I ROTO I TE TARAIPIUNARA WAITANGI

IN THE WAITANGI TRIBUNAL

Wai 2180

IN THE MATTER	of the Treaty of Waitangi Act 1975
AND	
IN THE MATTER	of the Taihape: Rangitīkei ki Rangipō District inquiry

CLAIMANTS' GENERIC REPLY SUBMISSIONS ON 'ISSUE 21: WĀHI TAPU'

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MAY IT PLEASE THE TRIBUNAL

INTRODUCTION

1. By way of these generic reply submissions, we address Issue 21: Wāhi Tapu. The Crown filed closing submissions in relation to wāhi tapu on 5 May 2020.[1] These generic reply submissions respond to the Crown's closing submissions on wāhi tapu.

2. Issues One and Two are addressed by Tamaki Legal and Issue Three is addressed by Wackrow Williams & Davies.

ISSUE ONE

An appropriate concession not made

3. The Crown "recognises" at paragraph 17 of its closings that it's 19th century land legislation, the individualisation of Māori land title and Crown purchasing activity in the Taihape district contributed to loss of wāhi tapu and/or to the loss of control of wāhi tapu.[2] Then at paragraph 20, the Crown admitted that it neglected the Claimants' wāhi tapu in the 19th century with its submission that the Crown has provided for the protection of wāhi tapu "[s]ince the early 20th Century".[3] The Crown also stated at paragraph 21 that "there is little evidence of any legislative protections for wāhi tapu" during the 19th century.[4] Given the combined effect of these Crown submissions, it is disappointing that the Crown did not act in good faith and concede that it breached the principles of te Tiriti ō Waitangi by failing to protect wāhi tapu during the 19th century. In any event, it is clear that the Crown failed to protect wāhi tapu during this period in a manner that is consistent with the principles of te Tiriti ō Waitangi and so the Waitangi Tribunal should find accordingly.

Evoking the duty to actively protect

4. In its closings, the Crown qualified its duty to protect wāhi tapu:[5]

[1] Crown Law Office, *Crown Closing Submissions in relation to issue 21: Wahi Tapu*, Wai 2180, #3.3.95.
[2] Crown Law Office, *Crown Closing Submissions in relation to issue 21: Wahi Tapu*, Wai 2180, #3.3.95 at [17].
[3] Crown Law Office, *Crown Closing Submissions in relation to issue 21: Wahi Tapu*, Wai 2180, #3.3.95 at [20].
[4] Crown Law Office, *Crown Closing Submissions in relation to issue 21: Wahi Tapu*, Wai 2180, #3.3.95 at [21].
[5] Crown Law Office, *Crown Closing Submissions in relation to issue 21: Wahi Tapu*, Wai 2180, #3.3.95 at [16].

> … there are various limitations on the Crown's ability to protect wāhi tapu sites including identification (for which the Crown is generally reliant on Māori or members of the public to report when archaeological sites are uncovered) and competing private land interests where wāhi tapu sites are located on private land.

5. Given the "identification" limitation on the Crown and that the Crown "cannot practicably police all wāhi tapu and other archaeological sites across New Zealand,"[6] it is suggested that regular site assessments of wāhi tapu are undertaken by a tohunga or expert possessed of the appropriate knowledge about the historical sites and possessed of the appropriate knowledge about tikanga and Māori lore. For want of a better term at this stage, we refer to the tōhunga/expert as the "Site Assessor". The Site Assessor should have authorised access to known wāhi tapu that are situated on private land and they should be empowered to accompany and monitor access to known wāhi tapu by whānau and hapū with an affiliation thereto. Where information exists to warrant its use, there should be a power to access private land to search for, locate and record wāhi tapu. Such a power should be wielded in conjunction with known wāhi tapu identification and registration procedures, such as those available under the Heritage New Zealand Pouhere Tāonga Act 2014. The Site Assessor should be tasked with assessing risk to wāhi tapu. They should be tasked with reporting any risk to a wāhi tapu to the local authority, to local hapū leadership, to the private landowner and to any Māori person associated with the wāhi tapu. Once a risk has been identified and reported, the parties referred to should engage in minimising or nullifying the risk to the wāhi tapu. A contractual obligation could be placed on the Site Assessor to maintain perennial confidentiality with regard to the location, history and purpose of any wāhi tapu they encounter. As opposed to the local authority, the Site Assessor should be affiliated with a national entity that administers the Site Assessors.

6. In the Crown submission cited in paragraph 3 above,[7] "competing private interests" are also said to qualify the Crown's duty to actively protect wāhi tapu. At paragraph 69 of its closings, the Crown recognised that its pre-Historic Places Act 1954 legislative regime for the supposed protection of

[6] Crown Law Office, *Crown Closing Submissions in relation to issue 21: Wahi Tapu*, Wai 2180, #3.3.89 at [51].
[7] Crown Law Office, *Crown Closing Submissions in relation to issue 21: Wahi Tapu*, Wai 2180, #3.3.95 at [16

wāhi tapu did not require consultation with Māori about their continuing associations with wāhi tapu.[8] In order to explain or justify its failure to consult with the Claimants, the Crown stated that it applied English law when purchasing Māori land and considered "that it had acquired all the rights associated with that land".[9] In other words, the English common law is relied on by the Crown to elevate private property rights over the Claimants' customary rights and interests in their wāhi tapu. We contend that the Crown cannot rely on the English common law to qualify its duty to actively protect the Claimants' wāhi tapu.

6. By way of section 1 of the English Laws Act 1858, English laws were deemed to have been in force in New Zealand from 14 January 1840 **"so far as applicable in the circumstances of the ... colony"**.[10] We submit that despite the repeal of the 1858 Act, the English common law remains subject to being modified by "the circumstances of the ... colony'" where the meaning of 'circumstances' is said to include customary rights and native title.[11] The New Zealand case of *Baldick v Jackson*[12] is apposite. In that case, Jackson and his crew killed and secured a whale. It later sank and was carried out to the Cook Strait by the tide. Baldick found the whale carcass, towed it to land and claimed it. To whom did the whale belong? Chief Justice Stout had to decide whether an English statute from Edward II's reign (late 13th century – early 14th century) applied in New Zealand. Stout CJ decided that the old English statute was not applicable to the circumstances of the colony. In deciding the case, His Honour relied on the prevailing 'custom'. Stout CJ was aware that whaling had been practiced before, during and after the signing of the Treaty of Waitangi and that the government had never tried to assert the English statute nor the royal prerogative it enshrined. It was decided that the English statute was not applicable because it would be claimed against Māori and this would interfere with their whaling rights and interests:[13]

[8] Crown Law Office, *Crown Closing Submissions in relation to issue 21: Wahi Tapu*, Wai 2180, #3.3.89 at [69].
[9] Crown Law Office, *Crown Closing Submissions in relation to issue 21: Wahi Tapu*, Wai 2180, #3.3.89 at [69].
[10] English Laws Act 1858, section 1.
[11] *Attorney General v Ngati Apa* [2003] 3 NZLR 643 at [134] per Keith and Anderson JJ.
[12] *Baldick v Jackson* (1910) 30 NZLR 343.
[13] *Baldick v Jackson* (1910) 30 NZLR 343 per Stout CJ at 344-345.

> I am of opinion that this statute has no applicability to New Zealand, and that though the right to whales is expressly claimed in the statute of 17 Ed II, c 2, as part of the Royal prerogative, it is one not only that has never been claimed, but one that it would have been impossible to claim without claiming it against the Maoris, for they were accustomed to engage in whaling; and the Treaty of Waitangi assumed that their fishing was not to be interfered with—they were to be left in undisturbed possession of their lands, estates, forests, fisheries, etc.

7. The 'lost whale case' as it became known was relied on by Keith and Anderson JJ for the decision they made in *Ngati Apa*:[14]

> Accordingly, under the law of England which became part of the law of New Zealand in 1840 "so far as applicable to the circumstances of New Zealand", private individuals could have property in sea areas including the seabed. The "circumstances" qualification is well and relevantly demonstrated by the judgment of Stout CJ in *Baldick v Jackson* (1910) 30 NZLR 343. He held (at pp 344 - 345) that a statute of Edward II concerning the King's revenue and treating whales as a Royal fish was not applicable to the circumstances of the colony:

8. In her judgment in *Ngāti Apa*, Chief Justice Elias overruled the High Court for "starting with the English common law, unmodified by New Zealand conditions (including Maori customary proprietary interests), and in assuming that the Crown acquired property in the land of New Zealand when it acquired sovereignty (as appears from the passage from the judgment set out at paragraph [7] above), the judgment of the High Court was in error. The transfer of sovereignty did not affect customary property. They are interests preserved by the common law until extinguished in accordance with the law."[15] In reaching her decision, Elias CJ overruled the Court of Appeal's decision in *Re the Ninety-Mile Beach*.[16]

[14] *Attorney General v Ngati Apa* [2003] 3 NZLR 643 at [134].
[15] *Attorney General v Ngati Apa* [2003] 3 NZLR 643 at [13].
[16] *Re the Ninety-Mile Beach* [1963] NZLR 461 (CA).

9. The following finding from the judgment of Chief Justice Elias is highlighted in particular:[17]

> In British territories with native populations, the introduced common law adapted to reflect local custom, including property rights. That approach was applied in New Zealand in 1840. The laws of England were applied in New Zealand only "so far as applicable to the circumstances thereof". The English Laws Act 1858 later recited and explicitly authorised this approach. But from the beginning the common law of New Zealand as applied in the Courts differed from the common law of England because it reflected local circumstances.

10. The Crown's reliance on the English law for not recognising the Claimants' continued associations with wāhi tapu cannot be maintained. The now settled approach to any application of the English common law "[i]n British territories with native populations" must include an examination of "the circumstances' prevailing there, whereby 'the circumstances' include the "native population's" . . . "property rights". If, upon examination, it should be found that native property rights exist in a given resource, the English common law is modified to accommodate the "local circumstances". It is considered that continuing associations with wāhi tapu is a customary property right.

11. In their judgment, Keith and Anderson JJ concurred with the Chief Justice in relation to the limits in New Zealand of the application of the English common law:[18]

> Accordingly, under the law of England which became part of the law of New Zealand in 1840 "so far as applicable to the circumstances of New Zealand", private individuals could have property in sea areas including the seabed. The "circumstances" qualification is well and relevantly demonstrated by the judgment of Stout CJ in *Baldick v Jackson* (1910) 30 NZLR 343. He held (at pp 344 - 345) that a statute of Edward II concerning the King's revenue and treating whales as a Royal fish was not applicable to the circumstances of the colony...

[17] *Attorney General v Ngati Apa* [2003] 3 NZLR 643 at [17].
[18] *Attorney General v Ngati Apa* [2003] 3 NZLR 643 at [134].

12. It must be noted how Elias CJ takes matters much further than mere modification of the English common law:[19]

> The applicable common law principle in the circumstances of New Zealand is that rights of property are respected on assumption of sovereignty. They can be extinguished only by consent or in accordance with statutory authority. They continue to exist until extinguishment in accordance with law is established. Any presumption of the common law inconsistent with recognition of customary property is displaced by the circumstances of New Zealand.
>
> The common law as received in New Zealand was modified by recognised Maori customary property interests. If any such custom is shown to give interests in foreshore and seabed, **there is no room for a contrary presumption** derived from English common law. The common law of New Zealand is different.
>
> (emphasis added)

13. The passage from the judgment of Tipping J below can be construed consistently with Elias CJ's 'contrary proposition' finding:[20]

> It follows that as Maori customary land is an ingredient of the common law of New Zealand, title to it must be lawfully extinguished before it can be regarded as ceasing to exist. In this respect Maori customary title is no different from any other common law interest which continues to exist unless and until it is lawfully abrogated. In the case of Maori customary land the only two mechanisms available for such abrogation, short of disposition or lawful change of status, are an Act of Parliament or a decision of a competent Court amending the common law. But in view of the nature of Maori customary title, underpinned as it is by the Treaty of Waitangi, and now by Te Ture Whenua Maori Act 1993, no Court having jurisdiction in New Zealand can properly extinguish Maori customary title.

[19] *Attorney-General v Ngati Apa* [2003] 3 NZLR 643 at [85] and [86].
[20] *Attorney-General v Ngati Apa* [2003] 3 NZLR 643 at [85] and [86].

14. As opposed to a mere modification of the English common law, the English common law does not apply if it is opposed to 'local circumstances'. Since the Crown's position that cultural associations with Māori land are discontinued upon sale is anathema to the Claimants' continued interest in their wāhi tapu, the Crown's position cannot be maintained at law. It falls away. Certainly, private property rights cannot be relied on by the Crown to justify or excuse its failure to recognise continued associations with wāhi tapu or to justify or excuse its failure to consult with the Claimants about their wāhi tapu in the period prior to the enactment of the Historic Places Act 1954.

15. Te Tiriti ō Waitangi ō Waitangi is a declaration of customary rights. According to Chapman J in *R v Symonds*,[21] te Tiriti ō Waitangi does not add 'anything new and unsettled' in terms of Māori customary rights and so the cession treaty is merely declarative and not constitutive thereof. A similar view was expressed by Cooke P in 1990 in *Te Runanga o Muriwhenua Inc v Attorney-General*.[22] There it was considered that Treaty rights under Article 2 of te Tiriti ō Waitangi and customary rights at common law are the same, and that Article 2 was intended to preserve Māori customary title.[23] In *Te Runanganui o Te Ika Whenua Inc Society v Attorney-General*, Cooke P maintained that '[t]he Treaty of Waitangi 1840 guaranteed to Maori, subject to British kawanatanga or government, their tino rangatiratanga and their taonga. In doing so te Tiriti ō Waitangi must have intended to preserve for Maori their customary rights.[24] Given this aspect of te Tiriti ō Waitangi, it is reasonable to submit that treaty claims concerning the marine and coastal are, in substance, customary rights claims. Thus, it is appropriate for the Waitangi Tribunal to consider wāhi tapu-related customary rights-based claims when the Tribunal is exercising its jurisdiction.

Limited wāhi tapu protection

16. At paragraph 21 of its' closings submissions, the Crown lists a number of statutes said to have resulted in the protection of wāhi tapu during the 20th century with, apparently, a particular focus on protecting urupā:[25]

[21] *R v Symonds* (1847) NZPCC 357 at 388.
[22] *Te Runanga o Muriwhenua Inc v Attorney General* [1990] 2 NZLR 641 CA.
[23] *Te Runanga o Muriwhenua Inc v Attorney General* [1990] 2 NZLR 641 at 655.
[24] *Te Runanganui o Te Ika Whenua Inc Society v Attorney General* [1994] 2 NZLR 20, at 7.
[25] Crown Law Office, *Crown Closing Submissions in relation to issue 21: Wahi Tapu*, Wai 2180, #3.3.95 at [21].

> In the early 20th century, prior to the Historic Places Act 1954, the Crown protection of wāhi tapu and other historic sites existed mostly in relation to urupā…

17. The Crown referred to the Criminal Code Act 1893 "and its successors" and how they "criminalise interference with human remains in a grave, punishable by imprisonment".[26] Undoubtedly, interfering with human remains in an urupā constituted a desecration thereof. Although the 1893 Code could have been a deterrent in this regard, urupā can be desecrated in ways that do not necessarily involve an interference with human remains. The destruction of headstones, other grave markers, in memoriam paraphenalia and urupā fencing by livestock, bush felling, building construction, road construction, farm fencing, stream re-coursing and excavation also constitute desecration. The 1893 Code was inapplicable in these circumstances because it was only focused on interfering with human remains.

18. The Crown's failure to provide for access to urupā on privately-owned land meant that the desecration of urupā by livestock and other settler activities often went undetected or, by the time it was detected, the damage caused was beyond remedying. In effect, the failure to provide access to urupā facilitated their desecration. The 1893 Code and its successors did nothing to protect urupā from being smashed, covered, squashed or trampled.

19. It is accepted that the 1893 Code could protect human remains in an urupā. However, it afforded no protection to wāhi tapu that were not urupā, such as Whakarara Pā,[27] Auahitōtara Pā,[28] Te Rei Bush,[29] tūahu, battle grounds where blood was shed, stream areas where the bones of the dead were washed, rongoa gathering areas imbued with special healing powers, sites of historical significance, the rohe of spiritual guardians, pito burial areas and numerous other places of significance.

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[26] Crown Law Office, *Crown Closing Submissions in relation to issue 21: Wahi Tapu*, Wai 2180, #3.3.95 at [21.1].
[27] Waitangi Tribunal, *Hearing week 4 Transcript*, Wai 2180, #4.1.11 p 158.
[28] Cleaver, *Taking of Māori land for Public Works in the Taihape Inquiry District*, Wai 2180, #A009 p 27.
[29] Cleaver, *Taking of Māori land for Public Works in the Taihape Inquiry District*, Wai 2180, #A009 p 27.

20. The Crown refers to the Māori Land Administration Act 1900 and how it allowed for the creation of inalienable reserves on Māori-owned land for urupā. Whilst a step in the right direction, a major flaw with the 1900 Act was that it could not protect wāhi tapu that were situated on land that was not Māori owned. Given that the vast majority of land in Aotearoa[30] is not Māori-owned and given the greater propensity for there to be wāhi tapu desecration on land that was or that is not Māori-owned, the 1900 Act and its successors offered just limited protection. We level the same criticism at the other legislation cited by the Crown to say that there was legislative protection of urupā.[31]

21. As with the Criminal Code Act 1893, the Māori Land Administration Act 1900 did not protect wāhi tapu that were not urupā, such as Tūpurupuru Pā,[32] Te Piri a Paretutira,[33] Te Whakapai,[34] or other wāhi tapu such as the birth-place of a great leader or a puna that has healing powers. This is the same with other legislation relied on by the Crown to say that there was protection, that being section 11 of the Māori Councils Amendments Act 1903,[35] section 274 of the Native Land Act 1931,[36] section 472 of the Native Land Act 1932,[37] section 5 of the Native Purposes Act 1937,[38] the Māori Social and Economic Advancement Act 1945[39] and section 439 of the Māori Affairs Act 1953. With the latter provision, the phrase places of "historical or scenic interest" that is referred to by the Crown does little to increase the provision's ambit.

[30] In the Taihape inquiry district the total area land mass is 1,169,226.07 acres. Māori Freehold land accounts for only 14.68% of that land area, which equates with 171,596.52 acres. This means that almost 1 million acres (85.32%) has been alienated from Taihape Māori. Innes, *Māori land retention and alienation*, Wai 2180, #A15, at 81.
[31] Crown Law Office, *Crown Closing Submissions in relation to issue 21: Wahi Tapu*, Wai 2180, #3.3.95 at [21.3-21.9].
[32] Waitangi Tribunal, *Nga korero tuku iho, hearing week 2*, Wai 2180, #4.1.5 at page 20
[33] Waitangi Tribunal, *Hearing week 2*, Wai 2180, #4.1.9 at page 498.
[34] Waitangi Tribunal, *Hearing week 2*, Wai 2180, #4.1.9 at page 498.
[35] Crown Law Office, *Crown Closing Submissions in relation to issue 21: Wahi Tapu*, Wai 2180, #3.3.95 at [21.4].
[36] Crown Law Office, *Crown Closing Submissions in relation to issue 21: Wahi Tapu*, Wai 2180, #3.3.95 at [21.5].
[37] Crown Law Office, *Crown Closing Submissions in relation to issue 21: Wahi Tapu*, Wai 2180, #3.3.95 at [21.6].
[38] Crown Law Office, *Crown Closing Submissions in relation to issue 21: Wahi Tapu*, Wai 2180, #3.3.95 at [21.7].
[39] Crown Law Office, *Crown Closing Submissions in relation to issue 21: Wahi Tapu*, Wai 2180, #3.3.95 at [21.8].

Historic Places Act(s) and Historic Places Trust

22. The Crown submitted that from the mid-20th century, the "legislative frameworks for the protection of wāhi tapu have improved significantly".[40] Even if that were the case, this Crown submission is an admission that for more than 100 years there was no protection wāhi tapu other than for urupā situated on Māori land. We submit that it is available for the Waitangi Tribunal to make a finding that, in the least, there was no legislative protection of wāhi tapu other than urupā from 1840 to 1950.

23. There is Crown purport that wāhi tapu were protected by the Town and Country Planning Act 1953 and its successors, the Historic Places Act 1954 and its successors and the Resource Management Act 1991 ("RMA").[41] We briefly re-iterate submissions already made on the failures of this legislative regime:[42]

    a. The Town and Country Planning Act 1953 did not provide for Māori interests in developing district schemes. Although local authorities had to pay due regard to the associations that Māori had or have with their sites of significance under the Town and Country Planning Act 1977, there was no legal obligation on them to do so. Furthermore, the 1977 Act did not address the protection issues that arose when Māori land with wāhi tapu was alienated.[43]

    b. The Historic Places Act 1954 and its 1980 successor did no more than passively protect wāhi tapu with registration measures that put the onus on the Claimants to identify and locate wāhi tapu. None of the wāhi tapu sites in the Taihape Inquiry were given statutory recognition.[44]

    c. With regard the RMA, we note the Wai 262 Tribunal's finding that 20 years (then) after the RMA was enacted, the legislation had

[40] Crown Law Office, *Crown Closing Submissions in relation to issue 21: Wahi Tapu*, Wai 2180, #3.3.95 at [22].
[41] Crown Law Office, *Crown Closing Submissions in relation to issue 21: Wahi Tapu*, Wai 2180, #3.3.95 at [22].
[42] Claimant Counsel, *Wāhi Tapu Generic Closing Submissions* dated 20 May 2020, Wai 2180, #3.3.42.
[43] Claimant Counsel, *Wāhi Tapu Generic Closing Submissions* dated 20 May 2020, Wai 2180, #3.3.42 at [292].
[44] Claimant Counsel, *Wāhi Tapu Generic Closing Submissions* dated 20 May 2020, Wai 2180, #3.3.42 at [84-86].

delivered to Māori scarcely a shadow of its original promise.[45] Since the Wai 262 Tribunal published its findings with regard to the protection of wāhi tapu, there has been very little progress. Environmental management agreements between local authorities and iwi could furnish the necessary protection. However, only 5 such agreements exist across the country and there are none in the Taihape inquiry district. We elaborate on joint management agreements below.

Historic Places Act 1993

24. The Crown noted that wāhi tapu is defined in the Historic Places 1993 Act as "a place sacred to Māori in the traditional, spiritual, religious, ritual or mythological sense."[46] Also noted by the Crown was that the register of historical sites was reformed to include all historic places, historic areas, wāhi tapu and wāhi tapu areas ("the wāhi tapu register"),[47] and that a Māori Heritage Council was established to manage the process for registering wāhi tapu.

25. The wāhi tapu register informs the public, landowners, developers and local authorities as to the existence of wāhi tapu. A problem arises where the disclosure of the whereabouts and significance of a wāhi tapu to the local authority violates its tapu. The Te Roroa Tribunal found that wāhi tapu are very personal to the people to whom they are significant. Any exposure takes the tapu out of the wāhi tapu. Privacy is an ingredient in the "undisturbed possession" of taonga and any intrusion is a trespass.[48] Therefore, the wāhi tapu register cannot suffice for the Claimants' purposes. The very means by which the Crown claims to protect wāhi tapu can in fact lead to their desecration. It constitutes a failure on the Crown's part to actively protect the Claimants' wāhi tapu.

26. In these circumstances, it is proposed that the wāhi tapu register is made confidential to the Site Assessor, referred to above in paragraph 4. The wāhi

[45] Claimant Counsel, *Wāhi Tapu Generic Closing Submissions* dated 20 May 2020, Wai 2180, #3.3.42 at [94].
[46] Crown Law Office, *Crown Closing Submissions in relation to issue 21: Wahi Tapu*, Wai 2180, #3.3.95 at [26].
[47] Crown Law Office, *Crown Closing Submissions in relation to issue 21: Wahi Tapu*, Wai 2180, #3.3.95 at [26].
[48] Waitangi Tribunal, *Te Roroa Report 1992*, Wai 38, page 257.

tapu register is administered in such a way that the Site Assessor is notified of any proposed commercial, agricultural, horticultural or land development activity that poses a risk to a wāhi tapu. The Site Assessor is tasked with liasing with the whānau-hapū affiliated with the wāhi tapu, with any party with an interest greater than that of the general public in the proposed activity and with the local authority. All communication should be conducted in the strictest confidence. Details about the wāhi tapu need not be divulged other than that the wāhi tapu exists and that the proposed activity could pose a risk to it. If a resource consent application that poses a potential risk to the wāhi tapu is proceeded with nevertheless, the strictest confidence could be maintained throughout any ensuing proceeding with regard to the wāhi tapu's actual whereabouts and associated information.

Heritage New Zealand Pouhere Taonga Act 2014

27. Although it is possible for a wāhi tapu to be declared an archaeological site, pursuant to section 43 of the 2014 Act there must be "significant evidence" provided "by archaeological methods" that the wāhi tapu relates to the "historical and cultural heritage of New Zealand." We contrast the "significant evidence" requirement in section 43 with the "evidence" requirement in the section 6 definition of "archaeological site. On its face, the section 43 evidential criteria is onerous. As is the requirement that "archaeological methods" be employed to determine whether a wāhi tapu is an archaeological site. The cost involved with doing so may be prohibitive. Furthermore, the "historical and cultural heritage of New Zealand" is the standard to be achieved as opposed to, for the Claimants' purposes, the "historical and cultural heritage of Māori". Although, technically, a wāhi tapu may be declared an archaeological site, the pathway to achieving the objective is fraught and perhaps unattainable.

28. The Crown lists the main features of the 2014 Act at paragraph 27 of its closing submissions as protective measures available to Taihape Māori to protect wāhi tapu. We provide the following in response:

    a. Whereas the 2014 Act provides for the **protection** of archaeological sites, it merely provides for the **recognition** of places of historical, cultural and ancestral significance.

b. The Rārangi Korero/New Zealand Heritage List is a list of historical sites of significance. As discussed, any exposure of a wāhi tapu site takes the tapu out of the wāhi tapu. According to the Te Roroa Tribunal, **privacy is an ingredient** in the "undisturbed possession" of a taonga.[49] The Rārangi Korero list is unsuitable and therefore it does not provide the protection required. In fact, it could lead to the desecration of wāhi tapu. In these circumstances, it is suggested that the Rārangi Kōrero is kept confidential and administered in accordance with the procedure that is alluded to in paragraph 25 above.

c. Section 44 of the 2014 Act does not prohibit the destruction or modification of a wāhi tapu. It allows a third party to apply to Heritage New Zealand to seek permission to destroy or modify the wāhi tapu. The 2014 Act balances the interests of Māori against the public interest and/or commercial interests and in these circumstances the result can be inevitable.[50] Furthermore, under section 87 of the 2014 Act, Heritage New Zealand can only prosecute someone who has desecrated an unknown archaeological site if they have been notified that such a site exists. Heritage New Zealand can only prosecute if the person that is modifying or destroying the archaeological site knows or reasonably suspected that the site is an archaeological site. Therefore, Heritage New Zealand relies on the moral conscience and knowledge of private landowners, local councils and developers to inform Heritage New Zealand when a site of significance is disturbed. We submit that the 2014 Act fails to protect wāhi tapu. More needs to be done.

[49] Waitangi Tribunal, *Te Roroa Report 1992*, Wai 38, at 257.

[50] See for example Ngati *Paoa Trust Board v Heritage New Zealand Pouhere Taonga*, [2021] NZEnvC 75 where the Ngati Paoa Trust Board opposed the granting of a consent to build on or near a wāhi tapu of Ngāti Paoa. The court found in favour of Heritage New Zealand. *King v Heritage New Zealand Pouhere Taonga*, [2018] NZEnvC 214 where King appealed a decision by the Heritage New Zealand to grant consent to build on or near a wāhi tapu. The court found in favour of Heritage New Zealand. *Nga Mana Toopu o Kirkiriroa Charitable Trust v Heritage New Zealand Pouhere Taonga* [2015] NZEnvC 194 where Nga Mana Toopu o Kirikirioa Charitable Trust challenged Heritage New Zealand's decision to grant consent to remediation work without consultation. The parties settled outside of Court however it had gotten to a stage where an application was filed.

d. We have proposed the creation of the Office of the Site Assessor above. The Site Assessor could be empowered to inspect any land development activity at any time, without notice to any party, to ensure that wāhi tapu are not disturbed by the land development activity. To offset concerns with any perceived abuse of power on the Site Assessor's part, their conduct in relation to any such assessment should be amenable to review.

e. Pursuant to section 39 of the 2014 Act, Heritage New Zealand Pouhere Tāonga may enter into a heritage covenant with a land owner to protect, conserve or maintain a wāhi tūpuna, wāhi tapu or wahi tapū area. However, any heritage covenant is at the land owner's discretion. Despite the advent of the 2014 Act, significant constraints remain on the Claimants' ability to access wāhi tapu that are situated on privately owned land.

f. Pursuant to section 81, Heritage New Zealand Pouhere Tāonga is to maintain a list of places of outstanding national heritage value to be called the National Historic Landmarks/Ngā Manawhenua o Aotearoa me ōna Kōrero Tūturu ("the Landmarks list"). The requirement that a place on the Landmarks list must be "of outstanding national heritage value" may rule out landmarks that are only of heritage value to local hapū, such as the birthplace of a renowned leader or a boundary marker between two hapū. This concern is exacerbated by section 81(4) of the 2014 Act which provides that "[a] place must not be included on the Landmarks list unless there is strong evidence of **broad national and community support** for its inclusion".

Resource Management Act 1991

29. The Claimants filed relatively extensive submissions concerning the RMA and wāhi tapu.[51] In its closing submissions on the RMA there is just one reference by the Crown to the Claimants' closing submissions.[52] Of course,

[51] Claimant Counsel, *Wāhi Tapu generic closing submissions* dated 6 May 2020, Wai 2180, #3.3.42 at [17-19]
[52] Crown Law Office, *Crown Closing Submissions in relation to issue 21: Wahi Tapu*, Wai 2180, #3.3.95 at [31].

the manner in which the Crown conducts its case is a matter for the Crown. However, there is also the consideration that a good faith treaty partner should engage with the concerns of the other partner instead of merely talking past them. We provide an example below.

30. By adopting findings of the Wai 262 Tribunal, the Claimants' position is that the RMA failed to provide for iwi control of their iconic tāonga[53] and the RMA failed to give proper effect to kaitiakitanga.[54] Without referencing these particular Claimant submissions, the Crown took a diametrically opposed position to them nevertheless, submitting that "[u]nder the RMA, Māori are involved in the management of natural and physical resources in two broad ways".[55] A series of RMA provisions were referred to in support, including section 6(e), 7(a), 8, 66(2A)(a) and 74(2A) ("the RMA provisions"). The Crown then submitted that "the combination of these provisions gives significant protection to Māori interests".[56] No explanation or rationale was provided by the Crown as to why the Claimants' stated position was opposed. No obvious flaw in the Claimants' submissions was highlighted. Furthermore, the Crown merely cited several RMA provisions in support of its protection claim. No other evidence was cited. It is as if the mere existence of the RMA provisions protects the Claimants' interests. But that is not the case. The reality is wholly different. The Claimants set some of that reality out with reference to a key Wai 262 Tribunal finding on the utility of the RMA:[57]

> Nearly 20 years after the RMA was enacted, it is fair to say that the legislation has delivered Māori scarcely a shadow of its original promise . . . Between 1991 and 2010, not a single section 33 delegation of powers or functions of iwi occurred . . . for the most part they remain in the role of reactive consultees.

[53] Claimant Counsel, *Wāhi Tapu Generic Closing Submissions* dated 20 May 2020, Wai 2180, #3.3.42 at [93].
[54] Claimant Counsel, *Wāhi Tapu Generic Closing Submissions* dated 20 May 2020, Wai 2180, #3.3.42 at [94].
[55] Crown Law Office, *Crown Closing Submissions in relation to issue 21: Wahi Tapu*, Wai 2180, #3.3.95 at [29].
[56] Crown Law Office, *Crown Closing Submissions in relation to issue 21: Wahi Tapu*, Wai 2180, #3.3.95 at [30].
[57] Claimant Counsel, *Wāhi Tapu Generic Closing Submissions* dated 20 May 2020, Wai 2180, #3.3.42 at [94], per Waitangi Tribunal, *Ko Aotearoa Tēnei – A Report into Claims Concerning New Zealand Law and Policy Affecting Maori Culture and Identity* (Wai 262, 2011), at 284-285.

The Claimants relied on other Tribunal findings that were highly critical of the RMA.[58] None of the Tribunal findings were grappled with by the Crown so as to undermine or otherwise dispose of them. The Crown's RMA submissions were made as if the Waitangi Tribunal had not previously reported on the RMA.

31. Other than the mere existence of the RMA provisions, no evidence was cited in support of the Crown's RMA submissions and given that the Claimants' submissions were not referred to and/or specifically addressed, it is submitted that the Claimants' submissions must stand. Thus, it is available to the Waitangi Tribunal to attribute well-foundedness to claims such as those referred to above and to other claims concerning the RMA's failure to protect wāhi tapu.

32. Under section 36B of the RMA, a local authority can enter into a joint management agreement with an iwi authority or with a group that represents hapū. Presently there are five joint management agreements in effect:[59]

a. Raukawa Settlement Trust and Waikato Regional Council;
b. Maniapoto Māori Trust Board and Otorohanga District Council, Waikato District Council, Waikato Regional Council, Waipa District Council and Waitomo District Council;
c. Te Arawa River Iwi Trust and Waikato Regional Council;
d. Waikato Raupatu River Trust and Waikato Regional Council; and
e. Waikato Raupatu River Trust and Waikato District Council.

("the joint management agreements")

33. Most of the joint management agreements are between local council and iwi that have settled with the Crown. Accordingly, there are no joint management agreements in the Taihape inquiry district even though the hapū group option has been available since 1991. This aspect and the low number of joint management agreements overall further undermines the

[58] Claimant Counsel, *Wāhi Tapu Generic Closing Submissions* dated 20 May 2020, Wai 2180, #3.3.42 at [96], [97]. The Te Roroa Tribunal was also critical of the RMA in its report—see Claimant Counsel, *Wāhi Tapu Generic Closing Submissions* dated 20 May 2020, Wai 2180, #3.3.42 at [99].
[59] http://www.environmentguide.org.nz/rma/maori-and-the-rma/

Crown's claim that "Māori are involved in the management of natural and physical resources . . .".[60]

34. It is interesting that the Crown focused on the RMA law reform that is afoot.[61] The fact of RMA law reform speaks to its deficiencies. Greater decision-making powers are proposed for mana whenua,[62] which infers that decision-making powers for mana whenua has been and is deficient. This also runs counter to the Crown submission that "Māori are involved in the management of natural and physical resources in two broad ways".[63]

35. As discussed, the Crown did reference one of the Claimants' closing submissions:[64]

> Particularly in relation to wāhi tapu, the claimants accept that the RMA allows Māori to interpret the significance of wāhi tapu and the importance of the environment within their rohe according to Māori cultural values.

36. Although the RMA may allow Māori to establish the significance of wāhi tapu in accordance with Māori cultural values, the apparent sanctioning was heavily qualified by the Claimants in the following terms:[65]

> Nonetheless, these Māori interests had to be seen alongside other values and other interests. They were not privileged in the decision-making processes.

In other words, Māori cultural values can be outweighed. The heavy qualifier that the Claimants submitted was not alluded to by the Crown.

Te Ture Whenua Māori Act 1993

37. The Crown submits that sections 338 and 339 of Te Ture Whenua Māori Act 1993 are available to Taihape Māori to protect wāhi tapu. Section 338 allows

[60] Crown Law Office, *Crown Closing Submissions in relation to issue 21: Wahi Tapu*, Wai 2180, #3.3.95 at [29].
[61] Crown Law Office, *Crown Closing Submissions in relation to issue 21: Wahi Tapu*, Wai 2180, #3.3.95 at [32].
[62] Crown Law Office, *Crown Closing Submissions in relation to issue 21: Wahi Tapu*, Wai 2180, #3.3.95 at [32].
[63] Crown Law Office, *Crown Closing Submissions in relation to issue 21: Wahi Tapu*, Wai 2180, #3.3.95 at [29].
[64] Crown Law Office, *Crown Closing Submissions in relation to issue 21: Wahi Tapu*, Wai 2180, #3.3.95 at [31].
[65] Claimant Counsel, *Wāhi Tapu Generic Closing Submissions* dated 20 May 2020, Wai 2180, #3.3.42 at [164].

the Court to set aside any Māori freehold land or any General land as wāhi tapu. The utility of providing for the protection of wāhi tapu on Māori land is limited when the vast majority of the land in the Taihape inquiry district is in private ownership. Furthermore, the protection of wāhi tapu on Māori land is fraught with its own set of obstacles.[66]

38. During Hearing Week 16, Crown counsel was unable to refer to any evidence of the use of sections 338 or 339 in the Taihape inquiry district.[67] In fact, Crown counsel could not reference any use of the statutory provisions.

39. Across Aotearoa, there are 848 gazetted notices under section 338(1) of the Te Ture Whenua Māori Act 1993 setting apart reserved land for the purposes of marae, urupā and wāhi tapu. Only 10 gazette notices reference the Aotea District Māori Land Court:[68]

Date	Landblock	Area	Purpose
15.02.21	Ngarara West A25B2C2	Additional added 0.0068 ha	Wāhi tapu
13.04.06	Part Lot 1, DP 13850 and part Sections 9, 10, 13 and 14, Pukearuhe District	0.0476 ha	Urupa
23.02.06	Part of the land known as Ohinepuhiawe 140E Block.	7.5m2	Grave site of the late Pono Hakaria
24.07.03	Part Tauranga Taupo 1B2B1	29.5429 ha	Swamp/wetlands
29.04.1999	part Taraketi 2A2 Block IX	1.091 ha	Marae
18.06.1998	Pungaereere No. 1	51.83 ha	Wāhi tapu
09.04.1998	Te Paepae-O-Aotea	2 ha	Wāhi tapu

[66] Armstrong, O'Mally, Stirling, *Northland Language and Culture*, Wai 1040, #A14, p 88
[67] Waitangi Tribunal, Hearing Week 16 transcript, Wai 2180, #4.1.25, at 197, lines 5-12.
[68] https://gazette.govt.nz/notice/NoticeSearch/?keyword=Aotea+338+%281%29+Te+Ture+whenua+Maori&year=&pageNumber=&noticeNumber=&dateStart=&dateEnd=&noticeType=&act=

22.05.1997	Rakautaua 1B2C1, Lot 2A Block	1r 2.6p	Urupā
20.10.1994	Part Hohotaka 2F1	5.9 ha	Papakainga

40. A more in-depth review of the gazette notices would allow us to confirm with exactitude the wāhi tapu that have been reserved in the Taihape inquiry district. At a cursory level however, it seems possible to state that the Taraketi block reserve is the only one located within the district.[69] This is the location of Rata Marae. We submit that just one gazetted reserve in the Taihape inquiry district in the 28 years since the Te Ture Whenua Māori Act was enacted is a poor record. It is an indication that this provision is not working for Taihape Māori. It is unclear whether it is because the application process is difficult to navigate, or whether it is because the wāhi tapu are located on General land, or whether it is because the wāhi tapu are so tapu that revealing their location would jeopardise their tapu status. In any event, what we can confirm is that the utility of section 338 is confined.

41. In its closing submissions, the Crown naively asserts that certain statutory provisions for the protection of wāhi tapu have been provided in Te Ture Whenua Māori Act and therefore they are protected. However, the availability of statutory protection does not necessarily mean that there is protection. Furthermore, the record does not support the Crown in this respect.

Limited legislation

Earlier Māori land legislation

42. The Crown discussed the reservation of certain wāhi tapu in the Taihape inquiry district by earlier Māori land legislation:[70]

a. In 1929, Awarua 3D315 (church and carved whare), 0.5301 ha;
b. In 1936, part of the Awarua 2C13J7 block (urupā), 2 acres;

[69] https://gazette.govt.nz/notice/id/1999-ln3050
[70] Crown Law Office, *Crown Closing Submissions in relation to issue 21: Wahi Tapu*, Wai 2180, #3.3.95 at [37-39].

c. In 1937, part of Awarua 4C15F1A2A (meeting house and urupā), 3 acres; and

d. In 1949, Awarua 2C13L (marae and meeting place), 4 acres.

43. The reservations are all on Māori land. As discussed, the vast majority of the land in the inquiry district is not Māori land and this has been the case for some time. A shortcoming with the early Māori land legislation that the Crown relies on is that it could not protect wāhi tapu that are not situated on Māori owned land.

44. Just four reservations were recognised under the earlier Māori land legislative regime. It should be noted that they are a regular kind of amenity, being wharenui and urupā, and they are conspicuous. Due to these particular characteristics, the recognised wāhi tapu are amenable to being protected. However, not all wāhi tapu are wharenui and urupā and not all wāhi tapu are conspicuous. Notably, wāhi tapu that do not possess such characteristics did not receive statutory protection. We have mentioned these kinds of wāhi tapu previously. They include, for instance, the birthplace of a renowned leader, a boundary marker between two hapū, tūahu, battle grounds where blood was shed, stream areas where the bones of the dead were washed, rongoa gathering areas imbued with special healing powers, sites of historical significance, the rohe of spiritual guardians, pito burial areas and certain landmarks.

45. The Taihape inquiry district is approximately 1,160,000 acres in area. The four sites of significance account for approximately 10 of those acres. They are but a handful of the wāhi tapu located in the Taihape inquiry district. The lack of uptake by Taihape Māori with respect to the Crown's wāhi tapu legislative regime is evidence that the legislative regime was deficient.

Historic Places legislation

46. The Crown discussed how the Historic Places legislation was used to record 17 Māori historical sites on the Historic Places Trust Rangitikei County inventory ("the County inventory") in the 1970s.[71] Whilst placement of the

[71] Crown Law Office, *Crown Closing Submissions in relation to issue 21: Wahi Tapu*, Wai 2180, #3.3.95 at [40].

historical sites on the County inventory was a step in the right direction, there is no evidence that their placement on the County inventory resulted in the protection of the historical sites. The Crown also claimed that the District Planning Scheme Review under the Town and Country Planning Acts protected historic places and wāhi tapu in the inquiry district.[72] However, just a single instance of site protection resulting from the District Planning Scheme Review is cited by the Crown.[73]

47. The Crown discusses the alleged protection that "has been provided to five Māori sites in the inquiry district".[74] The "protection" is said to emanate from the listing of the five sites on the Historic Places Trust national register under the Historic Places Act 1993 ("the national register"). As discussed, the mere listing of wāhi tapu on a public record does not necessarily equate with protection. In somewhat curious circumstances, the Crown appears to agree. Having affirmed that "protection has been provided to five Māori sites" by the national register, the Crown undermines its protection claim:[75]

> Further, while it is evident that over time the Crown has undertaken a number of initiatives to protect and preserve the wāhi tapu of Taihape Māori, the Crown notes that it cannot guarantee the success of such initiatives, or that the wāhi tapu of Taihape Māori will not be lost or disturbed. Such provisions can only go so far to prevent interference with wāhi tapu, and legislation is only part of the solution.

48. The protection of wāhi tapu involves much more than the enactment of statutory provisions. As evidenced by Ti Aho Pillot, wāhi tapu need attending with and caring for:[76]

> I was told one of the reasons Koro Patena used to ride his horse across those areas was so that he could attend to the puna. This included the puna on the Owhaoko block. Many of the headwaters for the awa around us are on that block. Before the power scheme, the headwaters ran from there into Lake

[72] Crown Law Office, *Crown Closing Submissions in relation to issue 21: Wahi Tapu*, Wai 2180, #3.3.89 at [41].
[73] Crown Law Office, *Crown Closing Submissions in relation to issue 21: Wahi Tapu*, Wai 2180, #3.3.89 at [43].
[74] Crown Law Office, *Crown Closing Submissions in relation to issue 21: Wahi Tapu*, Wai 2180, #3.3.89 at [44].
[75] Crown Law Office, *Crown Closing Submissions in relation to issue 21: Wahi Tapu*, Wai 2180, #3.3.89 at [50].
[76] Amended Joint Brief of Evidence of Maata Merle Ormsby, Daniel Ormsby and Ti Aho Pillot dated 29 September 2017, Wai 2180, #G18, at [25].

> Rotoaira. Koro Te Ngoi would cut the sides back, clean the branches and leaves out and anything else that dropped in there. He was always clearing the waterways, even the ones around where we lived. He like our dad were conservationists and very protective of our environment. Even if you threw a stone into the creek, he would tell you to go and get it out. That was the kind of person he was. He would clean and care for the puna but he would also ride the boundaries because he was told to go out there by my Nan or by our elders. They would say that there was something wrong or something was in need of his attention and away he would go.

49. As discussed, the public registration of wāhi tapu can be prejudicial. Therefore, as opposed to placing the whereabouts and knowledge of wāhi tapu with local authorities, as we have suggested already, the placement of such information should reside with an entity that is Crown-resourced pursuant to the partnership principle and the principle of active protection, but which is independent of local and central government.

Latent Crown understanding

50. At paragraph 53 of its submissions, the Crown states that its relationships with tangata whenua are still developing which has meant that the protection of Māori tino rangatiratanga in respect of wāhi tapu located on Crown land has not been provided for in a manner now recognised as important and necessary.[77] There are significant concerns with this submission. The Crown has been in the Taihape rohe since at least the 1870s and it has only now come to the understanding that the protection of wāhi tapu is "important and necessary". This is wholly disappointing. The other concern is that its latent understanding of what is "important and necessary" to Taihape Māori evidences the Crown's failure to protect wāhi tapu in accordance with the principles of te Tiriti ō Waitangi.

51. The Crown goes on to illustrate its latent relationship development with Taihape Māori viz a viz the Waiōuru Military Training Area. The Crown had understood that Waiōuru lands were "under the mana" of Ngāti Tūwharetoa whereas now the Crown understands that other groups have customary

[77] Crown Law Office, *Crown Closing Submissions in relation to issue 21: Wahi Tapu*, Wai 2180, #3.3.89 at [53].

interests in Defence lands such as Ngāti Rangi, Ngāti Tamakopiri and Ngāti Whitikaupeka.[78] The Crown's recent realisation of other customary interests in Defence lands is at odds with Ngāti Tamakopiri and Ngāti Whitikaupeka evidence:[79]

> The trail that Koro Te Ngoi Patena rode included Tahuarangi near Lake Rotoaira, an important wharepuni to us. We talk more about Tahuarangi later in our korero on the Mangai. So the trail he rode included that important landmark, the puna opposite Turoa and from there Koro would go towards Waiouru but go around Waiouru and past the army camp. But then on one occasion, he returned from his ride and he was not happy. He had been told by the army that he could no longer ride across the blocks like he had always done. He was quite angry about this. I think it had something to do with the naval base they built there, with all its aerials. It was a big raruraru between Koro Patena and the army. In the end, the army assigned a major to come and talk to him. They ended up being great friends but I don't think that his issue with the army was ever properly resolved.

The New Zealand Defence Force has known for some time of customary interests in Defence lands other than those of Ngāti Tūwharetoa.

52. In its submissions, the Crown extolls the virtues of New Zealand Defence Force initiatives of late to recognise and protect wāhi tapu located on Defence lands. Whilst genuinely laudable effort and intent, the latent protection being afforded to Defence land wāhi tapu is only possible because the wāhi tapu are located on what is effectively Crown owned land. As discussed, most of the whenua in the Taihape inquiry district is privately owned. The initiative shown by the New Zealand Defence Force to protect wāhi tapu is seldom emulated by the land owning public.

ISSUE TWO

53. At paragraph 72 of its closings, the Crown claims in effect that the consultation requirements in the Conservation Act 1987 and the Resource Management Act 1991 are adequate. It was submitted in the Wāhi Tapu

[78] Crown Law Office, *Crown Closing Submissions in relation to issue 21: Wahi Tapu*, Wai 2180, #3.3.89 at [53].
[79] Amended Joint Brief of Evidence of Maata Merle Ormsby, Daniel Ormsby and Ti Aho Pillot dated 29 September 2017, Wai 2180, #G18, at [28].

Generic Closing Submissions that the legislation referred to fails to provide for meaningful engagement between the Claimants, the Department of Conservation and the local authority.[80] There is no need to repeat those submissions here. Despite their status as tangata whenua and their treaty partner status, the Claimants interests are just one of a number of competing interests when decisions are made by DOC or the Rangitikei District Council concerning their wāhi tapu.

54. A number of environmental groups have been established, such as Te Rōpū Awhina, Te Rōpū Ahi Kā, and Ngā Pae o Rangitkei. They have an advisory role and no decision-making capacity whatsoever.

55. The Crown discusses a consultation effort undertaken with Ngāti Hauiti between 2003 and 2006 "to promote the identification, research and protection of sites of heritage significance to Ngāti Hauiti".[81] The Historic Places Trust was provided with a list of 19 sites for registration. Whilst a step in the right direction, the registration of wāhi tapu does not equate with their being protected. Much more needs to be done, such as regular attendances with and the monitoring of wāhi tapu.

56. Alexander referred to the "complexity" of the heritage site assessment process. Perhaps this is why Ngāti Hauiti remains the only Māori group to have participated in it. Moreover, the view of tangata whenua on what comprises a heritage site is just one of many criteria:[82]

> The assessment is not just based on the views of tangata whenua, but has to also accommodate the opinions of archaeologists and other academically trained heritage professionals. This wider analysis of 'value' is set out in the legislation, where the importance that tangata whenua attach to a site is just one of eleven matters or criteria for which regard is to be had when registration is being considered.

[80] Claimant Counsel, *Wāhi Tapu Generic Closing Submissions* dated 20 May 2020, Wai 2180, #3.3.42 at [141-180]
[81] Crown Law Office, *Crown Closing Submissions in relation to issue 21: Wahi Tapu*, Wai 2180, #3.3.89 at [73].
[82] David Alexander, *Environmental Issues and Resource Management (Land) in Taihape Inquiry District, 1970s – 2010*, Wai 2180, #A38, at 171.

57. The remaining claim issues that are addressed by the Crown under Issue Two are claimant specific. In these circumstances, it is best that the particular claimant groups involved reply to the Crown on matters concerned.

ISSUE THREE

58. Counsel submit that the Claimants maintain their position that the Crown has breached the principles of the Treaty in regard to their wāhi tapu. Counsel has outlined the reasons for this in great detail in closing submissions. However, counsel address some of the Crown's closing submissions here in reply.

59. The Crown states that:[83]

> there are multiple interests involved in land and environmental management and use, and any management regime must carefully weigh up all of those interests.

60. Counsel submit that this is an attempt by the Crown to minimise the impacts of its prior actions. While a balancing exercise (under the current regime) needs to occur, a key issue for the Claimants is that the Crown has primarily favoured its own interests and those of Pākehā settlers, over the interests of Māori. At a minimum, "the balancing of Maori interests must be done in a manner consistent with the Treaty, and Maori rights cannot be balanced out of existence".84 However, counsel submit that the rights of Taihape Māori have been ignored in favour of policies that are for a wider group of interests. This has directly caused many of the obstructions faced by Māori in protecting their wāhi tapu today.

61. In regard to protecting wāhi tapu, the Crown states that:[85]

> it will depend on a range of factors, including the relative importance of certain wāhi tapu to Māori, any threat to or current protection of the wāhi tapu, and competing private interests where

[83] Crown Law Office, *Crown Closing Submissions in relation to issue 21: Wahi Tapu*, Wai 2180, #3.3.95 at [88].
[84] David Alexander, *Environmental Issues and Resource Management (Land) in Taihape Inquiry District, 1970s – 2010*, Wai 2180, #A38, 98-99.
[85] Crown Law Office, *Crown Closing Submissions in relation to issue 21: Wahi Tapu*, Wai 2180, #3.3.95 at [88].

> wāhi tapu are located on private land. As outlined, there are also various limitations on the Crown's ability to protect wāhi tapu, in particular identification.

62. Counsel submit that any limitations on the Crown's ability to protect wāhi tapu is due to its own actions, not the actions of Māori. The Crown imposed on Māori, the land tenurial system that directly caused large tranches of Māori land to be alienated and vested into private, Pākehā ownership. Therefore, it is disingenuous for the Crown to now rely on the results of its own actions as an excuse to say why it can or cannot protect wāhi tapu, particularly in the way that the Claimants say wāhi tapu should have been protected.

63. The Crown further states:[86]

> … that any negative impacts of the broader land and environmental management regime, and the way it has been applied in the inquiry district, on the wāhi tapu of Taihape Māori are not the result of breaches of te Tiriti/the Treaty. Rather, the Crown has actively tried to protect such sites, and continues to do so in good faith and in consultation with Taihape Māori, as outlined above, and in other Crown submissions of relevance to these matters.

64. Counsel submit that while the Crown has made some effort, it has not been anywhere near enough. For example, in regard to the Historic Places Trust, counsel previously submitted that it was, "overwhelmingly Eurocentric in its approach, and Māori representation was minimal",87 or tokenistic.88 Other examples include the purported protections provided under Land Advisory Committees, as we already know these committees were less than adequate in managing Māori interests, as Māori membership on the boards was restricted and not guaranteed. Counsel submit that this certainly does not reflect a world where Māori are treated as equal partners under Te Tiriti.

[86] Crown Law Office, *Crown Closing Submissions in relation to issue 21: Wahi Tapu*, Wai 2180, #3.3.95 at [89].
[87] Claimant Counsel, *Wāhi Tapu Generic Closing Submissions* dated 20 May 2020, Wai 2180, #3.3.42 at [79].
[88] Claimant Counsel, *Wāhi Tapu Generic Closing Submissions* dated 20 May 2020, Wai 2180, #3.3.42 at [79].

65. Counsel submit that the enactment of the Resources Management Act and its subsequent reforms has also yielded mixed results, with concerns still remaining over the inability for Māori to exercise their duties under kaitiakitanga. Furthermore, ultimate authority still rests with the Crown and Māori have not been provided any ability to exercise tino rangatiratanga over their sites of importance.

66. Counsel submit that the Tribunal need only look to the overwhelming evidence in favour of the Claimants' case to surmise that the Crown breached Te Tiriti in not protecting the wāhi tapu of Taihape Māori.

67. Counsel submit that good faith consultation requires the Crown to treat with Māori under the principle of partnership at every step, particularly in the creation, development, and construction of any protective regime over their wāhi tapu.

68. Counsel submit that in order to develop new processes of protection that are robust and will gain back the trust of Taihape Māori, that fresh engagement from the Crown is needed. While counsel acknowledge that under the current regime challenges exist in relation to wāhi tapu located on privately owned land or unidentified wāhi tapu, counsel submit that a way forward can only be done by meaningful consultation with Taihape Māori.

CONCLUSION

69. It is disappointing that the Crown did not act in good faith and concede that it breached the principles of te Tiriti ō Waitangi when it confirmed that there was little evidence of any legislative protection for wāhi tapu during the 19th century. In any event, the Waitangi Tribunal should find accordingly.

70. The Crown has qualified its duty to protect wāhi tapu on the basis of identification issues and competing private land interests where wāhi tapu are located on private land. Given these qualifiers, it is suggested that a Site Assessor with appropriate powers be tasked with identifying and risk assessing wāhi tapu. The Site Assessor should be administered by a central government-sponsored national-based entity.

71. It is clear that the prevailing legislative regime for the protection of wāhi tapu has had very little uptake from Taihape Māori. The utility of the available provisions under the RMA and the Te Ture Whenua Māori Act 1993 are restrained in this regard. There should be legislative change as a result.

72. The public registration of wāhi tapu can be prejudicial to wāhi tapu and it can deter registration. A Waitangi Tribunal recommendation is sought so that the registration list lies with an entity that is Crown resourced pursuant to the partnership principle and the principle of active protection, but which is independent of local and central government.

73. Counsel submit that the prejudice outlined in our submissions at paragraphs 300 to 302 remain.[89]

74. Counsel submit that nothing stated in the Crown's submissions changes the position of the Claimants. The Claimants continue to sustain the findings and recommendations made in closing submissions, and that the Crown has breached the principles of the Treaty in regard to their wāhi tapu and respectfully seek a finding from the Tribunal to that effect.

DATED at Auckland this 27th day of September 2021.

Darrell Naden
Counsel Acting

Siaosi Loa
Counsel Acting

Neuton Lambert
Counsel Acting

[89] Claimant Counsel, *Wāhi Tapu generic closing submissions* dated 6 May 2020, Wai 2180, #3.3.42.