Mandates of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living and on the right to non-discrimination in this context and the Special Rapporteur on the rights of indigenous peoples

REFERENCE:
AL NZL 1/2019

22 March 2019

Excellency,

We have the honour to address you in our capacities as the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context and Special Rapporteur on the rights of indigenous peoples, pursuant to Human Rights Council resolutions 34/9 and 33/12.

In this connection, we would like to bring to the attention of your Excellency's Government information we have received concerning **the proposed construction of 480 houses by Fletcher's Living Ltd on Puketapapa, a land plot of 32 hectares near Auckland, which has strong spiritual, cultural and archaeological meaning to the Te Wai o Hua o Ihumātao (Maori community). Concerns have been voiced to us about this housing project, including its alleged negative effects on the land, cultural heritage and community well-being. Concerns have furthermore been raised about the lack of adequate and inclusive consultation with the Te Wai o Hua o Ihumātao in relation to the project as well as in relation to the prior designation of the land as a special housing area for development of intensive urban housing (SHA62) in 2014 under New Zealand's Housing Accords and Special Housing Area Act 2013 (HASHAA).**

As your government is aware, overall concerns over contemporary and historical land claims in New Zealand and the settlement processes with Maori in this regard were raised as a remaining challenge during the country visits by the previous Special Rapporteur on the rights of indigenous peoples to New Zealand, respectively in 2005 (E/CN.4/2006/78/Add.3, paragraphs 22-42) and 2010 (A/HRC/18/35/Add.4). In addition, concerns related to land issues have been mentioned in a previous communication to your Government about the Waitingi Tribunal and the representation of Maori in historical claim processes (NZL 1/2012).

According to the information received:

Puketapapa is an undeveloped area of 32 hectares of land on Ihumātao Quarry Rd in Auckland. Puketapapa is an important natural, archaeological and historic area for the Te Wai o Hua o Ihumātao, containing ancestral burial caves, volcanic cones and pre-colonial stonewalls. It borders the 100 hectares area of the Otuataua Stonefields Historical Reserve, which was established to protect and preserve the archaeological remains of communities that have been living on this land for several hundred years. The reserve and surrounding areas, including Puketapapa, are reportedly regarded as a waahi tāpu (a sacred place) to Ihumatao residents and a key source of their identity, as well as cultural and spiritual grounding.

In 2016, Puketapapa was bought by the company Fletcher Living Ltd, which plans to construct 480 houses for commercial sale on the land. Representatives of the Te Wai o Hua o Ihumātao (Maori community), who live nearby Puketapapa in Ihumātao village, oppose this construction project due to its adverse impact on the landscape, heritage and culture.

The Te Wai o Hua o Ihumātao traditionally held authority over Puketapapa as well as a larger area of 900 acres land in total, until it was confiscated in 1863 under the New Zealand Settlements Act. Members of Te Wai o Hua of Ihumātao have contested the confiscation with letters dating from as early as July 1865. The Waitangi Tribunal has summarized the evidence relevant to the confiscation of Ihumātao, including Puketapapa, in its Manukau Report of 1985 (WAI 008), which states the following: *... the inhabitants [were] attacked, their homes and property destroyed and their cattle and horses stolen, but then they were punished by confiscation of their lands for a rebellion that never took place (at 35).*[1]

In April 1866, the 900 acres land of Ihumātao was partitioned between the Crown and Maori by a Compensation Court set up under the New Zealand Settlements Act 1863, at which point Puketapapa fell to the Crown. In July 1866, Puketapapa was then offered for sale in a public auction by the Waste Lands Office and purchased by a Scottish immigrant, Mr. Wallace. The land remained in the hands of the Wallace family and was cultivated as farm lands in the following 149 years, before selling it to Fletcher Living Ltd in 2016.

In July 2014, Puketapapa was designated as a Special Housing Area, namely Special Housing Area 62 (SHA62), under the Housing Accords and Special Housing Area Act 2013 (HASHAA). Under the HASHAA, Special Housing Areas are designated through a fast-track procedure, which does not require the same level of safeguards as otherwise provided for in the Resource Management Act (1991) related to consultation and notification of plans to interested parties, including the Maori. The HASHAA expressly allows the development of land to progress without notice to any parties except adjacent landowners. According to the information obtained, the HASHAA was developed and passed in urgency in 2013 without proper consultation with the Maori.

On 13th December 2016, Puketapapa was sold by its then private owner, Wallace Farms Ltd, to Fletcher Living Ltd for an estimated $NZ20million. Fletcher Living Ltd plans to build 480 houses on the land for commercial sale.

The purpose of the HASHAA is to address the housing shortage as well as need for affordable housing in New Zealand. Fletcher Living has in this regard informed that 10 % of the 480 houses would be sold at controlled price caps, which were established to increase the supply of lower-priced housing. While contributing with 48 new social housing units, it is alleged that the development of Puketapapa would unlikely address the needs for affordable housing at the

[1] Manukau Harbour Report of the Waitangi Tribunal is available at: https://forms.justice.govt.nz/search/Documents/WT/wt_DOC_68495207/The%20Manukau%20Report%201985.pdf

lower end of the market but rather lead to higher housing prices in the area. It is unclear how or if member of the Maori community would benefit from the housing project.

Some representatives of the Te Wai o Hua o Ihumātao still claim authority over Puketapapa and demand that the land be returned to them or converted into a public reserve, over which they may exercise their duties of guardianship.

In terms of legal actions, a case related to Pukatapapa was filed with the Waitangi Tribunal on 7 December 2015. An application to have the case heard under an urgent hearing was declined by the Waitangi Tribunal (Wai 2547, #2.5.5) on 14 August 2017. However, in the decision, the Chief Judge noted that the claim may be suited for a future inquiry as it raises general concerns about the form, operation and potential effects of the special housing areas legislation, of which the claimants say their claim provides a specific example. The decision also noted that 'there is a real possibility that the treaty rights of the traditional owners of Ihumātao may not be given sufficient weight and consideration in the new legislative framework established by the Crown. Such a limitation raises a risk of prejudice to the traditional owners of Ihumātao that is both significant in that it would affect large-scale development in an area of cultural significance to the claimants and irreversible in that it is unlikely that the taonga (sacred object) identified on the land, if disturbed or destroyed by the development, could be restored' (para. 60).

Furthermore, an appeal was raised to the Environment Court by indigenous organisations and archaeologists over the decision by Heritage New Zealand, the national historic heritage agency, to grant Fletcher 'archaeological authority' over SHA62. In November 2018, the Environment Court rejected this appeal, thereby closing possible domestic avenues for legal redress.

Recent opposition to the proposed construction of 480 houses by Fletcher's Living Ltd on Puketapapa land as well as the designation of the land as SHA62 has been voiced by several leaders and indigenous peoples' organisations, including through a petition that has obtained more than 15.000 signatures and will be presented to Parliament, and the Auckland Council Governing Body in April 2019.

Noting the cultural, spiritual and archeological importance of Puketapapa to the Maori involved, we express our concern about the proposed construction of housing for commercial sale on their traditional land. We are furthermore concerned about the alleged lack of adequate participation of the Te Wai o Hua o Ihumātao in relation to the designation of Puketapapa as Special Housing Area 62 (SHA62) in 2014, under the Housing Accords and Special Housing Area Act 2013 (HASHAA). While we note that Fletcher Housing Ltd. has informed about consultations undertaken with certain Maori representatives about SHA62 and on the construction of the 480 houses, we would like to recall the importance of ensuring inclusive consultations and settlements.

The case of SHA62 also seems to reflect a broader challenge in terms of ensuring a human rights-based approach to national housing strategies. Of specific concern is the fast-track procedure of the Housing Accords and Special Housing Area Act 2013, which does not allow for adequate consultations with the Maori. In addition, the HASHSAA section 80 appears to limit avenues for judicial review.

Furthermore, the HASHSAA does not seem to adequately address the housing shortages faced by the Maori. In this regard, the case of Puketapapa was raised in March 2018 at the 63rd session of the Committee on ESCR, where the fourth periodic report of New Zealand was discussed. The concluding observations expressed a general concern that "disadvantaged groups and individuals, notably Māori and Pasifika families and persons with disabilities are more likely to experience severe housing deprivation, including overcrowded conditions. The Committee is also concerned that housing costs have significantly increased, leading to housing becoming unaffordable for many families and thereby increasing homelessness". The Committee in this regard recommended that the State party adopt a human rights-based national housing strategy, taking into account the 2018 Housing stocktake report produced by the Government.

While we do not wish to prejudge the accuracy of these allegations, we would like to draw the attention of your Excellency's Government to the relevant international norms and standards that are applicable to the issues brought forth by the situation described above.

In connection with the above alleged facts and concerns, please refer to the **Annex on Reference to international human rights law** attached to this letter which cites international human rights instruments and standards relevant to these allegations.

As it is our responsibility, under the mandates provided to us by the Human Rights Council, to seek to clarify all cases brought to our attention, we would be grateful for your observations on the following matters:

1. Please provide any additional information and/or comment(s) you may have on the above-mentioned allegations.

2. Please provide further information on how the Government seeks to ensure that the commercial housing project, with construction of 480 houses, by Fletcher Living on SHA62/Puketapapa will not undermine the cultural heritage and the rights of Maori.

3. Please provide information how the Governments plans to ensure that the planned housing construction on SHA62/Puketapapa contributes to the realization of the right to housing of the Maori people.

4. Kindly provide any additional information you have about the consultations undertaken with Te Wai o Hua o Ihumātao regarding the use and development of Puketapapa.

5. Please provide information on the background of designating Puketapapa as a Special Housing Area under HASHAA in 2014, as well as the

measures that your Excellency's Government has taken to ensure the participation as well as the free, prior and informed consent of the Te Wai o Hua o Ihumātao during this process.

6. Kindly explain in detail how the Government seeks to ensure that the HASHAA improves access to adequate, affordable and culturally appropriate housing for all residents, including Indigenous Peoples and will not undermine indigenous peoples' rights, under the UN Declaration on the rights of indigenous peoples and human rights law, as outlined above.

We would appreciate receiving a response within 60 days. Passed this delay, this communication and any response received from your Excellency's Government will be made public via the communications reporting website. They will also subsequently be made available in the usual report to be presented to the Human Rights Council.

While awaiting a reply, we urge that all necessary interim measures be taken to halt the alleged violations and prevent their re-occurrence and in the event that the investigations support or suggest the allegations to be correct, to ensure the accountability of any person(s) responsible for the alleged violations.

Please accept, Excellency, the assurances of our highest consideration.

Leilani Farha
Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context

Victoria Lucia Tauli-Corpuz
Special Rapporteur on the rights of indigenous peoples

Annex
Reference to international human rights law

In connection with the above alleged facts and concerns, we wish to draw the attention of your Excellency's Government to its obligations under binding international human rights instruments.

Of particular relevance to the case of Puketapapa is Article 27 of the International Covenant on Civil and Political Rights (ICCPR), ratified by New Zealand in 1978, which states that "In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language". These cultural rights are furthermore guaranteed in article 15 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), also ratified by New Zealand in 1978.

We would also like to recall the International Convention on the Elimination of All Forms of Racial Discrimination (CERD), which New Zealand has been a party to since 1972. In particular, we would like to draw attention to the General Recommendation 23 of the UN Committee on Elimination of Racial Discrimination, which in its paragraph 5 calls on States "to recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources and, where they have been deprived of their lands and territories traditionally owned or otherwise inhabited or used without their free and informed consent, to take steps to return those lands and territories" (Doc A/52/18, annex V 1997).

In addition, we would like to refer your Excellency's Government to relevant provisions of the United Nations Declaration on the Rights of Indigenous Peoples, adopted by the General Assembly on 13 September 2007 and endorsed by New Zealand in 2010. As affirmed in Article 26 of the Declaration: "indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or other-wise used or acquired." Article 26 further provides that indigenous peoples have the right "to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired" and establishes a positive duty on States to "give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned".

Relevant to the discussion of reparations for historical wrongs and the confiscation of Puketapapa in 1863, article 28 provides for indigenous peoples' "right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent.".

We would furthermore like to recall article 27 of the UN Declaration on the Rights of Indigenous Peoples, which states that indigenous peoples shall have the right to participate in the process of recognizing and adjudicating "the rights of indigenous

peoples pertaining to their lands, territories and resources, including those which were traditionally owned or otherwise occupied or used". In addition article 18 establishes the right of indigenous peoples to participate in decision-making in matters which would affect their rights and article 19 affirms that indigenous peoples shall be consulted "through their own representative institutions in order to obtain their free, prior and informed consent" before States adopt legislative or administrative measures that may affect them.

In addition, we would also like to draw your Excellency's attention to article 11 of the UN Declaration on the rights of indigenous peoples that stipulates that indigenous peoples have the 'right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites'. Article 31 states that indigenous peoples have the 'right to maintain, control, protect and develop their cultural heritage'. It adds that 'in conjunction with indigenous peoples, States shall take effective measures to recognize and protect the exercise of' this right'. These provisions recall article 15 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), which urges States to take steps to ensure the realization of the right to cultural life for everyone, including steps necessary for the conservation of culture. In this connection, we refer to General Comment 21 (2009) of the Committee on Economic, Social and Cultural Rights, which recalls that States have the obligation to respect and protect cultural heritage in all its forms. Cultural heritage must be preserved, developed, enriched and transmitted to future generations as a record of human experience and aspirations. Such obligations include the care, preservation and restoration of historical sites, monuments, works of art and literary works, among others (E/C.12/GC/21, para.50).

In relation to New Zealand's housing strategies, we would like to refer to the International Covenant on Economic, Social and Cultural Rights ratified by New Zealand in 1978, and more specifically article 11.1 recognizing the right of everyone to an adequate standard of living for himself and his family, including food and housing, and to the continuous improvement of living conditions. This article must be read in conjunction with article 2.2 of the Covenant which provides for the exercise of any right under the Covenant without discrimination of any kind. In addition, we would like to bring to the attention of your Excellency's Government general comment No. 4 (1991) of the Committee on Economic, Social and Cultural Rights which defines seven fundamental characteristics of the right to adequate housing that the Government must ensure. By focusing the priority on social groups living in adverse conditions, these features include the guarantee of: (a) legal security of tenure; (b) availability of services, materials, facilities and infrastructure; (c) affordability; (d) habitability; (e) accessibility; (f) location; and (g) and cultural adequacy. We would also like to refer you to the Special Rapporteur's report on human rights based housing strategies (A/HRC/37/53).

Finally, we wish to bring to the attention of your Excellency's Government that in accordance with the "Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework", endorsed by the Human Rights Council in its resolution 17/4 of 16 June 2011, States must protect against human rights abuse within their territory and/or jurisdiction by third parties, including business enterprises. This requires taking appropriate steps to prevent, investigate, and redress such abuse through effective policies, legislation, regulations and adjudication (Guiding

Principle 1). Sate should also exercise adequate oversight when they contract with business enterprises to provide service that may impact upon the enjoyment of human rights (Guiding Principle 5). Moreover, according to the Guiding Principle 25, the State must take appropriate steps to ensure that those affected have access to effective remedy.

NEW ZEALAND
Permanent Mission
TE AKA AORERE

Note no. 114/2019

The New Zealand Permanent Mission to the United Nations Office at Geneva presents its compliments to the Secretary General of the United Nations (High Commissioner for Human Rights) and the Special Procedures Branch and has the honour to request a three months extension to be able to fully reply to the questions posed by the Special Rapporteurs, in the "Joint Communication from Special Procedures" (AL NZL 1/2019), dated 22 March 2019.

The New Zealand Permanent Mission takes this opportunity to renew to the Secretary General of the United Nations (High Commissioner for Human Rights) and the Special Procedures Branch the assurances of its highest consideration.

New Zealand Permanent Mission

Geneva

16 May 2019

NEW ZEALAND PERMANENT MISSION – GENEVA

NEW ZEALAND
Permanent Mission
TE AKA AORERE

Note no. 177/2019

The New Zealand Permanent Mission to the United Nations Office at Geneva presents its compliments to the Secretary General of the United Nations (High Commissioner for Human Rights) and the Special Procedures Branch and has the honour to submit the attached information and observations of New Zealand in response to the questions posed by the Special Rapporteurs, in the "Joint Communication from Special Procedures" (AL NZL 1/2019), dated 22 March 2019.

The New Zealand Permanent Mission takes this opportunity to renew to the Secretary General of the United Nations (High Commissioner for Human Rights) and the Special Procedures Branch the assurances of its highest consideration.

New Zealand Permanent Mission

Geneva

21 August 2019

INTRODUCTION

The New Zealand Government submits the following information and observations in response to the Joint Communication from Special Procedures, AL NZL 1/2019, sent by the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living and on the right to non-discrimination in this context, and the Special Rapporteur on the rights of indigenous peoples, following a complaint by Te Wai o Hua o Ihumātao in respect of a proposed residential development at Puketāpapa, Ihumātao Quarry Rd, Auckland.

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EXECUTIVE SUMMARY

1. The information and observations below respond to the allegations made by Te Wai o Hua o Ihumātao and to subsequent queries raised by the Special Rapporteurs in the Joint Communication in relation to a proposed development at Puketāpapa, Ihumātao in Auckland. The allegations and queries concern consultation of Māori with respect to decisions that affect their rights, legislation and policy to facilitate housing development generally and for Māori specifically, and the extent to which the proposed development at Puketāpapa provides for Māori cultural heritage and the supply of adequate housing. The allegations and queries sit at the heart of a broad range of complex domestic concerns, and international obligations and commitments. The New Zealand Government welcomes the opportunity to provide its observations to assist the Special Rapporteurs in their mandate to promote the rights concerned and develop cooperative dialogue between the relevant actors.

2. The relevant decisions made by the New Zealand Government involve a complex and overlapping set of interests, including the range of interests specific to Māori, the social, economic and cultural interests of all New Zealanders, commercial interests, and property rights. They arise in the particular historical context of the Treaty of Waitangi, the well-established Treaty of Waitangi settlement programme, and the framework for the relationship between the Government and Māori. They arise also in the present circumstances of a concentrated interest in the provision of housing, including the particular challenges with respect to housing for Māori. There are competing views held by those with competing interests in the matter, including within and among Māori rōpū (groups). The Government has determined, in the circumstances particular to New Zealand, the appropriate balance to protect Māori cultural heritage to the best extent possible while also facilitating the supply of adequate housing for Māori and for all New Zealanders.

3. The New Zealand Government's response outlines the factual background relevant to the Joint Communication. It details the history of Ihumātao and related Treaty of Waitangi Settlements. It sets out the legislative framework for the development of land, including the overarching Resource Management Act 1991, the Heritage New Zealand Pouhere Taonga Act 2014, and the temporary measures contained in the Housing Accords and Special Housing Areas Act 2013 (**HASHAA**). It outlines, in summary only, the extensive legislative and policy measures taken to address housing need generally, and housing for Māori in particular. It further details how Puketāpapa was temporarily designated a special housing area, and the rigorous process to obtain consent for the proposed development – a process that included significant consultation with and input from Māori rōpū who have interests in the area. The factual background is supported by appendices which include maps of the area, a list of the stakeholders and decision makers involved, a glossary of te reo Māori terms, and a chronology of events.

4. The New Zealand Government's response then addresses the specific queries raised by the Special Rapporteurs. It demonstrates that local Māori have been extensively consulted and have had substantial input into the design of the development at Puketāpapa. The process has resulted in a development that protects their cultural heritage, contributes to their future cultural well-being, and provides culturally appropriate housing, while also contributing to the pool of adequate affordable housing. In summary, the New Zealand Government is confident it has upheld its obligations under the International Covenant on Civil and Political Rights (**ICCPR**), the International Covenant on Economic, Social and Cultural Rights (**ICESCR**) and the Convention on the Elimination of All Forms of Racial Discrimination (**CERD**),

and its commitments under the UN Declaration on the Rights of Indigenous Peoples (**UNDRIP**).

SUMMARY OF ALLEGATIONS AND OBSERVATIONS

Summary of the allegations

5. Te Wai o Hua o Ihumātao allege the following:

5.1 Te Wai o Hua o Ihumātao have authority as tangata whenua over Puketāpapa, the whenua (land) subject to proposed development;

5.2 they were inadequately consulted on the decision to designate Puketāpapa a special housing area (**SHA 62**);

5.3 they were inadequately consulted on the proposed subdivision and residential development at Puketāpapa;

5.4 legal action has not protected their interests;

5.5 the proposed development does not adequately address the need for affordable housing, particularly for Māori; and

5.6 the designation and proposed development risks adverse impact on the landscape, heritage and culture.

Special Rapporteurs' communication

6. The Special Rapporteurs requests the New Zealand Government:

6.1 provide any additional information and/or comments on the allegations;

6.2 provide further information on how the Government seeks to ensure the commercial housing project, with construction of 480 houses, by Fletcher Living on SHA 62/ Puketāpapa will not undermine the cultural heritage and the rights of Māori;

6.3 provide information on how the Government plans to ensure that the planned housing construction on SHA 62/Puketāpapa contributes to the realisation of the right to housing of the Māori people;

6.4 provide any addition information about the consultations undertaken with Te Wai o Hua o Ihumātao regarding the use and development of Puketāpapa;

6.5 provide information on the background of designating Puketāpapa as a special housing area under HASHAA in 2014, as well as the measures that the New Zealand Government has taken to ensure the participation as well as the free, prior and informed consent of the Te Wai o Hua o Ihumātao during this process; and

6.6 explain in detail how the Government seeks to ensure that the HASHAA improves access to adequate, affordable and culturally appropriate housing for all residents, including Indigenous peoples and will not undermine indigenous peoples' rights under UNDRIP and human rights law.

Summary of Government observations

7. The New Zealand Government is confident it has upheld its obligations under the ICCPR, the ICESCR and CERD, and its commitments under UNDRIP. The Government states the additional information and observations provided show:

   7.1 The legislative and policy framework has ensured that the proposed development at Puketāpapa will not undermine the cultural heritage and rights of Māori. The development instead gifts significant portions of land back to local Māori and establishes a series of measures to protect the cultural heritage on and around the site, while also providing affordable and adequate housing to Māori and others.

   7.2 The views of Māori were sought from many Māori groups with interests in the Ihumātao area. Two in particular, to which other groups deferred, continued with extensive consultation resulting in the positive effects for Māori mentioned at paragraph 7.1.

   7.3 HASHAA is one part of a complex and multifaceted legislative and policy framework that continues to be developed to address changing and emerging conditions. Taken together, these measures demonstrate the Government is meeting its international obligations and commitments relating to the rights of Māori and the right of everyone (including Māori) to adequate housing.

FACTUAL BACKGROUND

History and status of the land

8. Puketāpapa refers to an area within Ihumātao,[1] on the south-western edge of the city of Auckland (Tāmaki Makaurau), New Zealand. It comprises 35 hectares of largely undeveloped farmland, situated at 545 Oruarangi Rd and bisected by Ihumātao Quarry Rd.

9. Adjacent to Puketāpapa, stretching to the coastline of the Manukau harbour, is the Ōtuataua Stonefields Historic Reserve. The Ōtuataua Stonefields is a site of special significance for tangata whenua (local Māori people) and the community. It contains significant geological and heritage features, as well as archaeological remains of Māori and settler communities. More importantly, it is recognised as wāhi tapu (sacred place), due to the presence of sacred lava caves, kōiwi (human remains), and two sacred volcanic maunga (mountains): one named Ōtuataua[2] and the other Pukeiti/Puketāpapa.[3] The Ōtuataua Stonefields Historic Reserve comprises some 100 hectares of land, which is zoned for conservation purposes and listed by Heritage New Zealand Pouhere Taonga as a category 2 historic place.

10. Before colonisation, Ihumātao was a sought after area of land amongst Māori. It was occupied by various Māori groups at various times, predominantly Ngāti Whatua, Waikato-Tainui and Wai-o-Hua iwi (tribes) and hapū (subtribes). The Wai-o-Hua groups – Te Ahiwaru, Te Ākitai Waiohua, Ngāti Tai Tāmaki, Ngāti Te Ata, Ngāti

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1 This name is an abbreviated version of Te Ihu a Mataoho, which means the nose of Mataoho. Mataoho was the god of earthquakes and volcanoes, who give rise to the geological features of greater Auckland.

2 Ōtuataua refers to the war party approaching, and is associated with Mataoho and the god of war parties, Atua-Taua.

3 The full name of which is Te Puketāpapatanga ā Hape – Hape being a historic tohunga who also gave his name to Karangāhape Road in central Auckland.

Tamaoho, and Te Kawerau ā Maki – have strong links to the Waikato-Tainui federation. The Government understands Te Wai o Hua o Ihumātao to be a smaller sub-group within the Wai-o-Hua groups listed above – "o Ihumātao" means "of Ihumātao", indicating the group are located in and/or are from the area.

11. The Crown drove iwi and hapū off the land at Ihumātao in 1863 as a part of its war against supporters of the Kīngitanga in Waikato. When those inhabitants returned, they found their land confiscated, pursuant to the New Zealand Land Settlements Act 1863. Much of the land had been on-sold to pākehā settlers. Ihumātao was subject to a claim in the Compensation Court, which partitioned the land and granted a small plot to Māori and the remainder to the Crown. The land in Crown possession was sold to the Wallace family in 1866.

12. Descendants of the original Māori inhabitants still live on the small plot granted to them in the 1860s. That plot is situated to the north-east of the proposed development and is now called Puketāpapa/Ihumātao papakāinga (village). The papakāinga includes Makaurau Marae, and is recognised as the longest continuously occupied Māori settlement in the Auckland region. Those who live there whakapapa (have genealogical links) to various Māori kin-groups, including Waikato-Tainui, Te Ahiwaru, Te Ākitai Waiohua, and Te Kawerau ā Maki.

13. The Wallace family retained an ownership interest in Puketāpapa since the 1860s. In 1999, local authorities, together with the Department of Conservation, bought the area that now forms the Ōtuataua Stonefields Historic Reserve. In 2007, the local authority proposed a plan change that would see a proposed extension of the metropolitan urban limit stop short of Puketāpapa, which would remain a rural zone. In addition, the local authority – recognising the cultural and historical significance of the area – issued a Notice of Requirement which sought to further protect the land from development by designating it for "passive open space and landscape protection purposes". These planning decisions were subsequently appealed to the by the affected landowners, including the Wallace family.

14. After hearing the appeal on the proposal in 2012, which included evidence from mana whenua who opposed the development, the Environment Court found in favour of the appellants. The RMA requires an appropriate balance to be struck between providing for private landowner's well-being and recognising broader considerations, including protecting historical and Māori heritage from inappropriate development. The Court considered appropriate development could be undertaken that was sensitive to and protects its special features, and such appropriate development should not be prohibited. The Court pointed to pt 2 of the Resource Management Act 1991 (discussed in detail below), which contain strong directions to ensure development is appropriate and recognises and provides for Māori culture and traditions. The Court directed the local authority to modify modified the zoning such that Puketāpapa was included in the metropolitan urban limit and designated as a future development zone. It also directed the removal of the Notice of Requirement.[4]

15. The Court's decision led the Auckland Council to include Puketāpapa as Future Urban Zone in the Proposed Auckland Unitary Plan issued in 2013.

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4 *Gavin H Wallace Ltd v Auckland Council* [2012] NZEnvC 120; and *Gavin H Wallace Ltd v Auckland Council* [2012] NZEnvC 283.

16. In 2016, the Wallace family sold their interest in Puketāpapa to Fletcher Residential Limited (**FRL**).

Waitangi Tribunal and Treaty of Waitangi settlements for historical claims

17. The Waitangi Tribunal addressed the confiscation of Ihumātao when it considered the Manukau Harbour claim in 1985. The Tribunal described the invasion of the Waikato as a direct violation of the Treaty of Waitangi, against Tainui people who never rebelled as claimed by the Crown.[5] It went on to explain the extent of land confiscated by the Crown from Manukau and Waikato Māori, which the Crown had also justified on grounds of rebellion. Referring to land at Māngere, Pukake and Ihumātao, the Tribunal said:[6]

> The last three confiscations in this list totalling 3700 acres were taken from the people living on the three marae mentioned by Sir John Gorst. It was on one of these very marae, at Ihumatao, that the Tribunal held its sittings. It seems that not only were the inhabitants attacked, their homes and property destroyed and their cattle and horses stolen, but then they were punished by confiscation of their lands for a rebellion that never took place.

18. Settlements for historical grievances, such as raupatu (land confiscation), may include the return of Crown-held land in which iwi have an interest, along with monetary and cultural redress. Such settlements do not include the return of privately held land to iwi or hapū, and the Waitangi Tribunal is precluded by its statute from making recommendations with respect to privately held land.[7]

19. In 2014, the Crown reached a Treaty settlement with a collection of 13 Auckland-based iwi and hapū, known as Ngā Mana Whenua o Tāmaki Makaurau or the Tāmaki Collective.[8] That Collective included Te Ākitai Waiohua, Ngāti Tai Ki Tāmaki, Ngāti Te Ata, Ngāti Tamaoho, and Te Kawerau ā Maki.[9] This settlement addresses the shared interests of the members of the Tāmaki Collective in maunga and lands within Tāmaki Makaurau. Specifically, it vests ownership of 14 maunga around central Auckland in the Tāmaki Collective, to be held on trust by the Tūpuna Tāonga a Tāmaki Makarau Trust.[10] It does not settle historical Treaty claims. Settlement of the historical claims of the iwi and hapū of the Tāmaki Collective over Tāmaki Makaurau either has been or will be made through specific settlements.

20. Ihumātao is situated within the areas of interest of Waikato-Tainui and the Wai-o-Hua groups. In 1995, the Crown reached a Treaty settlement with Waikato-Tainui for historical raupatu claims, in which it apologised for the invasion, the devastation of property and life, and the crippling effects of confiscation.[11] The redress package totalled some $170 million in returned land and cash assets. Waikato-Tainui has since received an additional $190 million pursuant to relativity clauses in their settlement. Through the 1995 Waikato-Tainui settlement, the Crown acknowledged

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5 Waitangi Tribunal *Report of the Waitangi Tribunal on the Manukau Claim* (Wai 8, July 1985) at 17.

6 At 18.

7 Treaty of Waitangi Act 1975, s 6(4A).

8 Ngā Mana Whenua o Tāmaki Makaurau Collective Redress Act 2014. The 13 iwi and hapū are: Ngāi Tai ki Tamaki, Ngāti Maru, Ngāti Paoa, Ngāti Tamaoho, Ngāti Tamatera, Ngāti Te Ata, Ngāti Whanaunga, Ngāti Whatua o Kaipara, Ngāti Whatua Orakei, Te Ākitai Waiohua, Te Kawerau ā Maki, Te Patukirikiri, and Te Rūnanga o Ngāti Whatua.

9 Section 9.

10 The Tūpuna Tāonga a Tāmaki Makarau Trust comprises 6 representatives from the Tāmaki Collective and 6 representatives from Auckland Council.

11 Waikato Raupatu Claims Settlement Act 1995; and Deed of Settlement between Her Majesty the Queen and Waikato-Tainui 1995, cl 3.

land at Ihumātao was confiscated under the New Zealand Settlements Act 1863 and apologised to Waikato-Tainui.

21. Ihumātao is also mentioned in the historical accounts contained in settlements for both Ngāti Tamaoho and Te Kawerau ā Maki. Te Kawerau ā Maki reached a settlement in 2015, with a redress package that totalled $6.8 million and included the return of significant forestry land, the right of first refusal to buy certain Crown-owned commercial properties, $300,000 towards the establishment of a marae, and cultural redress such as the vesting of nine significant cultural sites totalling 31 hectares in the iwi.[12] Ngāti Tamaoho reached a settlement in 2018, with a redress package that included $10 million in financial redress, the return of several Crown-owned commercial properties and the opportunity to buy others, and the vesting of three sites of significance in the iwi.[13] Both settlement packages included statutory recognition of each iwi's traditional and cultural associations to sites of special significance and changes to specific geographic and place names.

22. Te Ākitai Waiohua has yet to reach settlement, but has signed an Agreement in Principle with the Crown. As part of their cultural redress, Te Ākitai Waiohua have been offered a statutory acknowledgement over part of Ōtuataua Stonefields Historic Reserve. On settlement, the statutory acknowledgement will recognise Te Ākitai Waiohua's traditional and cultural associations with the area.

23. The groups yet to settle any remaining historical Treaty of Waitangi claims in the Ihumātao area are Ngāti Te Ata and the remaining claims of Waikato-Tainui. Once these are settled, all historical claims in the Ihumātao area will be settled.

Legislative framework for land development

24. Land use and development is governed by several pieces of legislation. The primary legislation governing land use and development is the Resource Management Act 1991 (**RMA**). The RMA is a complex piece of legislation, with a significant number of sections and schedules that apply to all manner of decisions related to the sustainable management of natural and physical resources.[14] It is divided into a number of Parts.

25. Part 2 of the RMA sets out a series of purposes and principles that apply to all decisions made under the Act. The purposes and principles cover a variety of matters related to the promotion of sustainable management of natural and physical resources, and include several specific references to Māori interests. In particular, s 6 of the RMA requires authorities to recognise and provide for:

> (e) the relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga:
>
> (f) the protection of historic heritage from inappropriate subdivision, use, and development:

26. Section 7 requires authorities to have particular regard to kaitiakitanga. Kaitiakitanga is a te reo Māori word typically translated as guardianship, although its full meaning is more complex and nuanced. The RMA defines it as "the exercise of guardianship by

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12 Te Kawerau ā Maki Claims Settlement Act 2015; and Te Kawerau ā Maki Deed of Settlement 2014.

13 Ngāti Tamaoho Claims Settlement Act 2018; and Ngāti Tamaoho Deed of Settlement 2017.

14 Resource Management Act 1991, s 5.

the tangata whenua of an area in accordance with tikanga Māori in relation to natural and physical resources; and includes the ethic of stewardship".[15]

27. Finally, s 8 requires authorities to take into account the principles of the Treaty of Waitangi (Te Tiriti o Waitangi). The Courts have identified three broad principles of Te Tiriti o Waitangi that give rise to expectations on the Crown:

    27.1 Partnership: Both the Crown and Māori have a positive duty to act in good faith, fairly, reasonably and honourably towards the other.[16]

    27.2 Active protection: The Crown has a positive duty to protect Māori property interests and taonga.[17]

    27.3 Redress: Past wrongs give rise to a right of redress.[18]

28. The duties owed by the Crown under these principles are not unqualified. The principles "do not authorise unreasonable restrictions on the right of a duly elected Government to follow its chosen policy".[19] The yardstick is what is reasonable in the circumstances.[20]

29. The remaining parts of the RMA are the means by which pt 2 purposes and principles are achieved. The RMA itself sets some restrictions on the use of land and resources, and allows central and local government to put in place further restrictions. Central government may issue national environmental standards or policy statements with which local government must comply. None currently in place is relevant to the present circumstances. Local authorities are required to have in place Regional and/or District Plans that classify certain activities as permitted, restricted, controlled or prohibited. Permitted activities may take place without the need to obtain consent from the local authority. Restricted and controlled activities require consent. Prohibited activities cannot be undertaken.

30. A local authority has a prescribed ability to notify the public or affected parties of a resource consent application. An application may only be publicly notified in certain circumstances, including if the proposal "will have or is likely to have adverse effects on the environment that are more than minor".[21] An application may only be notified to affected parties in certain circumstances, including if "adverse effects on the person are minor or more than minor (but are not less than minor)".[22] Many resource consents are not notified because the effects on the environment or on affected parties are assessed as being less than minor.

31. When taking a decision on resource consent, the local authority considers all material submitted to it, including submissions from the public (if publically notified) and

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15 Section 2.

16 *New Zealand Māori Council v Attorney General* [1987] 1 NZLR 641 [*Lands case*]; *New Zealand Māori Council v Attorney-General* [1994] 1 NZLR 513 (PC) [*Broadcasting Assets case*]; and *Te Runanga o Te Wharekauri Rekohu v Attorney-General* [1993] 2 NZLR 301 (CA).

17 *Lands case*, above n 16, at 664.

18 At 664–665 and 693.

19 At 665.

20 *Broadcasting Assets*, above n 16, at 517. See also: *New Zealand Māori Council v Attorney-General* [2013] NZSC 6, [2013] 3 NZLR 31 [*Might River Power case*] at [89].

21 Resource Management Act 1991, s 95A.

22 Sections 95B and 95E.

from affected parties (if limited notified). The local authority may decline to grant consent, grant consent, or grant consent with conditions.

32. The RMA scheme puts pt 2 into practice by:

32.1 ensuring decisions under the RMA are made according to the pt 2 purposes and principles; and

32.2 providing the necessary balance between enabling efficient and sustainable development where effects are considered less than minor and ensuring the public and/or affected parties are heard on matters that concern them.

33. If consent is obtained from the local authority, a further authority is required to undertake activities at archaeological sites.[23] The Heritage New Zealand Pouhere Taonga Act 2014 makes it unlawful for any person to modify or destroy, or cause to be modified or destroyed, the whole or any part of an archaeological site without first obtaining an Archaeological Authority from Heritage New Zealand Pouhere Taonga.[24] Heritage New Zealand Pouhere Taonga is the body charged with, inter alia, advocating for the conservation and protection of historic and wāhi tapu areas, to protect those areas and to protect the extent of land surrounding them that is reasonably necessary to ensure their protection and enjoyment.[25] In making any decision, Heritage New Zealand Pouhere Taonga must recognise:[26]

> (a) the principle that historic places have lasting value in their own right and provide evidence of the origins of New Zealand's distinct society; and
>
> (b) the principle that the identification, protection, preservation, and conservation of New Zealand's historical and cultural heritage should—
>
> (i) take account of all relevant cultural values, knowledge, and disciplines; and
>
> (ii) take account of material of cultural heritage value and involve the least possible alteration or loss of it; and
>
> (iii) safeguard the options of present and future generations; and
>
> (iv) be fully researched, documented, and recorded, where culturally appropriate; and
>
> (c) the principle that there is value in central government agencies, local authorities, corporations, societies, tangata whenua, and individuals working collaboratively in respect of New Zealand's historical and cultural heritage; and
>
> (d) the relationship of Māori and their culture and traditions with their ancestral lands, water, sites, wāhi tūpuna, wāhi tapu, and other taonga.

34. Further, a person to whom authority is granted must nominate a person that Heritage New Zealand Pouhere Taonga considers has sufficient skill and competency to carry out the work appropriately and, in the context of Māori sites, has "the requisite competencies for recognising and respecting Māori values" and "has access

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23 Heritage New Zealand Pouhere Taonga Act 2014, s 44.

24 Section 42(1).

25 Sections 3 and 13(c) and (e).

26 Section 4.

to appropriate cultural support".[27] Finally, Heritage New Zealand Pouhere Taonga may set any condition in the Archaeological Authority it sees fit.[28]

Legislative and policy framework for provision of housing

35. Due to the complex and broad-ranging nature of policy concerning both the provision of housing and indigenous rights, the Government emphasises what follows is necessarily a summary only of the relevant legislation, policies and frameworks in the context of housing.

36. The Government accepts the housing situation in New Zealand needs improvement. This position is reflected in its report for the third periodic review to the UN Human Rights Council.

37. Housing is provided by a number of different parties such as private developers (including NGO, Māori- and iwi-led developments), local government, and central government. The Government's response to the housing situation seeks to improve conditions to enable the provision of housing by all those parties. Initiatives outlined in the Government's most recent periodic review report included:

    37.1 Kiwibuild: this is an ambitious programme which aims to deliver 100,000 affordable homes for first home buyers in the next 10 years. The aim is to increase the supply of affordable homes by incentivising property developers to build more affordable, high-quality, starter homes. The Government committed $2 billion to Kiwibuild.

    37.2 Public housing: the Government has committed $500 million to increase the number of public housing homes to 6,400, to enable Housing First to provide an additional 550 places to alleviate homelessness in Auckland City, and to achieve 2,155 transitional housing places to alleviate homelessness across New Zealand.

    37.3 Land for Housing Programme: this programme acquires vacant or underutilised state housing land for to develop housing for first home buyers.

    37.4 The Healthy Homes Guarantee Act 2017: this Act enables regulations for minimum standards for rental properties, including standards for ventilation, insulation and heating.

    37.5 Reform of the Residential Tenancies Act 1986: this reform aims to improve security of tenure, promote good faith relationships, and ensure appropriate protections are in place.

38. In addition, the Government is committed to ensuring equitable housing outcomes for Māori. To that end, the Government continues to take further steps to develop legislation to address housing needs, as well as ensuring that housing meets the needs of Māori.

39. The first in a series of legislative developments since the periodic review report is the Kāinga Ora—Homes and Communities Bill 142-1 (2019), which had its first reading

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[27] Section 45(2).

[28] Section 52.

in the House of Representatives in March 2019. When enacted, this legislation will create a new Crown entity, Kāinga Ora—Homes and Communities, to deliver on the Government's vision of healthy, secure and affordable homes within diverse and thriving communities. Kāinga Ora will bring together existing housing and development agencies – including Housing New Zealand (which operates public housing) and Kiwibuild – under a single housing development authority. It will oversee the Government's public and affordable housing agenda, both as a landlord and as a leader and coordinator of housing developments. Kāinga Ora will facilitate the Government's priorities across the housing spectrum, as a developer and public housing landlord, maximising the synergies between the two roles. The intention is for Kāinga Ora to lead and coordinate a range of housing and urban development projects, working in partnership with the private sector, iwi and community housing providers.

40. Kāinga Ora will have Māori interests at its core. Clause 4 of the Kāinga Ora—Homes and Communities Bill provides:

> In order to recognise and respect the Crown's responsibility to consider and provide for Māori interests, this Act provides,—
>
> (a) in section 11(1)(b), that the board must ensure that Kāinga Ora–Homes and Communities maintains systems and processes to ensure that, for the purposes of carrying out its urban development functions, Kāinga Ora–Homes and Communities has the capability and capacity to uphold the Treaty of Waitangi (Te Tiriti o Waitangi) and its principles, to understand and apply Te Ture Whenua Māori Act 1993, and to be able to engage with Māori and to understand Māori perspectives:
>
> (b) in section 13(1), that it is a function of Kāinga Ora–Homes and Communities to understand, support, and enable the aspirations of Māori in relation to urban development:
>
> (c) in section 14(1), that Kāinga Ora–Homes and Communities must contribute to the social, economic, environmental, and cultural well-being of current and future generations by—
>
> (i) identifying and protecting Māori interests in land, and recognising and providing for the relationship of Māori and their culture and traditions with their ancestral lands, water, sites, wāhi tapu, and other taonga:
>
> (ii) partnering and having early and meaningful engagement with Māori and offering Māori opportunities to participate in urban development:
>
> (d) in section 20, that Kāinga Ora–Homes and Communities cannot use the exemptions for Housing New Zealand Corporation and its subsidiaries to dispose of land subject to rights of first refusal under Treaty settlement legislation:
>
> (e) in section 24(1)(e), that a [Government Policy Statement] must include the Government's expectations in relation to Māori interests, partnering with Māori, and protections for Māori interests.

41. The Bill requires a Government Policy Statement referred to in paragraph (e) above to be in place by October 2020. Kāinga Ora must give effect to the Statement when performing its functions.

42. The Government is also developing a number of initiatives to ensure wider policies are of benefit to Māori, and to reduce systemic and financial barriers to building on Māori land (which can be difficult to obtain finance and building consents for

because it is held communally and protected against alienation). The new Ministry of Housing and Urban Development has created a new Māori Housing unit to develop a work plan and policies for this work, which will include facilitating and developing bespoke, flexible working partnerships between iwi, Māori groups and government. These partnerships will enable packages of Crown housing investments to be matched with specific whānau (extended family) identified housing projects to deliver new housing supply.

43. In addition, Te Puni Kōkiri – Ministry of Māori Development oversees several initiatives relating to Māori housing within its overarching Māori Development Portfolio investment approach. The principles of the Māori Development Portfolio investment approach are to:

43.1 invest in initiatives where whānau are leading development in their communities to deliver and support intergenerational wellbeing;

43.2 invest in building capability and capacity to support the achievement of whānau, hapū and iwi aspirations;

43.3 co-invest in partnership with the community and with other agencies to maximise outcomes;

43.4 invest strategically, using regional knowledge and evidence to target our investment to where it can make the biggest difference;

43.5 invest in initiatives that promote and encourage the use of te reo me ngā tikanga Māori in everyday situations and settings; and

43.6 leverage other funding mechanisms available to whānau Māori.

44. Policies within this approach include (inter alia) the Māori Housing Network and Te Ara Mauwhare – Pathways to Home Ownership.

45. Te Ara Mauwhare – Pathways to Home Ownership identifies, trials, and evaluates innovative approaches to assist low to median income whānau who cannot purchase their own home using current purchase mechanisms. Models to be trialled include shared equity, rent-to-buy, and other innovative models in a papakāinga context.

46. The Māori Housing Network supports individuals, whānau, hapū, iwi and rōpū with information, advice and practical support to improve and develop whānau housing. The Network:

46.1 works alongside whānau in their communities to envisage what can be achieved through a housing kaupapa such as knowledge about developing a home, understanding finance and infrastructure, and links with whānau enterprises;

46.2 invests in whānau and/or community-led projects to restore the quality of sub-standard housing by repairing whānau homes; and

46.3 invests in whānau and/or community-led papakāinga developments, including infrastructure support and capability development, potentially for some larger-scale projects.

47. The Network's current investment priorities are:

47.1 Repairing sub-standard houses with grants to support community-led repair programmes of whānau-owned homes, grants to help an individual whānau with urgent repairs, and grants for home maintenance workshops;

47.2 Supporting the development of papakāinga to increase supply of affordable housing in high need communities by providing grants toward planning, project management, infrastructure and construction, and providing grants for workshops about papakāinga development, including home ownership; and

47.3 Building the capability of the Māori housing sector through enabling whānau, hapū, iwi, and rōpū to resolve short and long-term housing problems and advising on support available from other sources.

48. Te Puni Kōkiri's approach is increasingly using an intentional and targeted community-led and community development approach, using housing investment as a vehicle to address other community needs and aspirations. It considers how whānau housing aspiration links to whānau capability and sustainability through, for example, whānau enterprise support and the Whenua Māori Fund (which supports Māori land owners to explore different uses of land). It more systematically connects with other community and government initiatives to support broader wellbeing objectives, including lifting the productive potential of the regions. It seeks to prioritise communities identified through Te Puni Kōkiri regional offices according to whānau and community needs, and the readiness of the rōpū to undertake the projects proposed.

49. These initiatives overseen by Te Puni Kōkiri recognise the different needs and capabilities of different whānau and Māori groups, as well as the need to work across government agencies to realise Māori housing aspirations. Combined, in the year 2018–2019, the Māori Housing Network invested in repairs to 292 whānau homes, building 34 affordable rental homes and supporting infrastructure for 90 house sites on Māori land, and support for 25 groups with papakāinga planning.

50. In addition, Te Puni Kōkiri oversees the Whenua Māori Programme, which establishes regional on-the-ground advisory services in certain areas, the creation of a Whenua Knowledge Hub and website, and provides support for legislative amendments to Te Ture Whenua Māori Act 1993 (the primary legislation governing the use of Māori land).

51. Finally, the Government is taking an active part in the forthcoming Waitangi Tribunal kaupapa (thematic) inquiry into housing services and policy, discussed below. It is hoped the outcomes of the Tribunal inquiry will be useful in informing Government policies in relation to housing services, not just for Māori but for all New Zealanders including migrants, refugees and asylum seekers.

Development of HASHAA

52. The Bill that became HASHAA was introduced in May 2013 in response to critical housing supply and affordability issues in several locations around New Zealand. It is envisaged as a short-term legislative tool to improve housing affordability through

facilitating an increase in land and housing supply in regions or districts with significant supply or affordability issues.[29]

53. HASHAA works via a number steps, some of which apply to the circumstances of this communication. First is the establishment of a Housing Accord (**Accord**) between the Minister and local government.[30] This step provides the parties the opportunity to further define the terms on which they will work together to achieve the purpose of HASHAA in the relevant area.

54. Second is the establishment of special housing areas (**SHAs**) in regions specified in HASHAA as experiencing housing affordability issues. Where there is an Accord, SHAs are designated by Governor-General on the recommendation of the Minister, who has received a request from the relevant local authority.[31]

55. Third are streamlined consenting measures for qualifying developments. Once land is designated an SHA, a developer must still obtain various consents and approvals from the relevant authority. Approval from a local authority must be obtained for plan changes (required for re-zoning land), and resource consent is required for the buildings themselves (required for particular residential development proposals, including subdivision and certain types of buildings). HASHAA provides streamlined measures for obtaining the necessary approvals and consents, but only to qualifying developments. These measures include limiting the category of persons to whom the local authority must provide limited notification of the plan change or resource consent,[32] restricting appeals to certain parties,[33] and restricting the availability of judicial review to parties who have exhausted their appeal rights.[34] However, in recognition of the importance of plan changes in particular, HASHAA requires the relevant authority to hold a hearing to receive oral submissions from notified parties, if those parties have indicated they wish to be heard.[35] The process for obtaining an Archaeological Authority is not affected by HASHAA.

56. In recognition of the need to balance the demand for more affordable housing with the competing rights of others, several constraints are incorporated into HASHAA. One limiting factor is that the streamlined consent measures are only available to qualifying developments. To be classified as such, a qualifying development must meet certain criteria, in particular that the development contains a prescribed percentage of affordable homes.[36] This reflects the Government's desire to fulfil the right to adequate housing through facilitating efficient development, while not removing the appropriate RMA processes for other developments that would not provide affordable housing.

57. Another constraint is the inbuilt time-limit mechanisms. First, SHAs are automatically disestablished after a set period, which means developers have a limited window within which to make use of the streamlined consent provisions in

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29 Housing Accords and Special Housing Areas Act 2013, s 3 (purpose).

30 Sections 10 and 11.

31 Section 17.

32 Section 29 and 67.

33 Sections 78 and 79.

34 Section 80.

35 Section 67.

36 Section 14.

HASHAA.[37] Secondly, HASHAA contains self-repealing mechanisms: provisions relating to designating SHAs will automatically repeal on 16 September 2019, and the remainder of the Act will automatically repeal on 16 September 2021.[38] This means two things. First, no more land can be designated as an SHA from 16 September 2019. Secondly, existing SHAs will lose their SHA status and developers cannot make use of the streamlined consent provisions after 16 September 2021 – they must instead revert back to the process contained in the RMA. The time-limited nature of the legislation reflects the Government's view that housing affordability needs to be addressed as a matter of urgency, but that other mechanisms in development will start to deliver increased land and housing supply in the medium and long-term. This too reflects the Government's desire to act quickly to progress towards fulfilling the right to adequate housing while restricting the extent to which the rights of others might be impacted.

58. After it was introduced, the Bill was sent to the Social Services Select Committee, which sought and received submissions from the public over a two-week period. The Committee received 64 written submissions and heard 40 oral submissions. Submitters included those representing Māori interests, such as Tainui Group Holdings,[39] the Independent Māori Statutory Board, and Te Rūnanga o Ngāi Tahu.[40] Submitters generally supported the intention of the Bill to streamline planning processes to facilitate an increase in land and housing supply. Some submitters raised issue with aspects of the Bill relating to appeal rights and to Māori interests – the latter specifically with respect to consultation on designation decisions.

59. The Ministry of Business, Innovation and Employment prepared a departmental report on the Bill. It noted the Bill did not expressly require consultation with iwi in relation to designating a special housing area, and recorded submissions received from the public to that effect. The report noted, however, two things. First, the RMA itself provides for notification of resource consent only if affects are minor or more than minor (and not less than minor). Secondly, the Minister would need to engage with local authorities to obtain the necessary information before making a decision on designation, and local authorities would need to comply with their usual decision-making processes in making any recommendation on designation to the Minister. Local authorities have detailed and specific requirements to consult under the Local Government Act, which ensure Māori are consulted where their interests are at issue. HASHAA does not override those requirements. The Ministry concluded, therefore, that it was not necessary to build into the Bill any additional consultation requirements with respect to designation decisions.

60. Further, in respect of plan change and resource consent decisions, local authorities remain bound by pt 2 of the RMA which, as noted above, expressly requires them to recognise and provide for the relationship of Māori and their culture and traditions with their ancestral lands, and for the protection of historic heritage from inappropriate development. Despite the restrictions contained on the parties who

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37 Section 18.

38 Section 3.

39 Tainui Group Holdings is owned by the Waikato Raupatu Lands Trust, which was set up to administer the Waikato-Tainui Treaty Settlement package. The Trust represents over 76,000 members of Waikato-Tainui in the wider Waikato region. Tainui Group Holdings invests on behalf of Waikato-Tainui to support the iwi with financial, employment and land opportunities.

40 Te Rūnanga o Ngāi Tahu is the tribal council of Ngāi Tahu, a large iwi based in the South Island of New Zealand. It is the umbrella governance entity that oversees, protects and advances the collective interests of the iwi, including the Ngāi Tahu Treaty Settlement package.

may be notified of any plan change or resource consent applications, the discharge of obligations under pt 2 of the RMA may nevertheless extend to requiring the local authority to obtain evidence of the views of other affected parties – including, in particular, Māori.

61. HASHAA came into force in September 2013. Due to the self-repealing mechanisms in HASHAA, all SHAs designated in the Auckland region, including Puketāpapa, have since been disestablished.

Designation of Ihumātao as SHA 62

62. The Minister and Auckland Council entered into an Accord (the **Auckland Housing Accord**) in October 2013. The Auckland Housing Accord set out a number of matters to which it would have regard in assessing qualifying developments. Auckland Council also produced a supplementary set of criteria to assess applications for SHA designation requests. That set of criteria included matters such as capacity of infrastructure, location, affordability, demand and optimal investment. It also included the views of iwi.

63. The Wallace family in conjunction with FRL made a request to Auckland Council that Puketāpapa be designated an SHA in late 2013. Auckland Council considered this request, alongside many other potential SHA sites, over the following six months. During that six months, Auckland Council undertook the following:

63.1 a Māngere-Ōtāhuhu Local Board workshop in November 2013;[41]

63.2 a Māngere-Ōtāhuhu Local Board meeting on 14 March 2014;

63.3 a combined Māngere-Ōtāhuhu Local Board and Auckland Development Committee workshop on 31 March 2014;

63.4 two formal Committee meetings on 2 and 14 April 2014; and

63.5 a meeting of the Auckland Council Governing Body on 1 May 2014.

64. In respect of Māori specifically, Auckland Council undertook the following:

64.1 sent letters to hapū and iwi representatives about the SHA process from July 2013 and regularly throughout the designation process;

64.2 held a special hui on 18 February 2014, to which Te Ākitai Iwi Authority, Te Kawerau Iwi Tribal Authority and Makaurau Marae Māori Trust were invited to attend, but only Makaurau Marae representatives did so;

64.3 established and attended the Mana Whenua Kaitiaki Forum;[42] and

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41 Local boards are part of local government in the Auckland region, providing governance at the local level within Auckland Council. They enable democratic decision making by, and on behalf of communities within the local board area. There are 21 local boards with between five and nine members elected to each board (149 local board members in total). Local boards are charged with decision-making on local issues, activities and services, and provide input into regional strategies, policies, plans and decisions. The area Māngere-Ōtāhuhu Board is responsible for is bound by the Manukau Harbour and the Tamaki Estuary. The area includes the coastal township of Māngere Bridge, the Māngere and Ōtāhuhu town centres, the Favona and Māngere East town centre and suburbs. It also includes Ihumātao and the Ōtuataua Stonefields Historic Reserve.

64.4 reviewed the consultation undertaken by the organisations requesting the SHA designation.

65. Te Wai o Hua o Ihumātao are understood to be a sub-group of the hapū and iwi that were informed of the process and invited to the special hui (items 64.1 and 64.2 above), and the hapū and iwi that were consulted by FRL (item 64.4). Te Wai o Hua o Ihumātao are also understood to be a sub-group of the hapū and iwi represented by the Mana Whenua Kaitiaki Forum.

66. In Auckland Council's internal discussions regarding possible sites for SHAs, reference to Puketāpapa is accompanied by comment that key aspects of any designation decision would involve consideration of the papakāinga and would need to provide appropriate housing with strong associations to Ōtuataua Stonefields and heritage aspects.

67. Auckland Council's due diligence records early dialogue with Te Ahiwaru and Te Kawerau ā Maki, both of which expressed strong concerns about designating Puketāpapa an SHA. This led Council staff to record that there were "significant iwi concerns" in relation to an SHA at Puketāpapa.

68. However, further consultation was initiated with Te Ahiwaru, Te Ākitai Waiohua Iwi Authority, and Te Kawerau Iwi Tribal Authority. Meetings between representatives of FRL and Te Ākitai, and FRL and Te Kawerau ā Maki occurred between April and May 2014, which informed Auckland Council analyses. Auckland Council sought further assurances of the consultation FRL intended to undertake in the future. The assurances Auckland Council received led it to record that FRL intended to, in consultation with Te Ākitai Waiohua and Te Kawerau ā Maki, identify relevant and significant Māori cultural associations within the area, including wāhi tapu, as the proposed development progressed.

69. Further, Auckland Council undertook an express assessment of the impact on Māori with respect to the SHA scheme in its entirety. It noted its views had been informed by the Tāmaki Māori Housing Forum,[43] the Mana Whenua Kaitiaki Forum, the Independent Māori Statutory Board,[44] and the body of information already held by Auckland Council. It noted concerns raised regarding potential negative effects of urban growth, particularly with respect to water management and effects on cultural or spiritual values. It also noted that SHAs provide an opportunity to mana whenua, illustrated by a number of direct requests for SHA designation made by Māori organisations, three of which had by that stage been designated SHAs.

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42 The Mana Whenua Kaitiaki Forum is a collective of the 19 hapū and iwi authorities in the Auckland region. It was established to advance the Treaty partnership between iwi and local government. The Forum identifies priorities for collective advancement between iwi and central and local government organisations. The hapū and iwi authorities represented are: Ngāti Wai, Ngāti Manuhiri, Ngāti Rehua Ngāti Wai ki Aotea, Te Rūnanga o Ngāti Whātua, Te Uri o Hau, Ngāti Whātua o Kaipara, Ngāti Whātua Ōrākei, Te Kawerau ā Maki, Ngāti Tamaoho, Te Ākitai Waiohua, Ngāi Tai ki Tāmaki, Ngāti Te Ata Waiohua, Te Ahiwaru Waiohua, Waikato-Tainui, Ngāti Paoa, Ngāti Whanaunga, Ngāti Maru, Ngāti Tamaterā and Te Patukirikiri.

43 The Tāmaki Māori Housing Forum was established under the national body Te Matapihi He Tirohanga mō te Iwi Trust. The Trust advocates for Māori housing interests and assists local and central govenrment in developing Māori housing policy. It supports the growth of the sector through existing and emerging regional forums, and providing a platform for sharing high quality resources and information.

44 Independent Māori Statutory Board is a nine-member board that has specific responsibilities and powers under the Local Government (Auckland Council) Amendment Act 2010 to promote significant Māori issues to the Auckland Council. Two Board members sit on each of the council's committees that deal with the management and stewardship of natural and physical resources. The Board provides direction and guidance to the Auckland Council on issues affecting Māori to help improve council responsiveness to Māori.

70. Auckland Council recommended to the Minister that Puketāpapa be designated an SHA in June 2014, along with 43 other sites. This was the third of 10 tranches of recommendations Auckland Council made to the Minister.

71. Puketāpapa was formally designated a SHA 62 on 31 July 2014 by Order in Council.[45] Due to the time-limiting provisions in HASHAA outlined above, the SHA 62 designation has since lapsed.

Consent for subdivision and residential development at Ihumātao

72. In June 2015, prior to the lapsing of the SHA 62 designation, FRL applied under HASHAA's stream-lined process for a plan variation and resource consent for a development at Puketāpapa. The development proposes to subdivide Puketāpapa into 478 dwelling lots in two stages. Resource consent for the building of dwellings on the lots will be sought at a later date.

73. The applications included a detailed summary of consultation undertaken with Māori groups and a detailed assessment of environmental effects, including consideration of both archaeological and cultural effects.

74. The summary of consultation notes that, between May and September 2014, Auckland Council approached 13 iwi groups known to have an interest in Ihumātao and the surrounding area to obtain their input on development at Puketāpapa. These groups were:

74.1 Te Runga o Ngāti Whātua;

74.2 Ngāti Whātua o Ōrakei;

74.3 Ngāti Tai Ki Tāmaki;

74.4 Te Kawerau ā Maki;

74.5 Ngāti Tamaoho;

74.6 Te Ākitai Waiohua;

74.7 Te Ahiwaru;

74.8 Ngāti Te Ata Waiohua;

74.9 Ngāti Poia;

74.10 Ngāti Maru;

74.11 Ngāti Whanaunga;

74.12 Ngāti Tamaterā; and

74.13 Waikato-Tainui.

75. A number of these iwi stated they had an interest in Puketāpapa. Through a self-selecting process, those many of those iwi that registered an interest deferred to the

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45 Housing Accords and Special Housing Areas (Auckland) Order 2013, sch 9AB.

views of Te Kawerau ā Maki and Te Ākitai Waiohua, to make recommendations on their behalf. Ongoing consultation was undertaken, by both Auckland Council and by the FRL with Te Kawerau ā Maki (through Te Kawerau Iwi Tribal Authority and Makaurau Marae Māori Trust) and Te Ākitai Waiohua.

76. As noted above, Te Wai o Hua o Ihumātao is understood to be a sub-group of those with whom Auckland Council and FRL continued to consult.

77. The assessment of cultural effects in the application provided a summary of consultation undertaken with Te Kawerau ā Maki and Te Ākitai Waiohua. In addition, documents submitted in support of the applications included extensive cultural impact assessments authored by Te Kawerau Iwi Tribal Authority (on behalf of Te Kawerau ā Maki) and Te Ākitai Waiohua.

78. Te Kawerau Iwi Tribal Authority outlined Te Kawerau ā Maki's relationship to Ihumātao in detail. It considered the development would have both positive and negative impacts, but supported the development on the condition that certain recommendations were followed. It made the following assessment of the cultural impacts.

78.1 Wāhi tapu:

> The proposed development has both adverse (development in close proximity/on wahi tapu, and the associated effects of increased population, traffic, and pollutants), and potential positive (if the buffer zones are established and were transferred to Mana Whenua – as this will enable rangatiratanga and kaitiakitanga as opposed to the current status) effects to wahi tapu.

78.2 Toanga (treasures)

> The proposed development has adverse (development in close proximity/on/discharging to taonga, and the associated effects of increased population, traffic, and pollutants), potential adverse (if unrecorded Maori archaeology is destroyed), and potential positive (if the buffer zones are established and were transferred to Mana Whenua, and if the papakainga is uplifted/developed in conjunction with the development) effects to taonga.

78.3 Spiritual values

> The proposed development has adverse (development on/discharging to land and water of very high spiritual and cultural value, and the associated effects of increased population, lighting, traffic, and pollutants) effects on spiritual values.

78.4 Wellbeing

> The proposed development has adverse effects (cultural landscape, integrity of papakainga, traffic, noise, vehicle emissions, stormwater discharge, and construction activities), potential adverse effects (housing affordability, road safety), and potential positive effects (if the buffer zones are established and were transferred to [Te Kawerau Iwi Tribal Authority] and Makaurau Marae Māori Trust], if the papakainga is uplifted/developed in conjunction with the development, and if a cultural facility is identified and provided for within the structure plan.)

79. Te Kawerau Iwi Tribal Authority concluded that while the cultural impacts would be numerous, nonetheless the "opportunities for Te Kawerau ā Maki to re-obtain their most important wāhi tapu and taonga, while mitigating other effects are potentially very positive outcomes".

80. Te Kawerau Iwi Tribal Authority recommended:

80.1 FRL continue consultation with Te Kawerau ā Maki on detailed design;

80.2 the use of Te Aranga Design Principles in the development (Te Aranga Design Principles are a set of outcome-based principles founded on intrinsic Māori cultural values that sit within Auckland Council's Auckland Design Manual – Te Puka Hoahoa mō Tāmaki Makaurau);

80.3 extreme caution when undertaking earthworks near wāhi tapu sites;

80.4 two buffer zones to be zoned Public Open Space - Conservation and Green Infrastructure Corridor and title transferred jointly to Te Kawerau Iwi Tribal Authority and Makaurau Marae Māori Trust:

80.4.1 one to protect the cultural and spiritual well-being of the two sacred maunga – Ōtuataua and Puketāpapa; and

80.4.2 one to protect Ihumātao papakāinga;

80.5 specific inward-facing design of the roading layout to mitigate the visual and cultural impact, and protect the integrity of the maunga;

80.6 the inclusion of neighbourhood parks;

80.7 an ecological approach to stormwater, including support for a management plan for the stormwater assets on Māori land;

80.8 an ecological approach to vegetation, with plant selection being undertaken in conjunction with Te Kawerau ā Maki;

80.9 provision for a future cultural facility;

80.10 support for a papakāinga development plan; and

80.11 support Te Kawerau ā Maki to develop and implement a cultural heritage management plan to incorporate naming, planting, cultural design and art, interpretation, cultural monitoring, maintenance, and kaumātua (senior leader) involvement.

81. Te Ākitai Waiohua also outlined its strong connections to Ihumātao. It considered the development would have both positive and negative impacts, but did not oppose the development.

82. Te Ākitai Waiohua stated its main interests are:

82.1 the recognition and acknowledgment of Te Ākitai Waiohua and its history in Tāmaki Makaurau (Auckland);

82.2 the opportunity for Te Ākitai Waiohua to exercise its role as kaitiaki in Tāmaki Makaurau; and

82.3 the ability for Te Ākitai Waiohua to protect and preserve its interests, resources and taonga in Tāmaki Makaurau.

83. Te Ākitai Waiohua recommended:

83.1 the use of Te Aranga Design Principles in the development;

83.2 FRL ensure ongoing participation, consultation and involvement of Te Ākitai Waiohua in all phases of the project, including the provision of karakia (blessings) before earthworks;

83.3 acknowledgement of Te Ākitai Waiohua in names and signage;

83.4 Te Ākitai Waiohua nominate an iwi monitor in areas of significance, with series of particular recommendations if kōiwi are found;

83.5 ecologically and culturally sound design of water management;

83.6 buffer zones to protect the papakāinga and the maunga; and

83.7 preservation and rejuvenation of natural landscapes.

84. FRL considered the recommendations in the cultural impact assessments. In its application, FRL emphasised the consultation process had set the parameters for the design of the development. It pointed to several critical aspects of the design to illustrate this:

84.1 Buffer zones – totalling some 25 per cent of the land area – would be zoned as requested and gifted mana whenua. FRL noted site visits with both Te Kawerau ā Maki and Te Ākitai Waiohua to map areas of significance directly informed the placement and extent of these zones.

84.2 Viewshafts will be retained to protect significant views of the maunga.

84.3 Specific areas on the site would not be built on, including areas of lava caves of significance to mana whenua.

84.4 The design process and features incorporated Te Aranga Design Principles, including the overall planning, as well as entry/gateway design thresholds.

84.5 Te Aranga Design Principles would be progressively implemented throughout the remaining phases.

84.6 The inclusion of design controls that provide for mana whenua input into landscaping and roads.

85. These documents make clear that the development at Puketāpapa will not affect the culturally and archeologically significant Ōtuataua Stonefields Historic Reserve. The development will in fact effectively add to the Reserve with the buffer zones designed to protect sites of significance to iwi. FRL have confirmed that residents of the Puketāpapa development will be instructed on tikanga Māori, including the importance of respecting tangihanga (funeral) processions and cultural activities within the nearby Māori community. In addition, Te Kawerau Iwi Tribal Authority has indicated the agreement between FRL and Te Kawerau Iwi Tribal Authority will see 40 homes set aside for Te Kawerau ā Maki in shared-equity ownership.

86. Notification letters were sent to adjacent land owners pursuant to ss 67 and 29 of HASHAA, including the owners of adjacent Māori land. Concerted efforts were

made to contact owners of adjacent vacant Māori land, including contacting Makaurau Marae Māori Trust and the Māori Land Court, and the deadline for submissions was extended as a result.

87. The applications were considered by the Auckland Accord Territorial Authority (**Authority**), comprised of four independent hearings commissioners and one Local Board member. The Authority held a hearing where it heard from the applicants, Auckland Council planners and experts. It also heard from 13 public submitters, including eight Māori individuals living on adjacent land (who opposed the application), and a representative of Te Kawerau Iwi Tribal Authority and the Makaurau Marae Māori Trust (both of which submitted in support of the application).

88. The Authority considered the relevant issues and how they met the purposes of HASHAA and pt 2 of the RMA. It canvassed landscape, ecological, heritage, cultural, density and infrastructure issues. It considered, inter alia, the following issues were key to whether the proposal ought to be granted consent:

88.1 the hierarchy of archaeological significance of the site in comparison with the Ōtuataua Stonefields Historic Reserve; and

88.2 the cultural and spiritual value to mana whenua of Oruarangi, the urupā, the Ōtuataua Stonefields Historic Reserve, awa (springs), and the use of the land for food gathering and cultural practices.

89. The Authority considered the evidence of three archaeologists, the representative of Makaurau Marae Trust and Te Kawerau Iwi Tribal Authority and the other Māori submitters. The representative of Makaurau Marae Trust and Te Kawerau Iwi Tribal Authority gave evidence that, through consultation with FRL, FRL:

> … came to realise how much this land means to us. The proposal was 520 houses which came down to 480 ... then it agreed to move a fence back by 80 metres which is a sizeable area and that land will come back to us in fee simple. This is the first time since the confiscations that land, including the toe of the maunga, will come back to us.

90. Further, he noted "big changes which had impacted on the balance of the development" had been made in order to accommodate concerns of Māori, including setbacks, height limits, and gardens for cultural harvesting. He stated the proposal would "effectively provide an extension to the existing village and represent more land coming back to the hapū".

91. Other individual Māori submitters were those who were notified as adjacent land owners. They each used template letters as their written submissions which did not indicate their iwi or hapū affiliation, but did indicate that they resided in the Ihumātao papakāinga area. They did not support the application on the basis that, inter alia, they had not been adequately consulted, the development would destroy cultural landmarks, wāhi tapu and archaeological sites, the development would increase density in the area with detrimental environmental and cultural impacts, and would increase surrounding land prices. They indicated their relationships to the land, the importance of wāhi tapu areas and areas for food gathering, and the possibility of kōiwi in the lava caves on the site.

92. As a result of oral evidence from one Māori individual submitter, further archaeological investigation of the extent of lava caves in the development area was undertaken. This revealed the lava caves were limited to the buffer zones.

93. On the basis of the application, reports and submissions, the Authority found that, although the heritage, cultural and archaeological effects were more than minor, the proposal satisfactorily mitigated these effects through the buffer zone and height restrictions.

94. In respect of the plan change application, the Authority concluded:

> 9.2 We have taken account of Part 2 of the RMA in the course of reaching our decision. Overall we have found that the variation, as modified, meets the purpose of the RMA in section 5 as well as the matters to which regard must be paid, or may be paid, in sections 6 to 8 of the Act.
>
> 9.3 The proposed Oruarangi sub-precinct development will provide for the sustainable use of the land concerned and at the same time enable an environmental benefit in terms of the built in protections for the archaeological and heritage items on the land. Along with those, the heritage houses and their curtilage will be protected and a notable tree will be scheduled for protection. Open space areas have been planned as an integral part of the development and will benefit the health and wellbeing of the new community. Walking, cycling and recreation are promoted by the provisions and public access to the coast is provided for. The views of tangata whenua have been incorporated, particularly in the project design and the stormwater management and water design provisions (but not limited to those).

95. In respect of the subdivision and land use application, the Authority concluded:

> 15.1 The provision of affordable housing and comprehensive development of a residential community on the qualifying development site will contribute to and enable the social, economic, and cultural wellbeing of the people and community in this area. We have found that any adverse effects of the development will be adequately avoided, remedied, or mitigated. Overall the proposal has been found to be consistent with the purpose of the RMA.
>
> 15.2 The relevant matters of national importance provided in section 6 of the RMA as they relate to this application are appropriately provided for, particularly the protection of outstanding natural features from inappropriate subdivision, use and development (section 6(b)) and the relationship of Maori and their culture and traditions with their ancestral lands, water, sites waahi tapu and other taonga (section 6(e)). Part 2 of the RMA requires us to consider if this application has recognised and provided for the protection of historic heritage from inappropriate subdivision, use and development, a matter of national importance. Our conclusion on section 6 is that the applicant will satisfy section 6(f) because the lava caves /tubes which may contain koiwi (archaeological site R11/2999) will be set aside from development within the Public Open Space Conservation zone, a historic heritage tree will be protected and the precinct plan and zoning pattern provides for suitable buffer areas from the papakainga and other heritage features on Oruarangi Historic Reserve. …
>
> 15.3 In terms of the relevant 'other matters' set out in section 7 of the RMA have been paid regard and in particular the amenity values of this area will be maintained, the proposal is consistent with the efficient use and development of the site, and no ecosystems will be adversely affected by the proposed subdivision.

15.4 The proposal is consistent with the principles of the Treaty of Waitangi because it has taken account of iwi values and will take active steps to recognise those as part of the development. Consultation with iwi has been undertaken and their views have been integrated into the project design along with the Te Aranga Maori Design principles.

96. The Authority issued its decision granting consent for both the plan change and the subdivision resource consent on 18 May 2016.

97. FRL applied to Heritage New Zealand Pouhere Taonga for an Archaeological Authority. On the basis that FRL's application would satisfy the relevant matters in the Heritage New Zealand Pouhere Taonga Act, an Archaeological Authority was granted. However, it excluded areas of archaeological sites, including lava burial caves, a 19th century house, and parts of the historic stone walls. It also set 10 conditions that required:

97.1 the briefing of all contractors by an approved archaeologist at the start of each stage of works on the possibility of encountering archaeological evidence and what to do if that happens;

97.2 the Archaeological Authority to be exercised in accordance with the management plan attached to the application;

97.3 all earthworks to be monitored by an archaeologist approved by Heritage New Zealand Pouhere Taonga;

97.4 any archaeological evidence encountered to be investigated, recorded and analysed;

97.5 prior to earthworks commencing, the carrying out of an archaeological investigation of the listed archaeological sites in accordance with the research strategy submitted with the application; ·

97.6 Heritage New Zealand Pouhere Taonga to be satisfied with the completion of that investigation and given its written approval before the next stage of works;

97.7 after consultation with tangata whenua and Heritage New Zealand Pouhere Taonga, and subject to Heritage New Zealand Pouhere Taonga's satisfaction, the erection of a public interpretation panel in the application area referencing the findings of investigations under the Authority;

97.8 specific provision for access by and information, notification and reporting to tangata whenua;

97.9 interim reports and updated or submitted site records to Heritage New Zealand Pouhere Taonga; and

97.10 final reports to Heritage New Zealand Pouhere Taonga with copies to tangata whenua, the University of Auckland and the Auckland Museum.

Waitangi Tribunal urgency request and other measures

98. The proposed development has been raised in New Zealand's political fora. The Māngere–Ōtahuhu Local Board wrote to the Auckland Council Governing Body in November 2014, outlining its concerns about SHA 62 and requesting the Council

revoke the SHA designation. The Board's concerns included a range of matters such as infrastructure capacity and the objections of members of Makaurau Marae.

99. At a Council meeting in August 2015, a councillor proposed a vote to revoke the SHA designation following a petition by an advocacy group called Save Our Unique Landscape (**SOUL**). SOUL is comprised of Pākehā and Māori who oppose the development. The Council vote did not reach a majority. The Minister responsible for HASHAA wrote to the Deputy Mayor of Auckland on 13 August 2015, noting that only the Minister could revoke an SHA, and pointing to the limited circumstances in which he could do so under s 16 of HASHAA – most relevantly, when there is no longer a demand for housing within the area. The Minister indicated that such circumstances did not apply at that time and the SHA could not be revoked.

100. In 2016, SOUL petitioned the Social Services Select Committee about the limited consultation in the SHA designation. The Social Services Select Committee found that the development was legitimately zoned and consented after considerable consultation with local Māori.

101. In late 2018, SOUL wrote to the Mayor of Auckland outlining their concerns. The Mayor considered the matter in the context of the legislation, judicial and local authority decisions. On 21 January 2019, the Mayor wrote to SOUL reiterating the Council position in alignment with those decisions.

102. The proposed development has also been raised in New Zealand's judicial fora. An appeal against the FRL's archaeological authority was lodged in the Environment Court by two Māori individuals who whakapapa to Makaurau Marae, SOUL, and Nga Kaitiaki Ihumātao Charitable Trust. The appellants argued Heritage New Zealand Pouhere Taonga had failed to preserve and protect wāhi tapu sites, lava caves, and undiscovered archaeological sites. The Environment Court rejected the appeal, stating Heritage New Zealand Pouhere Taonga had duly considered those factors, and appropriately responded to it with conditions in the archaeological authority. The Court also noted FRL's management plan provided for a greater level of protection than required by the archaeological authority, and commended FRL and Te Kawerau ā Maki for taking a constructive approach to each other's interests.[46]

103. Six Māori claimants brought an urgent claim in the Waitangi Tribunal in respect of the development of HASHAA and the designation of Puketāpapa as SHA 62. The claimants are individuals who live close to Makaurau Marae and are members of Ngāti Te Ahiwaru, Te Waiohua, Te Kawerau ā Maki, Waikato-Tainui, and Ngāti Whātua. The Waitangi Tribunal also considered evidence from a representative of Makaurau Marae Māori Trust and Te Kawerau ā Maki in support of SHA 62:[47]

> … the submission of [the] Executive Chair of Te Kawerau Iwi Tribal Authority and Chair of Makaurau Marae Māori Trust [was] in support of the development at Ihumātao. In expressing his support, [he] states that the two bodies that he chairs "represent the people who hold Mana Whenua of Ihumatao and whom reside at Puketapapa Papakainga (Ihumatao Village) which is adjacent to this SHA".

104. The threshold for an urgency hearing requires that claimants would suffer immediate and irreversible prejudice. On the matter of prejudice, the Waitangi Tribunal took

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46 *King v Heritage New Zealand Pouhere Taonga* [2018] NZEnvC 214, [2019] NZRMA 194.

47 Waitangi Tribunal *Decision on an application for an urgent hearing* (Wai 2547, 14 August 2014) at [66].

note of the consultation undertaken with Te Kawerau ā Maki and Te Ākitai o Waiohua and the practical mitigating effects of that consultation. The Tribunal declined to hold an urgent hearing, stating:[48]

> A combination of the evidence that the developers have taken steps to mitigate potential prejudice that may be caused to the claimants at Ihumātao and the absence of a clear argument as to the utility of an urgent Tribunal inquiry in removing the immediate prejudice alleged by the applicants in this case leads to the conclusion that this application has not justified the diversion of Tribunal resources to hear it under urgency.

105. The Tribunal did, however, note that the wider matter of the operation of HASHAA might be addressed in the forthcoming housing policy and services kaupapa inquiry, to address "general concerns about the form, operation and potential effects of the special housing areas legislation".[49]

106. The housing policy and services kaupapa inquiry was formally initiated by the Chairperson of the Waitangi Tribunal on 25 July 2019.[50] In submissions to the Tribunal, counsel for the Crown stated that addressing issues associated with housing is a policy priority for the Government. As noted above, the Government intends to take an active part in the inquiry and anticipates outcomes that will be useful in informing future housing policy.

Previous UN involvement

107. In May 2017, SOUL presented their concerns about Puketāpapa's SHA designation to the Permanent Forum on Indigenous Issues. In its report, the Forum made no observations on those concerns.

108. In August that same year, SOUL presented similar concerns to the UN Committee on the Elimination of all forms of Racial Discrimination during New Zealand's 2017 periodic review. The concluding observations of the Committee on this issue stated:[51]

> Special Housing Area 62
>
> 18. The Committee is concerned by conflicting information regarding consultation with local Maori in connection with the designation of Special Housing Area 62 at Ihumatao on land traditionally and currently occupied by Maori. The Committee notes that this land has been sold to a commercial developer who is required to actively mitigate the effects of development. While noting the State party's position that it adequately consulted and obtained support from Maori authorities regarding the designation, the Committee is concerned by alternate reports that Maori have not had the opportunity to formally take part in decision-making with respect to use of the land (arts 2 and 5).
>
> 19. The Committee recommends that the State party review, in consultation with all affected Maori, the designation of Special Housing Area 62 to evaluate its conformity with the Treaty of Waitangi, the United Nations Declaration on the Rights of Indigenous Peoples and other relevant international standards, and that the State party obtain the free and informed

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48 At [74].

49 At [75].

50 Waitangi Tribunal *Housing policy and services kaupapa inquiry* (Wai 2750, #2.5.9).

51 Committee on the Elimination of Racial Discrimination "Concluding observations on the combined twenty-first and twenty-second periodic reports of New Zealand" CERD/C/NZL/CO/21-22.

> consent of Maori before approving any project affecting the use and development of their traditional land and resources.

109. The Government notes representatives of Te Kawerau Iwi Tribal Authority, the Makaurau Marae Māori Trust and Te Ākitai Waiohua were not present before the Committee and did not have the opportunity to present their point of view.

110. In March 2018, SOUL attended the 63rd session of the UN Committee on Economic, Social and Cultural Rights and contributed to the shadow report on New Zealand. SOUL's concerns were not mentioned in the Committee's report.

Events subsequent to the communication

111. The New Zealand Government acknowledges recent events relevant to the communication, namely the peaceful occupation of Puketāpapa by those protesting its development.

112. In response to these events, the Government has taken several steps to resolve the issue. Government Ministers have visited the site and listened to the concerns of protestors. The Government has offered to facilitate further discussion between the interested parties. After one such discussion on 26 July, the Prime Minister announced the agreement that there would be no building activity on the land while a solution is sought.

OBSERVATIONS AS TO THE MERITS

Summary of the allegations

113. The allegations are:

113.1 Te Wai o Hua o Ihumātao have authority as tangata whenua over Puketāpapa, the whenua (land) subject to proposed development;

113.2 they were inadequately consulted on the decision to designate Puketāpapa a special housing area (SHA 62);

113.3 they were inadequately consulted on the proposed subdivision and residential development at Puketāpapa;

113.4 legal action has not protected their interests;

113.5 the proposed development does not adequately address the need for affordable housing, particularly for Māori; and

113.6 the designation and proposed development risks adverse impact on the landscape, heritage and culture.

Special Rapporteurs' communication

114. The Special Rapporteurs requests the New Zealand Government:

114.1 provide any additional information and/or comments you may have on the allegations;

114.2 provide further information on how the Government seeks to ensure the commercial housing project, with construction of 480 houses, by Fletcher

Living on SHA 62/ Puketāpapa will not undermine the cultural heritage and the rights of Māori;

114.3 provide information on how the Government plans to ensure that the planned housing construction on SHA 62/Puketāpapa contributes to the realisation of the right to housing of the Māori people;

114.4 provide any addition information you have about the consultations undertaken with Te Wai o Hua o Ihumātao regarding the use and development of Puketāpapa;

114.5 provide information on the background of designating Puketāpapa as a special housing area under HASHAA in 2014, as well as the measures that the New Zealand Government has taken to ensure the participation as well as the free, prior and informed consent of the Te Wai o Hua o Ihumātao during this process; and

114.6 explain in detail how the Government seeks to ensure that the HASHAA improves access to adequate, affordable and culturally appropriate housing for all residents, including Indigenous peoples and will not undermine indigenous peoples' rights under the UN Declaration on the Rights of Indigenous Peoples and human rights law.

Government observations

Additional information and/or comments on the allegations

115. The New Zealand Government refers to paragraphs 8–112 above, which provide a detailed summary of the background facts, relevant legislation and Government policy.

How the Government has ensured the development provides for cultural heritage and rights of Māori

116. Te Wai o Hua o Ihumātao allege the development at Puketāpapa risks adverse impact on the landscape, and their cultural and heritage. The Special Rapporteurs raise further concern about inclusive consultation and settlements.

International obligations and jurisprudence

117. Article 27 of the ICCPR provides:[52]

> In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

118. Articles 11, and 26–28 of UNDRIP provide:

> Article 11
>
> 1. Indigenous peoples have the right to practise and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and

[52] See also International Covenant on Economic, Social and Cultural Rights, art 15.

> historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature.
>
> 2. States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs.
>
> Article 26
>
> 1. Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.
>
> 2. Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.
>
> 3. States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.
>
> Article 27
>
> States shall establish and implement, in conjunction with indigenous peoples concerned, a fair, independent, impartial, open and transparent process, giving due recognition to indigenous peoples' laws, traditions, customs and land tenure systems, to recognize and adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources, including those which were traditionally owned or otherwise occupied or used. Indigenous peoples shall have the right to participate in this process.
>
> Article 28
>
> 1. Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent.
>
> 2. Unless otherwise freely agreed upon by the peoples concerned, compensation shall take the form of lands, territories and resources equal in quality, size and legal status or of monetary compensation or other appropriate redress.

119. Further, General Recommendation 23 of the UN Committee on Elimination of Racial Discrimination calls on States to:

> … recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources and, where they have been deprived of their lands and territories traditionally owned or otherwise inhabited or used without their free and informed consent, to take steps to return those lands and territories.

120. The New Zealand Government reiterates its formal statements in supporting UNDRIP, specifically:

120.1 Māori hold a distinct and special status as the indigenous people, or tangata whenua, of New Zealand.

120.2 A unique and important feature of New Zealand's constitutional arrangements is the Treaty of Waitangi, which holds great importance in its laws.

120.3 UNDRIP contains principles that are consistent with the principles of the Treaty of Waitangi and is an affirmation of accepted international human rights and also expresses new, and non-binding, aspirations.

120.4 Where UNDRIP sets out aspirations for rights to and restitution of traditionally held land and resources, New Zealand has, through its well-established processes for resolving Treaty claims, developed its own distinct approach which respects the status of Māori and the importance of their relationship to the land, while also maintaining existing legal regimes of ownership and management.

120.5 Further, where UNDRIP sets out principles for indigenous involvement in decision-making, New Zealand has developed, and will continue to rely upon, its own distinct processes and institutions that afford opportunities to Māori for such involvement. These range from broad guarantees of participation and consultation to particular instances in which a requirement of consent is appropriate.

120.6 Māori have an interest in all policy and legislative matters. Māori have been, and continue to be, active in developing innovative responses to issues with a strong indigenous perspective and in engaging with successive governments on possible paths forward within the framework of the Treaty of Waitangi.

121. Little jurisprudential guidance is found on the application of these rights in a similar context. The Government emphasises the fact- and context-dependent assessment of such rights.

Application to the present facts: protection of cultural heritage at Ihumātao

122. The New Zealand Government submits that it has acted consistently with international obligations, including art 27 of the ICCPR, in terms of the protection of Māori cultural heritage at Ihumātao. The Government submits it has acted consistently with its commitment to arts 11 and 26–28 of UNDRIP as expressed by New Zealand's formal statement of support summarised at paragraph 120 above.

123. The Government acknowledges that the scope for justifying any interference with cultural heritage protection is limited. In circumstances where the social, cultural and economic issues are acute, an appropriate balance must be struck. The appropriate body to determine the best way in which to give effect to these rights in such a context is the responsible Government, which best understands the social, cultural and historical context. In decisions of strong policy content, competing interests and competing views, States ought to be given a significant margin of appreciation in respect of the way in which it meets the obligations and aspirations of the relevant international instrument. The Government submits this is such a case.

124. The relevant decisions made by the Government involve a complex set of interests, including the range of interests specific to Māori, the social, economic and cultural interests of all New Zealanders, commercial interests, and property rights. They arise in the particular historical context of the Treaty of Waitangi, the well-established Treaty of Waitangi settlement programme, and the framework for the relationship between the Government and Māori. They arise also in the present circumstances of a concentrated interest in the provision of housing for everyone, including the particular challenges with respect to housing for Māori. There are competing views,

amongst New Zealanders generally and amongst Māori, on these matters. The Government has determined, in the circumstances particular to New Zealand, the appropriate balance to protect Māori cultural heritage to the best extent possible while also facilitating the supply of adequate housing.

125. The New Zealand Government refers to paragraphs 8–112 above for detail of the factual and legislative background. In particular, it draws attention to the consultation undertaken as part of HASHAA's legislative development, the protections contained in HASHAA by virtue of pt 2 of the RMA, and the results of extensive and ongoing consultation undertaken with Māori with respect to Puketāpapa, which demonstrate the effectiveness of the process. It emphasises that the Waitangi Tribunal – the body which provides guidance to the Government on Treaty issues – declined to consider a complaint with respect to this issue under urgency, due in part to a lack of prejudice.

126. The Bill that became HASHAA underwent the standard process for legislation to be passed under urgency. Public submissions were sought and those received included several from Māori organisations – including Tainui Group Holdings, which invests Treaty settlement funds on behalf of some 76,000 members of the Waikato-Tainui iwi federation, and Te Rūnanga o Ngāi Tahu, which oversees the interests of some 56,000 members of the Ngāi Tahu iwi and their Treaty settlement funds. The concerns raised by these submitters were assessed by both a Select Committee and the Ministry for Business, Innovation and Employment. The Government considers the concerns were adequately addressed by the way in which the legislation operated in tandem with the RMA and the Heritage New Zealand Pouhere Taonga Act (outlined in detail above), and in light of the balance required between the rights of Māori and the right to housing.

127. The protections contained in HASHAA have resulted in the extensive consultation undertaken with several Māori groups with established mana whenua status at Ihumātao. That consultation has in turn led to the modification of the proposed development to protect areas of importance to local Māori. At the request of Māori, this protection includes:

127.1 the inclusion of a buffer zone (some 25 per cent of the land area at Puketāpapa) to protect important cultural sites, including wāhi tapu, the foot of the maunga, lava caves and kōiwi;

127.2 the protection of the buffer zone by zoning it as public open space;

127.3 the gifting of the buffer zone to vest in Te Kawerau Iwi Tribal Authority;

127.4 protected viewshafts of the maunga from Ihumātao papakāinga;

127.5 a reduction in the number of houses, a reduction in height, and a reduction in the area on which they will be developed;

127.6 the incorporation of Te Aranga Design Principles in the subdivision and in future development phases;

127.7 the inclusion of design controls that provide for mana whenua input into landscaping and roads;

127.8 cultural instruction for new residents on tikanga Māori;

127.9 provision for a future cultural facility; and

127.10 40 homes set aside for Te Kawerau ā Maki in shared-equity ownership.

128. Importantly, the proposed development is confined to an area that has been intensively farmed for 150 years and contains no identified areas of wāhi tapu or archaeological sites of significance. Ōtuataua Stonefields Historic Reserve – which contains many identified sites of significant archaeological and cultural importance to Māori, including the remains of ancestors – remains protected. Moreover, the protection of the Reserve is enhanced from a practical and cultural perspective by the buffer zones incorporated into proposed development. The buffer zones are the direct result of consultation with Māori undertaken pursuant to pt 2 of the RMA. The New Zealand Government submits this illustrates the pt 2 protections working as intended.

129. The Government submits this illustrates the legislative regime working as intended to protect the interests of Māori while enabling developers to address critical housing needs. The Government submits this also illustrates the extent to which the right of Māori to develop their cultural heritage, recognised in art 11 of UNDRIP, has been respected in this process. The Government, through implementing a legislative matrix that ensures Māori views on their heritage and culture is a key component of decision-making, has taken effective measures to protect that right and taken steps to ensure the realisation of the right to cultural life for Māori, including steps necessary for the conservation of Māori culture, as per art 31 of UNDRIP and art 15 of the ICESCR respectively.[53]

130. The Government also submits that, in combination with the broader legislative and policy matrix, these matters show consistency with the guiding principles on business and human rights with respect to preventing human rights abuses by third parties.[54]

Application to the present facts: Treaty settlements

131. The New Zealand Government submits it has acted consistently with international obligations, including art 27 of the ICCPR. The Government submits it has acted consistently with its commitment to arts 11 and 26–28 of UNDRIP, in terms of the protection of Māori rights to their traditional lands and redress where those lands have been taken without consent, as expressed by New Zealand's formal statement of support summarised at paragraph 120 above.

132. The New Zealand Government refers to paragraphs 8–112 above for detail of the factual and legislative background. In particular, the Government highlights New Zealand's unique framework of the Treaty of Waitangi, which provides a foundation for relationships between Māori and the Government, and the foundation for its approach to settlements and redress.

133. Further, the Government notes that the Ngā Mana Whenua o Tāmaki Makaurau Collective Redress package, and the iwi-specific settlements either completed or in

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53 See also General Comment 21 of the Committee on Economic, Social and Cultural Rights (E/C.12/GC/21, 2009) at [50], which recalls that States have the obligation to respect and protect cultural heritage in all its forms: "Cultural heritage must be preserved, developed, enriched and transmitted to future generations as a record of human experience and aspirations. Such obligations include the care, preservation and restoration of historical sites, monuments, works of art and literary works, among others".

54 "Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework" UNHRC Res 17/4, 16 June 2017.

train, highlight to the broader community the local iwi and hapū interests in the area. The settlement process thus enables both local authorities and private developers such as FRL to engage with local iwi and hapū that have interests in the area. This in turn facilitated the extensive consultation of Māori outlined above, and the consequential modifications to the design at their request to protect their interests. The Government submits this is indicative of its policy and legislative framework working as intended to protect Māori interests.

134. The New Zealand Government has yet to conclude Treaty settlements for historical claims with all iwi and hapū that have an interest in the Ihumātao area. The current status of settlements is detailed at paragraphs 17 to 23 above. The Government confirms its intention to complete historical settlements in the utmost good faith and consistently with its international obligations and formal statement of support for UNDRIP.

How the development contributes to the realisation of the right to housing for Māori

135. Te Wai o Hua o Ihumātao allege the proposed development at Puketāpapa does not adequately address the need for affordable housing, particularly for Māori.

International obligations and jurisprudence

136. The right to adequate housing is recognised in the Universal Declaration of Human Rights and in the ICESCR. Article 11(1) of the latter provides:

> The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.

137. Article 2(2) of the ICESCR provides for the exercise of any right under the Covenant without discrimination of any kind.[55]

Application to the present facts

138. The New Zealand Government submits that it has acted consistently with international obligations, including arts 2(2) and 11(1) of the ICESR, in terms of the right to housing, and specifically the right to housing for Māori.

139. The New Zealand Government refers to paragraphs 8–112 above for detail of the factual and legislative background. In particular, the Government highlights the legislative and policy matrix in place for the provision of housing across New Zealand, and the specific consideration given to the provision of housing for Māori.

140. The Government accepts the housing situation in New Zealand needs improvement, and is taking active and appropriate steps to address this issue. Moreover, the Government recognises the specific needs of Māori with respect to housing, which it is also taking active and appropriate steps to address.

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[55] Also reflected in art 5 of the Convention on the Elimination of All Forms of Racial Discrimination. See also General Comment 4 of the Committee on Economic, Social and Cultural Rights, which defines seven fundamental characteristics of the right to adequate housing, including accessibility and cultural adequacy (E/1992/23, 1991).

141. The provision of adequate housing for Māori is not limited to this development, and the Government submits the steps it is taking to address housing for Māori across the country adequately addresses these needs. Because the provision of housing touches on many policy areas, the Government has taken and continues to take a multifaceted approach to the issue. It has set legislative conditions to enable the private sector to develop affordable housing. It has developed policy and legislative tools to provide public housing. All of these measures address the needs of Māori in a manner appropriate to the relevant social and policy dimensions in New Zealand.

142. In respect of this particular development, the Government highlights the component of affordable homes to be built at Puketāpapa as well as the agreement between FRL and Te Kawerau Iwi Tribal Authority to set aside homes for Māori. These factors are the result of the legislation and policy measures put in place by the Government. These homes will be accessible. As part of the criteria of the resource consent, the development must provide a proportion of affordable housing, which Māori are entitled to buy. In addition, Te Kawerau Iwi Tribal Authority indicates FRL has agreed to set aside 40 homes within the development for Te Kawerau ā Maki people. Moreover, these homes will be culturally adequate: they will be provided within a development that, due to consultation with Māori during the SHA consent process, has integrated Māori cultural values into the core of its design.

Consultation with mana whenua with respect to HASHAA decisions

143. Te Wai o Hua o Ihumātao allege they were inadequately consulted on the development of HASHAA, on the decision to designate Puketāpapa an SHA and on the proposed development.

International obligations and jurisprudence

144. Articles 18 and 19 of UNDRIP provide:

> Article 18
>
> Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.
>
> Article 19
>
> States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.

Application to the present facts

145. The New Zealand Government submits that it has acted consistently with international obligations in terms of the participation of Māori with respect to HASHAA decisions. The Government submits it has acted consistently with its commitment to arts 18 and 19 of UNDRIP as expressed by New Zealand's formal statement of support summarised at paragraph 120 above.

146. The New Zealand Government reiterates its comments at paragraphs 123 and 124 above and refers to paragraphs 8–112 for detail of the factual and legislative background. In particular, the Government highlights the seeking and consideration of public submissions on the Bill that became HASHAA, the extensive and ongoing

consultation undertaken with Māori with respect to Puketāpapa, and the outcomes of that consultation which demonstrate the effectiveness of the process.

147. Public consultation with respect to the development of HASHAA followed the standard approach for legislation required to be passed under urgency to address a matter of critical and national importance. Public submissions were sought, and included several from Māori groups. Their concerns were considered by both a Select Committee and the Ministry for Business, Innovation and Employment. The concerns raised were adequately addressed by the way in which the legislative matrix operates and in the context of tension between the rights of Māori and the need to address to housing supply issues.

148. The adequacy of the operation of the legislative matrix is demonstrated by its application to Puketāpapa. Extensive and ongoing consultation of mana whenua was undertaken which resulted in a designation and development that is consistent with the cultural and housing interests of Māori.

How the Government seeks to ensure appropriate housing generally without undermining UNDRIP

149. The Special Rapporteurs request a response to how the New Zealand Government ensures HASHAA addresses the parameters of the right to housing without undermining the rights recognised by UNDRIP.

International obligations and jurisprudence

150. As noted above, the right to adequate housing is recognised in the Universal Declaration of Human Rights and in art 11 of the ICESCR. The relevant provisions of UNDRIP are also noted above at paragraph 118.

Application to the present facts

151. The New Zealand Government submits that it has acted consistently with international obligations, including arts 2(2) and 11(1) of the ICESR in terms of the right to housing. The Government submits it has acted consistently with its commitment to UNDRIP, as expressed by New Zealand's formal statement of support summarised at paragraph 120 above.

152. The New Zealand Government refers to paragraphs 8–112 for detail of the factual and legislative background. In particular, the Government highlights the legislative and policy measures currently in place and in development noted at paragraphs 35–61. However, due to the strong social policy content and complex and broad-ranging nature of both the provision of housing and indigenous rights, the Government emphasises this is necessarily a summary only of the relevant legislation, policies, frameworks, and analyses in the context of housing.

153. As noted above, the Government accepts the housing situation in New Zealand needs improvement. It is taking active and appropriate steps to address this issue. Moreover, the Government recognises the need to balance its approach in light of potential effects on the rights of Māori.

154. The New Zealand Government reiterates its comments at paragraphs 123 and 124 above. The rights and interests at issue in these circumstances are very important and are sometimes in tension. Due to the strong policy content involved, a significant margin of appreciation ought to be afforded to the responsible Government (that best understands the social, cultural and historical context) in

respect of the way in which it meets the obligations and aspirations of the relevant international instrument.

155. The provision of housing touches on many policy areas. The rights of Māori similarly touch on many policy areas. The Government has taken and continues to take a multifaceted approach. It has determined that the combination of policy initiatives and legislative tools outlined above is the best way in which to balance the need for additional housing with the rights of Māori.

156. HASHAA is one of several legislative and policy tools to facilitate affordable housing. It is a short-term measure, designed to alleviate the housing situation in the short-term. It requires a consideration of Māori cultural concerns through reference to the RMA.

157. Other complementary measures – current and in train – address similar policy concerns, with similar sensitivity to Māori rights to culture, to development and to housing. These measures include (but are not limited to) Kiwibuild, Kāinga Ora, investment in public housing, Māori Housing Network, Te Ara Mauwhare – Pathways to Home Ownership, and the Whenua Māori Programme. Taken together, these measures demonstrate the Government is meeting its international obligations and aspirations relating to the rights of Māori and the right of everyone (including Māori) to adequate housing.

Additional observations

158. In 2010, the special rapporteur on the rights of indigenous peoples reported that New Zealand had "made significant strides to advance the rights of Māori people" and that the Treaty settlement process "is one of the most important examples in the world of an effort to address historical and ongoing grievances of indigenous peoples". However, the special rapporteur noted "extreme disadvantage in the social and economic conditions of Māori people" and, despite progress, "more remains to be done to achieve the increased social and economic parity".[56]

159. Further, in 2018, the Committee on Economic and Social Rights raised access to adequate housing as part of New Zealand's fourth periodic review, commenting:[57]

> … disadvantaged groups and individuals, notably Maori and Pasifika families and persons with disabilities are more likely to experience severe housing deprivation, including overcrowded conditions. The Committee is also concerned that housing costs have significantly increased, leading to housing becoming unaffordable for many families and thereby increasing homelessness.

160. The New Zealand Government accepts the housing situation needs improvement and takes such concerns seriously. This response has outlined, in summary only, a range of legislative and policy steps taken by the Government to address the concerns highlighted by the Special Rapporteurs and the Committee on Economic and Social Rights insofar as they relate to the right to adequate housing for everyone and, in particular, for Māori.

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[56] James Anaya *Report of the Special Rapporteur on the rights of indigenous peoples: The situation of Māori people in New Zealand* A/HRC/18/35/Add.4.

[57] At [39].

CONCLUSION

161. For the above reasons, the New Zealand Government is confident it has upheld its obligations under the ICCPR, the ICESCR and CERD, and its commitments under the UNDRIP.

162. In light of recent events at Puketāpapa, the Government respectfully requests the opportunity to provide supplementary information should these events develop whilst the Special Rapporteurs are seized of the matter.

163. In addition, due to the broad-ranging and complex matters this communication involves, the Government respectfully requests the right to provide comment on a draft of the Special Rapporteurs' decision. The Government will also be available and willing to answer any further questions the Special Rapporteurs have in respect of this matter.

APPENDICES

Maps

Māngere-Ōtāhuhu Local Board area

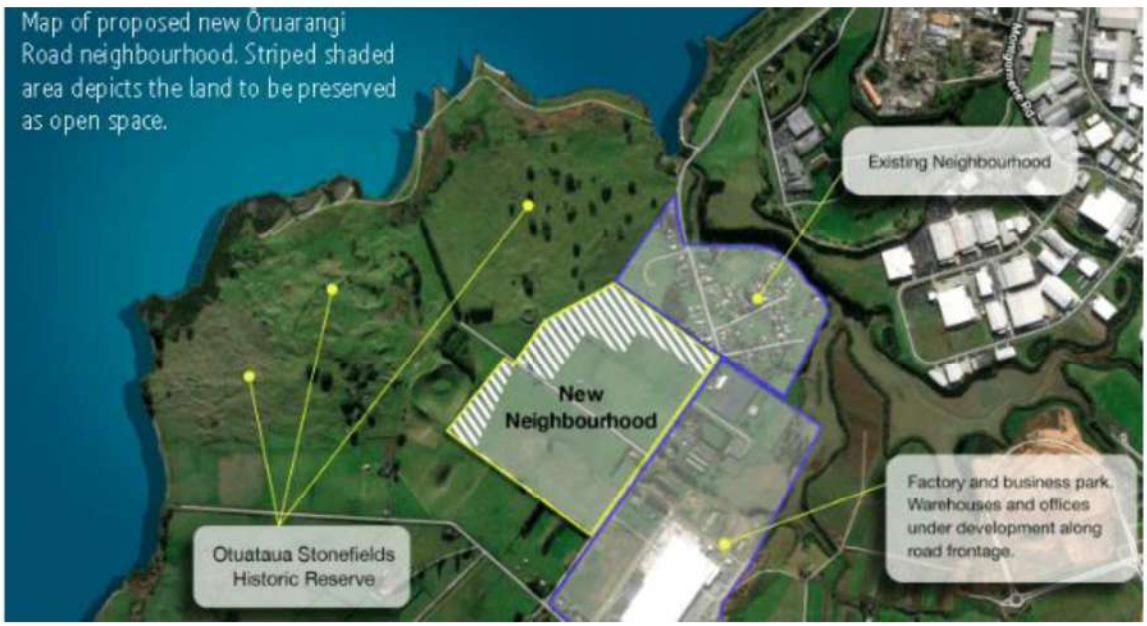
Ihumātao/Puketāpapa area circled in red

Plan of Puketāpapa and Ihumātao papakāinga /village

Puketāpapa outlined in red (image prepared by Te Kawerau Iwi Tribal Authority)

Plan of Puketāpapa and Ōtuataua Stonefields Historic Reserve

Puketāpapa site outlined in yellow and the area set aside as a buffer zone in white striped shading (image prepared by Fletchers Residential Limited)



Stakeholders

Iwi and hapū with interests in the area

Makaurau Marae (often represented by Makaurau Marae Māori Trust)
Ngāti Maru
Ngāti Poia
Ngāti Tamaoho
Ngāti Tai Ki Tāmaki
Ngāti Whātua o Ōrakei
Te Ahiwaru
Te Ākitai Waiohua (often represented by Te Ākitai Waiohua Iwi Authority)
Te Kawerau ā Maki (often represented by Te Kawerau Iwi Tribal Authority)
Te Runga o Ngāti Whātua
Ngāti Tamaterā
Ngāti Te Ata Waiohua
Ngāti Whanaunga
Waikato-Tainui

Auckland Council

Auckland Accord Territorial Authority	A panel of hearing commissioners and local board members specially constituted to consider applications and hold hearings under HASHAA.
Auckland Council	Umbrella term for the local government bodies of Auckland: the Governing Body and Local Boards.
Auckland Council Development Committee	Now the Auckland Council Planning Committee. This Committee guides the physical development and growth of Auckland. It focuses on land use planning, housing and the appropriate provision of infrastructure and strategic projects associated with these activities. All Governing Body councillors are members, as are two members of the Independent Māori Statutory Board.
Auckland Council Governing Body	Local government body that makes region-wide strategic decisions, made up of 20 elected councillors.

Auckland Council Local Boards	Local Boards are part of local government in the Auckland region. They provide governance at the local level within Auckland Council. They enable democratic decision making by, and on behalf of communities within the local board area. There are 21 local boards in Auckland with between five and nine members elected to each board (149 local board members in total). Local boards are charged with decision-making on local issues, activities and services, and provide input into regional strategies, policies, plans and decisions.
Māngere-Ōtāhuhu Local Board	The Local Board that has responsibility for the area including Ihumātao and the Ōtuataua Stonefields Reserve. It is comprised of seven elected members.

Other stakeholders

Fletcher Residential Limited	The developer of the proposed residential complex at Puketāpapa / SHA 62.
Heritage New Zealand Pouhere Taonga	The national historic heritage agency tasked with protecting and managing heritage places, buildings and objects. It is the body that considers applications for Archaeological Authorities to undertake work at archaeological sites.
Independent Māori Statutory Board	A nine-member board that has specific responsibilities and powers under the Local Government (Auckland Council) Amendment Act 2010 to promote significant Māori issues to the Auckland Council. Two Board members sit on each of the council's committees that deal with the management and stewardship of natural and physical resources. The Board provides direction and guidance to the Auckland Council on issues affecting Māori to help improve council responsiveness to Māori.

Mana Whenua Kaitiaki Forum	A collective of the 19 hapū and iwi authorities in the Auckland region. It was established to advance the Treaty partnership between iwi and local government. The Forum identifies priorities for collective advancement between iwi and central and local government organisations. The hapū and iwi authorities represented are: Ngāti Wai, Ngāti Manuhiri, Ngāti Rehua Ngāti Wai ki Aotea, Te Rūnanga o Ngāti Whātua, Te Uri o Hau, Ngāti Whātua o Kaipara, Ngāti Whātua Ōrākei, Te Kawerau ā Maki, Ngāti Tamaoho, Te Ākitai Waiohua, Ngāi Tai ki Tāmaki, Ngāti Te Ata Waiohua, Te Ahiwaru Waiohua, Waikato-Tainui, Ngāti Paoa, Ngāti Whanaunga, Ngāti Maru, Ngāti Tamaterā and Te Patukirikiri.
Ngā Mana Whenua o Tāmaki Makaurau / Tāmaki Collective	A collective of iwi and hapū with interests in the Auckland region, established by the Ngā Mana Whenua o Tāmaki Makaurau Collective Redress Act 2014. The 13 iwi and hapū are: Ngāi Tai ki Tamaki, Ngāti Maru, Ngāti Paoa, Ngāti Tamaoho, Ngāti Tamatera, Ngāti Te Ata, Ngāti Whanaunga, Ngāti Whatua o Kaipara, Ngāti Whatua Orakei, Te Ākitai Waiohua, Te Kawerau ā Maki, Te Patukirikiri, and Te Rūnanga o Ngāti Whatua.
Ministry of Housing and Urban Development	Ministry of central government concerned with urban development policy, and responsible for the administration of HASHAA.
SOUL / Save Our Unique Landscape	A group of Māori and Pākehā established to prevent development at Puketāpapa.
Tainui Group Holdings	An organisation owned by the Waikato Raupatu Lands Trust, which was set up to administer the Waikato-Tainui Treaty Settlement package. The Trust represents over 76,000 members of Waikato-Tainui in the wider Waikato region. Tainui Group Holdings invests on behalf of Waikato-Tainui to support the iwi with financial, employment and land opportunities.
Tāmaki Housing Forum	The Tāmaki Māori Housing Forum was established under the national body, Te Matapihi He Tirohanga mō te Iwi Trust. The Trust advocates for Māori housing interests and assists local and central government in developing Māori housing policy. It supports the growth of the sector through existing and emerging regional forums, and providing a platform for sharing high quality resources and information.

Te Puni Kōkiri	Ministry of central government concerned with Māori development and policy.
Te Rūnanga o Ngāi Tahu.	The tribal council of Ngāi Tahu, a large iwi based in the South Island of New Zealand. It is the umbrella governance entity that oversees, protects and advances the collective interests of the iwi, including the Ngāi Tahu Treaty Settlement package.
Te Wai o Hua o Ihumātao	Understood to be a sub-group of the Wai-o-Hua groups that have an interest in Ihumātao.

Glossary of Te reo Māori terms

Awa	River, stream.
Hapū	Sub-tribe, clan. This is a smaller but significant unit of political authority in Māori society, made up of several whānau (extended family) groups.
Iwi	Tribe, people. This is the largest unit of political authority in Māori society, usually made up of multiple hapū and often named for a significant tupuna (ancestor).
Kaitiakianga	Guardianship. This is defined in the RMA, s 2 as "the exercise of guardianship by the tangata whenua of an area in accordance with tikanga Māori in relation to natural and physical resources; and includes the ethic of stewardship".
Karakia	Prayer.
Kaupapa	A collective vision, purpose, principles and/or set of values.
Kaupapa inquiry	Thematic inquiry (rather than district or historical inquiry) heard by the Waitangi Tribunal.
Kōiwi	Human remains, skeletal remains.
Mana whenua	The authority of a Māori group over land or territory. This is defined in the RMA, s 2 as "customary authority exercised by an iwi or hapū in an identified area".
Marae	Open space in front of a wharenui (meeting house) where formal greetings and speeches take place. This is often used as an umbrella term to refer to the complex of buildings and open spaces around a wharenui.
Maunga	Mountain.
Papakāinga	A collective form of Māori living, often translated as a village. They are often the ancestral home of a Māori kinship group, and consist of multiple dwellings around a central marae, wharenui, or other place of significance.
Raupatu	Confiscation of land by the Crown.
Rōpū	Group.
Tāmaki Makaurau	Auckland.

Tangata whenua	Indigenous people, people of the land. This is defined in the Heritage New Zealand Pouhere Taonga Act 2014, s 6 as "in relation to a particular place or area, the iwi or hapū that holds, or at any time has held, mana whenua in relation to that place or area", and in the RMA, s 2 as "in relation to a particular area, means the iwi, or hapū, that holds mana whenua over that area".
Tangihanga	The traditional Māori funeral rites held on marae, spanning several days. Tangi means to weep.
Taonga	A treasured thing in Māori culture, either tangible or intangible.
Tupuna / Tūpuna	Ancestors.
Wāhi tapu	Sacred place. This is defined in the Heritage New Zealand Pouhere Taonga Act 2014, s 6 as "place sacred to Māori in the traditional, spiritual, religious, ritual, or mythological sense".
Whakapapa	Genealogy or genealogical/ancestral links. Whakapapa refers to the layering of one thing on another. It demonstrates identity, lineage from significant ancestors and links to the waka (canoes) that first arrived in New Zealand. It also places Māori in a wider context of kin relationships.
Whānau	Extended family.
Whenua	Land, ground.

Chronology

18 October 2007	The former Manukau City Council publicly notified a Plan Change to the Manukau District Plan to extension to the metropolitan urban limit. The Council also issued a Notice of Requirement to designate the Ōtuataua Stonefields reserve and adjacent land, including Puketāpapa, as "Passive Open Space and Landscape Protection Purposes" to preserve the land from development.
2009	2007 planning decisions appealed by land owners, including the Wallace family.
2011 and 2012	Appeal heard by the Environment Court.
15 June 2012	The Environment Court decision held that the metropolitan urban limit is to be extended to include Puketāpapa, the land is to be zoned Future Development Zone, and the Notice of Requirement is cancelled. The Court also outlined a number of criteria that must be adhered to as part of any development proposal, including avoiding adverse impacts on significant features and values, consultation with Mana Whenua, and identifying sites of cultural significance.
16 September 2013	HASHAA came into force.
20 March 2014	FRL agreed to purchase the Puketāpapa upon establishment as a SHA.
2 and 14 April 2014	The Auckland Development Committee considered SHA request for the development site.
1 May 2014	Auckland Council's Governing Body made a resolution to recommend to the Minister for Building and Housing that the development site be designated a SHA.
31 July 2014	Order in Council establishing SHA 62 came into force.
27 August 2015	Notice of motion to Auckland Council's Governing Body seeking that its resolution of 1 May 2015 recommending SHA 62 be revoked. The Governing Body resolved not to revoke SHA.
30 June 2015	Fletcher Residential applied for a Plan Variation to the proposed AUP to rezone SHA 62 from Future Urban to a combination of Mixed Housing Suburban, Public Open Space - Conservation, and Green Infrastructure Corridor zones. The rezoning anticipated to enable a yield of approximately 500 houses.
6 October 2015	The plan variation request and concurrent land use, subdivision and earthworks consents notified to adjacent landowners.
November 2015	Submissions closed on the plan variation request. 13 submissions on plan variation were received from adjacent landowners, including residents of Ihumātao papakāinga, Te Kawerau Iwi Tribal Authority, and Makaurau Marae Māori Trust. Te Kawerau Iwi Tribal Authority and Makaurau Marae Māori Trust indicated their support for the development and plan variation consents.
3 December 2015	The Social Services Select Committee heard SOUL petition.

7 December 2015	SOUL filed an urgent application in the Waitangi Tribunal about the HASHAA and the declaration of the development site as an SHA.
3–5 February 2016	The Auckland Accord Territorial Authority considered the application and the resource consents for the first stage of the development by FRL. Submitters participated in the hearings due to the provisions in HASHAA that enable adjacent landowners to submit and be heard. Request made for further archaeological information. Cultural Impact Assessments drafted by Te Kawerau Iwi Tribal Authority and on behalf of Te Ākitai iwi.
May 2016	The Auckland Accord Territorial Authority grants the consents sought by FRL. Puketāpapa zoned as mixed housing suburban zone in the Auckland Unitary Plan.
August 2016	The Social Services Select Committee released a report on the petition that advised that the Committee was not able to either revoke the land's SHA designation or prevent development on the land.
14 August 2016	The Waitangi Tribunal declined the application for an urgent inquiry into SHA 62. The Tribunal suggested the claim may be more appropriate as part of a thematic inquiry into housing policy.
September 2016	Heritage New Zealand Pouhere Taonga approved FRL's application for an archaeological authority.
16 September 2016	SHA 62 disestablished under the standard terms in HASHAA which state that all SHAs established before 15 September 2015 must be disestablished on 16 September 2016.
May 2017	SOUL made a presentation at the UN Permanent Forum on Indigenous Issues, and had a one hour meeting with the Special Rapporteur. No observations on SOUL's concerns were included in the Committee's report.
August 2017	SOUL submitted a report on SHA 62 to the UN Committee on the Elimination of Racial Discrimination. The Committee recommended that the government review the establishment of SHA 62, in consultation with all affected Māori, to evaluate its conformity with the Treaty of Waitangi, the UN Declaration on the Rights of Indigenous Peoples and other relevant international standards. New Zealand must respond to this recommendation in its next period report, due in December 2021.
March 2018	SOUL attended the 63rd UN International Covenant on Economic, Social and Cultural Rights session and contributed to the shadow report. SOUL's concerns were not mentioned in the ICESCR committee's report.
23–24 May 2018	SOUL appealed to the Environment Court regarding Heritage New Zealand Pouhere Taonga's decision to grant an archaeological authority.

7 November 2018	The Environment Court releases decision *King v Heritage New Zealand Pouhere Taonga* [2018] NZEnvC 214. It confirmed the decision of Heritage New Zealand Pouhere Taonga to grant Fletcher Residential the necessary archaeological authority needed as part of their resource consents.