down the reef, subject to strong ocean currents. There is also a large debris field (of up to 3,000 tonnes of material) on and around the reef.³⁵ Buddy Mikaere emphasised the impact of this on the mauri of the reef, the principle which he said ‘envisages a pristine state’ where all elements are ‘perfectly in balance’. ‘The mauri or spiritual essence of our reef’, he said, ‘is unquestionably compromised by the *Rena* wreck’, which means that they are ‘unable to properly discharge’ their kaitiaki obligations.³⁶ The claimants have also been unable to use their fishing grounds near Otaiti because of the exclusion zone that has been in place over the wreck since the grounding. Mr Mikaere told us about how these effects inform the view of the claimants that the wreck must be removed in its entirety in order to restore the mauri of the reef.³⁷

3.3 The Crown’s duty in the circumstances

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

However, the Crown’s Treaty duties exist equally outside the resource management process as they do inside it. It appears to us that the present situation has required and will require the Crown to take the following steps:

- To fulfill its duty of active protection of rangatiratanga, at least so far as the resource consent process is concerned, the Crown must:

35. Draft transcript, day 2, sess 2, p 43

36. Document A39, p [4]

37. Draft transcript, day 1, sess 1, p 63

THE INTERIM REPORT ON THE MV *RENA* AND MOTITI ISLAND CLAIMS

4

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

We now turn to consider whether the Crown has fulfilled these duties in consulting Māori after the signing of the Wreck Removal Deed.

4 TRIBUNAL ANALYSIS

The Crown began a process for seeking Māori views on a possible resource consent application in November 2013, when it was becoming clear that the *Rena* owners would lodge a resource consent application in the coming months, and continued through to June 2014, following the lodging of the owners’ resource consent application in late May 2014. In opening submissions, the Crown reassured the Tribunal that it had been ‘undertaking a process

38. *Wellington International Airport Ltd v Air New Zealand* [1993] 1 NZLR 671 (CA), 676

of meaningful engagement with iwi' on the owners' resource consent application.³⁹ Our task is to assess if the Crown has achieved active protection in light of the obligations the Crown owes to Māori as we have outlined above.

4.1 Important factors for consideration

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

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

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

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

4.2 The Crown's consultation process

Despite the fact that these obstacles were known, the Crown approached its task with what we consider to be minimal effort. The Ministry for the Environment sent letters to around 20 Māori groups (including the Motiti Rohe Moana Trust and Ngāi Te Hapū) inviting consultation on just three occasions: on 29 November 2013, 29 April 2014 (three months after the

39. Submission 3.3.3, p 4

40. Document A49, p [61]

41. Paper 2.5.11

42. Submission 3.3.5, p 2

THE INTERIM REPORT ON THE MV *RENA* AND MOTITI ISLAND CLAIMS

4.2

Crown knew that a resource consent application was imminent), and 6 June 2014 (a week after the application had been lodged).⁴³ In addition, the Minister of Local Government, in her capacity as the territorial authority for Motiti, wrote to iwi and hapū groups on 22 May to encourage them to participate in the consultation process.⁴⁴ This appears to have been the sum total of the Minister of Local Government's involvement, despite having been advised by officials in March 2013 that she would 'need to carefully consider your consultation obligations . . . if the Crown proposes to support the resource consent application'.⁴⁵

Throughout this period, the Crown approached the consultation process only as a means to ascertain the views of Māori to inform the Crown's decision-making. We do not have a copy of the letter that the Ministry for the Environment sent to Māori on 29 November 2013. However, its content is described in the letter sent on 29 April 2014 as having invited affected groups 'to meet with Crown officials to discuss the future of the mv *Rena*, and to assist in formulating a Crown position in anticipation of a resource consent application by the *Rena* owners'.⁴⁶

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

The Crown has met with just five groups. Ngāti Awa and Ngāi Te Rangi met with the Crown in early February 2014 in response to the Ministry for the Environment's first letter.⁴⁹ The Tapuika Iwi Authority, the Mataatua District Māori Council, and the Motiti Rohe Moana Trust (the latter two groups being the Wai 2391 claimants) met with the Crown in late June in response to the Crown's more recent letters.⁵⁰ The last of these meetings, with the Motiti Rohe Moana Trust, occurred on 27 June, just three days before our hearing began.

43. Document A33, pp 9–10

44. Document A33(a), pp 66–70

45. Document A49, p [52]

46. Document A33(a), p 109

47. Document A14(a), p 265

48. Ibid, p 225

49. Document A14, p 12; doc A14(a), pp 209–224

50. Submission 3.3.5, pp 8–9

Mark Sowden, the deputy secretary for the Ministry for the Environment, told us during our hearing that other groups had refused to meet on the basis that their views were already known by the Crown.⁵¹ Ngāi Te Hapū expressed interest in meeting with the Crown, but were unable to agree with the Ministry on who should pay transport costs.⁵²

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

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

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

Further, the meetings that were held with Māori seem to have been brief, perfunctory affairs, that would have done very little to reassure Māori that their views were being taken seriously and did little to meaningfully inform them of the situation. Hugh Sayers, the project manager of the Motiti Rohe Moana Trust, decried the ‘last-minute’ nature of their 27 June 2014 meeting with the Crown and told us that it seemed the Crown had flown ‘all the way up [to Tauranga] with 8 people for a 1½ hour meeting just so you can go back and

51. Draft transcript, day 2, sess 4, p 61

52. Draft transcript, day 1, sess 1, pp 57, 62

53. Submission 3.3.5, p 14

54. Document A14(a), pp 213–214

55. Draft transcript, day 3, sess 2, p 28

56. Document A33(a), p 109

THE INTERIM REPORT ON THE MV *RENA* AND MOTITI ISLAND CLAIMS

4.2

say, yeah, we went there.⁵⁷ Despite the Crown writing that it wanted ‘detailed feedback’ on the resource consent application, meeting notes from the Crown’s February meetings with Ngāti Awa and Ngāi Te Rangi and evidence presented by Maanu Paul indicate that Crown officials simply turned up and told Māori that they wanted to ‘hear your story’.⁵⁸ It is hard to reconcile this rather informal approach with the level of detail the Crown was apparently seeking from these meetings, let alone the requirement to ensure Māori were sufficiently informed. That needed to be to a level where they were able to provide informed insight not only on the issue of whether parts of the wreck should stay, but also in relation to the complex issues of potential conditions of any consent.

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

Only after the owners’ application was lodged in late May did the Crown send its third and final letter to Māori, dated 6 June. However, by that stage, Māori were presented with extremely tight timeframes for the remainder of the process. The letter informed groups that they needed to advise the Crown by 13 June of their interest in meeting with the Crown, and that the engagement would need to occur no later than the week of 23 June.⁵⁹ Meaningful engagement could only occur in such a timeframe if the proper groundwork had been laid in the period prior, but it is clear that it had not been in this instance.

We also do not consider that the Crown’s consultation process has adequately taken into account the resourcing difficulties faced by the claimants, particularly in light of the tight timeframes set out above and the length and complexity of the owners’ resource consent application. The Crown has not provided any assistance to Māori for the consultation process beyond flying Crown officials to Tauranga for meetings. The Wai 2391 claimants told us during our hearing that the Crown had refused to pay for kaumatua Graeme Hoete to travel from Motiti to Tauranga or for the professional and travel fees of their planner, Graeme Lawrence, to attend the meeting.⁶⁰ As we mentioned above, Ngāi Te Hapū were unable to meet with the Crown because the Ministry for the Environment refused to pay for their

57. Draft transcript, day 2, sess, 1, p 8

58. Document A14(a), pp 215–224; draft transcript, day 1, sess 4, p 9

59. Document A14(a), pp 225–226

60. Draft transcript, say 2, sess 1, p 9; submission 3.3.7, p 16; doc A38(a), p 81

travel to Wellington or their lawyers' travel to Tauranga.⁶¹ Mr Sowden responded that the Ministry had limited resources, and funding Motiti groups in such a manner could set a precedent for others.⁶² The Crown instead 'sought to minimise costs on all parties by seeking to compromise on where the parties met'.⁶³

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

The claimants further point out that no funding has been made available for their own expert reviews of the resource consent application. No funding is available from the Environmental Legal Assistance fund at the consultation stage, (or indeed, until the application is formally referred to the Environment Court).⁶⁴ In the absence of independent expert advice, it is difficult to imagine what kind of 'detailed feedback' could be provided on a 1,600-page document of expert evidence in just two weeks, as the Crown's 6 June letter suggested. We have already established that, to ensure robust consultation, the Crown needed to provide information to Māori to ensure they were adequately informed. This is a view shared by Dr Grant Young, who was contracted by the Crown to prepare a customary interests report on Otaiti. In his report to the Crown, he noted that

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

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

61. Draft transcript, day 1, sess 1, pp 57, 62

62. Draft transcript, day 2, sess 3, p 35

63. Submission 3.3.5, p 11

64. Submission 3.3.7, pp 21–22; submission 3.3.6, p [10]

65. Document A14(a), p 298

66. Submission 3.3.5, p 11

67. Draft transcript, day 2, sess 4, p 63

THE INTERIM REPORT ON THE MV *RENA* AND MOTITI ISLAND CLAIMS

4.3

meeting at which many matters might have needed to have been discussed, and too late in the process.

We consider it clear that the Crown should have been on notice that the particular circumstances of the situation before it required a more active approach to consultation. If its engagement with Māori was to be truly meaningful, the Crown needed to do more than simply turn up and ask Māori for their views. It needed to ensure that Māori had the information before them – in good time – that was necessary for them to make a well-informed contribution. Officials should have been providing information, in advance of any meeting, on the resource consent process, the areas that Māori might most be concerned about, and the opportunities they would have to make their concerns known. They should have also been engaging with Māori as to any potential monitoring conditions or mitigation aspects attached to the application. In the absence of these kinds of discussion, or of the resources to otherwise inform them, Māori were not in a position to meaningfully engage with the Crown on the full range of aspects of this complex resource consent application which required consideration.

4.3 Māori capacity to engage in the resource consent process

Our concerns about the capacity of Motiti groups to meaningfully engage with the *Rena* owners' application extend to the resource consent process, particularly because the Crown has advanced this process as an alternative avenue for claimants to express their views. The Tribunal has in several reports highlighted the difficulties Māori face in engaging with the resource management process. In the *Tauranga Moana, 1886–2006* report, for instance, the Tribunal referred to fighting resource consents as 'a costly and ineffective way to try and shape planning processes', and noted that Māori were frequently unsuccessful in their efforts to do so.⁶⁸ That Tribunal, as others have done, made recommendations that better resourcing needed to be made available to Māori for resource management processes.⁶⁹ We see no reason not to accept the evidence presented by the claimants that engaging with the owners' application will require significant effort and incur considerable expense well beyond their capacity and means.⁷⁰ The funding available under the Environmental Legal Assistance fund to submit is limited to \$40,000, an amount that will fall far short of the actual amount required, but again we observe that it is a funding resource which is not even

68. Waitangi Tribunal, *Tauranga Moana, 1886–2006: Report on the Post-Raupatu Claims*, 2 vols (Wellington: Legislation Direct, 2010), vol 2, p 588

69. Ibid, p 862; Waitangi Tribunal, *Ko Aotearoa Tēnei*, p 706; Waitangi Tribunal, *The Report on the Management of the Petroleum Resource* (Wellington: Legislation Direct, 2011), pp 182, 184; Waitangi Tribunal, *Te Tau Ihu o te Ika a Maui: Preliminary Report on Customary Rights in the Northern South Island* (Wellington: Legislation Direct, 2007), p 1445

70. See, for example, doc A17, p 4

available at this stage of the process. We are also aware of the particular challenges that an Environment Court hearing will bring if Māori do not have sufficient resources.⁷¹

The local government support available for Motiti Māori to engage in such a process also appears inadequate. Because Motiti is not part of the district of any other territorial authority, its territorial authority is the Minister of Local Government.⁷² A witness for the Department of Internal Affairs, the department responsible for administration of the island, acknowledged during our hearing that the relationship between the department and Motiti residents 'isn't good'.⁷³ That poor relationship has not been helped by the fact that the person charged by the Minister of Local Government with the role of effectively being the local planning officer to protect the environment of Motiti and its community, Keith Frentz (a contractor employed by Beca), is also working on the *Rena* owners' behalf to advance their resource consent application.⁷⁴ Whereas citizens on the mainland might turn to their local planning officer for advice on how to respond to a resource consent application of this nature, Motiti Māori are unable to do so.

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

71. Submission 3.3.6, pp [7–8]

72. Local Government Act 2002, s 22(1)

73. Draft transcript, day 3, sess 3, p 23

74. Draft transcript, day 2, sess 1, pp 5–6; submission 3.3.5, pp 12–13

75. Draft transcript, day 3, sess 3, p 39

76. Draft transcript, day 3, sess 3, pp 39–40

77. Document A49, p [61]

78. Draft transcript, day 2, sess 2, p 40

THE INTERIM REPORT ON THE MV *RENA* AND MOTITI ISLAND CLAIMS

4.4

4.4 The current situation

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

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

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

To inform the decision-making process, the Crown has also engaged a series of experts to conduct desk-top reviews of the technical reports submitted by the owners. This includes the report by Dr Grant Young, who was engaged to produce a report on cultural matters relating to Otaiti, including an assessment of the groups with interests in the reef, values held in the reef, and an assessment of the impact in cultural terms of either full or partial wreck removal.⁸⁰

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

79. Submission 3.3.5, p 14

80. Document A14(a), p 272

81. Submission 3.3.5, p 3

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

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

5 FINDINGS AND RECOMMENDATIONS

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

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

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

82. Document A39, p[4]

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

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

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

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

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

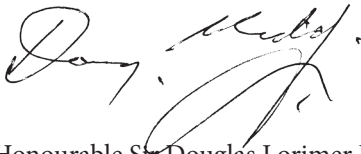
Dated at *Wellington* this *17* day of *July* 20 *14*



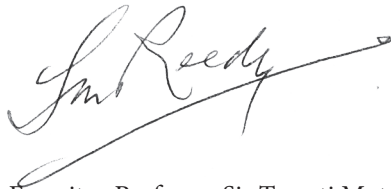
Judge Sarah Reeves, presiding officer



Ron Crosby, member



The Honourable Sir Douglas Lorimer Kidd KNZM, member



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



