THE MANGATŪ REMEDIES REPORT

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Minister of Māori Affairs

and

The Honourable Christopher Finlayson
Minister for Treaty of Waitangi Negotiations

Parliament Buildings
WELLINGTON

The Waitangi Tribunal
141 The Terrace
WELLINGTON

18 December 2013

E ngā Minita, tēnā kōrua

We enclose our report in respect of applications for binding recommendations relating to the Mangatū Crown forest licensed (CFL) lands. On 19 May 2011, the Supreme Court directed us to hear the application by the Mangatū Incorporation for the remedy of its claim in respect of the Crown's 1961 purchase of 8,522 acres of land in the Mangatū 1 block, north of Gisborne. The Crown purchased the 1961 land from the Mangatū Incorporation to establish a forest to prevent and control hill country erosion and downstream flooding. In its report, *Turanga Tangata Turanga Whenua: The Report on the Turanganui-a-Kiwa Claims*, the Waitangi Tribunal found that the Crown 'failed to act reasonably and with the utmost good faith when it acquired the Mangatu forest lands from the Maori owners' and therefore breached the principles of the Treaty of Waitangi.

Following the direction of the Supreme Court, the Tribunal was reconstituted and convened to consider the Mangatū Incorporation's application. At that point, additional Māori claimant groups sought to participate in our hearings. Those groups are Te Aitanga a Māhaki and Affiliates (TAMA), Ngā Ariki Kaipūtahi, and Te Whānau a Kai, all claimant groups from the Tūranga inquiry district. These groups also sought binding recommendations from the Tribunal in respect of part or all of the Mangatū CFL lands. Their applications therefore overlapped or competed with the remedy sought by the Mangatū Incorporation.

The claims represented by TAMA include the comprehensive district-wide Te Aitanga a Māhaki historical claims against the Crown in the Tūranga inquiry district. These are wide-ranging claims and include events about which the Tūranga report made strong findings:

- the unlawful attack by Crown forces on the defensive pā at Waerenga a Hika;
- the high casualties suffered by Tūranga Māori in that attack;

- the large numbers of men subsequently imprisoned or deported by the Crown to Wharekauri (the Chatham Islands) , which group came to be known as the Whakarau;
- the unprecedented number of Tūranga Māori summarily executed by Crown forces after the siege of Ngātapa (the pā held by Te Kooti who had led the Whakarau in their escape from Wharekauri); and
- the Crown's confiscation of land in the wake of a deed of cession signed under duress by a minority of Tūranga Māori.

The comprehensive claim also included breaches by the Crown of the Treaty guarantees of Māori title and of rangatiratanga in respect of the alienation of land following the imposition of the Native Land Court title and transfer system. The Crown's failure to comply with these guarantees, and with its fiduciary and active protection obligations, resulted in Te Aitanga a Māhaki losing hundreds of thousands of acres of land. The Tūranga trusts which Māori set up to prevent large scale land loss and to develop their land on their own terms were also destabilised by the Crown's complex, inefficient, and contradictory system of individual transfer.

Ngā Ariki Kaipūtahi and Te Whānau a Kai are closely associated with Te Aitanga a Māhaki, and have similarly been prejudiced by Crown Treaty breaches in respect of their district-wide historical claims. However, they also have specific land claims arising from longstanding grievances. Ngā Ariki Kaipūtahi's specific claim relates to the Crown's failure to allow them a proper opportunity to reargue the case in respect of their interests in the Mangatū land following an unsafe decision by the Native Land Court in 1881. Te Whānau a Kai have a specific land claim in respect of the Tahora lands falling within the Tūranga inquiry district, although the findings in respect of those lands were made by the Te Urewera Tribunal.

Apart from the claim regarding the Tahora blocks, all major historical claims were considered in the Tūranga report, in which the Tribunal made significant findings of Treaty breach against the Crown. That report discussed the prejudice suffered by the claimants from these breaches, and we received supplementary evidence in our hearings in June and October 2012, which gave us a fuller picture of the scope of the prejudice inflicted on claimants.

The wide-ranging claims of Te Aitanga a Māhaki, Ngā Ariki Kaipūtahi, and Te Whānau a Kai require a comprehensive settlement. In the Tūranga report, we observed that the settlement for Tūranga should be substantial. While the confiscation aspect of the claim was not as large as in other areas, the treatment of the people in Tūranga was amongst the worst recorded in New Zealand's history. The report said that 'reparations must be of a dimension that reflects the enormousness of the loss that the iwi and hapū of Turanga have

suffered in people and in land since 1865'. However, in order to comply with the Supreme Court's direction to hear as a matter of urgency the Mangatū Incorporation's application for a binding recommendation in respect of the Mangatū CFL lands, we decided to confine our hearings to the four applications we received for binding recommendations.

In arriving at our decisions on these four applications, we took into account the extent and seriousness of the Treaty breaches, the full scope of prejudice suffered by all the applicants, and what was required to remove or compensate for that prejudice. We wanted to ensure that any binding recommendations we might make would provide redress proportionate to the prejudice suffered, and would be fair and equitable as between the different applicants. This was particularly important since the redress we can give by way of a binding recommendation is limited at this stage to the Mangatū CFL lands.

We acknowledge that the Incorporation has a well-founded claim in relation to the Crown's purchase, in breach of Treaty principles, of thousands of acres of land in 1961. This was particularly difficult for the owners because it is the only piece of land that the incorporation has lost in its history. The incorporation found its origins in the remarkable foresight of Wi Pere, a Tūranga leader, who was determined to prevent the Crown from securing Tūranga lands by piecemeal purchase. The Mangatū Incorporation, created by its own act of parliament in 1893, was the first Māori incorporation, and the most successful of Wi Pere's attempts to retain ancestral land in the hands of its owners. We understand the wish of the incorporation's current leaders to secure the return of ancestral land, and we found that the owners suffered grave cultural and spiritual prejudice when they unwillingly sold the land in the public interest.

However, we determined that the price paid by the Crown for the 1961 land was fair and that the owners did not suffer economic or financial prejudice. A key reason for our decision against granting a binding recommendation is that it would not only return the land to the incorporation but, pursuant to the Crown Forest Assets Act 1989, would also provide substantial monetary compensation. We considered that the combined value of the land and money went beyond what was needed to compensate for or remove the prejudice suffered by the shareholders of the incorporation. It would also be disproportionate compared to the total Treaty settlement package on offer to settle all the historical claims of Te Aitanga a Māhaki, Ngā Ariki Kaipūtahi, and Te Whānau a Kai.

On the basis of those findings, we declined the Mangatū Incorporation's application for the return of the whole of the 1961 land. Redress that seems to favour one applicant over others would likely have the effect of creating fresh grievances, and might undermine the chances of a durable settlement being completed with the other claimants. We considered various ways in which the redress to the incorporation might be reduced to provide a more

equitable outcome for all parties, but in the end we determined that this was not possible in the context of making binding recommendations. The reasons for our decisions in relation to the incorporation's application are set out in full in chapter 6 of our report.

Ngā Ariki Kaipūtahi and Te Whānau a Kai are smaller groups in our inquiry, each with different reasons for bringing an application for a binding recommendation, and with different objectives in terms of redress.

Ngā Ariki Kaipūtahi's application, arising from their long history of grievance about their marginalised position in the Mangatū lands, originally sought return of 70 per cent of the Mangatū CFL lands. However, during our hearings they put forward a proposal that the whole of the Mangatū CFL lands within the Tūranga district should be returned to them, on the basis that they would retain the accompanying monetary compensation, and a small area of land to re-establish their mana whenua. Ngā Ariki Kaipūtahi proposed to transfer the rest of the Mangatū CFL lands to other applicants at the direction of the Tribunal. We declined this application because, in our view, such a proposal runs counter to the statutory scheme of the Crown Forest Assets Act 1989 and the Treaty of Waitangi Act 1975. Nor could we be certain that Ngā Ariki Kaipūtahi would receive fair and equitable redress as compared with other claimants. We also had concerns about the representativeness of the Ngā Ariki Kaipūtahi groups before us. For these reasons, amongst others, which we describe more fully in chapter 6, we decided to decline their application.

Te Whānau a Kai are a group whose customary rohe spans three of the Tribunal's inquiry districts. This has made it difficult for them to negotiate a Treaty settlement. Their wide-ranging claims not only require commercial redress such as CFL land, but also other kinds of redress which can only be obtained from the Crown. From the outset they have been forthright in expressing their concerns over the delay that the applications for binding recommendations have caused in finalising a settlement. They made their application as a defensive measure in case the Tribunal were to make a binding recommendation in favour of one of the other applicant groups. We declined the Te Whānau a Kai application primarily because we are not satisfied that the binding recommendation sought by them would provide fair and equitable redress. It was also clear that Te Whānau a Kai would prefer to negotiate their full redress with the Crown and undertake further discussions with the other claimants to arrive at a satisfactory settlement.

The claimants represented by TAMA also require wide-ranging redress, besides what they would receive through a binding recommendation. TAMA previously held the mandate for the other applicants to undertake settlement negotiations with the Crown. If all applicants reconfirm TAMA's mandate to represent them, then TAMA can return to the Tribunal for a comprehensive remedies hearing. However, we see such a hearing as a last resort

for them. As our report sets out, the applicants' need for redress is pressing, and further comprehensive hearings through the Tribunal would inevitably involve delay in obtaining such redress. While the Tribunal can make binding recommendations, other parts of the redress needed, such as an apology, cultural redress, and recognition and rebuilding of the autonomy of the applicants can only come from the Crown. We therefore consider that TAMA's energies would be better spent in completing negotiations with the Crown as soon as possible. Moreover, TAMA has in fact been offered redress in the form of an option to obtain the whole of the Mangatū CFL lands including CFL land lying outside the Tūranga district and over which the Tribunal has no jurisdiction. In these circumstances we have decided to adjourn TAMA's application pending further discussions and negotiations with the other applicants and the Crown.

Our report strongly urges all the applicants, including the Incorporation, to reunite and return to negotiations with the Crown, rather than undertake further litigation. Unfortunately any litigation has the effect of disrupting the working arrangements between the parties. Our hearings have been no different, and some effort will be required to re-establish the relationships between the applicants so that they are able to undertake further negotiations with the Crown. We welcome the Crown's expressed willingness to support facilitation or mediation between the parties, and would encourage the Crown to provide funding for them to have discussions with each other as well as with the Crown. It is critical that the parties agree as soon as possible on how to approach settlement negotiations for the sake of those needing immediate redress as well as for the future benefit of their tamariki and mokopuna. Further delay would be highly undesirable. We welcome and endorse the Crown's expressed willingness to consider innovative strategies to help progress matters.

It seems to us that there are clear limitations to the usefulness of binding recommendations in this inquiry because they follow a strict statutory formula from which we cannot depart. Negotiations allow all parties much more flexibility to develop a satisfactory settlement package. Any compromises required to achieve a fair and equitable settlement for all the applicants can and should be made by them. They have the mana and rangatiratanga to decide what proposals they are prepared to accept.

Finally, we have urged the Crown to take a generous approach to resolving the issues which led to these applications. While questions of relativity with other Tūranga settlements will need to be taken into account, this seems an opportune time for the Crown to review the elements of its settlement offer. We consider that offer should align more closely with the applicants' aims and objectives. Some further flexibility in the Crown's approach to the negotiations may result in achievement of the settlement which has so far eluded the parties.

It is crucial that the Crown take the necessary steps to ensure that the cultural, spiritual, political, and economic wellbeing of these claimants is restored. In doing this, the Crown will restore its own honour and enhance its future Treaty relationship with Te Aitanga a Māhaki, Ngā Ariki Kaipūtahi, Te Whānau a Kai, and the Mangatū Incorporation.

Nāku noa, nā,

Judge Stephanie Milroy
Presiding Officer

PREFACE

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

ABBREVIATIONS

AIP	agreement in principle
app	appendix
AWI	Atihau–Whanganui Incorporation
CA	Court of Appeal
CFAA	Crown Forest Assets Act 1989
CFL	Crown forest licensed
CFRT	Crown Forestry Rental Trust
ch	chapter
comp	compiler
doc	document
ed	edition, editor
fn	footnote
fol	folio
ltd	limited
no	number
NZLR	New Zealand Law Reports
OTS	Office of Treaty Settlements
p, pp	page, pages
para	paragraph
PKW	Parininihi-ki-Waitotara
pt	part
ROI	record of inquiry
s, ss	section, sections (of an Act of Parliament)
SC	Supreme Court
sec	section (of this report, a book, etc)
SOE	State-owned enterprise
SOI	statement of issues
TAMA	Te Aitanga a Māhaki and Affiliates
TOWA	Treaty of Waitangi Act 1975
vol	volume

'Wai' is a prefix used with Waitangi Tribunal claim numbers.

Unless otherwise stated, footnote references to claims, documents, memoranda, and papers are to the Wai 814 (Mangatū remedies) record of inquiry, a select copy of which is reproduced in appendix I. A full copy is available on request from the Waitangi Tribunal.

CHAPTER 1

THE BACKGROUND TO THIS INQUIRY

1.1 Introduction: What Is Our Task?

On 19 May 2011, the Supreme Court directed the Waitangi Tribunal to hear the Mangatū Incorporation's application for remedy of its claim urgently (Wai 1489).[1] The Mangatū Incorporation claim concerns the Crown's 1961 purchase of 8,522 acres (3,448 hectares) of land north of Gisborne. The Crown purchased 'the 1961 land' from the incorporation to establish a forest to prevent and control hill country erosion and downstream flooding. The forest would be managed partly for protection and partly for commercial production. The 1961 land remains Crown forest land, as part of the Mangatū forest. The incorporation's claim is that they sold the 1961 land unwillingly, having been misled by the Crown into believing that they could not profitably use it, and having been given no option by the Crown but to sell. The incorporation's application to the Tribunal seeks recommendations that would compel the Crown to resume (return) the 1961 land to them.

The Waitangi Tribunal investigates and reports on claims by Māori that they have been or will be prejudiced by conduct of the Crown in breach of the principles of the Treaty of Waitangi. If the Tribunal finds that a Treaty breach has caused Māori claimants prejudice, then it may recommend to the Crown a remedy to compensate for or remove the prejudice. These recommendations are ordinarily non-binding on the Crown. However, there are specific circumstances where the Tribunal's powers to recommend a remedy are of an altogether different nature.

The Tribunal's recommendations for remedies involving the return of Crown forest licensed (CFL) land are potentially binding on the Crown.[2] The same is true of State-owned enterprise (SOE) land.[3] Such recommendations bind the Crown unless a negotiated settlement altering the terms of the recommendation is reached within 90 days.[4] The Supreme Court recognised these Tribunal powers as 'adjudicatory', being akin to those of a court. Further, the Tribunal's recommendation is final: there is no right of appeal. It

1. *Haronga v Waitangi Tribunal* [2012] 2 NZLR 53
2. Treaty of Waitangi Act 1975, ss 8HA–8HI
3. Ibid, ss 8A–8H
4. Ibid, s 8HC

1.1

is these extraordinary binding powers concerning Crown forest land that the Mangatū Incorporation seek to invoke in applying for the return of the 1961 land.

The Waitangi Tribunal has already inquired into and reported on all historical claims in the Tūranganui a Kiwa (Tūranga or Gisborne) district, in the 2004 report *Turanga Tangata Turanga Whenua* (the Tūranga report). The Tribunal made findings of Treaty breach in respect of a wide range of events and Crown conduct. Its findings on Mangatū included those relating to the Native Land Court process for determination of title to the Mangatū lands, and the Crown's conduct in purchasing the 1961 land. However, the Tribunal did not make any recommendations as to remedies, instead granting leave to the parties to return to the Tribunal should settlement negotiations with the Crown fail.

Following the direction of the Supreme Court, the Tūranga Tribunal was reconvened to consider the Mangatū Incorporation's application. To do so, existing Tūranga Tribunal panel members Wharehuia Milroy and Dr Ann Parsonson were joined by presiding officer Judge Stephanie Milroy and Tim Castle, who replaced presiding officer Judge Joseph Williams and Dame Margaret Bazley respectively.

The Supreme Court tasked us with determining the answer to one very specific issue: whether the 1961 land 'should be resumed, and if so, by whom and on what terms and conditions'.[5] However, additional Māori claimant groups promptly sought to participate when we commenced our inquiry in accordance with the Supreme Court's direction. In particular, three other claimant groups from the Tūranga inquiry district, Te Aitanga a Māhaki and Affiliates (TAMA), Ngā Ariki Kaipūtahi, and Te Whānau a Kai, all applied for (among other things) recommendations from the Tribunal that would compel the Crown to return to them parts of the Mangatū CFL lands, including part or all of the 1961 land. The applications from TAMA, Ngā Ariki Kaipūtahi, and Te Whānau a Kai therefore seek remedies that overlap or compete with the remedy that the Mangatū Incorporation seeks.

The Treaty of Waitangi Act 1975 'safeguards the right of any Māori or group of Māori with an interest in the inquiry apart from any interest in common with the public to appear and be heard in the course of any inquiry into a claim for licensed Crown forest land'.[6] In this case TAMA, Ngā Ariki Kaipūtahi, and Te Whānau a Kai are not simply interested parties with a right to be heard. They have each made their own applications that seek binding recommendations as remedy for their particular claims. Accordingly, they deserve to be on the same footing as the Mangatū Incorporation. The rules of natural justice and the interests of efficiency further dictate that we should consider the four applications at the same time: any decision reached on any one of the four would be likely to affect the other three claimants, and might cause them prejudice.[7] This is because Mangatū CFL land is one of the

5. *Haronga v Waitangi Tribunal* [2012] 2 NZLR 53, 90, para 108
6. Ibid, 91, para 107 fn 106; Treaty of Waitangi Act 1975, s 8HD(1)(d)
7. Paper 2.5.18, pp 6–9

largest and most valuable commercial properties that can be made available to Māori in the Tūranga region, either under the Tribunal's limited powers of binding resumption recommendations, or through the Crown's Treaty claims settlement framework.

In order to do justice to all applicants for resumption, we have enlarged the scope of this inquiry to hear the applications of all four claimant groups who seek the return of parts of the Mangatū CFL lands. The forest covers 12,509 hectares in all, but is spread across two Tribunal inquiry districts: 7,668 hectares falls within the Tūranga inquiry district on the Mangatū 1 and 2 blocks, and 4,841 hectares falls within the East Coast inquiry district on the Waipāoa block.[8] Our jurisdiction as the reconvened Tūranga Tribunal is limited to considering applications for return of the 7,668 hectares of the Mangatū CFL land located within the Tūranga inquiry district.

In sum: our task in this remedies inquiry is to determine whether any part of the Mangatū CFL land within the Tūranga inquiry district should be returned, and if so, to whom and on what terms and conditions. We must decide the applications of four Māori claimant groups, the Mangatū Incorporation (Wai 1489), Te Aitanga a Māhaki (Wai 274 and Wai 283), Ngā Ariki Kaipūtahi (Wai 499, Wai 507, and Wai 874), and Te Whānau a Kai (Wai 892). Each of these groups seeks recommendations from this Tribunal that would compel the Crown to return to them portions of the Mangatū CFL land within the Tūranga inquiry boundary.

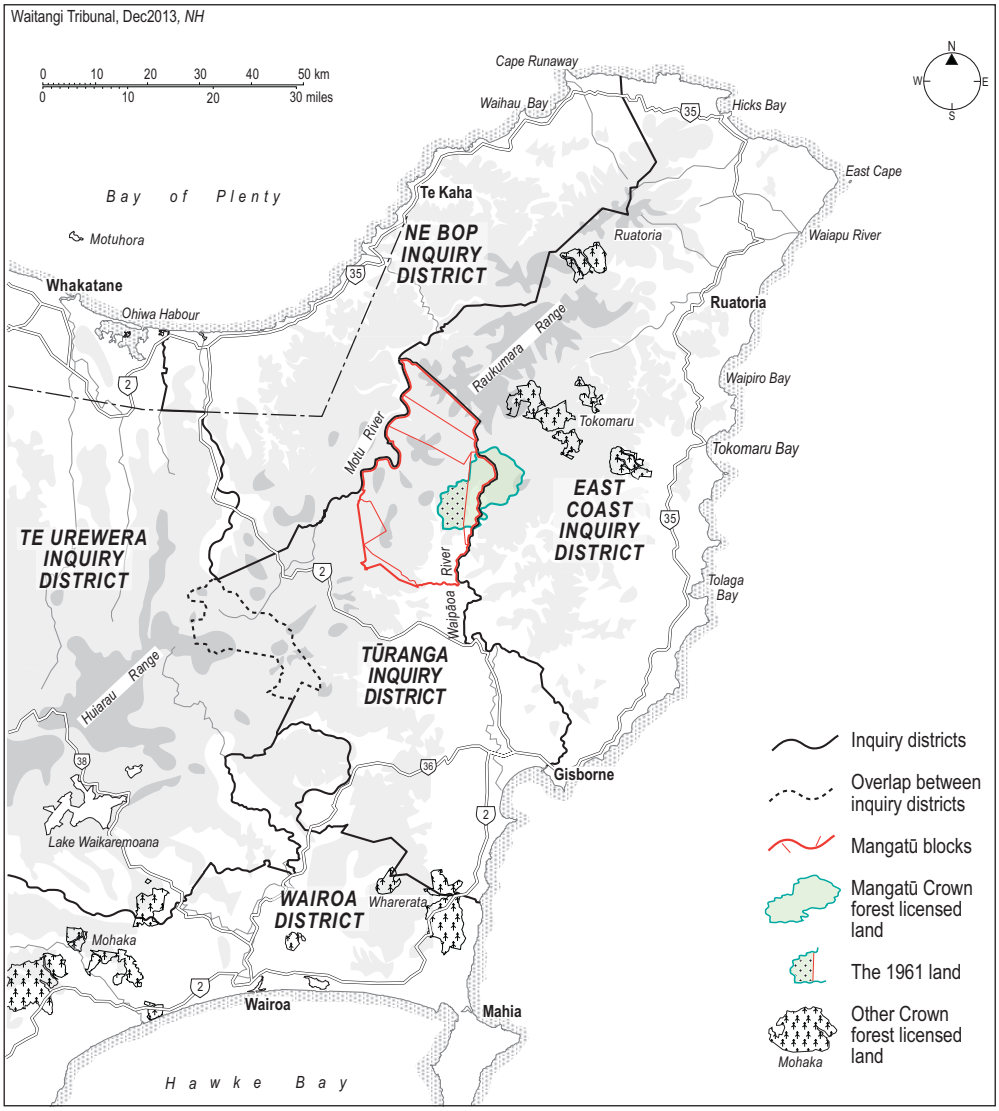
In the remainder of this chapter, we explain how it comes to pass that we have this particular task of deciding whether or not to recommend the return of all or any of the Mangatū CFL land within the Tūranga inquiry district to any of these four claimant groups. We explore first the complex origins of this remedies inquiry. We then introduce more fully the parties before us, and describe the process that determined the scope of our inquiry.

1.2 The Origins of this Remedies Inquiry

This remedies inquiry is part of the Tribunal's overall comprehensive inquiry into the claims brought on behalf of the iwi, hapū, and whānau of the Tūranga district which resulted in the 2004 report *Turanga Tangata Turanga Whenua*. The principal iwi and hapū who appeared before the Tribunal were Te Aitanga a Māhaki, Rongowhakaata, Ngāi Tāmanuhiri, Te Whānau a Kai, and Ngā Ariki Kaipūtahi.[9] Following the release of that report, the claimants and the Crown entered negotiations in an effort to achieve the settlement of all historical claims in the inquiry district. While two iwi have signed settlements, progress on settling the Māhaki cluster of claims (those of Te Aitanga a Māhaki, Ngā Ariki Kaipūtahi,

8. Document 128, pp 5, 13
9. Waitangi Tribunal, *Turanga Tangata Turanga Whenua: The Report on the Turanganui a Kiwa Claims*, 2 vols (Wellington: Legislation Direct, 2004), vol 1, p 13

1.2.1

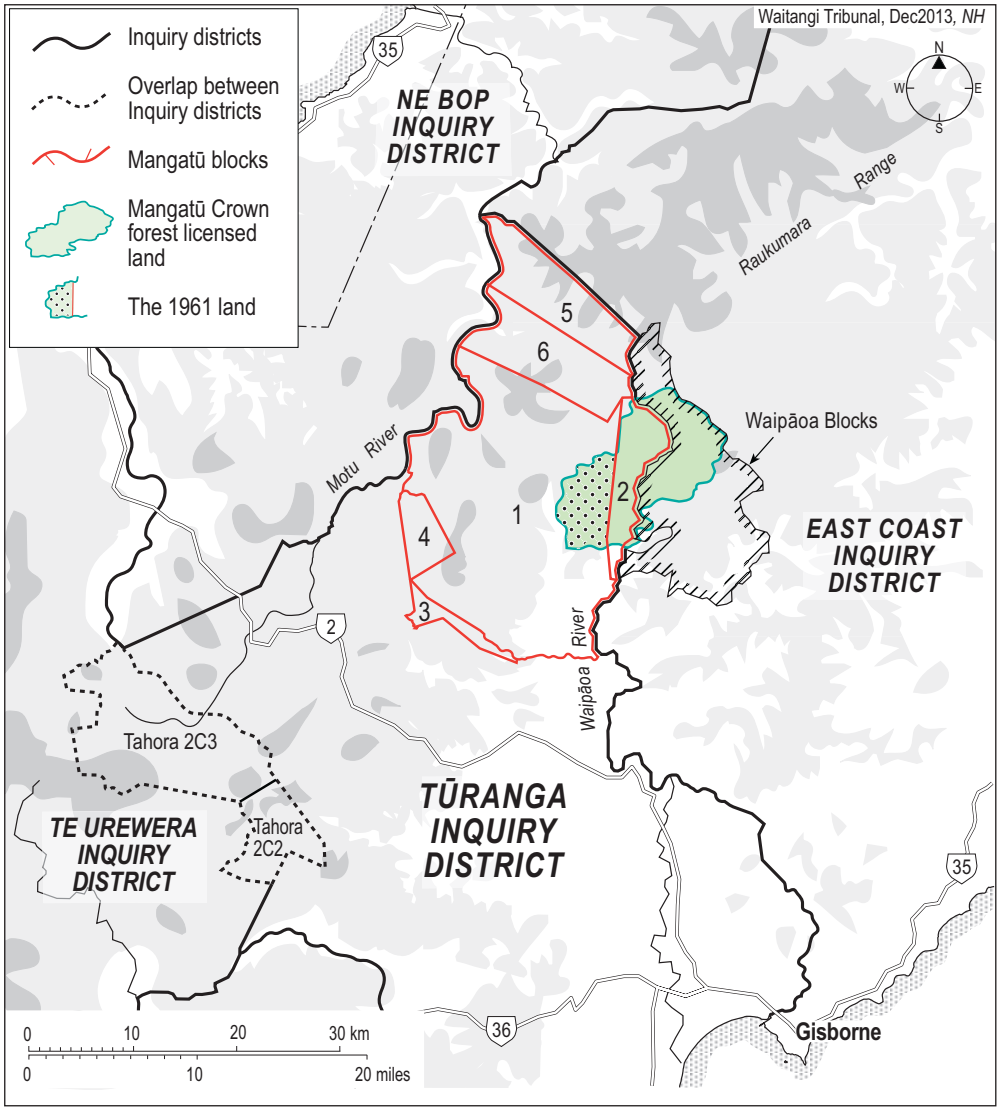


Map 1: The Tūranga inquiry district and the Mangatū Crown forest licensed land

and Te Whānau a Kai) was halted by the success in the Supreme Court of the Mangatū Incorporation's actions in seeking judicial review of the Tribunal's decision to decline the incorporation's application for an urgent remedies hearing. Our inquiry cannot properly be understood without our fully explaining these complex events.

1.2.1 The Tūranga inquiry

The Tūranga inquiry was the first to be conducted under the Tribunal's 'new' approach, which involved investigating and reporting on general issues arising from historical claims



Map 2: Mangatū blocks and the Mangatū Crown forest licensed land

on a district-wide basis. It was hoped that this approach would reduce the timeframes involved in hearing the claims and advance them as quickly as possible to settlement.[10] A March 2000 Tribunal memorandum stated:

> It is important to remind all parties that the Tribunal process is not an end in itself. It is a means by which the claimants and the Crown can be assisted in achieving a durable and just settlement of such of the claims as may be found to have substance. The Tribunal is

10. Paper 2.21, pp 9, 12

1.2.1

anxious therefore to encourage the parties to focus on these matters and to adopt processes, particularly at the pre-hearing stage, which expedite that outcome.[11]

The 'primary innovation' of the new approach was a formal pleadings process whereby 'all the claimants were required to identify and carefully document their grievances in fully particularised statements of claim'. This allowed the Crown to respond to claims at an early stage, enabling the Tribunal to determine areas of agreement and disagreement and thus generate a statement of issues which would be central to the hearings.[12]

A second important aspect of the Tribunal's new approach was the early identification of mandate and the management of mandate disputes. Claimants were asked to state who they represented during judicial conferences and other parties were given the opportunity of objecting to those statements of representation.[13] The Tribunal emphasised that issues of representation were to 'be raised at an early stage if they [we]re to be raised at all'.[14]

While lengthening the period spent in preparation, the new approach resulted in a dramatically shorter hearing period. Between November 2001 and June 2002, seven hearings were held in Tūranganui a Kiwa over eight and a half weeks. The Tribunal reported in October 2004.

In the Tūranga report the Tribunal found that all of the iwi and hapū groups who had appeared before us had been prejudicially affected by wide-ranging Treaty breaches deriving from Crown conduct and policies in the mid-late nineteenth and twentieth centuries. We expand on those findings in chapter 3 of this report, but in the briefest terms the Tribunal's findings emphasised above all that the Crown had adopted policies and enacted laws specifically designed to destroy Māori autonomy in Tūranga. The Tribunal concluded that the loss of autonomy, which 'stripped [Tūranga Māori] of their former power to act as communities in the protection and promotion of their rights', was the fundamental cause of their subsequent impoverishment.[15] The Tribunal highlighted the effects of two sets of Crown actions in deliberately destroying Māori autonomy. First, the initiation of hostilities which announced the Crown's effective arrival in Tūranga in 1865, and the conduct and outcomes of those hostilities, including:

- the unlawful attack by Crown forces on the defensive pa at Waerenga a Hika;
- the high casualties suffered by Tūranga Māori in that attack;
- the large numbers of men subsequently imprisoned or deported by the Crown to Wharekauri (known as the Whakarau);

11. Paper 2.2, p 1
12. Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, vol 1, p 2
13. Ibid, p 7
14. Paper 2.2, p 3
15. Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, vol 1, p 739

- the unprecedented number of Tūranga Māori summarily executed by Crown forces after the siege of Ngātapa (the pā held by Te Kooti who had led the Whakarau in their escape from Wharekauri); and
- the Crown's confiscation of land in the wake of a deed of cession signed under duress by a minority of Tūranga Māori.

Secondly, the Tribunal highlighted the scale of land loss in Tūranga as Māori attempts to retain their land were undermined by the Native Land Court title and transfer systems instituted by the Crown, and they lost control of the pace and volume of land alienation.

The Tribunal made two specific findings that Crown conduct had breached the principles of the Treaty with respect to land that is now part of the Mangatū CFL lands. First, the Tribunal found that the Native Land Court determination of title to the Mangatū 1 block in 1881 was 'clearly unsafe'. The Crown subsequently intervened by passing the Native Land Amendment and Native Land Claims Adjustment Act 1917 to reopen the question of the ownership of interests of one Te Aitanga a Māhaki hapū, Te Whānau a Taupara, in some of the Mangatū blocks, including Mangatū 1. However, the Tribunal found that this statutory intervention breached the Treaty, because it provided that the customary interests of only one of the parties affected by the 1881 land court title determination could be considered afresh. The claimant group Ngā Ariki Kaipūtahi were unable properly to participate in the drawn out processes of title determination, and the subsequent revisiting of relative interests of all owners in the block, that followed.[16] However, the Tribunal was 'unable now to say what rights would have been allocated if Ngariki Kaiputahi had been able to properly reargue their case', and noted that: 'It is certainly too late to argue for a rearrangement of rights in Mangatu.'[17]

Secondly, the Tribunal found that, while the scale of erosion in the Waipāoa catchment and its impact on the Poverty Bay flats was such that the Crown was justified in exploring options for the establishment of a forest, the Crown's purchase of the 1961 land breached the principles of the Treaty. The Tribunal found that the owners had not wanted to sell the 1961 land, and did so only because the Crown offered them no other option. The owners believed that they could not retain and profitably utilise their lands, because officials and Ministers 'were constantly advising the owners that this scenario was not possible'. But, at the same time, the Crown was planning 'a high proportion of profitable production forest.' The Tribunal found that 'this misrepresentation led directly to the owners' decision to reverse their stance from one of implacable opposition to sale'. Given these circumstances, the Tribunal found that the Crown had been 'far from scrupulously fair, even handed and honest'. Rather, 'the Crown failed to act reasonably and with the utmost good faith when it

16. Ibid, vol 2, pp 693, 694–695
17. Ibid, p 694

acquired the Mangatu forest lands from the Maori owners. The Crown breached the principles of the Treaty accordingly.'[18]

The Tribunal did not however specify the Mangatū Incorporation as the prejudiced party. The Tribunal found that 'Te Aitanga a Mahaki were directly affected by these matters.'[19] This was because during the inquiry's interlocutory process the Mangatū Incorporation claim (Wai 274) had been consolidated into the broader Te Aitanga a Māhaki claim (Wai 283). That claim asked for the Mangatū Crown Forest Licensed lands to be returned to the claimants, defined as the members of Te Aitanga a Māhaki.[20] The incorporation did not appear before the Tribunal in its own right. The claim was presented to the Tribunal by and on behalf of Te Aitanga a Māhaki. The Tribunal considered it on that basis. We explore the implications of this more fully in chapter 3.

In the Tūranga report, the Tribunal did not make specific recommendations to remedy the prejudice suffered as a result of these breaches. As we have already seen, the Tribunal instead recommended that the Crown and claimants enter settlement negotiations. At the Crown's request, and with 'considerable caution' the Tribunal made some general observations about the level at which settlements should be made and the groups with which the Crown should engage. The Tribunal supported a single district-wide negotiation process, but expected several settlement packages to result from that process. The Tribunal thought that the Māhaki cluster should negotiate a single settlement, though it did 'not discount the possibility that the result would include separate packages for each of Te Whanau a Kai and Ngariki Kaiputahi'.[21] In light of the 'enormousness of the loss that the iwi and hapu of Turanga have suffered in people and in land since 1865', the Tribunal observed that any settlement should be 'substantial'.[22] Of the overall quantum, it was suggested that Rongowhakaata should receive 36 per cent, Ngāi Tāmanuhiri 18 per cent, and Te Aitanga a Māhaki 46 per cent (including 3 per cent of the total Tūranga settlement for Ngariki and 7 per cent for Te Whānau a Kai).[23]

1.2.2 Settlement negotiations

Shortly after the release of the Tūranga report, settlement negotiations between the Tūranga claimants and the Crown commenced. Guided by the Tribunal's suggestions for settlement, claimants mandated three groups to conduct settlement negotiations with the Crown. Te Pou a Haokai (now TAMA) was formed in 2004 to represent the claims of the Māhaki

18. Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, vol 2, pp 733, 748
19. Ibid, p 748
20. SOC 1, pp 4, 109
21. Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, vol 2, pp 741, 742
22. Ibid, pp 748, 750
23. Ibid, pp 750–751

cluster.[24] These claims encompassed those of Te Aitanga a Māhaki (including the Mangatū Incorporation's original afforestation claim, Wai 274), Ngā Ariki Kaipūtahi, and Te Whānau a Kai. In August 2005, the Crown recognised the deed of mandate for Te Pou a Haokai to settle the claims of its constituent groups, and also recognised deeds of mandate for Rongowhakaata and Ngāi Tāmanuhiri.[25]

In 2007, a Tūranga-wide body, Tūranga Manuwhiriwhiri, was formed to collectively negotiate the claims of the Māhaki cluster, Rongowhakaata, and Ngāi Tāmanuhiri.[26] In August 2008, this collective signed an agreement in principle (AIP) with the Crown for a $59 million package.[27] That quantum was to be divided between the groups on a basis largely similar to that suggested by the Tribunal in the Tūranga report. This agreement was the first step towards negotiating a comprehensive settlement of the Tūranga claims, including a historical account, Crown acknowledgments and apology, cultural redress, and financial and commercial redress.

Under the AIP, the entire Mangatū CFL land (that is, including the 4,841 hectares in the East Coast inquiry district) was being offered to Te Pou a Haokai for purchase as commercial redress. This deal would have seen the forest land – including the 1961 land – returned to the wider hapū grouping. However, Alan Haronga, chair of the Mangatū Incorporation committee of management, considered that the 1961 land should be returned to the incorporation owners, not to the wider hapū grouping. If the AIP was carried through to a deed of settlement and settlement legislation, the Mangatū Incorporation would be unable to retrieve the 1961 land for itself.

1.2.3 Applications for urgent hearing

Anticipating the agreements reached in the AIP between Tūranga Manuwhiriwhiri and the Crown – including by implication the 1961 land – Mr Haronga on 31 July 2008 filed in the Tribunal an application for an urgent remedies hearing, accorded the Wai number 1489, in which he sought the return of the 1961 land to the incorporation. After considering submissions *viva voce* at a 27 August judicial conference, Judge Coxhead declined Mr Haronga's Wai 1489 application for an urgent hearing.[28] Judge Coxhead did not consider that Mr Haronga's application met the Tribunal's requirements for urgency. In particular, he did not accept that the claimants would suffer significant and irreversible prejudice if the AIP were to go ahead, or that there was no alternative remedy available in the circumstances.[29] He

24. Document 118, [p 6], paras 23, 26.2. Te Pou a Haokai was renamed Te Whakarau in 2010 and then TAMA sometime during the following year.
25. Document 130, p 5
26. Document 118, [p 6], para 26.3
27. This figure was later increased to $65 million: see document 130, p 6.
28. Wai 1489 ROI, paper 2.5.4, [p 8], para 45
29. Wai 1489 ROI, paper 2.5.4, [pp 5–7], paras 28–40

regarded the allocation of settlement assets as an internal matter, and encouraged the incorporation and Tūranga Manuwhiriwhiri to enter discussions. The AIP followed on 29 August 2008.

The incorporation's discussions with Tūranga Manuwhiriwhiri and Te Pou a Haokai following the signing of the AIP were unsuccessful. In September 2009, Mr Haronga filed a second remedies application again seeking return to the incorporation of the 1961 land. He filed the application anticipating that a deed of settlement based on the AIP would soon be finalised and sent out to iwi members for ratification. The effect of settlement legislation embodying the deed of settlement would be to remove the Waitangi Tribunal's jurisdiction to inquire into or make recommendations regarding the 1961 land.

Judge Clark declined this second application, citing three reasons for doing so. First, although it had been open to the Tūranga Tribunal to recommend that the 1961 land be returned to the current owners of Mangatū, it had chosen not to do so. Instead, the Tūranga report had recommended that the claimants enter into a single district-wide negotiation process for settlement. The claimants and the Crown had proceeded on that basis.[30] Secondly, Judge Clark noted that the Tribunal had previously only held remedies hearings after negotiations with the Crown had broken down. That had not happened in Tūranganui-a-Kiwa; in fact, negotiations were moving apace with a deed of settlement imminent.[31] Finally, Judge Clark considered that, if Te Pou a Haokai (now TAMA) had not also been offered the Mangatū forest land, the incorporation's application for an urgent remedies hearing would have been strong. However, such an offer had been made. As a result, although the incorporation itself would not receive the 1961 land back, the incorporation's shareholders would not be denied a remedy, because their membership in Te Pou a Haokai would entitle them to the benefits that would accrue from settlement.[32]

1.2.4 Judicial review proceedings and Supreme Court decision

Mr Haronga sought judicial review of Judge Clark's decision in the High Court, followed by the Court of Appeal and the Supreme Court. Both lower courts dismissed his application for judicial review.[33]

In the High Court, Justice Clifford considered that the lawfulness of the Tribunal's 'circuit breaker' policy (where remedies hearings are held only when settlement negotiations have broken down) was the central question to be determined. He held that:

30. Wai 1489 R01, paper 2.5.10, pp 9–10
31. Ibid, p 10
32. Ibid, pp 10–11
33. *Haronga v Waitangi Tribunal* [2009] High Court, Wellington; *Haronga v Waitangi Tribunal* [2010] NZCA 201

> the Tribunal could not limit itself to holding remedies hearings only where negotiations in relation to the land have broken down (the circuit breaker policy), in circumstances where the claim at issue is in respect of another breach than those at issue in those settlement proceedings.[34]

We understand this to mean that where a claimant is no longer involved in settlement negotiations, the Tribunal's policy, of not holding remedies hearings unless settlement negotiations have broken down, cannot be lawfully applied. This was not so in Mr Haronga's case, however. The Tribunal had already considered the Mangatū claim and had refused to make recommendations.[35] The judge did not accept the argument of Mangatū Incorporation that the Tribunal's power to make binding recommendations in relation to CFL land 'sits outside or is to take precedence over the general claims process'.[36] He also held that 'settlement negotiations and Tribunal hearings are inherently inter-related'.[37] He noted, however, that if the Mangatū Incorporation had formally withdrawn its mandate from Te Pou a Haokai (though he did not accept that they had), those negotiations would have been an irrelevant consideration for the Tribunal in determining whether or not to convene an urgent hearing.[38]

The Court of Appeal dismissed Mr Haronga's appeal against the High Court decision. The court did not agree with the submissions for the Mangatū Incorporation that the Tribunal must facilitate an urgent remedies hearing when an application seeks binding recommendations. The court agreed with Justice Clifford that 'the introduction of the power to make binding recommendations did not change the Tribunal's role substantively'.[39] The 'central remedies provision' remained section 6(3), under which the Tribunal has a discretion to decide whether or not to make remedial recommendations.[40] Applications for urgent hearings were to be assessed on their merits. The court was satisfied that Judge Clark had done so in relation to Mr Haronga's application for urgency and that he had been correct in concluding the Tribunal had turned its mind to settlement in 2004.[41] The court acknowledged the profound connection the Mangatū owners had to the 1961 land, and their very real sense of grievance, but considered that effective remedies to their claim remained open as part of the settlement process.[42]

In its May 2011 decision, the Supreme Court upheld Mr Haronga's application for review of Judge Clarke's decision.[43] The Supreme Court found that the amendments made to the

34. *Haronga v Waitangi Tribunal* [2009] High Court, Wellington, para 103
35. Ibid, para 109
36. Ibid, para 110
37. Ibid, para 111
38. Ibid, paras 119–121
39. *Haronga v Waitangi Tribunal* [2010] NZCA 201, para 42
40. Ibid
41. Ibid, paras 44–48
42. Ibid, para 49
43. *Haronga v Waitangi Tribunal* [2011] NZSC 53

1.3

Treaty of Waitangi Act by sections 8HA to 8HE had specifically afforded greater protection to claimants with well-founded claims in respect of Crown forest land. This jurisdiction, though expressed as recommendatory, was 'ultimately adjudicatory'. Once the Tribunal had determined a claim to be well-founded, as it had with the Mangatū Incorporation's claim, it was then obliged to determine if the binding recommendations sought should be granted. The Tribunal had a discretion to decide whether or not to make the recommendations sought, but without actually making that determination the Tribunal had not fulfilled its obligation to inquire into the claim. In that regard, the 'general findings and indications' given in the Tūranga report had not satisfied the Tribunal's responsibilities under sections 6(2) and 8HB(1).[44]

The Supreme Court also held that the ongoing settlement negotiations were an irrelevant consideration on the issue of whether urgency for the Mangatū application should be granted, because any resulting 'settlement . . . [would] not deal with the specific claim for restoration of the land under the adjudicatory jurisdiction of the Tribunal'.[45] This made it likely that the Mangatū Incorporation would have suffered 'significant and irreversible prejudice'. The Tribunal had the power to identify to whom the land should be returned, meaning that overlapping interests could not be used as a reason to deny the application for an urgent remedies hearing.[46] The court quashed Judge Clark's first-instance decision and directed the Tribunal to hear urgently Mr Haronga's remedies application.[47]

Following the Supreme Court's decision, the Crown paused settlement negotiations with TAMA pending the outcome of the inquiry so directed. Each of the Māhaki cluster claimants – TAMA, Ngā Ariki Kaipūtahi, and Te Whānau a Kai – subsequently lodged their own resumption applications with the Tribunal.

1.3 Who Are the Parties and What Do they Seek?

The four applicants for remedies in this inquiry are:

- Alan Haronga, on behalf of the proprietors of Mangatū Blocks Incorporated (the Mangatū Incorporation) (Wai 1489);
- Eric John Tupai Ruru, on behalf of Te Aitanga a Māhaki and Affiliates (TAMA) (Wai 274 and Wai 283)
- The Ngā Ariki Kaipūtahi claimants, including Tanya Rogers, on behalf of the members of Ngāriki Kaipūtahi o Mangatū (Wai 499); Owen Lloyd, on behalf of Ngāriki

44. *Haronga v Waitangi Tribunal* [2011] NZSC 53, paras 88, 95
45. Ibid, para 101
46. Ibid, para 25
47. Ibid, paras 111, 152

Kaipūtahi Whānau Trust (Wai 507); and David Brown, on behalf of Ngāriki Kaipūtahi Tribal Authority (originally Te Iwi Ngāriki) (Wai 874);

- David Thomas Hawea, on behalf of Te Whānau a Kai (Wai 892).

The relationships between the parties in this inquiry – and their relationships with the other Tūranga groups – are complex and interwoven. In the Tūranga report, the Tribunal described the Tūranga peoples as:

> highly independent and inter-dependant kin groups having dominion over a rich landscape of resource complexes prior to British colonisation. They are kin groups inextricably linked by physical proximity and interwoven whakapapa, yet each with its own independent mana born of distinct whakapapa lines, distinct resource ownership, and strong leadership.[48]

The Tūranga peoples also suffered many of the same experiences at the hands of the Crown. These include the Crown's adoption of policies and enacting of laws specifically designed to destroy Māori autonomy in Tūranga, from the Crown's attacks on Tūranga men, women and children gathered in the Te Aitanga a Māhaki pā at Waerenga a Hika in 1865, to its subsequent determined acquisition of Tūranga land initially through a forced cession, then through the introduction of the Native Land Court into the district, the individualisation of the alienation process, and the Crown's refusal to make provision in the law for Māori to manage their lands as communities until it was too late. Accordingly, the Tribunal noted that it had 'been continually struck by the way in which the many Turanga claims form part of a single cohesive story'.[49] The Tribunal particularly explained that:

> In the end, although Te Whanau a Kai and Ngariki Kaiputahi have a number of distinctive claims, they are both so closely bound up in the Mahaki complex that the claims they share with their whanaunga outweigh, in our view, those which are distinct. This includes, we hasten to add, Ngariki Kaiputahi's separate Mangatu claim.[50]

We do not want to downplay the distinctiveness of the applicant groups, but we also think it is important to remember the ties that bind them together.

Chapter 2 of the 2004 Tūranga report provides more detail about the applicants who participated in the earlier inquiry. For the Mangatū Incorporation, which was not a distinct participant in that inquiry, we also provide a more detailed background in chapter 4.

1.3.1 The Mangatū Incorporation

The Mangatū Incorporation was the first of its kind. It was established in 1893 to manage the approximately 100,000-acre (40,500-hectare) Mangatū 1 block on behalf of its Māori

48. Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, vol 1, p 38
49. Ibid
50. Ibid, vol 2, p 742

owners as determined by the Native Land Court in 1881. The incorporation was established with a specific mandate to protect the Mangatū whenua and ensure that it remained in Māori control. In that sense, the incorporation has been a remarkable success, having lost only the land purchased by the Crown in 1961. Today, the incorporation holds around 40,500 hectares on behalf of around 5,100 Te Aitanga a Māhaki owners affiliated to Ngāti Wāhia, Ngāriki, and Te Whānau a Taupara.[51]

The Mangatū Incorporation's application for remedies draws upon the Wai 274 claim. Wai 274 was originally filed on behalf of the incorporation by John Ruru in his capacity as Chairman, and alleged Crown misconduct during the purchase of the 1961 land for the creation of the Mangatū State Forest. As outlined above, Wai 274 was later consolidated into the Te Aitanga a Māhaki claim and considered by the Tribunal on that basis. The negotiated settlement that followed the Tūranga report then proposed that the 1961 land would be returned to the wider Māhaki grouping, rather than the incorporation. The Mangatū Incorporation seeks remedies from the Tribunal to avoid that outcome.

The incorporation seeks from the Tribunal a binding recommendation that the 1961 land should instead be returned to the incorporation, as its former Māori owners. As we explain in chapter 2, such a recommendation would trigger provisions in the Crown Forest Assets Act 1989 that require accumulated rentals and compensation to be paid as a package deal along with the land. Finally, the incorporation also seeks accompanying non-binding recommendations that 'the Crown should preserve the value of the offer made to Te Aitanga a Māhaki and Affiliates (TAMA) to settle their historical Treaty of Waitangi claims.'[52]

1.3.2 Te Aitanga a Māhaki and Affiliates (TAMA)

The groups who affiliate to Te Aitanga a Māhaki share the common ancestor Māhaki. These groups include the hapū Ngāti Wāhia, Ngā Pōtiki, Te Whānau a Taupara, Te Whānau a Iwi, Ngāi Tamatea, Ngāi Tūtekenui, and Ngāriki.[53] The descendants of Māhaki are closely linked to one another and to neighbouring kin groups such as Rongowhakaata, Ngāti Porou, and Ngāi Tāmanuhiri. Their principal settlements are 'found inland, up through the rich alluvial river valleys of the Waipaoa River and its tributaries, and into the mountainous interior'.[54] In the past, Te Aitanga a Māhaki have claimed that Te Whānau a Kai and Ngā Ariki Kaipūtahi are hapū of Māhaki. This is disputed by those groups, with both preferring to emphasise their distinctiveness. Both have maintained separate representation before the Tribunal.

In the Tūranga report, the Tribunal described the historical claim of Te Aitanga a Māhaki as 'comprehensive':

51. Document I17, pp 11–12, 21
52. Wai 1489 ROI, claim 1.1.1(b), p 6
53. Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, vol 1, p 23
54. Ibid, p 25

> It covers matters of armed conflict with the Crown in 1865, subsequent unlawful detention on Wharekauri, unlawful executions by Crown forces at Ngatapa in 1869, and the forced cession of land. The claim also raises the impact of tenure change through the Poverty Bay Commission and the Native Land Court, subsequent land loss, problems of land development, and environmental and social deprivation issues.[55]

The Te Aitanga a Māhaki claim also includes Wai 274, the original claim concerning the afforestation of Mangatū.

Te Aitanga a Māhaki and Affiliates (TAMA) was described by counsel as 'the present "Iwi" expression of Te Aitanga a Mahaki me ona Hapu' and is the body currently mandated to settle the claims of the Māhaki cluster with the Crown.[56] TAMA is involved in these proceedings because the Crown has suspended settlement negotiations pending the outcome of the Tribunal's decision on the incorporation's remedies application.

What TAMA seek in these proceedings is not straightforward. TAMA have adopted a compromise position in response to the Mangatū application. If the incorporation's application for remedies for resumption of the 1961 land is successful, then TAMA seek from the Tribunal binding recommendations for return of the balance of the CFL land, within our inquiry district, and the associated rentals and compensation. If the incorporation's application is not successful, however, then TAMA seeks binding recommendations for the return of the entire CFL land within our inquiry district. TAMA also seek a range of other non-binding and binding recommendations. These aspects of the TAMA application were deferred and not pursued during the present hearings.

1.3.3 Ngā Ariki Kaipūtahi

Ngā Ariki Kaipūtahi (or Ngariki Kaiputahi, the name they claimed under in the comprehensive inquiry) are the direct descendants of the rangatira Rawiri Tamanui, a leader in Tūranga from the mid 1820s to the 1850s, and his only son to have issue, Pera Te Uatuku.[57] Ngā Ariki Kaipūtahi hold rights primarily in Mangatū, but they also have rights in the neighbouring Mānukawhītikitiki, Whātātutu, Mangataikapua, and Rangatira blocks. These rights overlap with those of Te Aitanga a Māhaki, but Ngā Ariki Kaipūtahi stress that their rights in land are derived through separate lines of descent which predate the hapū of Te Aitanga a Māhaki.[58]

Ngā Ariki Kaipūtahi are to be distinguished from the broader Ngāriki group which TAMA claim to represent. This broader group includes at least two other groups – Ngāriki Pō and

55. Ibid, p 27
56. Document M9, p 3
57. In a memorandum, counsel indicated that Ngā Ariki Kaipūtahi was the preferred spelling and we have adopted it accordingly: see paper 2.389, p 2.
58. Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, vol 1, pp 30–31

Ngāriki Rotoawe – who were, at various times, defeated in battle and absorbed into hapū of Te Aitanga a Māhaki and Te Whānau a Kai. In this report, when we use the name Ngāriki, we refer to this wider group. When we use the name Ngā Ariki Kaipūtahi, we refer to the descendants of Rawiri Tamanui, who are the claimants before us.

The Ngā Ariki Kaipūtahi historical claims were comprehensive and cover similar matters to the Te Aitanga a Māhaki claim. They have a distinct claim relating to the 1881 title determination of the Mangatū 1 block by the Native Land Court and the subsequent allocation, to their prejudice and disadvantage, of relative interests in the Mangatū 1 block in the early twentieth century. Their claims thus relate directly to the Mangatū CFL lands and the 1961 land.

What do Ngā Ariki Kaipūtahi seek? Ngā Ariki Kaipūtahi have proposed two, alternative, remedies in compensation for their claims. As detailed in their particularised claim for relief, Ngā Ariki Kaipūtahi seek from the Tribunal binding recommendations to return 70 per cent of the entire Mangatū CFL lands (which, by the definition provided in their application for remedies, includes the portion of the forest land outside of this inquiry district) and 50 per cent of the associated compensation and rentals. Ngā Ariki Kaipūtahi also seek a range of non-binding recommendations. As with the TAMA application, these aspects of the Ngā Ariki Kaipūtahi application were deferred and not pursued during the present hearings.

During our hearings, Ngā Ariki Kaipūtahi presented an alternative proposal for redress, with a view to obtaining a capital endowment and a small area of land. The method they proposed was that the Tribunal make binding recommendations for the return to them of the entirety of the Mangatū CFL land within our inquiry district. This would be on the condition that they would then 'pass on' all but a small portion of the land 'to those who the Tribunal finds suffered prejudice following the 1961 forced sale of the Mangatu lands', while retaining 100 per cent of the associated rentals and compensation.[59]

1.3.4 Te Whānau a Kai

Those who affiliate to Te Whānau a Kai descend from the marriages between Kaikoreaunei and the two sisters, Te Haaki and Whareana. Kaikoreaunei's father was Ihu, the eldest son of Māhaki. Kaikoreaunei, however, did not inherit land through his parents; Te Whānau a Kai's land rights are instead derived through his marriages. Te Whānau a Kai emphasise these links to distinguish themselves from the wider Māhaki cluster. They have customary rights in a rohe over a wide area which spans three inquiry districts (Tūranga, the East Coast, and Te Urewera). Their interests overlap in different areas with Rongowhakaata, Ngāti Hine, Ngā Pōtiki, and Te Whānau a Taupara.[60]

59. Statement of claim 3(a), pp 2–3; doc M8, pp 5–6. The 'small block' of land was defined in closing submissions as being 100 hectares: see doc M8, p 5.
60. Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, vol 1, pp 28–30

The status and identity of Te Whānau a Kai as a distinct entity was disputed in submissions and evidence to the Tribunal's original district inquiry and again before us. Te Whānau a Kai lead claimant David Hawea continued to emphasise the distinctiveness of Te Whānau a Kai in our hearings. He referred to 'a lot of the submissions that came in opposition to my submission' challenging Te Whānau a Kai's 'right to be here'. This did not happen 'just in this hearing, it happened in other hearings, that we keep getting told that we are only a hapū of Mahaki'.[61] Mr Hawea rebutted such challenges.

> Now, one thing that I want to say is that we honour our descent from Mahaki, we're proud to be part of Mahaki, however . . . the mana whenua that Whānau a Kai carries does not come from its Mahaki side.[62]

We consider that it is too late – and indeed unjust – to deny the distinctiveness of Te Whānau a Kai claims that have already been heard and reported on. Te Whānau a Kai have been represented and accepted as a distinct claimant group in two Tribunal inquiries – Tūranga and Te Urewera. We also accept the distinctiveness of Te Whānau a Kai for the purposes of this report.

The Te Whānau a Kai historical claim in Tūranga was comprehensive and covered similar issues to those of the Te Aitanga a Māhaki claim. They have distinct claims relating to the forced cession of land at Patutahi and loss of land in the Tahora blocks. They also have a number of other claims which fall into the East Coast and Te Urewera inquiry districts. The latter have been considered by the Te Urewera Tribunal. We discuss these claims in chapter 5.

What do Te Whānau a Kai seek? We were told that Te Whānau a Kai are involved in this process primarily to protect their position and to ensure that they are left no worse off than they were under the developing settlement framework. Te Whānau a Kai seek from the Tribunal binding recommendations to return to them a 'fair and appropriate proportion' of the Mangatū CFL lands. They made no claim to a specific area of the forest, but suggested that, subject to argument in our hearings, 40 per cent of the forest, with associated rentals and compensation, would be an appropriate proportion to be resumed to them.[63]

1.4 The Crown's Position

The Crown opposes all of the particular remedies involving binding recommendations sought by the applicants. It does so for two main reasons. First, while the Crown accepts that the Māhaki cluster grievances deserve redress, it contends that '[t]he scale of relief

61. Transcript 4.28, pp 326–327
62. Ibid, p 327
63. Statement of claim 8(b), p 2

sought goes beyond the severity of the prejudice . . . and the breaches of Treaty principles found to exist'. Secondly, the Crown contends that binding recommendations are unnecessary in the circumstances given that the Crown is prepared to transfer the land without compulsion.[64]

In the Crown's submission binding recommendations for the return of the 1961 land to the Mangatū Incorporation involve relief that 'is excessive in light of the severity of Treaty breaches' caused by the 1961 sale of land. The Crown submitted that it was more appropriate to return the land to 'a community level title via the customary groups with interests in the land', both because the Crown acknowledged it had more seriously breached the Treaty with respect to those customary groups with interests in the forest land, and because the appropriate goal of remedies was 'restoring the ability of tribal communities to act autonomously'. The Crown argued additionally that the incorporation is 'not the most suitable body to receive redress', as Māori Incorporations contain 'elements found to have been in breach of Treaty principles.'[65]

The Crown submitted that '[r]esumption ought to be a last resort because a negotiated settlement should always be encouraged and preferred'.[66] The Crown emphasised that, as part of settlement negotiations, it offered to convey at a price to be agreed the entire Mangatū forest to the Māhaki cluster. In doing so the Crown submitted that it followed the guidance given in the Tribunal's Tūranga report. That report signalled a strong preference that the Crown negotiate settlements with iwi and hapū, and it specifically identified Ngā Ariki Kaipūtahi as suffering 'significant loss of mana and land' in Mangatū.[67]

The Crown reiterated its willingness to transfer the forest land as part of settlement.[68] Binding recommendations would, in the Crown's submission, unnecessarily 'delay and complicate' settlement of Māhaki cluster claims.[69]

What does the Crown seek from the Tribunal? Rather than making binding recommendations, the Crown suggested that the Tribunal should instead adopt a staged remedies process, and might begin with 'initial directions as to a way forward', followed, if necessary, by an interim report on forest land issues. In the Crown's submission any 'formal recommendations' to 'finally determine matters for the well-founded claims' in respect of forest lands should be made under section 6(3) in the first instance, with parties granted leave to return for further recommendations to address the totality of their claims.[70]

64. Document M10, p 3
65. Ibid, pp 6–7
66. Ibid, pp 8–9; doc M10(a), p 9
67. Document M10, p 14; doc M10(a), p 2
68. Document M10(a), p 2
69. Document M10, p 7
70. Ibid, pp 3–4

1.5 The Scope and Timetable of our Inquiry

The scope and timetable of our inquiry was determined at judicial conferences held on 10 August 2011 and 12 December 2011. As part of this process, the four parties to this inquiry filed final particularised applications for relief, setting out what remedies they sought from the Tribunal, to which the Crown responded.[71] The parties having made their opening positions clear, the Tribunal issued its final statement of issues for inquiry on 23 March 2012.[72] The statement of issues is attached in full as appendix II.

Several factors were key in shaping the issues that we decided were to be determined in our inquiry. First, the historical claims of Tūranga Māori have already been investigated and reported on, and the findings of Treaty breach made in the Tūranga report cannot be overturned. Our remedies inquiry relies on those findings. That being said, our task here is to identify what remedy is appropriate to compensate for or remove the prejudice suffered by the claimants. In order to do that, we need to be clear about the prejudice we are seeking to remedy, including the seriousness of the breach, who was prejudiced by the breach, and the extent of prejudice suffered. Because the Tribunal's historical inquiry in Tūranga was conducted at a district-wide issue level, the Tūranga report is not always sufficiently detailed to complete all aspects of the task that we must undertake. In particular, we determined that we required more evidence from the parties as to the prejudice that they had suffered as a result of the Crown's Treaty breaches.[73]

Secondly, we have necessarily limited our inquiry to remedies applications concerning the Mangatū CFL lands in the Tūranga inquiry district. We have no jurisdiction to consider that part of the Mangatū CFL land which is outside our inquiry district and within the East Coast inquiry district (being 4,841 hectares, or 39 per cent of the forest).[74] The East Coast claims have not been inquired into by the Tribunal and may not ever be; that inquiry has been deferred.[75] This creates a jurisdictional limitation for the present Tribunal: as we can only make binding resumption recommendations in respect of 'well-founded claims'. If a claim has not been investigated by the Tribunal, it has not been adjudged well-founded for the purposes of our legislation. However, we may take the existence of claims in the East Coast inquiry district into account in our broader assessment of 'all the circumstances' of the claims.

We could, however, have considered making binding recommendations regarding other SOE lands within our district, as well as more general and non-binding recommendations. We have chosen not to do so in order to comply with the Supreme Court's direction as closely as is possible. We considered the Supreme Court's judgment requiring us to hear the Mangatū Incorporation claim urgently, 'requires us to start at the narrow point

71. Wai 1489 ROI, claim 1.1.1(b); SOCs 3(b), 6(c); SOCs 1(b), 2(b), 9(b); SOC 8(b); paper 2.396
72. Paper 2.404
73. Papers 2.343, 2.430
74. Paper 2.416
75. Wai 900 ROI, paper 2.5.57

of considering the Mangatū resumption question, and as part of that to consider the consequential effects such a recommendation might have in determining whether and the extent to which resumption recommendations could or should be made.'[76] We expanded our inquiry to hear other parties' applications because they sought substantially the same remedy and because it would be more efficient to hear them together rather than in a staged way.[77] We also believed that dealing with applications relating to the 1961 land would clarify the fate of that land for the parties for any future negotiations or wider remedies hearings. But we emphasised that in the context of this first tightly focused stage of our remedies inquiry 'the first and final question must be: can an applicant party show good cause for inclusion within a resumption recommendation over Mangatū land?'[78]

As part of adopting a staged approach, we envisaged that a second stage of hearings would occur to hear CFAA compensation evidence, should we decide to make binding recommendations.[79] Finally, some parties' applications did seek further remedies, including the return of SOE land and non-binding recommendations. These aspects of their applications may be revived at a later stage if the parties wish it.

1.6 The Structure of this Report

Chapter 2 sets out the jurisdictional basis for this inquiry, and the relevant circumstances and approach to redress which will frame our analysis of the applications before us. Chapter 3 determines whether the four parties before us have well-founded claims that relate to the Mangatū CFL lands. Having determined that they do, we then proceed to examine their applications for remedy of those claims. Chapter 4 examines the Mangatū Incorporation's application. It does so in light of the particular circumstances that chapter 2 identifies as relevant to the issues that are the subject of this inquiry. Chapter 5 similarly examines the applications by the three Māhaki cluster claimants. Finally, chapter 6 sets out our determination of the four applications before us.

76. Paper 2.367, p 5
77. Paper 2.338, p 7
78. Paper 2.404, p 2
79. Paper 2.409, pp 3–4

CHAPTER 2

THE TRIBUNAL'S TASK: LEGAL REQUIREMENTS AND GUIDING PRINCIPLES

2.1 Introduction

The task of this Tribunal, as stated in chapter 1, is to decide whether to make recommendations which will return those parts of the Mangatū Crown forest licensed lands (CFL lands) which fall within the Tūranga District Inquiry area to some or all of the claimant groups before us.

The Tribunal has to date only been asked to consider making binding recommendations on three occasions,[1] so there are few precedents to call on. In addition, this inquiry raises a host of issues that have not arisen in those earlier situations. Counsel have also raised questions about various aspects of our jurisdiction to make binding recommendations. We are therefore required to consider our approach to the Tribunal's remedial jurisdiction and to examine certain features of our statutory authority in more detail than we have previously been called upon to do.

This chapter sets out in detail the Tribunal's powers pursuant to the Treaty of Waitangi Act 1975 (TOWA) to recommend remedies, including binding recommendations. We also discuss the circumstances of particular relevance to the present applications and the criteria the Tribunal will apply in order to arrive at our recommendations.

2.2 The Tribunal's Powers to Recommend Remedies

The Tribunal's overall task of inquiring into claims is set out in the long title of the TOWA:

> to provide for the observance, and confirmation, of the principles of the Treaty of Waitangi by establishing a Tribunal to make recommendations on claims relating to the practical application of the Treaty and to determine whether certain matters are inconsistent with the principles of the Treaty.

1. Waitangi Tribunal, *The Turangi Township Remedies Report* (Wellington: Brooker's Ltd, 1995); Waitangi Tribunal, *Te Whanganui-a-Orotu Remedies Report* (Wellington: Legislation Direct, 1998); Waitangi Tribunal, *The Ngāti Kahu Remedies Report*.(Wellington: Legislation Direct, 2013)

2.2

The idea of the 'practical application of the Treaty' is directly relevant to the remedies stage of the Tribunal process, because we are considering how the Crown can take action in the present to remedy the prejudice caused by breaches of the principles of the Treaty in the past. We must bear in mind the practicality of our recommendations when carrying out our functions under the TOWA.

Our functions are set out in sections 5 and 6 of the TOWA. When a claim is submitted to the Tribunal we must inquire into it to see whether any actions by the Crown, or any legislation, policies, or practices of the Crown are inconsistent with, or in breach of the principles of the Treaty, and whether the claimant has been prejudiced by those actions. If the Tribunal finds that a claim is well-founded then we may make recommendations to the Crown as to remedial action that will compensate for or remove the prejudice or prevent others from being similarly affected in the future. In making any such remedial recommendations the Tribunal must have regard 'to all the circumstances of the case'.

The relevant parts of section 6 are:

> **6. Jurisdiction of Tribunal to consider claims**—(1) Where any Maori claims that he or she, or any group of Maoris of which he or she is a member, is or is likely to be prejudicially affected—
>
> (a) by any ordinance of the General Legislative Council of New Zealand, or any ordinance of the Provincial Legislative Council of New Munster, or any provincial ordinance, or any Act (whether or not still in force), passed at any time on or after 6 February 1840; or
>
> (b) by any regulations, order, proclamation, notice, or other statutory instrument made, issued, or given at any time on or after 6 February 1840 under any ordinance or Act referred to in paragraph (a); or
>
> (c) by any policy or practice (whether or not still in force) adopted by or on behalf of the Crown, or by any policy or practice proposed to be adopted by or on behalf of the Crown; or
>
> (d) by any act done or omitted at any time on or after 6 February 1840, or proposed to be done or omitted, by or on behalf of the Crown,—
>
> and that the ordinance or Act, or the regulations, order, proclamation, notice, or other statutory instrument, or the policy or practice, or the act or omission, was or is inconsistent with the principles of the Treaty, he or she may submit that claim to the Tribunal under this section.
>
> (2) The Tribunal must inquire into every claim submitted to it under subsection (1), unless—
>
> (a) the claim is submitted contrary to section 6AA(1); or
>
> (b) section 7 applies.

(3) If the Tribunal finds that any claim submitted to it under this section is well-founded it may, if it thinks fit having regard to all the circumstances of the case, recommend to the Crown that action be taken to compensate for or remove the prejudice or to prevent other persons from being similarly affected in the future.

(4) A recommendation under subsection (3) may be in general terms or may indicate in specific terms the action which, in the opinion of the Tribunal, the Crown should take.

2.3 The Power to Make Binding Recommendations about CFL Land

The Tribunal's powers to make binding recommendations in relation to CFL land are set out in section 8HB of the TOWA. The Supreme Court's decision in *Haronga v Waitangi Tribunal* provides a very instructive historical background as to how these powers were conferred upon the Tribunal.[2] That background need only be discussed briefly here because it was not subject to disagreement between the parties. In the 1980s, the New Zealand Forestry Corporation (a State-owned enterprise) intended to dispose of forests growing on Crown land. The New Zealand Māori Council and the Federation of Māori Authorities Incorporated took a case to the Court of Appeal seeking to safeguard the interests of Māori with claims to the lands on which the forests were situated. As a result of their success in that case the Māori representatives and the Crown entered into an agreement on 20 July 1989 (which we will call the 'forestry settlement') which provided certain protections to Māori claimants in exchange for the Crown being able to sell the trees but not the Crown land on which the forests were located. The Crown was free, however, to grant licences to forestry companies to replant and harvest forests on that land ('the CFL lands'). These protections were enacted in sections 8HA to 8HI of the TOWA.

The section relating to forests in the TOWA is section 8HB. The relevant part of the section reads:

8HB. Recommendations of Tribunal in respect of Crown forest land—(1) Subject to section 8HC, where a claim submitted to the Tribunal under section 6 relates to licensed land the Tribunal may,—

(a) if it finds—

(i) that the claim is well-founded; and

(ii) that the action to be taken under section 6(3) to compensate for or remove the prejudice caused by the ordinance or Act, or the regulations, order, proclamation, notice, or other statutory instrument, or the policy or practice, or the act or

2. *Haronga v Waitangi Tribunal* [2012] 2 NZLR 53, esp pp77–81, paras 57–76

2.3

omission that was inconsistent with the principles of the Treaty of Waitangi, should include the return to Maori ownership of the whole or part of that land,—

include in its recommendation under section 6(3) a recommendation that the land or that part of that land be returned to Maori ownership (which recommendation shall be on such terms and conditions as the Tribunal considers appropriate and shall identify the Maori or group of Maori to whom that land or that part of that land is to be returned); or

(b) if it finds—

(i) that the claim is well-founded; but

(ii) that a recommendation for return to Maori ownership is not required, in respect of that land or any part of that land by paragraph (a)(ii),—

recommend to the Minister within the meaning of section 4 of the Cadastral Survey Act 2002 that that land or that part of that land not be liable to return to Maori ownership; or

(c) if it finds that the claim is not well-founded, recommend to the Minister within the meaning of section 4 of the Cadastral Survey Act 2002 that that land or that part of that land not be liable to return to Maori ownership.

When a claimant makes an application for remedial recommendations which includes a request for recommendations under section 8HB, the Tribunal must consider the application in the light of the statutory provisions. If the Tribunal decides that the CFL land should be returned to the applicant an interim recommendation is issued. The parties then have 90 days to review that recommendation. If the parties do not like the interim recommendation they can enter into negotiations to come to some other arrangement for settlement of the claim. If those negotiations are successful and the claimant and the Crown settle the claim within that period, the Tribunal can cancel or modify the recommendation in accordance with the agreement between the parties. If there is no agreement the interim recommendation becomes final and binding on the Crown.[3] We call this type of recommendation a 'binding recommendation' for short.

In addition to the return of the land, the forestry settlement also made provision for the creation of the Crown Forestry Rental Trust (CFRT). As we alluded to above, the settlement allowed the Crown to dispose of the forest but not the Crown land on which the forest was growing. This meant that the land was preserved in Crown ownership so that it could be used for settlement of Māori claims. The Crown was at liberty to grant licences to forestry companies to harvest and replant the forest for the period of the licence agreement. In consideration of receiving the licence the forestry company has to pay rental, which is collected and held in the CFRT. On settlement of a claim which involves CFL land the claimants receive not only the land but also the rental that has accumulated (accumulated rentals)

3. Treaty of Waitangi Act 1975, s 8HC

in the CFRT. Similarly, if the Tribunal makes a binding recommendation the accumulated rentals associated with the land will pass to the successful applicant.

One further aspect of the forestry settlement is relevant to an application for binding recommendations. As part of the settlement the Crown and Māori agreed that Māori were entitled to compensation because the land was being returned subject to the encumbrance of the forestry licences. Section 36 of the Crown Forest Assets Act 1989 (CFAA), which gave legislative effect to the settlement, provides for the payment of compensation in accordance with schedule 1 to the CFAA.

Section 36 of the CFAA states:

> **36. Return of Crown forest land to Maori ownership and payment of compensation**—(1) Where any interim recommendation of the Waitangi Tribunal under the Treaty of Waitangi Act 1975 becomes a final recommendation under that Act and is a recommendation for the return to Maori ownership of any licensed land, the Crown shall—
>
> (a) return the land to Maori ownership in accordance with the recommendation subject to the relevant Crown forestry licence; and
>
> (b) pay compensation in accordance with Schedule 1.

Schedule 1 sets out the elements making up the monetary compensation that accompanies a binding recommendation. The schedule gives three different methods for calculating the compensation; the successful applicant chooses the method of calculation. Schedule 1 provides that the applicant automatically receives 5 per cent of the calculated compensation. The Tribunal is not required to assess the actual compensation figure. Rather, the Tribunal has to decide whether a further amount between 5 and 100 per cent of the calculated compensation ought to be payable to the applicant. The Tribunal can decide not to award any additional compensation beyond the automatic 5 per cent.

The statute does not provide any guidance to the Tribunal as to the matters to be considered when determining the percentage of compensation to be awarded to the successful applicant. Nor is there any comment in the Hansard record of the parliamentary debates which assists us on this point.[4]

The result of a successful application for binding recommendations relating to Crown forest land is that the applicant will receive:

- the land or a portion of it;
- the accumulated rentals associated with the returned land (or, if only a portion of the land is returned, the accumulated rentals associated with that portion);
- 5 per cent of the compensation calculated under the method chosen by the applicant as set out in schedule 1; and

4. Various speakers, 19 October 1989, NZPD, 1989, vol 502, pp 13311–13324

- any further compensation the Tribunal considers appropriate between 5 and 100 per cent of the schedule 1 compensation.

The accumulated rentals and the schedule 1 compensation are tied to the return of the land – they are a package deal.

In summary, the Tribunal's task under the statutory provisions is twofold:

1. To determine whether an applicant for a binding recommendation should receive the CFL land, or a portion of it; and if so
2. To determine whether the applicant should receive further schedule 1 compensation over and above the 5 per cent figure.

2.4 Statutory Prerequisites to the Making of Binding Recommendations

As already observed, section 6(3) of the TOWA sets out the circumstances in which the Tribunal may make any remedial recommendations. In this section, we discuss in more detail what is required under both section 6(3) and section 8HB.

First, the claim must be 'well-founded'. That means that after inquiring into the claim the Tribunal has found that the Crown's actions or omissions or legislation or policy or practice are inconsistent with the principles of the Treaty, and that the claimant has been prejudiced thereby. In general terms, during remedies hearings the Tribunal will begin by identifying the claims that, in light of the Treaty breaches and the prejudice flowing from them, have been found to be well-founded. The Tribunal may then, bearing in mind 'all the circumstances of the case', make remedial recommendations, including binding recommendations.

Any remedies inquiry will involve a range of factors – circumstances – that the Tribunal will need to weigh in arriving at its recommendations. These circumstances might include some which are outside the set of considerations the Tribunal took into account in determining whether a Treaty breach occurred, notably the current situation of the applicant party or parties. In this inquiry there are certain circumstances that are particularly relevant to our considerations and these will be canvassed in section 2.5.

Section 8HB sets out further prerequisites when claimants have applied for binding recommendations. The claimant must show that:

- the claim is well-founded (section 6(3));
- the claim relates to CFL land (the 'nexus' issue);
- the remedy ought to include the return to Māori ownership of the whole or part of the land; and
- the group of Māori to whom the land is to be returned is clearly identified as the appropriate group to receive the land and compensation.

The Tribunal does not have to make such recommendations, but the Supreme Court in *Haronga* has made it clear that when an application has been made for binding

recommendations then the Tribunal must at least consider *whether* to make any binding recommendations.[5]

2.4.1 Well-founded claim

As was pointed out in our inquiry, the Tūranga report did not, in general, find specific claims to be well-founded.[6] Rather, it focused in the main on matters of significant Treaty breach and prejudice and made a number of findings concerning those breaches. This is not unusual in district-wide historical inquiries which may include a large number of diverse claims. The Tribunal often makes findings at a general issues-based level, supplementing these findings with specific findings on some hapū claims, but not necessarily on all claims in the district. It follows that for each of the applicants for binding recommendations we must examine the Tūranga report to ensure that particular claims thus far have been, or should be adjudged as well-founded, especially if there is no plain language to that effect. We do this in chapter 3.

2.4.2 Nexus

The claimants and the Crown made submissions as to how the Tribunal should interpret the words 'relates to' in section 8HB(1). Ngā Ariki Kaipūtahi and Mangatū Incorporation took the position that there must be a relationship between the claim or the claimants and the land on which the Crown forest has been planted.[7] Mangatu Incorporation also submitted that, in accordance with the decision in the *Ngāti Kahu Remedies Report* the fact that Crown forest land is part of the tribal estate is a sufficient nexus.[8]

Te Whānau-a-Kai made two points:

- the claimant does not need to show a well-founded claim with respect to the particular Crown forest land because existing Crown settlement policy does not require this and because the Tribunal has considered this policy and formed the view that it is 'basically correct'; and
- the wording used in the legislation suggests that it would be sufficient if the claim were related in some way to nearby land or were brought by a group with some connection to the land, even if its principal concerns are with other land blocks in the region.[9]

The Crown submitted that:

- TAMA, Ngā Ariki Kaipūtahi, and the Mangatu Incorporation clearly have direct relationships with the forest land; but

5. *Haronga v Waitangi Tribunal* [2012] 2 NZLR 53, paras 87–88, pp 83–84
6. See, for example, paper 2.425, p 2.
7. Document 02, pp 3–4; doc 04, p 7
8. Document 04, p 7
9. Document M6, [pp 18–24, 30–36]

2.4.2

- the Tribunal needs to evaluate whether Te Whānau-a-Kai, who have expressed ancestral associations and customary rights to the land, have established a sufficient nexus to be eligible for consideration of a binding recommendation.[10]

Ngā Ariki Kaipūtahi and the Mangatū Incorporation claims clearly relate directly to the Mangatu CFL land because their claims concern that very land (although not all of it). The question of whether the claimants TAMA represents had a sufficient nexus was not a matter of controversy amongst the applicants either. TAMA represents the claimants in the original Māhaki claim, Wai 274/283. That claim included the Mangatū afforestation claim and therefore 'relates to' the Mangatū CFL land. We also note that in the *Ngāti Kahu Remedies Report* the approach taken was that where CFL land is part of the tribal estate of the claimant then a sufficient nexus has been established for the purposes of section 8HB.[11] In this case, the Mangatū lands were part of the Māhaki tribal estate so there is a nexus on that basis.

We agree with the Crown that some assessment must be made as to whether Te Whānau a Kai have a sufficient connection to the forest land before we can consider whether they are eligible for a binding recommendation. We note the comments made by the Tribunal in the *Ngāti Awa Settlement Cross-Claims Report* that recognise that the location and extent of CFL landholdings is arbitrary and that whether a tribe's rohe includes or is near to CFL land is also a matter of happenstance.[12] The Tribunal said:

> The Crown's landholdings that are available for Treaty settlements are limited, and many claimants (like Ngāti Awa) wish to have land included as part of their settlements. This is a reflection of the high value of land in Māori culture. Claimant groups often seek symmetry between the land that was lost as a result of Treaty breaches and the return of land by the Crown in settlement therefore. . . . The Crown wishes, to the extent it sensibly can, to share out the CFL land between entitled Māori groups. It does not wish groups to be arbitrarily benefited because their tribal areas happen to include, or be near to, large quantities of CFL land. This would lead to what is effectively a windfall gain that bears no relation to the relative level of harm, suffering and grievousness of breach experience.[13]

The Tribunal recognised that, because Māori wish to receive land in settlement but there is only limited CFL land available, the Crown is sometimes required to find an equitable way to share out that land amongst Māori groups. For that reason, the Crown takes a liberal approach to the question of the connection a claimant group has to have before it is able to receive CFL land in its settlement. In the *Ngāti Awa Settlement Cross-Claims Report*, the Tribunal was supportive of the Crown's policy of using CFL lands as part of the settlement for one group of claimants, even when other claimants with strong customary interests in

10. Document M10(a), p 15
11. Wai 45 ROI, paper 2.411, pp 4–5
12. Waitangi Tribunal, *Ngāti Awa Settlement Cross-Claims Report* (Wellington: Legislation Direct, 2002), p 73
13. Waitangi Tribunal, *Ngāti Awa Settlement Cross-Claims Report*, pp 73–74

the land would no longer be able to receive an equivalent share in the forest as a result of the settlement.[14]

At the point where we ask whether the claimant has a sufficient relationship to the land to be considered as one of the possible recipients for a binding recommendation, the question is a threshold question. In our view, the Tribunal should take a fair, large, and liberal approach to the interpretation of the words 'relates to' in section 8HB because of the remedial nature of the provision and the happenstance of the location of CFL land.[15] We will consider whether Te Whānau a Kai's connections to the CFL land meet this threshold, so that it could be the recipient of binding recommendations, in chapter 3.

In circumstances where there are competing claims, the extent of the connection of each claimant group to the land remains one of a complex mix of factors to be taken into account in determining whether a claimant should receive the CFL land or part of it. This is a substantive question of assessing and weighing the relative merits of the claims and considering the extent to which redress should be given to the different claimants through binding recommendations. We consider these matters in chapters 4, 5, and 6.

2.4.3 Remedy ought to include return of the land

The Tribunal is required to consider all the relevant factors and the relative merits of each of the claims in light of the Tribunal's approach to remedies, to determine whether redress ought to include return of the land. We discuss the Tribunal's approach to remedies in section 2.6.

2.4.4 Identified recipient

The last prerequisite that must be fulfilled before the Tribunal can exercise its discretion to make a binding recommendation is that the group making the application is identifiable as the appropriate group to receive the land and compensation package. That is to say, an appropriate recipient is one who must clearly represent the group that suffered the prejudice flowing from the Crown's Treaty breaches, and the Tribunal must be satisfied that making a binding recommendation in favour of that recipient will compensate for or remove the prejudice, as required by section 6(3). This approach involves a mix of considerations, including whether the applicant has a mandate from the group that has suffered the prejudice flowing from the Crown's breaches, the size of the group (whether the proposed remedy is appropriate for the size of the group), whether they have a legal entity with robust governance and accountability mechanisms to receive the returned land and compensation

14. See Waitangi Tribunal, *Ngāti Awa Settlement Cross-Claims Report*, pp 74–76 for further discussion of the Crown's policy on these matters.

15. See Waitangi Tribunal, *Turangi Township Remedies Report*, p 18.

and to make the benefits available to the group, and whether those who suffered the prejudice are able to participate in the governance and decision-making of the recipient entity.

The groups applying for binding recommendations before us differed from each other in terms of their organisational structure, governance, the nature of the group they were representing, the ability of their members to participate in decision-making, financial position, and preparedness for receiving significant settlement assets. The Tribunal sought information from each applicant directed at the need to establish to our satisfaction their suitability to receive the assets. The questions we asked each applicant (set out in the Tribunal's Statement of Issues) were:

- Does the applicant group represent those prejudiced by Treaty breaches?
- What is the size of the group in terms of notional iwi/hapū/entity population or potential beneficiaries?
- How many individuals are currently registered members of the applicant group?
- What is the nature of the applicant group's structure, organisation and governance? Is it, for example, incorporated or unincorporated? How are its trustees or officers elected or appointed and discharged of their duties/position? How is the group/entity governed and what financial and accounting control and reporting mechanisms are there which protect beneficiaries' interests?[16]

One further argument was raised by the Crown in respect of the Mangatū Incorporation. The Crown argued that the Incorporation was not the most suitable body to receive redress having regard to what the Crown described as the Tribunal's preference for restoration of tribal or community entities over Incorporations.[17] We discuss the various issues regarding the nature and characteristics of each of the applicants in chapters 4 and 5 and provide decisions in chapter 6.

2.5 Circumstances of Particular Relevance to the Present Applications

Having established the general requirements for the Tribunal in conducting a remedies inquiry, particularly those in which the Tribunal's binding powers are invoked, we turn to look at the circumstances that are of particular relevance to this inquiry. The Tribunal has considered the making of binding recommendations in three reports – *Te Whanganui-a-Orotu Remedies Report*, *The Turangi Township Remedies Report*, and *The Ngāti Kahu Remedies Report*. From our own hearings and from a consideration of these reports, we conclude that the variables the Tribunal must take into account in considering 'all the circumstances of the case' are very wide-ranging. The Tribunal has the difficult and challenging task of assessing as well as weighing the respective merits of each application. In this

16. Paper 2.404, pp 1–2
17. Document M10, pp 16–17

inquiry there is a range of circumstances that are of particular relevance to our determination of the appropriate remedy. In this section we list the relevant circumstances and discuss each in turn, to demonstrate why they are relevant to our deliberations. The particular circumstances are:

- multiple applicants;
- the extent and seriousness of the Treaty breach and prejudice suffered by each applicant;
- the characteristics of the land sought by the applicants;
- the value of the land and the associated compensation and rentals that may accompany its return by the Crown;
- the existence of other lands in the Tūranga district which might be subject to binding recommendations in favour of applicants with well-founded claims relating to those lands;
- the terms of the Tūranga Treaty settlement negotiations; and
- the current economic, social, and cultural circumstances of the applicant parties and whether they are able to exercise mana and rangatiratanga in respect of their present or future resources.

2.5.1 Multiple applicants

The first relevant circumstance and, in our view, one of the most significant aspects of this inquiry is the fact that there are four applicant parties who seek different parts of the same land, in some cases a defined part, and in others not defined at all, so that the overlap between them is not clear. The Mangatū Incorporation wishes to regain a specific part of the Mangatū CFL land, the land that was acquired by the Crown in 1961, while Ngā Ariki Kaipūtahi began by asking for a recommendation for 70 per cent of the forest, without specifying which part of the forest they sought. Te Whānau a Kai asked early on in these proceedings for a recommendation for 40 per cent of the forest, again without specifying any particular part of the forest, as a suitable remedy for the prejudice they suffered by reason of Crown breaches, both within and outside the Tūranga district. TAMA, although not opposing the Incorporation's application, seeks all the rest of the CFL land extending into the East Coast inquiry district, and also the 1961 land if the Incorporation's application should fail.

Clearly, whatever the Tribunal decides in respect of one applicant will inevitably affect the others. The Tribunal will need to consider what Crown property is available to provide 'land for land' redress, as well as how any available Crown property can be apportioned fairly amongst claimants. This has implications in terms of the flexibility available to the Tribunal in making remedial recommendations. For instance if the 1961 land is awarded in full to the Incorporation, that would mean that we could not grant both Ngā Ariki Kaipūtahi's original application for 70 per cent of the forest and Te Whānau a Kai's request for up to 40 per cent of the forest. We consider how these matters affect our decisions in chapter 6.

2.5.2 The extent and seriousness of Treaty breach and prejudice suffered

The second relevant circumstance is that the applicant parties have all suffered Treaty breaches and prejudice as identified in the Tūranga report. The extent and seriousness of the breaches and the prejudice suffered by each of the parties is another consideration we will have to take into account in determining the appropriate recommendations. Those breaches encompass a wide range of claims involving loss of life, liberty and property.[18] In addition to these breaches, we must add the Crown's determined destruction of Māori autonomy in the Tūranga district. We also consider the supplementary material received during the remedies hearings, regarding the nature and extent of the prejudice suffered by the applicants and their current circumstances, to determine how to compensate for or remove the prejudice flowing from the Crown's breaches.

Prejudice is, of course, not limited solely to economic or financial prejudice. The dislocation of family and community life, arising from some of the more heinous breaches committed by the Crown, has caused prejudice that is not amenable to economic quantification. The full effects of the loss of leadership, the loss of a generation of men to their whānau and hapū and the disempowerment suffered by these communities can never be known. Where a claim concerns loss of land prejudice goes well beyond that loss to include loss of hapū or iwi mana and rangatiratanga, loss of identity, and loss of spiritual and cultural connections to the land and between whānau, hapū, and iwi communities.

In a remedies hearing, the issue then becomes the challenging one of determining what kind of recompense will adequately address the needs of the claimants, including the need to empower them to re-establish their communities, nurture their economic, social, and cultural development, and protect and promote their rights. Where there are also multiple claimants and limited resources available for meeting those needs the Tribunal will be required to make some decisions about how those resources should be shared equitably between the parties. This is discussed further at section 2.6.2.

2.5.3 The characteristics of the land sought for return

The next significant factor for this inquiry is the nature of the land being sought by the parties. There are two issues arising from the location and quality of the Mangatū CFL land which the Tribunal needs to bear in mind. One is the question we have already mentioned of whether a claim 'relates to' the CFL land. In dealing with this question the situation of the land, its proximity to the rohe of the various groups, and the connections each applicant has to it are relevant and important. It also involves consideration of the 'happenstance' nature of the location of CFL land – should parties who have some connection with such land be denied a part of it simply because it happens to be sited outside their main tribal area?

18. Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, vol 2, p 739

The other question (and complication to some extent) arises because each of the applicants, apart from TAMA, has asked for a portion of the CFL land, rather than the whole of it, and because the Tribunal can only make binding recommendations in respect of the licensed land within the Tūranga inquiry district. About 38 percent of the forest, in rough proportion, is outside the inquiry district but is included in the extant settlement offer the Crown has made to TAMA.

In considering redress for the different groups the Tribunal may need to consider the practicality of dividing a forest which was planted on land of variable quality, some of which is severely erosion prone. Two very large slips are situated within the Mangatū forest[19] – if we were to divide up the forest we would need to think how these slips can be taken into account so that no claimant is unduly prejudiced by receiving that portion. The forest is also of variable quality, some of which would be uneconomic and/or unsafe to harvest. The question again arises as to how the Tribunal can deal with this in a manner that is fair to all applicants. We were also told about issues of access, forestry management, and survey which would need to be resolved if the forest was to be divided. All these matters we consider in more detail in chapters 4, 5, and 6.

2.5.4 The value of the land and associated monetary compensation

A related consideration is the amount of monetary compensation that may accompany a binding recommendation for the return of CFL land. As previously stated a binding recommendation for return of the land is a package deal, which carries with it compensation under the first schedule of the CFAA and the accumulated rentals held in CFRT. While the licence to the forestry company is referred to as an 'encumbrance', it does provide an income stream by way of future rentals to a successful claimant to whom the land is returned. The question for the Tribunal is whether, if a binding recommendation is made, the overall package of land plus money (compensation and future rental) provides appropriate redress commensurate with the prejudice suffered by an applicant.

2.5.5 Other Tūranga district lands that might be subject to binding recommendations

A further consideration is the amount of redress available to parties in the wider Tūranga district. The existence of other lands which could be used as part of a remedies package is relevant for two reasons. First, some claimants may have a strong customary connection to those other lands and it may be appropriate to consider a non-binding recommendation about those lands, instead of or in addition to a binding recommendation in relation to part of the CFL lands.

19. The Tarndale and Mangatū slips.

2.5.6

Secondly, the amount of redress available through binding recommendations in relation to other lands informs the Tribunal as to how far such recommendations might give redress to the parties and how such redress might be fairly allocated. Given the desirability of being able to return land to Māori who have lost it through Treaty breaches, the amount of land in Crown ownership and/or available for return is of some importance.

2.5.6 The terms of Treaty settlement negotiations

In the Tūranga district TAMA has been involved in settlement negotiations with the Crown, while other parties have not, or at least not directly. The negotiations were at the point where it was agreed that the return of the Mangatū Crown forest land would form part of the settlement package. However, the Crown rejected TAMA's proposal that the 1961 land be returned to the Incorporation, with TAMA to receive a corresponding top up of the settlement package. The negotiations were paused by the Crown after the Supreme Court's decision in *Haronga v Waitangi Tribunal*. The Tribunal has therefore had time to hear and determine the Incorporation's remedies application before further negotiations take place. We are of the view that the Tribunal should consider the effect binding recommendations might have on any future negotiations. One reason is that the parties who missed out on a binding recommendation would no longer be able to bargain over that part of the forest included in the recommendation, and the available Crown land for use in the settlement would be diminished accordingly.

The other reason settlement negotiations are relevant to our considerations is because of the conduct of those negotiations, and possible agreements reached among the parties during them. The Tūranga report encouraged claimants to 'focus on the overall value of a Turanga settlement rather than engage in divisive internal competition over comparative settlement values.'[20] That suggestion seems to have been the approach the Tūranga claimants took to the settlement negotiations. Where a cluster of claimants has approached negotiations on the basis of agreements or understandings as to the relative merits of their claims then the Tribunal should take a cautious approach to recommendations that might upset those relativities.

Where, as here, there is a settlement offer on the table the Tribunal should not consider making recommendations without taking some notice of the wider settlement context. That context is part of 'all the circumstances of the case'. We do not consider we should give anything other than a broad interpretation to that statutory language. We set out the reasons for this in section 2.6.3.

Just how the terms of the settlement negotiations may affect our considerations will be discussed further in chapter 6.

20. Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, vol 2, p 750

2.5.7 The current economic, social, and cultural circumstances of the applicant parties

The aim of remedies recommendations is to remove or compensate for prejudice flowing from Crown breaches of the Treaty. The groups' current economic, social, and cultural circumstances are relevant in determining what is needed to compensate for ongoing prejudice. That is not to say that a group which has overcome prejudice resulting from the loss of landholdings, and is now in a good economic position, should not receive redress for the prejudice they have suffered. Rather, it is that the Tribunal must look at the totality of the breach and prejudice and the overall picture of redress reasonably required by the claimants. We discuss the appropriate approach to redress further in section 2.6.1.

2.6 The Tribunal's Approach to Remedies, Including the Making of Binding Recommendations

Section 6(3) of the TOWA gives the Tribunal a discretion whether or not to make recommendations to compensate for or remove prejudice. The word 'compensate' may be taken in other contexts to suggest that remedies are to be given based on the principles developed in contract or tort law. However, the Treaty was not a contract, but an agreement between peoples. Accordingly we are of the view that a 'legalistic' approach to redress for historic breaches is inappropriate for the purposes of a political settlement between the Crown and Māori.[21] Instead, we are guided by the long title and the preamble of the TOWA and by the remedial nature of the provisions concerning recommendations. In reaching our decisions on the applications before us we will necessarily consider the extent and seriousness of well-founded Treaty breaches, the full scope of the prejudice suffered by the applicants, and what is needed to provide proportionate redress for the prejudice. However, our recommendations need to be practical. We also have to ensure that any remedies we recommend are fair and equitable to all parties and do not result in the creation of fresh Treaty grievances.[22]

In this section, we discuss this Tribunal's approach to remedies based on these guidelines, which are drawn from our assessment of the circumstances of this inquiry. In particular we have to consider how to approach the question of redress when at this stage of our inquiry the current applications are focused solely on redress that might be provided by way of binding recommendations in relation to the Mangatū CFL lands.

The concepts outlined here will guide our considerations in determining whether to grant the applications for binding recommendations.

21. Waitangi Tribunal, *Turangi Township Remedies Report*, p 12

22. Waitangi Tribunal, *Turangi Township Remedies Report*, at p 77 sets out a broad range of circumstances which we consider would apply in most remedies applications. These circumstances include the ones we set out above.

2.6.1 Restoration or full compensation

All those involved in seeking redress for Treaty breaches have had to grapple with the problem that on the one hand it is not politically or economically feasible for the Crown to make full economic restitution for all losses of land and resources suffered by Māori in breach of the Treaty; while on the other hand Māori have suffered far more than economic loss.[23] The Tribunal has long recognised that an approach to redress of Treaty breaches which simply considers economic factors when calculating loss is inadequate.[24]

In this remedies stage of the Tūranga inquiry, where we are focusing on the question of binding recommendations in relation to the Mangatū CFL lands, we will need to take into account not only the loss by the Incorporation of the land on which the Mangatū forest is now situated, and the economic value that might be associated with that loss, but also the cultural and spiritual consequences that follow from severing the shareholders of the Incorporation from such an important taonga as land. The Tribunal has often referred to the loss of rangatiratanga and mana of hapū/iwi as a specific and essential feature of the prejudice flowing from breaches involving land loss.[25]

However, in addition to the incorporation's prejudice arising from the forced sale of the 1961 lands, we must also consider the prejudice suffered by Te Whānau a Kai, Ngā Ariki Kaipūtahi, and the claimants now represented by TAMA. That prejudice extends not only to encompass the economic, cultural, and spiritual prejudice arising from loss of lands, but also the devastating impact of all Treaty breaches referred to in chapter 1. The Crown's actions in bringing war upon the Tūranga people were 'not just arbitrary and capricious' but also 'brutal, lawless, and manipulative'.[26] Our statutory duty and responsibility is to consider what will 'compensate for or remove' the prejudice when faced with such breaches as these.

The question then arises as to how we can approach the complex and difficult issues of redress for such significant economic, political, cultural, psychological, spiritual, and community harm, as experienced not just by one applicant, but by all four applicant groups before us. We also have to ask whether the Mangatū CFL land which falls within the Tūranga district and over which we can make binding recommendations, is capable of providing adequate and appropriate redress for each and all of the applicants. Or is some other redress required?

The number of applicants and the nature and extent of the prejudice we are dealing with means that we are driven to adopt the restorative approach to redress – any other approach is simply not adequate or appropriate. The goal of the restorative approach was set out in the *Muriwhenua Land Report* (amongst others) where the Tribunal said:

23. See, for instance, the comments of the Tribunal in *The Ngāti Kahu Remedies Report*, pp 97–98.
24. Waitangi Tribunal, *Ngāti Kahu Remedies Report*, pp 97–98
25. See, for instance, the comments in the *Ngai Tahu Report 1991*, vol 3, sec 24.2.
26. Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, vol 2, p 736

> It may be considered that the broad object of the Treaty was to secure a place for two peoples in one country, where both would benefit from settlement, and which basically required a fair sharing of resources. On that basis, where the place of a hapu has been wrongly diminished, an appropriate response is to ask what is necessary to re-establish it.
>
> On this basis, the remedy does not depend solely upon a measurement of past loss, and compensation for historical claims may be at less than the proven value of the total properties in question. . . .
>
> The thrust, it may be argued, is to compensate for past wrongs and remove the prejudice, by assuring a better arrangement for the hapu in the future.[27]

This approach involves the Tribunal in thinking about what sorts of remedies, including binding recommendations, would restore the claimant groups' mana and rangatiratanga, assure them of an economic base on which to rebuild their whānau, hapū, and community, and restore their relationship with the Crown. The *Ngāti Kahu Remedies Report* captured the essence of the restorative approach when the Tribunal stated:

> In our view, the restorative approach requires the Tribunal to make an assessment of what it is reasonable, in all the circumstances of a particular case, for the Crown to provide as a platform for the group's economic, social, and political recovery. It is likely that a range of different 'packages' of redress (having different values in dollar and other terms) could meet that standard, depending especially on the preferences of the claimants concerned.[28]

We agree. In the Ngāti Kahu remedies hearings the claimants asked for binding recommendations in respect of a range of properties, including Crown forest land. Rather than make the binding recommendations sought, the Tribunal made non-binding recommendations which included a range of remedial provisions in addition to the return of land. In reaching a decision as to what the remedial package should include, the Tribunal took account of the overarching purpose of restoration of the iwi, and did not confine itself to a notion of economic compensation which would simply be a question of what land and associated monetary compensation would be returned. The *Ngāti Kahu Remedies Report* later observed:

> we do not agree that the Tribunal's power to make binding recommendations exists for a purpose removed from that of restoring three vital and inter-connected elements of New Zealand's constitutional and social fabric: the Māori group in whose favour the recommendations are made; the honour of the Crown; and the relationship between the Treaty partners. The restorative purpose of Treaty redress means that it is as concerned with the future as it is with the past even though the claims are historical in nature.[29]

27. Waitangi Tribunal *The Muriwhenua Land Report* (Wellington: GP Publications, 1997), p 406
28. Waitangi Tribunal *Ngāti Kahu Remedies Report*, p 74
29. Ibid, pp 97–98

2.6.1

Thus, the economic, cultural, and social health of the claimant group is but one aspect of restoration. In this part of the Tūranga inquiry, we have to consider whether what the applicants have asked us to do will restore the relationship between the Crown and the claimants, and will carry the Treaty partnership on into the future. Another way of putting this is whether, if granted, the binding recommendations being sought will provide fair and durable settlements.

Restoring a proper Crown–Māori relationship also means that the focus of redress is not on punishment of the Crown, for instance by awarding punitive damages, since that is unlikely to help the parties to achieve a balanced and constructive relationship.[30] Rather, it is on assisting hapu to reclaim a degree of economic and political autonomy sufficient to allow them to participate as decision-makers in relation to their taonga in partnership with local and central government.

There may also be ways, other than those proposed by a particular applicant or the Crown, in which the restorative goals can be met. Here we are dealing with multiple parties. Binding recommendations made in favour of a particular applicant could become final before the other applicants have been able to negotiate or renegotiate their positions with each other and the Crown. In that case the Tribunal will have imposed a solution upon those other applicants, instead of allowing them to exercise mana and rangatiratanga in determining the redress that seems appropriate to them. This is one reason why the Tribunal must take considerable care in determining whether to make binding recommendations or not. It also means that we need to ask whether there might be other avenues by which appropriate redress can be given which will restore all the applicants before us and the Treaty partnership with the Crown. We address this in chapter 6.

One further aspect of the need for restoration of the claimant group became clear to us during the remedies hearings. Frequently the legacy of the Crown's Treaty breaches is ongoing disruption in the relationships between whānau, hapū, and iwi as the effect of Crown breaches continues on through time. As we mentioned in chapter 1, the Tribunal referred to the high level of formal and informal cooperation between Tūranga claimant groups during the original district inquiry hearings.[31] The Tribunal also found that, because of the interconnectedness of those in the 'Mahaki cluster', they should negotiate 'a single settlement, though we do not discount the possibility that the result would include separate packages for each of Te Whanau a Kai and Ngariki Kaiputahi'.[32]

It is important that in making any remedial recommendations we do not make the restoration of the claimant groups' relationships amongst themselves more difficult.

30. Waitangi Tribunal *Ngati Kahu Remedies Report* p 74.
31. Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, vol 2, p 741
32. Ibid, p 742

2.6.2 Redress must be equitable and not create fresh grievances: fairness and proportionality

As we have already noted, the interconnectedness of the claimants in the Tūranga district inevitably means that remedies necessary to restore one claimant group could impact on other groups. In these circumstances, compensation to one group which leaves others at an unfair disadvantage is not a part of the restorative approach and runs counter to the principle of redress that remedying one grievance should not create a fresh grievance for another group. Moreover, it is not only a Treaty principle but fundamental to concepts of justice that like cases must be treated alike.[33] We could not make a binding recommendation if the consequence is that like-for-like redress could not be offered to other claimants.[34]

This aspect of the remedial process was referred to in the *The Tāmaki Makaurau Settlement Process Report*, where the Tribunal said:

> The Crown provides redress and not compensation for losses. This means that people's satisfaction with what they get is not a function of a numerical calculation; it flows from pragmatism, from a sense that *within the limits of what is achievable politically, justice has been done, and they have been dealt with fairly*. [Emphasis added.][35]

In other words, in a situation where resources for appropriate redress are limited, claimant groups, and particularly those with close connections, have to be treated equitably, with due regard paid to the differences in their situations. What is important is that people feel they have got a fair share of the resources available, and as compared to similar groups with similar claims.

That comparative aspect means that, while the Tribunal may very well be in a position to grant a particular claimant group's application for redress, we cannot do so without considering how fair that would be to other claimants. Nor can we do so without recognising the need for some proportionality as between the redress offered to different claimant groups for their different claims. Redress for a district-wide claim dealing with the worst sorts of Treaty breach will naturally be greater than redress for a specific, localised claim.

The Tribunal also has to be careful in the approach it takes to the happenstance location of CFL land. We have mentioned this issue at section 2.4 in discussing the nexus issues. But a further complication arises because of the monetary compensation that accompanies a recommendation for return of the land. As we have shown earlier, a binding recommendation provides for the return of the land together with accumulated rentals and Schedule 1 compensation. To ensure equity amongst claimants, at least within the same district, the totality of the redress that comes with a binding recommendation needs to be proportional

33. Waitangi Tribunal, *Ngāti Kahu Remedies Report*, p 75
34. Ibid, p 98
35. Waitangi Tribunal, *The Tāmaki Makaurau Settlement Process Report* (Wellington: Legislation Direct, 2007), pp 103–104

to the severity of the prejudice suffered by the claimants and be comparable with what other claimants in that district may receive for similar claims. Evenhandedness and fairness across a connected group or groups should be an achievable objective, and be seen to have been secured.

The question of how to judge what is proportional redress for any particular claim is not an easy one for the Tribunal. What information can we use in order to determine this? And what are we to make of the Crown's settlement offer to TAMA in this regard?

A related question is the impact any binding recommendations may have upon the Crown's ability to provide appropriate redress to other claimants. The *Turangi Township Remedies Report* reminds us that we must take account of the greater consequences that a binding recommendation would have for the Crown.[36] The question of proportionality, and the issue of the consequences for the Crown of any binding recommendation lead us to consideration of the Crown's Treaty settlement policy in the Tūranga context.

2.6.3 Treaty settlement policy: fairness and proportionality

The long title of the TOWA requires us to make recommendations for the 'practical application of the Treaty'. Underlying the principles of the Treaty are the promises contained in article 1, whereby the Crown was given kawanatanga, the right to govern the country, while Māori were guaranteed tino rangatiratanga in respect of their taonga in article 2. There can be no doubt that land is a taonga of enormous importance to Māori. Our recommendations must give practical application to the protection of hapū rangatiratanga regarding land. At the same time the recommendations must recognise the Crown's prerogative to make policy for the settlement of historical grievances that takes account of wider national economic and political considerations. At the same time, the Crown has the responsibility to right historical wrongs in a way that is fair and equitable among Māori groups, in order to restore the honour of the Crown. The tensions between these imperatives, and the consequences for all parties involved in this inquiry of any binding recommendations the Tribunal might make, have implications for the Tribunal's approach to making such recommendations.

The Crown has now had considerable experience at working with claimants in carrying forward its settlement policy, including establishing quantum, that takes into account the nature and extent of the prejudice to be remedied, the available resources at a national and local level to meet remedial needs of claimants, the political and fiscal limitations applying at the time of any particular settlement, and the benchmarks for settlements of similar groups and claims. Ultimately, settlements are completed within the political landscape. From that standpoint the Crown will frequently have information that is not available to the Tribunal.

36. Waitangi Tribunal, *Turangi Township Remedies Report*, p 5

The Tribunal operates within a statutory framework and approaches the issue of redress based on that legal framework and the principles of the Treaty. When is it appropriate for the Tribunal to take into account the Crown's settlement policy in determining whether to make binding recommendations? In determining what is fair redress, can we take into account the settlement package on offer from the Crown to one of the applicants before us, and the settlements the Crown has made with other iwi in the district?

On these questions, the Mangatū Incorporation submitted that:

- the Crown's policy issues with respect to settlement negotiations were not relevant to the Tribunal's remedial jurisdiction because binding recommendations were a separate statutory regime providing additional protection to claimants with well-founded claims; and
- if the Tribunal did make a binding recommendation in its favour, it could not and should not be taken into account in terms of reducing the quantum available for settlement with other claimants.[37]

These submissions imply that we could give redress to the Incorporation which would be over and above the redress available through the settlement process and which ought not to affect the settlement process. In that way, other claimants would still get the redress that had been negotiated with the Crown.

The Crown argued that:

- The present context in which settlements are negotiated is completely different from that which existed when the forestry settlement was agreed. Now CFL lands are routinely included in settlements with Māori, and the voluntary arrangements that can be reached with claimants over such lands form a part of the Crown's ability to construct satisfactory comprehensive settlement packages.
- The making of a binding recommendation by the Tribunal could affect future settlement negotiations with the Tūranga claimants and would unduly complicate those negotiations.[38]

The Crown also referred to 'an obvious and significant gap in expectations between the parties as to the appropriate level of relief.'[39] The Crown submissions were concerned with the possibility that binding recommendations produce disproportionate redress to the successful claimant, and would deprive the Crown of the flexibility it needs to satisfactorily settle Treaty grievances of other claimants.

How far we take the Crown's settlement policy into account depends on what we have first determined is reasonably necessary to fulfil the restorative purpose of redress. If we consider the redress the Crown has offered to settle the claimants' Treaty grievances is

37. Document M7, pp 5–6, 26–27
38. Document M10, p 7
39. Ibid, p 6

inadequate then we are obliged to make recommendations that will assist the Crown to fulfil its responsibilities. If necessary that may include making binding recommendations. However, the offers the Crown has made to Tūranga Māori and the Crown's ability to offer redress to all parties for remaining Treaty grievances after a binding recommendation is made are relevant factors that the Tribunal must consider. If it is possible for the Crown to provide appropriate redress to all parties in some other way then we are entitled to consider making recommendations other than binding recommendations. We are supported in this approach by the comments in the *Ngāti Kahu Remedies Report* where the Tribunal said:

> We consider it is implicit in the notion that the Tribunal's resumptive power provides additional protection to claimants, that the power should be used only when there is no other means of securing the redress that the claimants should receive.[40]

As we mentioned in chapter 1, the Tūranga report offered some cautious observations as to the division of a settlement sum as between Te Aitanga a Māhaki, Te Whānau a Kai, and Ngā Ariki Kaipūtahi. The report, with some diffidence, also suggested comparative percentages for the division of a settlement figure for the entire district – that is, the percentage relativities as between the 'Mahaki cluster' and the other Tūranga iwi, Rongowhakaata and Ngāi Tāmanuhiri. In broad terms the proportions the settlement packages bear to each other have not diverged too far from the suggestions made by the Tribunal. That fact is relevant to our consideration of what is fair and equitable as between the parties in circumstances where the Tribunal may make a binding recommendation in favour of an applicant who was not separately represented in the original Tūranga hearings. That is so particularly if the recommendation may significantly alter those relativities. This is part of 'all the circumstances of the case' we must consider. Whether a binding recommendation does in fact produce a marked difference in the levels of redress is a matter we consider later in the report.

2.7 Conclusion

We have now set out the framework within which we intend to consider the applications before us. Our first step will be to assess whether the applications fulfil the statutory requirement of having a well-founded claim that relates to CFL land. We examine the applications themselves and discuss the particular circumstances set out above as they relate to each application. To determine whether to grant any of the applications we then consider whether the binding recommendations sought are fair and equitable in principle as well as

40. Waitangi Tribunal, *Ngāti Kahu Remedies Report*, p 103

between the applicants and whether they will restore the claimants' well-being, the Crown's honour and the Treaty relationship between the parties. Only if all these requirements are met will the overarching purpose of removing or compensating for the prejudice suffered by the claimants be fulfilled.

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CHAPTER 3

DO THE PARTIES HAVE WELL-FOUNDED CLAIMS RELATING TO MANGATŪ CFL LANDS?

3.1 Introduction

When embarking upon this remedies inquiry, the Tribunal must first establish whether the applicants have well-founded claims that relate to the Mangatū Crown forest licensed (CFL) lands within our inquiry district. As we have already completed our substantive inquiry into the historical claims of Tūranga Māori, our task here is to relate the findings of Treaty breach from the Tūranga report to the four applications for remedies before us now.

In chapter 2, we outlined the threshold a claim must meet for the Waitangi Tribunal to consider an application for binding recommendations over CFL lands. First, the claim must be well-founded. That is, the Tribunal must have found that the Crown breached the principles of the Treaty and that Māori were prejudicially affected by that breach. Second, the applicant's well-founded claim must relate to CFL land. As we explained in chapter 2, this does not mean that there needs to be a direct relationship between the Crown acts or omissions found to have been in breach of the Treaty and the land in question. Other factors, such as customary interests in that land, may also be taken into account. When dealing with the question of whether a claim meets the threshold for the Tribunal to consider an application for binding recommendations over CFL land, a more liberal approach can be taken. The relationship between a claim and the land eligible for return will, however, be relevant when dealing with the substantive questions of whether to make binding recommendations and, if so, what land should be returned, and to whom.

This chapter commences with our review of the findings in the Tūranga report in order to assess which findings relate to the claims and claimants before us. This allows us to determine which applicants have well-founded claims for the purposes of our remedies inquiry. We conclude with a brief assessment of the relative seriousness of the breaches identified as relating to the claims before us.

3.2 The Findings of the Tūranga Report

The following is by no means a complete account of the findings of the Tūranga report. We are providing a summary only of those findings most relevant to the applications before us and we refer readers to the Tūranga report for more detail about the Crown's Treaty breaches in this region. In the summaries below, we are not addressing the question of the extent of prejudice suffered by Māori. Rather, we are only interested here in establishing whether the applicant parties suffered any prejudice as a result of the Crown's breaches. We will explore the extent of prejudice suffered by each party in more detail in the following chapters.

The findings in the Tūranga report relevant to the applications before us fall into three broad categories. They concern, first, the hostilities which marked the Crown's first substantive engagement with Tūranga peoples and the aftermath of land confiscation; secondly, the Crown's imposition of the Native Land Court, and an introduced title system, leading to rapid and extensive land loss; and, thirdly, the twentieth-century breaches, most especially the sale of the 1961 land.

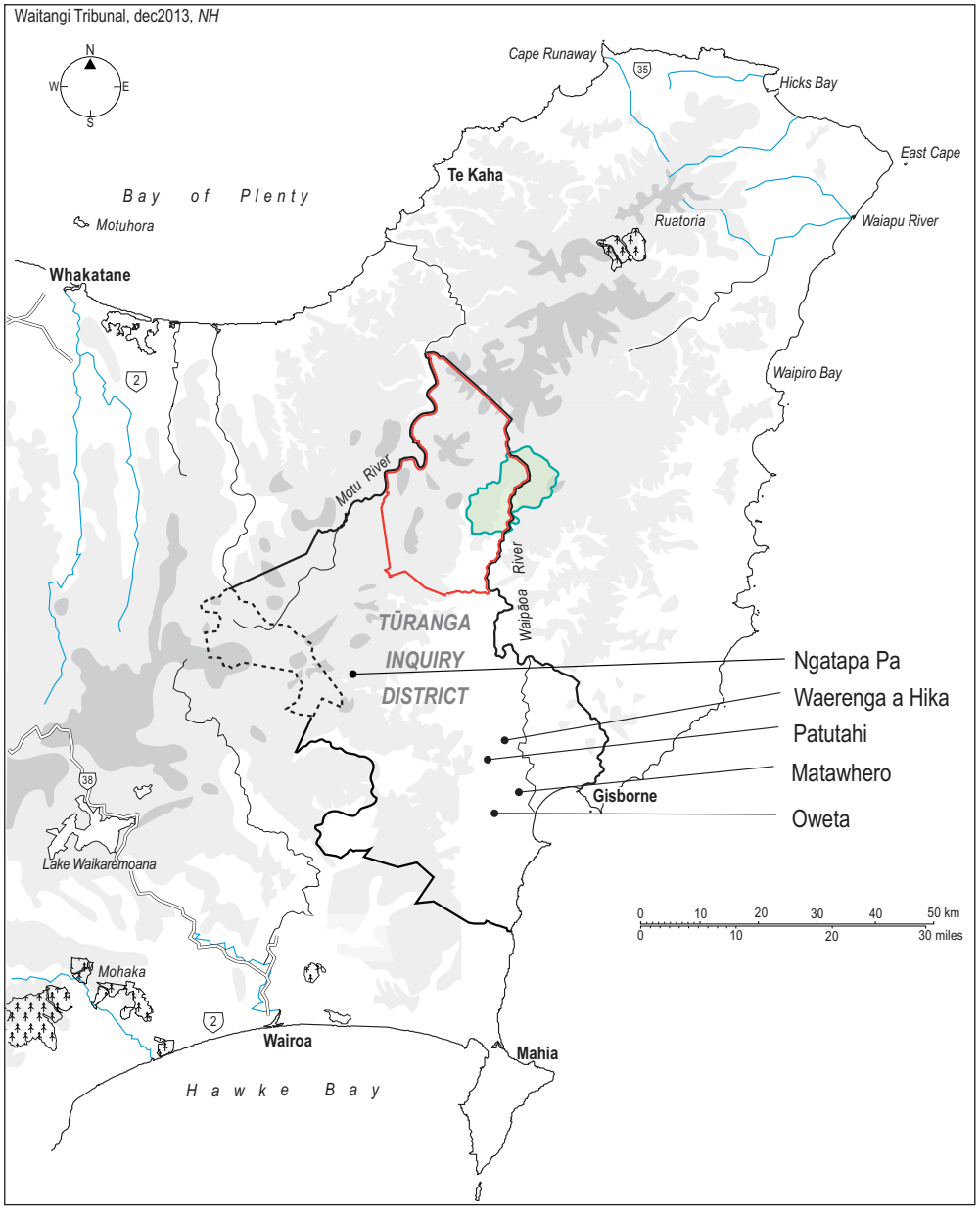
3.2.1 Hostilities and their aftermath

Over the 25-year period following the signing of the Treaty of Waitangi in 1840, Tūranga remained a 'fully autonomous district' under Māori control, with Māori leaders determined to protect their land. The Crown showed little interest in Tūranga and 'there was little evidence that effective sovereignty had been taken up by the Crown in accordance with the promise of the Treaty'.[1] This situation changed dramatically in 1865, with the Crown's first major foray into the Tūranga district. The Crown's first action in Tūranga was not to establish a Treaty relationship on the ground, however, but to treat Māori as rebels, imprison or exile some of them, to execute others, and to confiscate large swathes of Māori land in the district. The result was that, by the 1870s, 'Turanga had ceased to be an autonomous Maori district', with institutions in place to oversee the extinguishment of native title and a massive alienation of Māori land over the following decades.[2]

(1) *Waerenga a Hika*

The apparent cause of the Crown's shift in approach in Tūranga was the conversion of a majority of Tūranga Māori to the new faith of Pai Marire in 1865. The Crown, which had involved itself in conflict further north between those Ngāti Porou aligned with Pai Marire, and those deeply opposed to it, viewed this development with concern. Although the situation in Tūranga largely remained calm after the arrival of Pai Marire, the growing number

1. Waitangi Tribunal, *Turanga Tangata Turanga Whenua: The Report on the Turanganui a Kiwa Claims*, 2 vols (Wellington: Legislation Direct, 2004), vol 1, p xv
2. Ibid, p 42



Map 3: Sites of hostilities in the late 1860s

of Crown forces within the region eventually caused some conflict. In early November 1865, Donald McLean, the Crown's principal agent on the East Coast, decided to use the forces in the district to break both Pai Marire influence along the East Coast and the independence of Tūranga Māori.[3]

3. Ibid, pp xv–xvi

3.2.1(1)

McLean arrived in Tūranga on 9 November with additional troops and demanded that Tūranga Māori surrender all arms, take an oath of allegiance, and hand over all non-Tūranga Pai Marire Māori. McLean warned that failure to comply with these terms would result in colonial and Māori forces being deployed to 'secure peace'.[4] Tūranga Māori were willing to accept McLean's terms, provided that McLean personally visited them to 'make final arrangements' and that they be able to respond to the Crown's allegations of wrongdoing. McLean refused. Leading rangatira Raharuhi Rukupo then met with McLean to plead his case, but failed to dissuade McLean from proceeding with an attack. Between 17 and 22 November 1865, Crown forces attacked and besieged Waerenga a Hika pā, a defensive pā where 800 Māori, including 300 women and children, were gathered to protect themselves against imminent Crown aggression. Seventy-one Māori and 11 Crown forces were killed during the siege. The survivors either escaped or surrendered to Crown forces. One hundred and thirteen men were imprisoned and later detained on Wharekauri (the Chatham Islands).[5]

The Tribunal found that Tūranga Māori were not in rebellion in 1865 and that the Crown acted unlawfully and in breach of the Treaty in attacking and subduing Waerenga a Hika pā between 17 and 22 November 1865.[6] The Tribunal further found that the Crown's arrest, detention and deportation of 113 men captured at Waerenga a Hika to Wharekauri (the Chatham Islands) was unlawful and in breach of the Treaty.[7] The imprisonment of the Tūranga prisoners was unlawful because they had committed no crime, and they were held without charge, trial, or conviction. Their imprisonment was made indeterminate while the Crown was trying to decide how to take Tūranga land. That delay 'greatly aggravated' the Crown's breach.'[8]

The Tribunal found that most of the Treaty breaches relating to the events of 1865, such as the Crown's error in declaring that Tūranga Māori were in rebellion, applied equally to all Tūranga Māori. Of those who were killed at Waerenga a Hika, the Tribunal thought it likely that the majority of the casualties would have been Te Aitanga a Māhaki. The casualties would 'doubtless' have included some Te Whānau a Kai, 'because they were likely to have supported their Mahaki relatives'. Te Whānau a Kai people were also possibly at the pā from the outset, and others likely arrived with Rongowhakaata reinforcements during the siege. It appeared certain that some descendants of Rawiri Tamanui (Ngā Ariki Kaipūtahi) fought at Waerenga a Hika, as Pera Te Uatuku and two others were some of the first prisoners sent to Wharekauri. There was insufficient evidence before the Tribunal to conclude if any Ngā Ariki Kaipūtahi men were killed.[9]

4. Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, vol 1, p 86
5. Ibid, pp xvi–xvii
6. Ibid, vol 2, p 743
7. Ibid
8. Ibid, vol 1, p xvii
9. Ibid, pp 123–124

We consider that the Tribunal's findings establish that Te Aitanga a Māhaki, Ngā Ariki Kaipūtahi, and Te Whānau a Kai have well-founded claims concerning Waerenga a Hika and the deportation and detention of prisoners on Wharekauri.

(2) *Te Kooti and the Whakarau*

Those imprisoned on Wharekauri became known as the Whakarau – the exiled. The Whakarau suffered a long incarceration in cold and difficult conditions. Approximately 22 men died from illness, with further deaths among the women and children who had been allowed to join their men. Te Kooti Rikirangi of Rongowhakaata, who emerged from illness with faith that God would deliver the prisoners from their oppression and whose spiritual leadership bound the Whakarau together as a religious community, planned an escape. In early July 1868, the prisoners seized the *Rifleman*, a visiting schooner, and escaped to the mainland. After their arrival on 9 July, the Whakarau moved inland toward Taupō, fighting Crown attempts to recapture them, and unsuccessfully seeking passage through Te Urewera and the Rohe Potae (King Country). Neither Tuhoe nor King Tawhiao would give their permission. The path inland was blocked, food shortages loomed, and senior government official Captain Reginald Biggs had occupied the land of Te Kooti's whānau. Resentment of their whanaunga who had escaped detention and might be party to a cession of 'rebel' lands added to the deep sense of grievance the Whakarau felt. In response, Te Kooti resolved to strike at Tūranga. Between 8 and 14 November, the Whakarau attacked the settlements of Patutahi, Matawhero, and Oweta, killing between 50 and 70 settlers and Māori, and taking 300 Māori prisoner before escaping into the bush.[10]

In response, the Crown mobilised colonial and kawanatanga forces, including Ngāti Porou and Ngāti Kahungunu contingents, and pursued the Whakarau until they fell back to the mountain-top pā of Ngātapa. The Crown forces besieged the pā until it fell on 5 January 1869 with the escape of the defenders down a precipitous unguarded slope. Casualties were heavy, with up to 83 killed during the siege and the escape. Up to 128 were captured and taken to Ngātapa or Fort Richmond, where they were summarily executed. Those executed had all been unarmed. They were not charged, tried, or convicted for any offence. Some of those executed were almost certainly those who had been taken prisoner by Te Kooti two months earlier. These executions were carried out, over two or three days, in the Crown's name, with the knowledge and sanction of settler military commanders and J C Richmond, the senior settler politician present at the battle.[11]

The Tribunal first found that, because they were unlawfully detained, Te Kooti and the Whakarau were justified in escaping from Wharekauri. The Crown acted unlawfully and in breach of the Treaty in pursuing them after their return to the mainland. Although the Whakarau were entitled to resist Crown attempts to re-arrest them on the mainland, there

10. Ibid, pp xvii–vxiii
11. Ibid, p xix

was no justification for their attacks on Matawhero, Patutahi, and Oweta. Their actions were 'dishonourable, unlawful, and in breach of their Treaty responsibilities'. The Tribunal found that the Crown was entitled to take military action in response. However, the Crown breached the principles of the Treaty by not discriminating between the Whakarau and their innocent prisoners at Ngātapa, and by executing without trial between 86 and 128 unarmed prisoners at the end of the siege.[12]

The Tribunal found that, along with Te Kooti and Rongowhakaata, the Māhaki cluster had been particularly affected by these events.[13] The evidence is that a large proportion of the Whakarau were Māhaki. By November 1867, there were 207 Tūranga Māori on Wharekauri; 154 were reported as being Te Aitanga a Māhaki. It is possible this figure included the Te Whānau a Kai and Ngā Ariki Kaipūtahi detainees, as we know that Pera Te Uatuku and two of his relatives of Ngā Ariki Kaipūtahi were detained on Wharekauri, as was at least one Te Whānau a Kai man who had been captured and sent to the island in 1866.[14] A large proportion of Te Kooti's prisoners were Rongowhakaata people, though men, women and children were also seized at the Te Whānau a Kai kainga of Patutahi.[15] People from these two groups, in addition to the Whakarau, are very likely to have been amongst those executed at Ngātapa.

We consider that the Tribunal's findings establish that Te Aitanga a Māhaki, Ngā Ariki Kaipūtahi, and Te Whānau a Kai have well-founded claims concerning the treatment of the Whakarau on Wharekauri, their pursuit by Crown forces on their return to the mainland, and the summary executions at Ngātapa.

(3) *Tūranga deed of cession 1868 and Crown retained lands*

Following Waerenga a Hika, the Crown decided to confiscate land as punishment for the 'rebellion' of Tūranga Māori. However, the Crown's efforts were delayed by years of regional squabbling and legislative wrangling. Ultimately, instead of using either the New Zealand Settlements Act or the special East Coast confiscation legislation that was eventually passed, the Crown tried to pressure Tūranga Māori into signing a voluntary deed of cession as reparations to the Crown. Māori initially resisted the Crown's attempts. However, following the attacks at Patutahi, Matawhero, and Oweta in November 1868, when both settler and Māori communities were living in considerable fear, the Government Minister J C Richmond threatened to revoke the Crown's military protection, which would have left the area susceptible to assault by either Te Kooti or Ngāti Porou.[16] Faced with such an outcome, 279 Tūranga Māori who remained signed a deed of cession which declared their loyalty to the Crown and transferred to it some 1.195 million acres (483599 hectares) of land. The

12. Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, vol 2, p 744
13. Ibid
14. Ibid, vol 1, pp 174–175
15. Ibid, pp 204–206
16. Ibid, pp 253–254

Crown was to keep an amount of this land, with the balance returned to 'loyal' Māori (as determined by an independent commission, the Poverty Bay Commission). This meant the interests of 'rebel' Māori would be transferred to 'loyal' Māori or the Crown.[17]

The Crown and Māori did not agree over the amount of land the Crown would retain under the deed of cession. At the first hearing of the Poverty Bay Commission in June 1869, William Graham, a surveyor acting as representative of Te Aitanga a Māhaki and Rongowhakaata, reported that an agreement had been struck for the Crown to retain three blocks – Te Muhunga, Te Arai, and Patutahi. Graham pointed out the location of the three blocks on a rough sketch map, but the block boundaries and estimated acreages were not added to the map until months after the commission hearing. Māori present at the hearing understood that these blocks would be 5,000 acres (2023 hectares) each. The Crown, however, believed it was also to receive a larger, undefined hill-country block. It was some years until a proper survey of the area was carried out, at which point it became clear there were very different understandings of how much land the Crown was to retain. The Crown ultimately retained a total of 56,141 acres (22,719 hectares). The Te Muhunga block comprised 5,395 acres (2183 hectares), with the remaining 50,746 acres (20536 hectares) falling within the combined Patutahi and Te Arai blocks.[18]

Rongowhakaata and Te Whānau a Kai, who both claimed to have interests in the Patutahi block, sought compensation for the cession over many decades. Their protests to the Crown resulted in investigations by two commissions – the Clarke commission in 1882 and the Jones commission in 1920. Although both commissions were generally dismissive of the Te Whānau a Kai claims, the Jones commission did find that the owners of the Patutahi block should be compensated for excess land retained by the Crown from the 1869 cession in the block in the 1870s.[19] The Native Land Court eventually determined that Rongowhakaata alone had ownership interests in the block. Following further petitions from Te Whānau a Kai, the Crown passed legislation providing for a tightly circumscribed investigation which resulted in 38 Te Whānau a Kai individuals being allocated shares solely on the basis of their Rongowhakaata whakapapa. After decades of delayed negotiations over a settlement, Rongowhakaata reluctantly accepted the Crown's offer of £38,000 in 1950. Te Whānau a Kai were excluded from this settlement.[20]

The Tribunal found that the 1868 deed of cession was signed under duress. It was therefore in breach of the principles of the Treaty and ineffective in extinguishing Māori title. This was particularly so for the majority of Tūranga Māori who had not signed the deed and who therefore had not consented to the extinguishment of their rights. As the Crown retention was 'in substance a confiscation', the onus was on the Crown to 'record the concessions

17. Ibid, p xx
18. Ibid, p xxi
19. Ibid, pp 295–297, 327–328
20. Ibid, pp 329–335. The two groups, expecting that both would be separately included in any settlement, had previously agreed to a 60:40 split of compensation.

in writing and to ensure that the correct groups consented'.[21] Where it failed to do this, the Crown had breached the Treaty, as it did when officials attempted to cover up irregularities on the record of agreements reached over retained lands between the Crown and Māori. The Tribunal further found that the 1950 settlement of the Patutahi claim had not settled the claims of Rongowhakaata or Te Whānau a Kai.[22]

The Tribunal found that Rongowhakaata and Te Whānau a Kai were particularly affected by these events, as were Te Aitanga a Māhaki in relation to Te Muhunga. Te Whānau a Kai clearly had rights in the Kaimoe block that formed the northern portion of Patutahi. The Tribunal also considered it likely that Te Whānau a Kai had rights in the larger Patutahi area, albeit interests that intersected with those of Rongowhakaata.[23]

We consider that the Tribunal's findings establish that Te Whānau a Kai and Te Aitanga a Māhaki have well-founded claims concerning the 1868 deed of cession.

(4) *The Poverty Bay Commission, 1869–73*

The Poverty Bay Commission was the body empowered by the Crown to determine how the land subject to the deed of cession would be allocated amongst the Crown, settlers, and 'loyal' Māori. As described above, the commission completed the task of determining which lands the Crown would retain on its second day of hearings. Following this, the commission had three tasks:

> first, to punish 'rebels' by confiscating their lands; secondly, to investigate the claims of settlers to lands which they had allegedly purchased in Turanga in the 1840s, in order to award them formal Crown titles; and, thirdly, to transform the tenure of lands returned to 'loyal' Maori into Crown-derived titles.[24]

Over two sittings in 1869 and 1873, along with a brief period in 1870 when some claims were adjudicated by the Native Land Court (sitting as the commission), the commission awarded a total of 138,278 acres (55,959 hectares) to Tūranga Māori.[25]

There were several problems with the process employed by the commission. There was no consistent definition of 'rebel' and the commission instead relied on ownership lists drawn up by Māori outside the court. These lists either pre-emptively excluded rebels to prevent challenges from the Crown or deliberately did so to enhance the amount of land to be gained by 'loyal' Māori.[26] Further, because of legislative omission, the commission

21. Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, vol 2, p 744
22. Ibid, p 745
23. Ibid, vol 1, pp 336–337
24. Ibid, p xxii
25. Ibid, p 340
26. Ibid, p xxii

awarded these lands as joint tenancies, a form of title that deemed all interests to be equal and precluded shares being bequeathed by will; instead, on death, the undivided interests of a joint tenant reverted to the pool of surviving joint tenants.[27] This caused 'considerable anxiety' for Māori, denying the true nature, and succession, of customary interests and forcing Māori to adopt legal fictions such as trusts to circumvent restrictions on bequeathing shares to their descendants.[28] The Crown, though aware of the problems with the form of title, did not move to provide a remedy until 1873.[29]

The Tribunal found that the 'Crown acted unlawfully and in breach of the principles of the Treaty of Waitangi in empowering the Poverty Bay Commission to try "rebels" and confiscate their lands without due process or appropriate safeguards'.[30] The Crown could not establish a new court to usurp the constitutional role of pre-existing courts, nor could it grant that court the power to confiscate lands without specific statutory authority.[31] The Crown further breached the Treaty by failing to ensure that 'loyal' Māori were compensated for the lands retained by the Crown post-cession and that the 'form of title awarded following investigation by the Poverty Bay Commission was not prejudicial to Maori interests'.[32] Tūranga Māori had wanted their lands returned on a tribal basis, but the commission and ultimately the Crown failed to implement their request. Title was transformed in breach of the principles of the Treaty.[33]

Although the interests of Ngāi Tāmanuhiri and Rongowhakaata had been particularly affected by the operation of the Poverty Bay Commission, the Tribunal found that all iwi and hapū were affected to some extent. Almost all of those who were sent to Wharekauri were excluded from awards by the Poverty Bay Commission. There is less definite information about the fate of those from Te Aitanga a Māhaki or Te Whānau a Kai who may have been deemed 'rebels' but had not been sent to Wharekauri (those deported were considered the 'worst' offenders).[34] However, the Tribunal did consider that the blocks awarded to these groups by the commission had considerably reduced ownership lists.[35] This suggests that many non-Whakarau 'rebels' were also excluded from the commission's awards.

We consider that the Tribunal's findings establish that Te Aitanga a Māhaki, Ngā Ariki Kaipūtahi, and Te Whānau a Kai have well-founded claims concerning the operation of the Poverty Bay Commission.

27. Ibid, pp 379–380
28. Ibid, pp 386–387
29. Ibid, pp 380–381
30. Ibid, vol 2, p 745
31. Ibid, vol 1, p xxii
32. Ibid, vol 2, p 745
33. Ibid, vol 1, pp 392–393
34. Ibid, p 42
35. Ibid, p 365

3.2.2 The arrival of the Native Land Court

Although the Crown's conduct and activities during its first sustained engagement with Tūranga Māori had already resulted in a dramatic change in the district, further change was to come. The Native Land Court arrived in Tūranga in 1875 to investigate the title to remaining hapū lands under the Native Land Act 1873 and to transform Māori customary tenure into Crown-derived titles. By the time the court had completed this task 35 years later, three-quarters of the district had been alienated, with two-quarters purchased by settlers and one-quarter purchased by the Crown. This outcome was in spite of numerous attempts by Tūranga Māori to fight or circumvent the court in order to keep Māori land in Māori control. The Native Land Court thus continued the transformation of Tūranga set in motion by the events at Waerenga a Hika, 'from an almost entirely Maori district to one in which they were a minority both demographically and economically'.[36]

(1) *The Native Land Court and the new native title*

The widespread alienation of land that resulted from the determinations of the Native Land Court was not the outcome for which Tūranga Māori had wished. They wanted to adjudicate title themselves, not abdicate that power to a colonial court. Above all, Māori wanted to maintain community land management and alienation rights rather than have their interests individualised. But the new 1873 Native Lands Act undermined community ownership, creating an intermediate form of title, 'halfway between pure uninterrupted customary title and freehold title held by Crown grant'.[37] Technically the land remained Māori customary land. But the Act required that all members of land-owning hapū be recorded and created individually tradable interests in land, at the same time providing that the land could be purchased directly by the settlers. It individualised Māori title *only* for the purposes of sale or lease.[38]

Because the native land legislation did not allow for communities to access development opportunities, individual Māori instead had to rely on land alienation as the primary way to access the benefits of the colonial economy. The legal regime was weighted against retention, with few safeguards to protect against unfair and unwise land alienations. But the individualised sale process provided by the land legislation was complex, clumsy, and inconsistent. Purchasers faced a drawn-out process of acquiring individual interests in customary land before they could secure title themselves. As a result of these factors, Māori had to sell their land at significantly discounted prices.[39]

The Tribunal found that the Crown had breached the Treaty guarantee to Māori of their tino rangatiratanga. The Native Land Court expropriated from Māori the right to make

36. Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, vol 1, p xxiii
37. Ibid, vol 2, p 400
38. Ibid, p 440
39. Ibid, vol 1, pp xxiii–xxiv, 533

their own title decisions. This was done without their consent and against their will. Because of the complexities of the native land system and the lack of Crown support for community land management, Māori sold 'more land as individuals than they would have sold as communities, and at far lower overall prices'.[40] Because the Crown's system was designed to ensure that the bulk of Māori lands were sold, the Tribunal found that the Crown had breached both the title and rangatiratanga guarantees in article 2 of the Treaty. The system resulted in Māori quickly losing control of the pace and volume of alienation. Despite the Crown being warned this would be the result, it 'took no effective steps to prevent Maori landlessness', acting with reckless indifference to the risks inherent in the system. The Crown therefore breached its fiduciary and active protective obligations.[41]

The Tribunal found that '[a]ll iwi and hapu were affected to a significant degree by the operation of the Native Land Court'.[42] Figures provided by historian Katherine Rose show that nearly half of the Te Aitanga a Māhaki rohe had been bought by private purchasers by 1912 (this figure includes the land of Ngā Ariki Kaipūtahi and Te Whānau a Kai).[43] In 1886, the iwi owned 13 reserves; by 1916, they only owned six.[44] Although the level of sales of Te Aitanga a Māhaki and Ngā Ariki Kaipūtahi land was high, their interests in the Mangatū block (which we discuss below) meant they retained proportionately more land than other Tūranga Māori. This was not the case for Te Whānau a Kai, who had lost all their lands in what is now the Tūranga inquiry district by 1882.[45]

We consider that the Tribunal's findings establish that Te Aitanga a Māhaki, Ngā Ariki Kaipūtahi, and Te Whānau a Kai have well-founded claims concerning the operation of the Native Land Court and land alienation.

(2) *The Tūranga Trust lands, 1878–1955*

Keen to escape the onerous conditions of the Crown's native lands system, Tūranga Māori sought to develop 'sophisticated schemes' to derive maximum benefit from their lands.[46] The first of these attempts were the Rees Pere trusts, implemented by Tūranga leader Wi Pere and his lawyer William L Rees. Attracted by the prospect of profits from management of their lands by community leaders appointed as trustees, communities throughout the East Coast vested their land in the trusts, with Tūranga Māori vesting over 70,000 acres (28,328 hectares) of a total 200,000 acres (80,937 hectares). Alienation of land to attract Pākehā settlement and expenditure on infrastructure would be under their own control.[47]

40. Ibid, vol 2, p 746
41. Ibid, vol 1, pp xxiii–xxiv
42. Ibid, vol 2, p 746
43. Ibid, pp 405, 472; doc H1, p 79
44. Ibid, p 460
45. Ibid, p 511
46. Ibid, vol 1, p xxiv
47. Ibid, vol 2, pp 486–488

Unfortunately, the trusts soon failed, burdened with debt due to the cost of reacquiring some of the best land in Tūranga (which had already passed into settler hands after the Poverty Bay Commission or early native land court awards), and with little legal support from the Legislature or the courts. Rees and Pere's next attempt was a joint venture with Auckland property speculators, the New Zealand Native Land Settlement Company. Over 200,000 acres (80,937 hectares) within the inquiry district, including the Rees Pere trust lands and the lease of the 90,000 acre (36,421 hectare) Mangatū 1 block, were vested in the company. The company failed in 1888, burdened by debt, a massive economic downturn, and some bad business decisions.[48]

Finally, following the sale of a number of blocks by the Bank of New Zealand, the company's mortgagor, Pere and Sir James Carroll established another trust in 1892. All remaining lands in Tūranga from the company were transferred to the trustees (just under 100,000 acres, or about 40,000 hectares). The trust struggled to survive, beset by insecure titles which originated in transactions conducted between Māori land owners and the company in the 1880s, and the prohibitive amount of time and money necessary to fix the titles in the new Validation Court. Overall debt doubled between 1892 and 1897 and the cost of interest was very high. Other blocks, such as parts of Maraetaha and Tahora, were then drawn into the trust to spread the debt load (even though they should not have been included). Most of these blocks were then sold to repay debt owed to the bank.[49] Though the trust included 'some very good property', there was no capacity to raise finance for development.[50]

In 1902, the Crown finally intervened in the trust, both to avoid widespread landlessness among Tūranga Māori and to protect the Bank of New Zealand from collapse. This intervention came after numerous requests for assistance, notably from the trustees. The Crown established the East Coast Native Trust Lands Board to administer about 185,000 acres (74,866 hectares) of land throughout the East Coast (100,000 acres (40,500 hectares) of which was inside the Tūranga inquiry district). The lands remained in statutory management until 1955, with the owners denied a role in trust decisions for the duration of the period. When the lands were returned to the Māori owners, they were returned as profitable going concerns.[51] However, only 27,000 acres (10,927 hectares) were returned to Tūranga Māori; the remaining 75,000 acres (30,351 hectares) had been sold to meet debt.[52]

The Tribunal found that the Crown's failure 'to provide adequate systems for community title and management and to prevent piecemeal erosion of community land interests' was the primary reason for the failure of the Rees Pere trusts. This was a breach of the article

48. Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, vol 1, p xxiv
49. Ibid, p xxv
50. Ibid, vol 2, pp 560–561; evidence of W G Foster, 14 December 1897, 'Minutes of Evidence to Native Affairs Committee', AJHR, 1897, sess 2, I-3A, p 17
51. Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, vol 1, pp xxv–xxvi
52. Ibid, vol 2, p 569

2 guarantee of tino rangatiratanga and of the Crown's obligation of active protection.[53] The Tribunal also found that the Crown was substantially responsible for the failure of the Carroll Pere trust and had accordingly breached the principles of the Treaty. It was the Crown's land tenure system that 'destabilised the trust's titles' and 'made the cost of doing business too high', and '[i]t was the operation of the Validation Court that allowed for the inappropriate inclusion of debt-free lands into the trust'.[54] Finally, the Tribunal found that the Crown, despite being aware of its complicity in the problems facing the Carroll Pere trust before it took action in 1902, failed to intervene earlier, resulting in escalation of trust debt and further loss of land. The Crown also failed to require 'the trust to include Maori in the development of policy for the administration of their lands' once it became clear the trust would not be a short-term institution. The Crown failed in both respects to discharge its Treaty obligation of active protection.[55]

The Tribunal found that, while all 'iwi and hapu lost to some extent in the failure of the Turanga trusts . . . Ngai Tamanuhiri lost considerably in the sale through the trusts of their Maraetaha and Pakowhai lands and Te Whanau a Kai lost heavily in the sale of their Tahora blocks'.[56] There were originally two Tahora sections within our inquiry district: Tahora 2C2, section 2 (3,843 acres, or 1,555 hectares) and Tahora 2C3, section 2 (15,330 acres or 6204 hectares).[57] These sections were passed into the Carroll Pere trust in 1896 and then the East Coast Native Trust Lands Board. A total of 5279 acres (2,136 hectares) was returned to the beneficial owners of the two sections in 1955, constituting just 27 per cent of their original acreage.[58] The Tribunal 'did not have adequate evidence . . . to comment further on those alienations'.[59] However, the Te Urewera Tribunal subsequently made findings on these alienations.[60] We examine these findings in chapter 5, but for present purposes we are satisfied that Te Whānau a Kai have a well-founded claim in respect of the Tahora sections alienated by the East Coast Commissioner.

The Tribunal noted that '[t]he fortunes of Te Aitanga a Mahaki and Ngariki Kaiputahi were bound in the Rees Pere trusts (and their successors) and the Mangatu blocks'.[61] Te Aitanga a Māhaki lost about 100,000 acres (around 40,500 hectares) – one-seventh of their rohe – through sales by the New Zealand Native Land Settlement Company, the 1891

53. Ibid, vol 1, p xxiv
54. Ibid, p xxv
55. Ibid, vol 2, pp 746–747
56. Ibid, p 747
57. Ibid, p 579. The remainder of the Tahora block sits in the Te Urewera inquiry district, where the Tribunal has also made findings of Treaty breach. We examine these findings in chapter 5.
58. Ibid
59. Ibid
60. Waitangi Tribunal, *Te Urewera: Pre-publication, Part 11* (Wellington: Waitangi Tribunal, 2009), pp 940–942
61. Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, vol 2, p 511

mortgagee sale, sales by the Carroll Pere trust, and sales by the East Coast Native Trust Lands Board.[62]

We consider that the Tribunal's findings establish that Te Aitanga a Māhaki, Ngā Ariki Kaipūtahi, and Te Whānau a Kai have well-founded claims concerning the failure of the Tūranga trusts and the alienation of their land.

(3) *The 1881 Mangatū title determination*

The Mangatū block of 160,680 acres (65,025 hectares) came before the Native Land Court in 1881. It was subdivided into six sections to accommodate the number of parties claiming interests in different parts of the block and the need to pay survey costs.[63] Mangatū 1 was the largest section, estimated at 100,000 acres (40,500 hectares), and was claimed by several competing parties. Wi Pere and Wi Haronga lodged a joint application on behalf of Ngāti Wahia and Ngāriki (and people who could affiliate to both). Pera Te Uatuku, son of Rawiri Tamanui and rangatira of Ngā Ariki Kaipūtahi, appeared as a witness in support of Wi Pere's case, indicating that they operated as co-claimants. Five other parties lodged counter claims, with Wi Mahuika presenting the most substantive evidence on behalf of Te Whānau a Taupara.[64]

The customary evidence given before the Native Land Court in 1881 was 'lengthy and complex'.[65] The main issue in question concerned the historical rights of Ngāriki – and Ngā Ariki Kaipūtahi in particular – in the Mangatū area and the extent to which those rights had been extinguished by subsequent events. In its decision, the court noted that while the evidence had been 'exceedingly confused', it was satisfied:

> that the land originally belonged to Ngariki and that they were completely broken as a tribe in the time of Ihu and his sons and again by Te Whiwhi Grandfather of Waaka Mahuika, and that since then, though they continued to dwell on the land they can only have done so in subjection of the conquerors.[66]

62. Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, vol 2, pp 580–582

63. The six sections were Mangatū 1 (100,000 acres or 40,500 hectares); Mangatū 2 (11,000 acres or 4,450 hectares), which was treated as an extension of the Waipaoa block and awarded to Ngaitamatea; Mangatū 3 (3,680 acres or 1,490 hectares), which was awarded to the hapū Whakauaki; Mangatū 4 (6,000 acres or 2,428 hectares), which was awarded to Te Whānau a Taupara; Mangatū 5 (20,000 acres, or 8,094 hectares), which was awarded to six people represented by Wi Pere but set aside for survey costs; and Mangatū 6 (20,000 acres or 8,094 hectares), which was also awarded to six people represented by Wi Pere: see Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, vol 2, p 660.

64. Ibid, pp 664–665

65. Ibid, p 666

66. Gisborne Native Land Court minute book 7, 11 April 1881, fols 199–200 (John Robson and Bernadette Arapere, comps, 'Document Bank to Robson and Arapere Reports', various dates (doc A21(b)), [pp 73–74]); Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, vol 2, p 674

The court instead gave clear preference to the claim of Ngāti Wahia, as represented by Wi Pere and Wi Haronga, along with 'circumspect recognition of Te Whanau a Taupara.'[67] This was despite the fact that the reasoning of the court's decision seemed to support the case made by Te Whānau a Taupara.

The court's statement concerning the utter defeat of Ngāriki was not reflected in the subsequent attempts of the wider community of Mangatū owners to protect Ngā Ariki Kaiputahi from the full consequences of the court's decision.[68] When Wi Pere compiled a list of owners in 1881, Ngā Ariki Kaipūtahi individuals featured prominently despite the court's decision. Pera Te Uatuku of Ngā Ariki Kaipūtahi was listed at the top of the list of 12 owners. The 12 owners held the land in trust for 179 named individuals, 64 of whom could affiliate to Ngāriki and 63 of whom could affiliate to both Ngāriki and Ngāti Wahia.[69] When the incorporation was formed in 1893 to take over management of the Mangatū lands (for reasons we explore in more depth in chapter 4), Pera was one of seven elected to the first management committee. These actions indicate that the community of owners did not consider Ngāriki 'to be without rights, even after the judgment of the court which purported to extinguish them'.[70]

After Wi Pere's death in 1915, however, the owners of Mangatū sought to formally determine the relative interests in the land, a process provided for in native land legislation. This represented a shift away from Wi Pere's vision, to individualisation of title. In 1916, the committee of owners divided the 179 individuals recorded in 1881 into groups and began to apportion relative interests to individuals. Evidence later presented in the Native Land Court suggests that the Ngāriki group were to receive 17.5 per cent of shares. However, the committee's allocation failed to gain agreement from all of the owners. This triggered the intervention of the Native Land Court. In a series of decisions between 1917 and 1923, the share allocated to owners affiliating to Ngāriki steadily reduced to just 4 per cent.[71] This reduction was exacerbated by legislation passed by the Crown in 1917 which allowed Te Whānau a Taupara, but not Ngā Ariki Kaipūtahi, to reargue their interests in the Mangatū 1 and 4 blocks.[72]

The Tribunal considered that the Native Land Court's 1881 judgment was 'unsafe'.[73] In its 'unusually brief' judgment, the court did not justify its decision or properly explain its understanding of the evidence (if it had understood the evidence at all). In particular, the court failed to distinguish between the different Ngāriki groups and to recognise the

67. Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, vol 2, p 674
68. Ibid, p 678
69. Ibid, p 677
70. Ibid, p 678
71. Ibid, pp 679–692
72. Mangatū 4 was a 6,000-acre (2,428-hectare) block divided off from Mangatū 1 in 1881 for Te Whānau a Taupara.
73. Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, vol 2, p 678

continuing rights of Ngā Ariki Kaipūtahi in Mangatū.[74] As we discussed above, the Tribunal made a number of findings in regard to the Native Land Court, including that the Crown had breached the tino rangatiratanga guarantee in the Treaty by expropriating from Māori the right to make their own title decisions. The 1881 title determination needs to be seen in the context of those broader findings. The Tribunal also found that the 1917 legislation had breached the Treaty:

> When the Crown introduced legislation in 1917 to allow Te Whanau a Taupara to reargue the question of the rights of that hapu in the Mangatu block, it should have allowed Ngariki Kaiputahi to make the same argument and to that extent the Crown breached the principles of the Treaty of the Waitangi.[75]

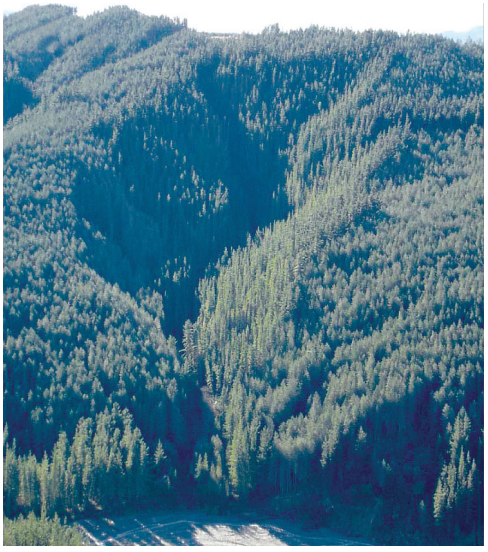
We consider that the Tribunal's findings establish that Ngā Ariki Kaipūtahi have a well-founded claim concerning the 1881 Mangatū title determination and the impact of the Crown's subsequent legislative intervention in 1917.

3.2.3 Mangatū afforestation – the 1961 sale

From the 1930s, erosion and aggradation in the upper Waipāoa River catchment area caused severe flooding that threatened the valuable farming land of the Gisborne flats. Several attempts to control the flooding throughout the 1940s and 1950s failed to make a significant impact. In 1955, an expert panel was appointed by the Soil Conservation and Rivers Control Council to report on the erosion problem in the Waipaoa catchment area and suggest a remedial programme that could be implemented at once. The panel recommended that an area referred to as the crushed argillite zone (in reference to the clay and crumbling rock that makes up the area) be afforested to protect the land from erosion and reduce aggradation in the river. The panel believed that around 45 per cent of this area could be productive forest, with the remaining area purely protective. Just under half of the land in question was owned by the Mangatū Incorporation. The panel recommended that, while the other, Pākehā-owned land should be purchased by the Crown, the incorporation land should remain in Māori ownership with the Crown financing the afforestation.[76]

In the years following the panel's report, a number of other Crown agencies became involved, including the Forest Service and the Lands and Survey Department. Initial discussions were held with the owners of the affected lands concerning the proposals. In August 1959, Cabinet approved in principle the afforestation scheme. However, in contrast to the recommendations of the 1955 panel, the Crown was to acquire all of the land required for the scheme, including that owned by the Mangatū Incorporation. The Mangatū owners

74. Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, vol 2, pp 678–679
75. Ibid pp 747–748
76. Ibid, pp 697–698



Clockwise from above: **The results of afforestation near Te Weraroa Stream in 1961, 1972, and 2004**

had long been aware of the erosion problem and recognised that action needed to be taken 'to prevent further damage . . . in the interests of the wider community'.[77] The owners had leased land to the Poverty Bay Catchment Board for some of the earlier flood control efforts.[78] Nonetheless, they did not wish to sell their lands to the Crown and instead sought alternatives. In particular they sought a land exchange, but they also repeatedly proposed undertaking the afforestation themselves, or entering some form of leasing arrangement, land exchange or joint venture. If the Crown had to purchase the land, the owners preferred

77. Ibid, p 698
78. Ibid, pp 702–703

that the Crown take the land under the Public Works Act, thus saving the management committee from the stigma of agreeing to a voluntary sale.[79]

Crown officials placed considerable pressure on the owners to sell the land. The Crown did not investigate seriously the numerous proposals for alternatives to sale put forward by the owners.[80] During its negotiations with the owners, the Crown emphasised that the high cost of afforestation meant selling the land was the only option. Crown officials told the owners that, because afforestation would largely be for protective purposes and any profits would therefore be uncertain, they could be exposed to significant risk if they undertook afforestation themselves. The owners found these arguments compelling. However, in contrast to what they were telling the owners, Crown officials were also privately contemplating the possibility of a much higher proportion of productive forest.[81]

After several months of difficult negotiations, a turning point came on 1 June 1960, when a special general meeting of Mangatū owners was held at the request of the Minister of Forests. Both the Minister and accompanying officials left the meeting with the impression that the owners had agreed to a voluntary sale (as opposed to compulsory acquisition), though it is uncertain whether they had. Nonetheless, after further deliberations, the owners did formally agree that the committee might negotiate a sale at the annual meeting of owners on 21 October 1960, provided a satisfactory price could be secured. Further negotiations, based on the respective valuations of the Government and the incorporation, resulted in a deed of sale for 8,522 acres (3,449 hectares) at a price of £80,958. The committee executed the deed in October 1961.[82]

The Tribunal found that the Crown 'failed to act reasonably and with the utmost good faith when it acquired the Mangatu forest lands from the Maori owners' and therefore breached the principles of the Treaty. The Crown's conduct in the negotiations for the acquisition of the 1961 land was 'far from scrupulously fair, even-handed, and honest'.[83] The arguments made by Crown officials – that the forest would be largely protective and therefore an uneconomic proposition for the owners themselves – led the owners to 'reverse their stance from one of implacable opposition to sale'.[84] The Crown also gave little consideration to alternatives to sale, despite the owners' frequent requests.

The Tribunal found that Te Aitanga a Māhaki had been directly affected by the Crown's Treaty breach. The reason why the Tribunal made its finding in favour of Te Aitanga a Māhaki rather than the Mangatū Incorporation has its origins in the 'new approach' the Tribunal adopted for investigating the Tūranga claims. As we outlined in chapter 1, the original claim relating to the 1961 sale was Wai 274, filed by John Ruru on behalf of the

79. Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, vol 2, pp 714–715, 729–730
80. Ibid, pp 729–730
81. Ibid, p 733
82. Ibid, pp 718–721, 724; doc 132(a), pp 362–364
83. Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, vol 2, p 733
84. Ibid, pp 733, 748

incorporation. As part of the interlocutory process before our historical inquiry, Wai 274 was amended and consolidated with Wai 283, the broader Te Aitanga a Māhaki claim. The Mangatū Incorporation was not independently represented at our earlier inquiry and the claim was instead advanced by counsel for Te Aitanga a Māhaki. The consolidated Wai 274/283 claim sought return of 'the area known as Mangatu State Forest . . . to the claimants' (defined as the members of Te Aitanga a Māhaki).[85] The Tribunal therefore considered the Mangatū afforestation claim on that basis and accordingly found that Te Aitanga a Māhaki had been directly affected by the Crown's breach in respect of the sale of the 1961 land.

However, we consider that the Mangatū owners – and by implication, the Mangatū Incorporation – are encompassed by this finding. There is a clear relationship between the Crown Treaty breach and prejudice identified and the Mangatū owners. The owners were specifically referred to throughout the chapter in the Tūranga report on the 1961 sale as the party negotiating with the Crown. The owners of the incorporation are also by definition members of Te Aitanga a Māhaki. Mr Haronga's evidence to our inquiry, which was unchallenged, is that the 1490 listed owners of the Mangatū Incorporation in 1961 were direct descendents of the 333 owners listed in 1922. These owners were in turn of Wahia, Ngāriki, and Taupara identity.[86] According to the evidence of Willy Te Aho before us, these groups are in turn all encompassed within Te Aitanga a Māhaki.[87] It is thus clear from evidence submitted to our inquiry that the Mangatū owners (and thereby, the incorporation), from whom the Crown purchased the 1961 lands, affiliate to Te Aitanga a Māhaki and were directly affected by the sale.

There is one final point we need to address before we can determine if the Mangatū Incorporation's application for remedies meets the threshold necessary for consideration by the Tribunal. During the course of our proceedings, counsel for Ngā Ariki Kaipūtahi questioned whether Wai 1489, because it is technically a new claim, had been inquired into by the Tribunal as is required by section 6(2) of the TOWA.[88] Counsel for the incorporation responded that Wai 1489 had been filed 'by Mr Haronga purely for procedural reasons'. That is, in 2008 Mr Ruru was a negotiator for TAMA and 'was unable to consent to Wai 274 being used'. Counsel further noted that the Supreme Court had been satisfied that Wai 1489 was a well-founded claim.[89] The court had considered that, '[a]lthough in form a separate claim, it [Wai 1489] was in reality pursuing the original claim in Wai 274 for resumption of the land sold in 1961.'[90]

We concur with and adopt the Supreme Court's conclusions on this point. Although Wai 1489 has been allocated its own Wai number, it is not a distinct claim of Treaty breach. It

85. SOC 1, pp 4, 109
86. Transcript 4.28, p 109
87. Document I18, [p 5], para 19. Mr Te Aho's evidence on this point was not challenged in our inquiry.
88. Document J11, p 5
89. Document M7, p 12
90. *Haronga v Waitangi Tribunal* [2012] 2 NZLR 53, 87

does not call on the Tribunal to make new findings of Treaty breach. Rather, Wai 1489 is an application for remedies drawing on existing findings of Treaty breach in respect of a claim which in its earliest manifestation encompassed the Mangatū owners. The inquiry the Tribunal is therefore called on to conduct is whether or not to grant the remedy sought. That is the inquiry we are undertaking now. We are satisfied there are no jurisdictional issues that preclude us from doing so.

We therefore consider that the Tribunal's findings establish that the Mangatū Incorporation has a well-founded claim concerning the forced sale of the 1961 land.

3.2.4 Summary of well-founded claims

In summary, we conclude that the following claimants have well-founded claims:

- Mangatū Incorporation, in respect of the acquisition of Mangatū lands – including the 1961 land – by the Crown for afforestation for erosion protection;
- Te Aitanga a Māhaki, in respect of the Crown's unlawful attack on Waerenga a Hika, resulting in high casualties, and the subsequent arrest, detention, and deportation of 84 Māhaki men captured at Waerenga a Hika to Wharekauri; the Crown's unlawful pursuit of the Whakarau after their return to the mainland, its failure to discriminate between the Whakarau and their innocent prisoners at Ngātapa, and the execution of many unarmed prisoners at the end of the siege; the punitive 1868 deed of cession, signed under duress, which was ineffective in extinguishing the rights of the majority of Tūranga Māori who had not signed it, and the Crown's subsequent failure to properly obtain agreement on the lands it would retain; the operation of the Poverty Bay Commission, which confiscated the lands of those deemed 'rebels' without due process or appropriate safeguards, failed to ensure 'loyal' Māori were compensated for the lands retained by the Crown, and transformed Māori tenure into Crown-derived titles without their consent; the operation of the Native Land Court, which expropriated from Māori the right to make their own title decisions, removed community land management rights, and resulted in massive land alienation in Tūranga; the failure of the Tūranga trusts and consequent land alienation, which resulted from the Crown's failure to provide adequate systems for community title and management, and to prevent piecemeal erosion of community land interests; and the Crown's acquisition of Mangatū lands for erosion protection.
- Ngā Ariki Kaipūtahi, in respect of the Crown's unlawful attack on Waerenga a Hika, resulting in high casualties, and the subsequent arrest, detention, and deportation of 84 Māhaki men captured at Waerenga a Hika to Wharekauri; the Crown's unlawful pursuit of the Whakarau after their return to the mainland, its failure to discriminate between the Whakarau and their innocent prisoners at Ngātapa, and the execution of many unarmed prisoners at the end of the siege; the operation of the Poverty Bay

Commission, which confiscated the lands of those deemed 'rebels' without due process or appropriate safeguards, failed to ensure 'loyal' Māori were compensated for the lands retained by the Crown, and transformed Māori tenure into Crown-derived titles without their consent; the operation of the Native Land Court, which expropriated from Māori the right to make their own title decisions, removed community land management rights, and resulted in massive land alienation in Tūranga; the failure of the Tūranga trusts and consequent land alienation, which resulted from the Crown's failure to provide adequate systems for community title and management, and to prevent piecemeal erosion of community land interests; and the effects of the 'unsafe' 1881 Mangatū title determination, including the Crown's failure to allow Ngā Ariki Kaipūtahi to reargue their rights in the Mangatū block when it passed legislation allowing Te Whānau a Taupara to do so in 1917.

- Te Whānau a Kai in respect of the Crown's unlawful attack on Waerenga a Hika, resulting in high casualties, and the subsequent arrest, detention, and deportation of 113 men captured at Waerenga a Hika to Wharekauri; the Crown's unlawful pursuit of the Whakarau after their return to the mainland, its failure to discriminate between the Whakarau and their innocent prisoners at Ngātapa, and the execution of many unarmed prisoners at the end of the siege; the punitive 1868 deed of cession, signed under duress, which was ineffective in extinguishing the rights of the majority of Tūranga Māori who had not signed it, and the Crown's subsequent failure to properly obtain agreement on the lands it would retain; the operation of the Poverty Bay Commission, which confiscated the lands of those deemed 'rebels' without due process or appropriate safeguards, failed to ensure 'loyal' Māori were compensated for the lands retained by the Crown, and transformed Māori tenure into Crown-derived titles without their consent; the operation of the Native Land Court, which expropriated from Māori the right to make their own title decisions, removed community land management rights, and resulted in massive land alienation in Tūranga; and the failure of the Tūranga trusts and consequent land alienation, which resulted from the Crown's failure to provide adequate systems for community title and management, and to prevent piecemeal erosion of community land interests.

3.3 Do the Applicants' Well-founded Claims Relate to the Mangatū Forest Lands?

We also conclude that all of the well-founded claims described above relate to the Mangatū CFL lands within the inquiry district. As we discussed in chapter 2, we have taken a liberal approach to nexus for the purposes of determining whether a claimant meets the threshold to have their application for remedies considered by the Tribunal. The claims of the

Mangatū Incorporation and Ngā Ariki Kaipūtahi have a direct relationship to the Mangatū CFL lands. The claims of TAMA relate to the Mangatū CFL lands because the lands that make up the forest are part of their tribal estate.

While Te Whānau a Kai do not have claims relating directly to the Mangatū blocks, they assert customary interests in them. Te Whānau a Kai's rohe falls within the Tūranga inquiry district, as well as in Te Urewera. As we will discuss in chapter 4, many people with Te Whānau a Kai affiliations were included on the original list of Mangatū owners. In particular, Peka Kerekere, principal rangatira of Te Whānau a Kai, was elected to the incorporation's first committee of management in 1893.[91] In addition to that 11 of the 12 representative owners on Wi Pere's 1881 list of owners – including Wi Pere himself – had Te Whānau a Kai connections to some extent, as did six of the seven members of the Mangatū committee of management and nearly half of the names on the full Mangatū list of owners.[92] The Tribunal noted the conclusion in the Tūranga report that,

> In the end, although Te Whanau-a-Kai and Ngariki Kaiputahi have a number of distinctive claims, they are both so closely bound up in the Mahaki complex that the claims they share with their whanaunga outweigh, in our view, those which are distinct.[93]

Given all these factors, we conclude that Te Whānau a Kai have a sufficient connection to the land to be eligible for consideration of a binding recommendation. We are strengthened in that view because of the happenstance nature of the existence and location of Crown forest licensed lands that are available for Treaty settlement, and, over time, the ebb and flow of customary interests in land where people have whakapapa in common. A determination of title to land made by the Native Land Court in the latter part of the nineteenth century, even if the court managed to correctly determine which groups had interests in land and what the nature of their interests was, froze the hapū occupation of land as it was at that time. But customary interests were considerably more fluid: interests changed as some hapū got stronger and more numerous, while others split or disappeared. Thus, customary interests of different whānau, hapū and iwi overlapped and co-existed rather than being the singular, exclusive interests imposed by the Crown's title system in Tūranga.

In the *Ngāti Awa Cross Claims Report*, the Tribunal endorsed the Crown's approach to using Crown forest licensed lands to give redress to those with 'threshold' interests.[94] The circumstances here are such that the same principled approach to resolving Treaty grievances needs to be taken. To do otherwise might lead to the result that those entitled to a remedy which includes 'land for land' redress, were unfairly excluded from being considered for a possible return of land. We see this point as being important because Te Whānau

91. Document M6, para 10.2
92. Ibid
93. Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, vol 2, p 742
94. Waitangi Tribunal, *Ngāti Awa Settlement Cross-Claims Report* (Wellington: Legislation Direct, 2002), p 73

a Kai lost virtually all their land interests in the Tūranga district, so that the Mangatū forest represents an opportunity for them to regain land in that district. We find ourselves in agreement with the Crown's policy of determining whether a group has a threshold interest in the land, rather than a dominant interest in it, to be eligible to receive that land as part of its redress.

We can, therefore, proceed to consider the remedies applications of all four claimants.

3.4 Conclusion

It is evident from the discussion above that the Crown's Treaty breaches in Tūranga were of a serious magnitude. In the Tūranga report, the Tribunal made a number of comments regarding the seriousness of the Crown Treaty breaches we had identified. The Presiding Officer's letter of transmittal to the Minister of Māori Affairs noted the lasting impressions with which the Tribunal had been left:

> We heard of the horrific events that unfolded in this district from 1865 to 1869, and the lasting impact they had on Maori and non-Maori. Of particular concern to us was the fact that Turanga Maori lost proportionately more killed at the hands of Crown forces in the New Zealand wars than any other district. We were struck also by the lawless brutality of many of those killings. We heard further of the numerous attempts by Maori from the 1870s on, to make the best they could of the new order which transformed the district after the wars. Some of those attempts were successful, some were not.[95]

In particular, the Tribunal was shocked by 'the horrors of Ngatapa' and commented that 'the scale of the systematic killing at Ngatapa represents one of the worst abuses of law and human rights in New Zealand's colonial history'.[96] The Tribunal went on to comment that,

> While the confiscation aspect of the claim was not as large as those of Taranki and Waikato, the treatment of the people in Turanga was, in our view, significantly worse. The illegal imprisonment of a quarter of the adult male population on Wharekauri is bad enough. But the loss in war of an estimated 43 per cent of the adult male population of Turanga, including the illegal execution of a third to a half of that number, is a stain on our national history and character. To this must be added the long term debilitating effect of the Poverty Bay Commission and the Native Land Court. The fact that Turanga Maori made numerous unsupported attempts to avoid the constraints of unfair laws and extract fair value from their lands aggravates matters in our view.[97]

95. Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, vol 1, p xiii
96. Ibid, pp xx–xix
97. Ibid, vol 2, p 750

3.4

In recognition of both the seriousness of the Crown's Treaty breaches, and the extent of prejudice suffered by Tūranga Māori as a result of those breaches, the Tribunal observed that 'the settlement for Turanga should be substantial'.[98] We reiterate those sentiments here.

Although no real comparison can be drawn between the various Crown Treaty breaches that have been identified in Tūranga, we think some general comments can be made. The district-wide claims relating to the events at Waerenga a Hika and its aftermath, which involved the Crown's brutal and lawless destruction of Māori autonomy and the imposition of its own authority, are of the most serious level of Treaty breach. As we will outline in subsequent chapters, the prejudice those breaches have caused to Tūranga Māori is unquantifiable and lasting. The claims relating to the extinguishment of native title through the Poverty Bay Commission and the Native Land Court, and to the introduction of a system of land alienation that excluded normal Māori community decision-making and that lacked any safeguards for Māori are, in their own way, no less serious. As the Tribunal put it:

> Can it really be said that these more insidious forms of Treaty breach were less grievous than direct Crown action against people and property, particularly in light of the fact that their effect covered more land and affected more people? In the end, the lasting effect of the Poverty Bay Commission and the Native Land Court on the lives of Turanga Maori was, in economic terms at least, worse than that of the conflicts which led to their arrival.[99]

What is common across all the Crown's Treaty breaches identified is the crushing of Māori autonomy in Tūranga. Restoring the autonomy of Tūranga Māori must therefore be a key component of any remedy for those breaches.

98. Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, vol 2, p 748
99. Ibid, p 738

CHAPTER 4

THE MANGATŪ INCORPORATION'S APPLICATION

4.1 Introduction

Wai 1489 is the main application in our remedies inquiry; it is the one the Supreme Court directed us to hear. The Mangatū Incorporation sold the 1961 land to the Crown for erosion control and afforestation. In 2004, the Tūranga Tribunal found the manner of the Crown's purchase to have been in breach of the Treaty. The incorporation owners now ask the Tribunal to order return of the land under binding provisions in the Treaty of Waitangi Act 1975.

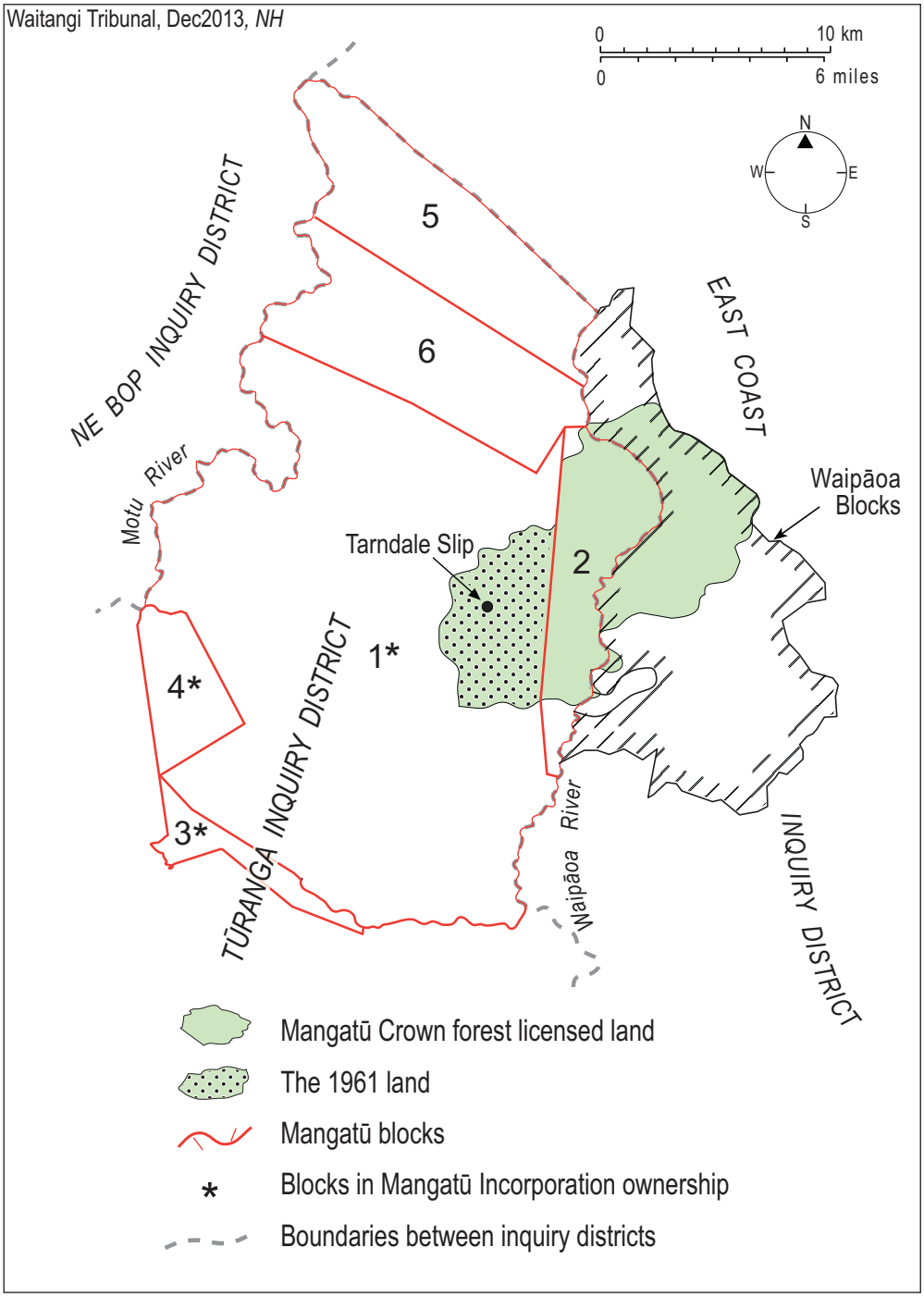
This chapter examines the Mangatū Incorporation's application for a binding recommendation for return of the 1961 land. First, we give a brief history of the incorporation, with an eye toward the aspects that are most relevant to our examination of its remedies application. Secondly, we analyse the extent of prejudice suffered by the Mangatū owners as a result of the 1961 sale, with a particular focus on cultural and spiritual prejudice, and financial and economic prejudice. Finally, we examine the current circumstances of the incorporation – its governance, representativeness, financial position – in order to assess both its suitability to receive redress and what redress is appropriate.

4.2 What is the Mangatū Incorporation?

The Mangatū Incorporation is the oldest Māori incorporation in New Zealand. The story of the founding of the Mangatū Incorporation 120 years ago must be understood in the context of the vision of its founder, Wi Pere, for the retention and management of Māori lands by their owners. Pere was a leader of Ngāti Wahia, Te Aitanga a Māhaki, Te Whānau a Kai, and Rongowhakaata descent,[1] who, along with his legal adviser, parliamentarian William Rees, initiated a number of schemes to help Tūranga Māori retain control over their lands in a period when it seemed that the Government was committed to their alienation. His

1. Waitangi Tribunal, *Turanga Tangata Turanga Whenua: The Report on the Turanganui a Kiwa Claims*, 2 vols (Wellington: Legislation Direct, 2004), vol 2, p 486; doc 117, p 11. Joseph Anaru Te Kani Pere and others, *Wiremu Pere: The Life and Times of a Maori Leader, 1837–1915* (Auckland: Libro International, 2010), p 33

4.1



Map 4: The Mangatū blocks and the Mangatū Crown forest licensed land

campaign gained him considerable mana in Tūranganui a Kiwa. Pere became a respected leader and served five terms as the parliamentary representative for Eastern Māori.

Wi Pere's vision was 'that no Maori land should pass out of control by Maori'[2] and, as Alan Haronga put it, that 'our people [should be assisted] to adapt to the new world order by promoting the economic development of Turanga land for the benefit of the hapū'.[3] Pere was motivated by what were widely perceived among Māori as the detrimental effects of the native land legislation on Māori communities, particularly the Native Land Act 1873. As was noted in the Tūranga report, 'leaders such as Pere came to hate the court and the utter disempowerment it stood for'.[4] The court played a central role in title transformation. It drew Māori into its orbit by offering an officially sanctioned title, even though the outcome of its processes worked against the retention and development of tribal lands:

> In all cases, the award of title would expose the land, if not already sold, to the slow and often secret process of piecemeal purchase. The chiefs were no longer in control. Pursuit of a single community-wide strategy for tribal lands had become inordinately difficult. Indeed, after the enactment of the 1873 Act, leadership itself had become inordinately difficult. For those, chiefs or otherwise, who wished to retain the land but could no longer influence what had formerly been a community decision, it must have been demoralising.[5]

Nevertheless, Tūranga leaders such as Wi Pere were forced to take a pragmatic approach towards the land court, despite their opposition to it, as they realised that '[t]o turn one's back on it risked losing jealously guarded rights to a competitor willing to file a claim'. Instead, they worked to control the decision-making process themselves 'through negotiation and cooperation [in settling lists of owners] out of court'.[6]

As we discussed in chapter 3, although Pere continued to campaign against the court, he and Rees also sought to work within the law to establish systems which would enable Tūranga Māori to retain control over their lands, such as the Rees Pere trusts they established between 1878–1880.[7] Pere's attempts to evade the effect of the Native Land Court extended to the Mangatū 1 block. When title to the 100,000-acre (40,500-hectare) block was determined by the court in 1881, he persuaded the court to issue a certificate of title to a group of 12 individuals. These 12 individuals were to execute a declaration of trust that they held the land for themselves and 106 others entitled to be declared owners.[8] These 12 trustees appear to have been selected to be broadly representative of the various hapū to which the listed owners affiliated. To protect the land further, Pere persuaded the court to

2. Pere and others, *Wiremu Pere*, p 229
3. Transcript 4.28, p 66
4. Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, vol 2, p 424
5. Ibid, pp 417–418
6. Ibid, p 424
7. Ibid, p 486
8. Ibid, p 677

place restrictions on the title preventing alienation, except by lease, for up to 21 years.[9] The trusteeship arrangement ran into problems, however, when the land court later refused to recognise it:

> Since the 12 [trustees] were formally recorded on the title as owners, later judges refused to recognise any other interest holders for any purposes. There could for example be no successions to the interests of the other 106 'owners'.[10]

Those not named in the certificate of title – that is, the great majority – were in effect denied any ownership rights.

It was at this point that Pere and Rees decided on a new approach to retaining tribal lands – an incorporation created by Act of Parliament. There were no general provisions for the incorporation of owners of Māori lands, so the Bill provided specifically for the incorporation of the owners of the Mangatū 1 block. Pere and Rees drafted the Bill, which was introduced into Parliament as a private Bill by Southern Māori member Tame Parata; it was subject however to a number of amendments in select committee. Its main aim was to provide a workable structure for future control of the lands; at the same time it remedied the various problems besetting the trust arrangement. The Act declared 179 individuals and their successors to be the owners of the Mangatū 1 block, and incorporated them in a body corporate known as 'Mangatū No 1'.[11] Members of the incorporation were to elect a management committee of seven who would administer the estate for the entire group of owners. The committee was empowered to make bylaws for operating the business and managing the estate, although these needed the approval of the Governor in Council.[12] The committee had the power to manage and lease any part of the land for up to 30 years, and could sell part or parts of the land to the Crown with the consent of the majority of owners assembled at a general meeting.[13]

The management committee was elected just weeks after the Mangatū No 1 Empowering Act came into effect in September 1893, as provided in the Act.[14] We do not appear to have any evidence on our record as to how members were elected and whether this was on the basis of ensuring the various hapū to which the owners affiliated were adequately represented. It is very probable however that Wi Pere played a key role in the process. In the Tūranga report, the Tribunal pointed to the significance of the election of Pera Te Uatuku of Ngā Ariki Kaipūtahi at the head of the list of 'trustee-owners' drawn up in 1881; Te Uatuku

9. Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, vol 2, p 677
10. Ibid, p 493
11. The second schedule to the 1893 Act lists only 178 owners; this is because the list is missing a comma between Rawiri Haua and Mereaira Parehuia. The correct total is therefore 179 owners.
12. Mangatu No 1 Empowering Act 1893, ss 2–7
13. Ibid, ss 5, 7
14. Document A27, p 120

was also elected to the management committee in 1893.[15] Peka Kerekere, principal rangatira of Te Whanau a Kai, was also elected to the committee[16], as were Hori Puru and Rutene Ahuroa.[17] It seems likely that what was important to Wi Pere was the whakapapa of committee members, their respective affiliations, and the dynamics of the historical relationships among the peoples of Mangatū. He may have avoided laying down any particular formula for the election of committee members. The new management committee drew up regulations that were submitted for Executive Council approval – finally secured over 18 months later.[18]

The incorporation's early years were beset by problems in raising finance. Because of legislative loopholes, the management committee could not secure a loan from the Public Trustee to pay for a survey and subdivision so that the land could be leased, nor could it mortgage the land, because mortgage was a form of alienation prohibited under the Act. Eventually the incorporation was put in the hands of three trustees – Wi Pere, Henry Jackson (who was involved in other schemes initiated by Pere and Rees), and the Hawkes Bay Commissioner of Crown Lands. In October 1900, Mangatu 3 and 4 were vested in trusts, under the same trustees who managed Mangatu 1. From this point all three blocks were managed as one entity.[19] The trustee arrangement enabled the trust to borrow money through the Commissioner of Crown Lands to develop the blocks. The land could then in turn be leased for up to 21 years. Over the first 12 years of the twentieth century, 59,845 acres (24,218 hectares) of Mangatū 1 was leased, along with all of Mangatū 3 (3680 acres, or 1,490 hectares). The 21-year leases were renewable, and the value of improvements up to a certain level could be recovered by the lessees, who 'took up the better country first'. Of the remaining lands, 12,100 acres (8,500 hectares) were farmed by the trust, while the rest remained undeveloped. The trust was legally able to borrow money for farm developments in its own right from 1907, with the help of large loans from the Public Trustee.[20]

Pere's authority and personality held the incorporation together during his lifetime.[21] The years after his death in late 1915 would bring major changes in the incorporation's affairs.

First, the owners initiated a process to determine relative interests in Mangatū 1 (as provided for in s 9 of the Mangatū 1 Empowering Act 1893). In accordance with his vision of lands held and administered for the benefit of owners collectively, owners' relative interests had not been determined during Pere's lifetime – though it had become a central part of

15. Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, vol 2, pp 677–678
16. Document M6, para 10.2
17. Great-great-grandfather and great-granduncle respectively of Rutene Irwin, who gave evidence to us; Mr Irwin stated that he was a direct descendant of Mahaki, through Wahia, as well as a direct descendant of Ngariki Kaiputahi: doc I12, pp 2, 4; see also doc I12(b).
18. Pere and others, *Wiremu Pere*, p 232
19. Document A18, p 158; Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, vol 2, p 493
20. Document A26, pp 160–162
21. Document A27, p 130

general land court practice in line with the provisions of successive Native land acts.[22] Pere's wisdom in this respect is evident in light of the tensions that arose among the Mangatū owners as this process dragged on over some years. And the success of Te Whānau a Taupara (placed by the court on the title of Mangatū 4 in 1881) in securing special legislative provision to remedy an injustice they claimed the court had done them at that time, increased the difficulties of the relative interests process for all owners in Mangatū 1. By section 6 of the Native Land Amendment and Native Land Claims Adjustment Act 1917, the land court was empowered to determine Te Whānau a Taupara title to Mangatū 1 and 4 blocks; if members were found to have interests, they would simply be added to the existing lists of owners. Te Whānau a Taupara succeeded subsequently in securing recognition of their interests in the court, thus increasing the number of owners in Mangatū 1.[23] In the Tūranga report, the Tribunal did not dispute Taupara's legitimate customary rights in the block, or the Crown's intervention to address their grievances. The outcome however had obvious implications for the individual relative interests of other owners in Mangatū 1, and the process of appeals ran till 1923. The divisions that resulted from all these processes would not be easily overcome in later years.

Secondly, the Crown removed the administration of the incorporation's affairs from the trustees to the East Coast Commissioner. (As we discussed in chapter 3, the commissioner had replaced the East Coast Native Trust Board in 1906, taking over the administration and development of the Carroll–Pere Trust lands, comprising blocks not just in Tūranga, but in other east coast districts.) Parliament took the first steps towards adding the Mangatū lands to the East Coast Commissioner's responsibilities in 1917. Pere had died, a second trustee was unwell, and questions had been raised about the conduct of the incorporation's financial affairs. Parliament authorised a commission of inquiry into the trust, but failed to give effect to its recommendations that new trustees should be appointed and new committees appointed for each block – once the owners and shares of Mangatū 1 and 4 were settled by the land court. Instead, the East Coast Commissioner continued to administer the trust's lands, alongside but separately from those of the East Coast Native Trust, until 1947.[24] This arrangement was formalised by the Native Purposes Act 1931 (section 27); section 45 of the Act repealed the Mangatū No 1 Empowering Act 1893.

During this period, the East Coast Commissioner focused primarily on clearing debt from the Mangatū lands. The trusts had borrowed various amounts, but 'overall the Mangatu trusts were in good shape' in 1917. But the commissioner applied the same policy to the Mangatū lands as to the East Coast trust lands, which had quite a different history

22. Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, vol 2, pp 678–679
23. Ibid, pp 684–692. The Supreme Court ruled in 1921 that Taupara applicants not already on the title to Mangatū 4 could be admitted to the title of Mangatū 1 and existing Taupara owners in Mangatū 4 could claim additional shares in Mangatū 1. Te Whanau a Taupara could thus argue their case afresh.
24. Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, vol 2, pp 506–507

in the wake of the demise of the Native Land Settlement Company.[25] As a result of difficult economic conditions and a variety of other factors, such as the non-renewal of several leases, the debt on the Mangatū lands actually increased over this period. Fortunately, the non-renewal of leases meant that 'more of the Mangatu lands came to be farmed directly by the commissioner'.[26] By 1947, the Mangatū blocks had 14 stations operating, with 85,730 sheep and 10,201 cattle. Overall the enterprise was profitable, although the profitability of individual stations varied, with some doing very well and others struggling.[27] Generally, however, profits were rising (increasing from £50,548 in 1949 to £300,000 in 1951), enabling the debt to be paid off comfortably.[28]

In 1941, Wi Haronga and others petitioned Parliament for Mangatū blocks 1, 3, and 4 to be incorporated as a single entity and returned to Māori control. They eventually gained the support of Prime Minister Peter Fraser, who determined that control and management of Mangatū should be returned to the owners.[29] In 1947, this was finally achieved by part III of the Maori Purposes Act 1947, which incorporated the owners of Mangatū 1, 3, and 4 as a body corporate: The Proprietors of the Mangatu Nos 1, 3, and 4 Blocks (Incorporated).[30] The Act vested the blocks as freehold Māori land in the body corporate and abolished the trusts established between 1899 and 1900, as a trustee arrangement was no longer needed; the Act explicitly authorised the incorporation to borrow money in its own right.[31] Because of the management success under the East Coast Commissioner, the new management committee appointed the commissioner, James Jessep, as general manager of the incorporation.[32] The new incorporation took over the land just in time to benefit from the Korean War wool boom.

From this time, the affairs of the Mangatū Incorporation were impacted by legislation applying to Māori incorporations generally. In particular, a major legislative change in 1967 affected the relationship of all incorporations with their lands. The controversial Maori Affairs Amendment Act 1967 deemed all Māori land vested in an incorporation to be European land. Shares in an incorporation no longer represented an interest in land, but instead became the equivalent of company shares. These could be bought and sold under certain conditions, including maximum individual shareholdings.[33] Multiple blocks

25. Document A26, p 176. For the role of the Native Land Settlement Company in the history of the Rees–Pere trust lands, see chapter 3. A more detailed account may be found in Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, vol 2, ch 9.
26. Document A26, p 179
27. Ibid, pp 182–187
28. Document A27, p 146; doc A26, p 191
29. Document A26, p 191; doc A27, p 147
30. The Mangatu No 1 Empowering Act, as noted above, had been repealed in 1931.
31. Maori Purposes Act 1947, ss 22, 36. The new incorporation took on all the debt accumulated by the East Coast commissioner and the trusts.
32. Document A27, pp 148–149
33. Waitangi Tribunal, *He Maunga Rongo: Report on Central North Island Claims, Stage One*, revised ed, 4 vols (Wellington: Legislation Direct, 2008), vol 2, pp 790–791

owned by an incorporation became a single unit, and shareholders were deemed to hold shares in the whole enterprise rather than in a specific block.[34] In the case of the Mangatū Incorporation, this effectively meant that Mangatū 1, 3, and 4 were merged as a single unit for ownership as well as management purposes. All owners became shareholders in the incorporation rather than owners in one of the three blocks. These changes, according to Henare Ngata, met with 'complete acceptance' by the owners.[35]

Under section 41 of the 1967 Act, it was possible to sell shares to 'any person' if, six months after they had been offered for sale back to the incorporation, that offer was not accepted.[36] However, section 40 allowed a meeting of owners to override this provision, thereby allowing transfer of shares only to: the incorporation; another shareholder; the Māori trustee or other state lender; the Crown; or 'the shareholder's spouse, child or remoter issue, brother, sister, parent, brother or sister of a parent, or to the child or remoter issue of a parent or of the brother or sister of a parent'.[37] It is unclear how many Mangatū Incorporation shares were sold on the open market, if any. Alan Haronga, in his evidence to the Tribunal, stated that, to his knowledge, 'very few' shares were sold to 'strangers'.[38]

Many provisions of the contentious 1967 reforms have been reversed, particularly by the Te Ture Whenua Maori Act 1993. Incorporation shares once more represent a beneficial interest in land.[39] However, owners are still able to sell their shares under the Act in limited circumstances.[40] Their shares also continue to represent undivided interests in the land held by the incorporation rather than reflecting their association with a particular part of the land.

Since the late 1960s, a number of other blocks have been amalgamated into the Mangatū Incorporation, including the Waihirere, Waimaata and Kopaatuaki blocks (which were previously incorporated under the Kaiwhakareirei Incorporation).[41] The amalgamation with the Kaiwhakareirei Incorporation was unanimously endorsed by the owners.[42] The incorporation has also acted as a trustee for other blocks.[43]

34. Waitangi Tribunal, *He Maunga Rongo*, vol 2, pp 789–790
35. Document 117(g), p 20
36. Maori Affairs Amendment Act 1967, s 41(5)
37. Ibid, ss 40, 41
38. Transcript 4.28, p 157
39. Te Ture Whenua Maori Act 1993, s 260
40. Ibid, s 264
41. Document 117, pp 14–15
42. Document A26, pp 389–390
43. Document 116, pp 4–5

4.3 What Was the Extent of Prejudice Suffered by the Mangatū Incorporation?

4.3.1 Submissions on prejudice

The Mangatū Incorporation submitted that the prejudice it suffered was the loss of the 1961 land. The owners had not wanted to sell because, in the words of Henare Ngata, they 'did not wish to lose part of a heritage which had been handed down to them by their forebears'.[44] The prejudice suffered by the owners also had an economic dimension. Counsel argued that '[t]he payment made for the acquisition of the 1961 Land does not ameliorate the prejudice suffered by the owners.'[45] The owners were denied the opportunity to negotiate a share of the revenue from the forest or to use the land as they saw fit, and the price in any case was inadequate. Counsel also cited the Tribunal's finding in the *Turangi Township Remedies Report* that 'prejudice' relates to more than just economic loss, including also cultural and spiritual aspects.[46] Counsel saw the extent of cultural and spiritual prejudice as being directly related to the fact that 'fundamentally, sale was unnecessary because alternatives could have been found'. In addition, the price paid for the land did not reflect cultural values – 'there was no premium for the cultural significance of the land'. On a cultural and spiritual basis, the claimants submitted that 'no price would have been sufficient to compensate for the anguish of losing ancestral land'.[47]

Counsel for the Mangatū Incorporation also argued that their clients could have benefitted greatly from a profit-sharing leasing arrangement with respect to the Mangatū State Forest. They submitted that a profit-sharing lease was concluded with the owners of the Ōtakanini block in Northland around the same time.[48] The Crown's failure to even consider such an arrangement for Mangatū land was seen as contributing to the prejudice to the owners. Counsel alternatively submitted that any sale agreement should have included a reversionary clause to return the land to the owners once stabilisation of the land had been achieved.[49]

The Crown argued that the degree of prejudice to those affected by the Treaty breach was small, both in relative and in absolute terms, and did not necessitate 'redress of forest land to the successors in title to the incorporation's then shareholders'.[50] In particular, the Crown argued that '[t]he 1961 purchase grievance relating to the Mangatū 1 land is not as significant in its possible prejudice as the tribal-level grievances affecting the same land'. The payment made by the Crown was not merely sufficient, but significant given the 'degraded state'

44. Document M7, p 14, quoting chairman, Mangatū Incorporation, to commissioner of Crown lands, 7 November 1960, cited in *Tūranga Tangata Tūranga Whenua*, p 722
45. Document M7, p 22
46. Ibid, p 23, quoting Waitangi Tribunal, *The Turangi Township Remedies Report* (Wellington: GP Publications, 1998), p 12
47. Document M7, p 24
48. Document O4, p 12; Waitangi Tribunal, *The Kaipara Report* (Wellington: Legislation Direct, 2006), p 250
49. Document M7, p 31
50. Doucment M10, p 6

of the land. That land was repaired at 'considerable public expense', albeit for public benefit, and afforestation resulted in 'very low returns' that would have rendered any joint venture prejudicial to the owners.[51]

4.3.2 Cultural and spiritual prejudice

The Mangatū owners have deep and longstanding connections to the Mangatū land. Rutene Irwin spent 62 years working on the Mangatū blocks (including 36 years on the management committee).[52] His connection to the Mangatū land stretches back for generations:

> I am an owner in Mangatu Blocks and I have lived on the Mangatu Blocks for over 70 years, on Manukawhitikitiki in Whatatutu. For that reason I like to say I am an *Ahi Ka Roa* of Mangatu, and so were my parents and their parents and so on back to the time of Te Ranginuiaihu. Our whanau is ahi tuturu as we have lived all our lives on this land. [Emphasis in original.][53]

Mr Irwin told us of his great-grandmother, Meri Puru, who was born on the Mangatū land in the 1850s and whose 'whole life' was Mangatū blocks: 'The land was part of her being.' Mr Irwin's great-grandfather, Hori Puru, was one of the twelve trustees placed on the certificate of title after the 1881 determination.[54]

The Mangatū Incorporation was formed against a backdrop of rapid, dramatic land loss by Tūranga Māori. As we outlined above, leaders like Wi Pere, as well as fighting the Native Land Court, also sought to work within the law in order to keep Māori land in Māori control. The Mangatū Incorporation was one such attempt to work within the confines of the Crown's native title and tenure system that was introduced into the district, while also staying true to Wi Pere's vision. That vision has guided the incorporation throughout its history. The importance the owners place on retaining their land was made clear by several kaumatua and kuia in our hearings. Hohepa Brown told us he was 'brought up to honour and protect our whenua'[55] and Mr Irwin said that he sees himself as 'a kaitiaki of our whenua.'[56]

Despite facing numerous challenges in its 120 years of existence, the incorporation has been remarkably successful at retaining its whenua. That success is a source of enormous pride for the Mangatū owners, as kuia Ingrid Searancke told us during our hearings:

> Today I look at the journey of Mangatu and its progress and I think that time has told its story. The hopes and prayers of the elders of that time have come to pass. Mangatu has

51. Doucment M10, pp 15–16
52. Document I12, p 5
53. Ibid, p 2
54. Ibid, pp 3–4
55. Transcript 4.28, p 47
56. Ibid, p 31

managed to survive adversity and our enterprise has been very successful. That has meant so much in so many ways.[57]

The 1961 sale is an exception to the incorporation's successful legacy. The 1961 lands were the first, and are still the only, lands sold by the incorporation since the Mangatū lands were first placed in trust in 1881.[58] Mr Brown spoke of the hurt that the loss of the lands caused to the community:

> My father was dead against selling the land, along with quite a few others. Much discussion and debate took place at the time. Dad had been brought up with the attitude that you never ever sell your land . . .
>
> . . . . .
>
> One of the saddest things for me is that my father did not live to see the 1961 land come back. He had always believed that it would. I remember his second wife, my stepmother Mae saying the same thing. She has also passed away.[59]

As well as breaking the connection between the owners and their land, the sale of the 1961 land – including the events that took place during the negotiations leading up to it – was a further example of the Crown's denial of Māori autonomy. The owners had not wanted to sell their land. As Henare Ngata explained to the *Gisborne Herald* in August 1961, 'the reasons for the [owners'] opposition were historical, and had their roots in the land dealings, the confiscations and the conflicts of the last century'.[60] There were also more recent reasons, including the fact that the 1961 sale took place less than 15 years after the owners had resumed control over their lands from the East Coast Commissioner, who had controlled the land for some 30 years. The owners had long hoped that, when the land returned, they would be able to farm it for the benefit of their people. In 1944, Henare Ruru, then chairman of the committee, stated: 'That is our deliberate intention and wish – that the lands be farmed by the people.'[61] To be forced into selling for afforestation some 8,500 acres (3,440 hectares) so soon after regaining control of their lands was a major contributor to the ongoing grievance felt by the owners. Mrs Searancke recalled that time in her evidence to the Tribunal:

> No sooner had Mangatu got on their feet after getting the land back than along came the business of taking the land for erosion control. In 1959 I think it was, the Prime Minister

57. Document I15, p 5
58. This excludes minor land exchanges and takings for roads since 1962.
59. Transcript 4.28, p 46
60. *Gisborne Herald*, 29 August 1961, quoted in doc F1, pp 170–171
61. Mr Ruru was replying to a question from Sir Apirana Ngata during hearings of a committee appointed by the Native Minister to inquire into issues affecting the East Coast Trust lands: doc A26, pp 181–182. 'Testimony, Proceedings of Committee Appointed by the Honorable Native Minister to Enquire into Certain Matters and Questions Affecting the East Coast Trust Lands, Gisborne', p 59, 26 May 1941, MA 13/33a, Archives New Zealand, Wellington (doc A26(a), vol J, p 153).

4.3.3

> Walter Nash came to meet the owners and told them the government wanted our land. I was present at that meeting and most of the big meetings where the Minister Tirikatene and other government officials. They were hoping to soften our attitude of no sale by their presence.[62]

Despite this context, the owners recognised the seriousness of the erosion problem in the area and were prepared to consider several alternatives which they presented to the Crown. In the Tūranga report, the Tribunal found that the Crown rejected these alternatives without giving them fair consideration, and continued to insist that sale was the only option. This caused the owners considerable anguish, as an example provided by Hohepa Brown illustrates:

> My father was the one who came up with the proposal to lease the 1961 Land to the Crown until it had been stabilised, but he was overruled by the government. We were hurt because we believed that we understood the effects of erosion and had the capability to look after the land. Mangatu has carried out erosion schemes on small blocks at Komihana, Mangamaia and Pukutarewa.[63]

By rejecting the owners' suggestions after so little consideration and disregarding their sustained opposition to sale, the Crown denied the owners the opportunity to have a say in the future of their lands or to play a role in the afforestation development. The Crown's failure to do so led to the Mangatū owners being disconnected from their ancestral whenua and diminished their tino rangatiratanga. The outcome for the Mangatū owners was cultural and spiritual prejudice of a serious kind.

4.3.3 Economic and financial prejudice

Economic and financial prejudice are not synonymous; economic prejudice encompasses broader considerations. As outlined above, counsel for the incorporation submitted that the owners were prejudiced economically by the Crown's breach, both in direct financial terms, because the price was not fair and, in broader economic terms, because they were denied the opportunity to negotiate a share of the ongoing revenue stream from the forest. The Crown disagreed, and as we understand their argument, contended that the owners suffered little if any financial loss, because the price was fair. The Crown also contended that there was no economic prejudice, because there were no viable alternatives to sale that would have allowed the Māori owners to retain the land, and gain an ongoing economic return.

62. Document 115, p 5
63. Document 113, pp 5–6

We consider that there are four questions we need to ask to make an assessment of whether, and if so to what extent, the incorporation suffered economic and financial prejudice. The first question is whether the Crown paid a fair price for the 1961 land. The second question is what impact the loss of the 1961 land had on the incorporation's farming operations. The third question is whether there were viable alternatives to sale of the 1961 land that, had they been implemented, could have potentially benefited the incorporation economically. The final question is whether the Crown made a profit from the sale of the Mangatū State Forest in 1992. We address each of these questions in turn.

It should be noted at the outset that, although we have adopted the restorative approach as the framework for our consideration of remedies, the question of the extent of economic and financial prejudice suffered by the incorporation is relevant here because of the considerable monetary elements that accompany binding recommendations relating to Crown forest land.

(1) *Did the Crown pay a fair price for the 1961 land?*

In the Tūranga report, the Tribunal made no comment on the price the Crown paid for the 1961 land. In our view, the fairness of that price has an important bearing on the extent of financial prejudice suffered by the owners. The logic of the opposing arguments is that there would be no financial prejudice to the owners if the price paid was reasonable, but if the price was too low the owners would have suffered financial and economic prejudice. The Mangatū Incorporation submitted that the price paid was not fair, as it failed to take account of the owners' cultural associations with the land and that the sale was a forced sale obtained under duress and misrepresentation.[64] The Crown contended that the price paid 'was significant given its [the 1961 land] degraded state'.[65]

The price paid for the 1961 land was arrived at after extensive negotiations between the Crown and the incorporation owners. The Government's initial valuation in 1957 was £56,595. By the time the sale had been agreed and negotiations over the sale price had commenced, the Government's valuation had increased to £61,515. The Mangatū management committee hired two valuers, one of whom thought the Government's valuation was reasonable. However, the other gave a valuation of £92,296, based on the price of the land and buildings, as well as a sum to account for the change in farming policy that the sale would necessitate.[66] He also considered that, if retained, the land would generate a profit of £90,000 over 10 years. He encouraged the committee to negotiate for no less than £100,000, in recognition of the 'sentimental value' attached to the land. On this advice, the committee initially offered the land to the Crown for £112,000.[67] At a subsequent meeting, the commit-

64. Document M10, p 24
65. Ibid, p 15
66. Document F1, p 148
67. Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, vol 2, p 722

tee disclosed to the Commissioner for Crown Lands that their land valuation was £75,140. Their valuer encouraged the committee to ask for £81,000. The committee asked for more than this; £9 10s an acre, or £82,137.[68] This was the figure finally agreed on; although once the Mangatū land was properly surveyed it was found to be 8522 acres (3449 hectares) – slightly smaller than originally thought. On the basis of the per acre price of £9 10s, the amount eventually paid in 1962 was £80,958, equivalent to $3.3 million in June 2013 dollars.[69]

The opinion of Crown officials as to the fairness of the price paid varied. The commissioner of Crown lands thought that the price was reasonable given that the owners were unwilling sellers and 'in agreeing to sell they are bowing to the weight of public opinion'.[70] Treasury objected that the offer of £82,137 was £6000 too much, particularly taking into account the price the Government paid for the neighbouring (Pakeha-owned) Tawhiti station.[71] In response, the commissioner of Crown lands noted that the owners had agreed to a lower figure than he had expected possible. He warned that:

> after listening for several hours to the type of evidence that the private valuer would be likely to tender regarding the value of the land, its productive possibilities and the re-organisation necessary to the farming set-up of three sheep stations, I feel that it would be quite possible for a higher sum to be awarded by the Maori Land Court if the land was taken compulsorily.[72]

On balance, we consider that the management committee negotiated a price that was within the range of prices that could be considered fair. The price was well above the Government's valuation, which had been endorsed by one valuer commissioned by the incorporation. The price was also above the land valuation provided by the other valuer commissioned by the incorporation, although it was below the management committee's initial offer to the Crown. Such a variance is not unusual in negotiations of this nature, where both parties make compromises to reach an agreement. A premium was paid for the land, though it is unclear whether that was in recognition of the fact that the sale was a forced sale or in recognition of the owners' cultural ties with the 1961 land. The Crown's Treaty breach involved misrepresentation in terms of the Crown's stated intentions as to the commercial viability of the forest, and duress in terms of the Crown's obdurate failure to consider alternatives to sale. The Crown's duress and misrepresentation heighten the cultural and spiritual prejudice suffered by the owners. If we were a court, this might provide a foundation for an argument that punitive damages should be imposed. However, in the

68. Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, vol 2, p 723
69. Document 132(a), pp 362–364. June 2013 figure calculated from the Reserve Bank's online consumer price index calculator.
70. Commissioner of Crown lands to director-general of lands, 19 December 1960, AADY W3564, box 15 6/2/108, Archives New Zealand, Wellington (Waitangi Tribunal, Turanga Tangata Turanga Whenua, vol 2, p 723)
71. Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, vol 2, pp 722–724
72. Document F33(2), pp 427–428

exercise of the Tribunal's jurisdiction we are adopting the restorative approach to remedies, which does not seek to punish the Crown. As such, punitive damages are not appropriate.

(2) *What impact did the loss of the 1961 land have on the Mangatū Incorporation's farming operations?*

In considering broader economic prejudice, we turn first to the impact of the loss of such a large area of land on the incorporation's farming operations. Although parts of the 1961 land clearly had erosion problems, the land nonetheless formed an important part of the Mangatū operation. The area sold spread across three of their stations, requiring a revamp of farming practices.[73] Parts of the 1961 land were regarded as some of the best farming land the incorporation possessed. Te Hua station, for instance, was regarded as very profitable and valuable to the incorporation.[74] Valuation evidence provided to the incorporation at the time of the sale indicated that the 1961 land would have generated a profit of £90,000 over the next 10 years.[75]

The Crown contended that the 1961 land was in a 'degraded state', implying that the incorporation was, at least financially, better off without it.[76] Mr Haronga acknowledged in his evidence the variable quality of the 1961 land, even after more than half a century of erosion control efforts:

> Although we have gone to a good deal of effort to recover the 1961 Land, the irony is that it could not be regarded as good land in a commercial sense. Indeed it may actually be a liability given its erosion prone nature, including the Mangatu and Tarndale slips, which I understand possess the distinction of being the two largest slips in the Southern Hemisphere.[77]

He noted, however, that, 'as kaumātua and kuia remind me, the point is that this is our ancestral land'.[78]

Whatever the quality of the 1961 land, following the sale, the incorporation had to 'counteract the effects of the loss of such a large area of land'.[79] It undertook a programme of land development to increase the productive capacity of the remaining land. As a result, by 1988, the incorporation had 40 per cent more cattle and sheep than it had had in 1958.[80] Over the 20 years following the 1961 sale, the incorporation also acquired 8,460 acres (3,424 hectares) of additional land in both freehold and leasehold title (compared to the 8522 acres (3,449 hectares) sold in 1961).[81] Mr Haronga suggested during our hearings that suitable

73. Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, vol 2, p 710
74. See, for example, doc F1, pp 80, 121, 144
75. Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, vol 2, p 722
76. Document M10, p 15
77. Document I17, pp 17–18
78. Ibid
79. Document I17(g), p 6
80. Ibid, p 7
81. Document I36, p 6

land was scarce and had to be acquired piecemeal as it became available.[82] However, we do not have enough evidence to make any reasonable assessment as to whether this delay meant the incorporation ended up paying more for new land than it received from the 1961 sale. Under cross-examination by Crown counsel, Mr Haronga accepted that the new land, while not always geographically contiguous with the incorporation's existing land, was generally of better quality.[83] The new land allowed the incorporation to eventually expand its operations to include, for instance, an area of good finishing land at Karoa.[84] Such ventures would not have been possible with the 1961 land.

The Tribunal accepts that the 1961 sale was disruptive to the incorporation's operations and a source of great concern to the owners at the time on this account. However, we do not consider that that disruption of itself caused economic prejudice. We concluded above that the owners were paid a fair price. Over time, the incorporation was able to purchase replacement lands of better quality, which in turn allowed the incorporation to diversify its activities. We also note that, because the Crown afforested Mangatū on a gradual basis throughout the 1960s, the incorporation was able to lease back areas of the 1961 land in the years following the sale to minimise disruption to its farming operations.[85] This means the impact of the loss of the land was spread over several years.

We also consider that, while the incorporation might not have been the direct recipient of any benefits arising from the afforestation scheme, some indirect benefits would have accrued to the incorporation. First, the presence of a large commercial forestry operation so close to the incorporation's land resulted in local infastructure improvements that would have benefited the incorporation. Henare Ngata acknowledged this point in 1993, singling out the improvements in roading as a result of forestry as a particular benefit for the incorporation.[86] Second, we acknowledge the point forester and Crown witness Andrew McEwen made, that although the public benefit from the afforestation scheme was primarily to the valuable lands on the Poverty Bay flats, the presence of a more stable regional economy would have indirectly benefited the incorporation.[87]

(3) *Were there viable alternatives to sale of the 1961 land?*

Our next question concerning economic prejudice is whether there were viable alternatives to the sale of the 1961 land for afforestation. In the Tūranga report, the Tribunal found that the Crown had failed to seriously consider such alternatives. On numerous occasions the owners had expressed a willingness to consider other options, including a land exchange, a lease, undertaking afforestation themselves, using the provisions of section 64 of the Forests

82. Transcript 4.29, pp 139–140
83. Transcript 4.28, p 141
84. Ibid
85. Document A27, p 198
86. Document I17(g), p 7
87. Transcript 4.29, pp 277–278, 285–288; doc M4(h), p 43

Act 1949, and as shareholders in a partnership with the Crown.[88] In general, the Tribunal did not comment about the viability of these alternatives, simply stating that the Crown had failed to explore them seriously. However, the Tribunal did suggest that, had the Crown explored them further, some alternatives might have been found to be viable:

> Although it was 1962 before the Forest Service and the Department of Maori Affairs began to work together to develop policies for the afforestation of Maori land, and to ensure that there was statutory provision for longer leases for this purpose, the tools clearly existed to allow the Crown to develop forests with the owners as agent and owner. There was plenty of room within section 64 of the Forests Act 1949 for funding and profit-sharing arrangements. Though these options were put forward, the Crown dismissed them on various grounds.[89]

Because of limited evidence, we cannot fully explore the viability of all of these alternatives. We were not presented with substantive evidence as to the viability of the owners afforesting the land themselves (though counsel for Mangatū Incorporation suggested such evidence would be presented during the second stage of our remedies hearing, if it were to occur). Further, there seemed to be little consensus among witnesses about the availability of land for a land exchange, which the incorporation sought repeatedly at the time without success.

As a result, we have limited our analysis here to three options: an arrangement under section 64 of the Forests Act 1949, which was first suggested by the 1955 panel report; a lease or profit sharing arrangement, which was raised both by the owners at the time of the original negotiations, and by counsel during our remedies hearings; and a reversionary clause, also raised by counsel during our remedies hearings.

(a) ***Section 64 of the Forests Act 1949:*** Section 64 of the Forests Act 1949 allowed the Minister of Forests to perform work as an agent of the owner, who would retain title to the land. The 1955 'expert panel' was confident that the Crown would be able to acquire the land belonging to the three Pakehā-owned stations which were to be included in the proposed afforestation scheme but considered that acquisition of the land lying in the Mangatū Blocks was 'unlikely'. As a result, it recommended that 'work carried out on this area should . . . be done under Section 64 of the Forests Act'.[90] According to the panel's report, 'the State would have to finance all tree establishment and protection work and some agreement would have to be reached about the management and sale of the timber and the division of profits'.[91]

The Soil Conservation Committee of the Poverty Bay Catchment Board took issue with the panel's proposal that the Mangatū owners should be treated differently from the other

88. Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, vol 2, pp 729–730
89. Ibid, p 730
90. Special Committee Report, 'The Waipaoa Catchment', [1956] (doc F33, vol 1, p 228)
91. Document F33, vol 1, p 127

owners. It proposed that negotiations should instead open on the basis that *all* the lands for the scheme would be managed under section 64.[92] However, the other station owners showed little interest in, or were hostile to, the prospect of a section 64 arrangement.[93]

It is also unclear whether the Mangatū owners were interested in a section 64 arrangement, though there is little evidence to suggest the Crown seriously engaged with the Māori owners about such a possibility. District forest ranger A M Moore reported that, at a meeting on 26 June 1956, the owners had asked about the financial viability of the afforestation scheme, particularly if ownership of the land was retained under section 64. Moore's account of the meeting stated that the chairman of the Committee of Management 'would prefer to be completely divorced from the scheme so far as section 64 of the Forests Act was concerned'.[94] While there is no mention of section 64 in the incorporation minutes, they did note Moore's general belief that afforestation would not be an economic proposition. The accounts of this meeting led Ashley Gould, the Crown historian at the original district inquiry, to conclude that section 64 was rejected by the owners at this early stage.[95] In our view, the evidence does not support Mr Gould's conclusion.

The possibility of a section 64 arrangement does not appear to have been discussed again until several years later, at a special owners meeting on 20 February 1960. The ccommissioner of Crown lands told the owners, 'if Section 64 of Forests Act is used there could be a large loss as a large area is to be protective forest. Would owners be prepared to share a loss?'[96] In his report of the meeting to the director-general of lands, the commissioner noted that the owners seemed agreeable to section 64. However, he thought 'the owners would be better off to sell and purchase other revenue producing lands' and recommended compulsory purchase of the land under the Public Works Act.[97] The director-general of lands referred the matter to A R Entrican, the director of forestry. Entrican also recommended compulsory purchase, asserting that use of section 64 would be tantamount to a confiscation. The inconsistency in this position evidently escaped him. Entrican further commented:

> A similar position arises if the land is administered under sec. 64 of the Forests Act 1949, i.e. the Crown's interest through cost of forest development is so colossal compared with the value of the land that future dealings with the area must be dictated by forest requirements, not the owners' wishes.[98]

92. A M Moore, district forest ranger, to conservator of forests, 6 June 1956 (doc F33, vol 3, p 1122)
93. Document F33, vol 1, pp 140–142
94. Ibid, p 217
95. Document F1, p 22
96. Commissioner of Crown lands, notes on special general meeting with Mangatu Incorporation, 20 February 1960, BANF5694, 86B LS4/883, vol 1,Archives New Zealand (doc F33, vol 2, p 507)
97. Commissioner of Crown lands to director-general of lands, 1 March 1960, ABWN6095, W5021, LS22/1185, vol 1, Archives New Zealand (doc F33, vol 1, p 327)
98. Director of forestry to director-general of lands, 8 April 1960, WF96/197000 (doc F33, vol 3, p 1065)

Clearly the owners' wishes to retain their land were secondary to the interests of his own department. Based on these opinions, the Soil Conservation Council also recommended compulsory purchase over section 64.[99] The use of this section of the Forests Act does not appear to have been considered again by officials.

One reason why the Crown did not seriously explore the possibility of a section 64 arrangement seems to have been its novelty. There is little evidence available of section 64 being used widely by the Forest Service. Crown witness Andrew McEwen recalled two instances of the section being used, though he was unclear when: in Harakeke Forest near Whanganui and in an area of forest south of Utiku between Mangaweka and Taihape. He did not personally know of any section 64 agreements concerning Māori land.[100] Because section 64 seems to have been used so infrequently, it is not entirely clear how a section 64 arrangement would have worked and whether it would have even allowed the Crown to fund the forest development as envisaged by the 1955 panel report.[101] We note, however, that section 64(4) specifically grants the Minister the authority to spend funds appropriated by Parliament.

In the Tūranga report, the Tribunal noted that, given the broad terms of section 64, 'there was plenty of room . . . for funding and profit-sharing arrangements.'[102] We consider that the Crown did not do nearly enough to explore the potential for such arrangements. The fact that section 64 had not been widely used does not seem to us a sufficient reason for the Crown to have so quickly dismissed it as a possibility. We cannot say definitively that an alternative arrangement under section 64 could have been reached, but the possibility deserved more than cursory consideration, particularly given the marked reluctance of the owners to sell their land. It is because of that inadequate consideration that we are now unable to say whether the prejudice could have been avoided.

(b) ***A lease or profit-sharing arrangement:*** During negotiations in 1960, some Mangatū owners suggested that the Crown lease rather than purchase the Mangatū land.[103] The Crown does not seem to have pursued the lease option particularly seriously at the time, but counsel for Mangatū Incorporation argued that a lease was a possible and viable alternative to purchase. In particular, counsel drew upon the example of the Ōtakanini Tōpū revenue-sharing lease scheme negotiated during the 1960s to argue that the Crown was contemporaneously negotiating forestry leases with other Māori landowners.[104] In this context, they

99. Document F1, p 113; Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, vol 2, p 717
100. Document I33, p 35
101. This was a point raised at hearings during our substantive inquiry by Crown historian Ashley Gould: see transcript 4.18, p 46. Mr Gould considered that the owners would have been required to fund the afforestation themselves, leaving the Crown to manage the development and operation of the forest.
102. Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, vol 2, p 730
103. For instance, at a special general meeting held on 20 February 1960: see doc F1, pp 103–105.
104. Document M7, pp 41–42; doc O4, pp 12–13

submitted, the Crown could reasonably have been expected to offer the Mangatū owners similar terms.

The establishment of the Ōtakanini Tōpū forest was detailed by the Tribunal in the *Kaipara Report*. The western coastal strip of the Ōtakanini block in Northland lay across 1680 acres (680 hectares) of sand dunes. From the late 1940s, the Forest Service sought to gain control of these lands for stabilisation purposes. After the Ōtakanini Tōpū management committee rejected the Crown's initial offers to purchase land for afforestation, attention turned to the possibility of a lease.[105] The conservator of forests first suggested a lease to the owners in December 1960, some two months after the Mangatū owners had agreed to sell the 1961 land to the Crown. This initial suggestion was rejected by the Ōtakanini owners, but after a Māori Land Court decision directing the owners to negotiate a lease with the Crown in 1964, a lease was eventually finalised in August 1969 with a 99-year term.[106] A nominal rent was to be paid until the first thinnings were sold, and thereafter the Māori owners would receive 30 per cent of the stumpage received from sale of the timber (stumpage being a form of royalty that is based on revenue, not profit).[107] The Ōtakanini Tōpū lease was followed by a series of similar forestry leases between the Crown and Māori concluded between 1969 and 1977.[108] These revenue sharing leases were commonly known as 'Grainger leases', after the forest service economist who developed the concept in the late 1960s.

In our hearings, Crown witness Andrew McEwen contended that the returns to the Mangatū owners under a Grainger lease would be far smaller than the returns to owners of forests such as those planted at Ōtakanini. Mr McEwen pointed out that most of the other leases were extensions to pre-existing forests where costs and profits were proven. The nature of the land in Mangatū meant that the establishment of the forest would be much more difficult. The stumpage rate in a leasing scheme would have reflected this difficulty and been significantly lower than those in other lease schemes, leaving little if any return to the owners.[109]

In submissions in reply, counsel for Mangatū Incorporation argued that afforestation at Mangatū had commercial potential and was of comparable cost to Ōtakanini Tōpū. Counsel cited a cost-benefit analysis of the proposed erosion control project undertaken by the Poverty Bay Catchment Board in 1958 that suggested the net value of forestry production and assets would be £3 million in 50 years' time.[110] Given that the scheme also had

105. Waitangi Tribunal, *The Kaipara Report*, pp 248–250
106. Wai 674 R01, doc O6, pp 135–140
107. Waitangi Tribunal, *The Kaipara Report*, p 250. Put simply, stumpage is an amount paid for a set volume of timber harvested.
108. Ibid, p 267
109. Transcript 4.29, pp 273–274
110. Document A18(a), vol 12, p 8225

significant regional benefits, counsel submitted 'that a profit-sharing lease was eminently feasible and could have supported a generous profit share to Mangatu'.[111]

If officials had put their minds to it in 1960, and consulted properly with the owners, they may well have come up with a 'Grainger'-type lease proposal. There was legal provision for such a leasing or profit-sharing arrangement under section 64 of the Forests Act 1949, as we discussed above. However, it is fairly obvious that the leases developed for Ōtakanini Tōpū and elsewhere were not 'contemporaneous' with the Mangatū sale, as submitted by counsel.[112] Rather, they were not suggested until after the Mangatū owners had agreed to sell and not developed until some years later. We also note that the Poverty Bay Catchment Board said of its £3 million figure that 'estimates for the 50-year period are made with very little confidence'.[113] In any case, actual information about whether or not the Crown profited from the forest would seem more relevant to the question of whether or not the owners would have benefited from a profit-sharing lease. This matter is discussed later in this chapter.

(c) ***Reversionary clause:*** In closing submissions, counsel for Mangatū Incorporation alternatively suggested that any sale agreement should have included a reversionary clause to return the land to the owners once stabilisation of the land had been achieved. Counsel cited the Canadian case of *Semiahmoo Indian Band v Canada* in support of their argument. In that case, the Canadian government acquired land in 1951 from the Semiahmoo Indian Band for expanded customs facilities. Over 40 years later, the land remained largely unused. The band, who had not wanted to sell, unsuccessfully sought return of the land several times over that period. The Supreme Court found that the Crown had breached the fiduciary duty it owed the band to prevent an exploitative sale and should have included a reversionary clause in the original agreement to diminish impairment of the band's rights.[114]

We note that, in the *Semiahmoo Indian Band* case, the Crown made no improvements to the land. The Crown's failure to utilise that land after a forced sale, followed by its refusal to return it to the owners, appears to have been a central feature of that case. The land was not used for the purpose it was purchased for, and a reversionary clause that applied in such situations would have provided for its return. In the case of Mangatū, the land was used for the purpose for which it was purchased – erosion control and afforestation – so the situation is clearly different. We do not consider the Semiahmoo case to be of material assistance to our task here.

(d) ***Conclusion on viability of alternatives:*** We conclude that it is likely that there were alternatives to sale of the 1961 land that might have proved viable had the Crown given them

111. Document O4, pp 13–14
112. Ibid, p 12
113. Poverty Bay Catchment Board to Soil Conservation and Rivers Control Council, 3 October 1958, AATE W3404 96/197000, Archives New Zealand, Wellington (doc F33, vol 3, pp 1195–1196)
114. Document M7, pp 30–31

serious consideration. This includes an arrangement under section 64 of the Forests Act 1949, which would have provided the legal basis for a lease or profit sharing arrangement. We acknowledge that, because the Crown did not give these alternatives serious consideration, there is no detailed evidence to indicate whether an arrangement could have been reached. However, it is evident that there was at least a legal basis for an alternative to sale in the form of section 64.

(4) *Did the Crown make a profit from the sale of the Mangatū State Forest?*

If there were potentially viable alternatives to sale, the final question we must ask is whether the Mangatū owners suffered economic prejudice because of the Crown's failure to explore and implement an alternative solution. The only area where we have reliable (though still incomplete) evidence on this point is in regard to the Crown's 1992 sale of the cutting rights to the Mangatū State Forest (which is more or less the equivalent of selling the trees without the land) to ITT Rayonier.[115] This raises the question as to whether the Crown made a profit or loss from the forest it established on land purchased from the Mangatū Incorporation in the 1960s. The incorporation was forced into selling land to the Crown; if the Crown made a profit on the sale, this would increase the prejudice to the Mangatū owners. Similar economic benefits would presumably have been available to the owners had they retained the land and entered into a revenue- or profit-sharing lease with the Crown. On the other hand, if the Crown made a loss this would indicate that there was no prejudice to the owners. The Crown could in that case be upheld in its assertion that the value of the scheme (to the Crown) was primarily in its public benefits, and little economic benefit would have flowed to the owners from an alternative arrangement to sale.

The profit from the Crown's sale would be the proceeds of selling the cutting rights after costs were deducted, minus the cost of establishing and maintaining the forest until sale. In 1959, officials estimated it would cost £1.1 million to establish the proposed forest on 16,000 acres (6,475 hectares), plus the cost of the land.[116] However, we do not appear to have any evidence as to how much the New Zealand Forest Service actually did spend. The picture was probably complicated somewhat by the fact that the Crown later enlarged the forest. Crown witness Andrew McEwen told the Tribunal that the 1959 figure was probably 'quite a big underestimate'.[117] Given Dr McEwen's limited evidence on this point (and no better Crown evidence), and the absence of actual data on spending, we have little choice but to work with the original estimate of £1.1 million. It does not appear that this estimate included

115. In 2002, Rayonier onsold the cutting rights to Huaguang Forests Company Limited. Huaguang subsequently went into receivership and onsold the rights in 2004 to the current owners, Ernslaw One Limited: see doc 132(a), pp 383–391.

116. Document A18(a), vol 12, p 8241

117. Transcript 4.29, p 234

the costs of financing the investment. It is unfortunately not possible for us here to adjust for that factor.[118]

We have better information relating to the eventual sale of the cutting rights. The Crown sold the forest-cutting rights to private investors in 1992. The price received by the Crown specifically for the Mangatū State Forest is unknown, as it was sold to ITT Rayonier as part of a package of 38 forests throughout the country totalling 97,453 hectares 'stocked area' (that is, the parts of the forests on which trees were planted).[119] In September 2010, Gibson Sheat Lawyers submitted an Official Information Act request to Treasury asking for details on 'the monetary consideration received by the Crown when it sold the cutting rights to the Mangatu State Forest'. Treasury responded that only a list of forests purchased by ITT Rayonier in 1992 for $366 million was available. The Crown failed to provide information assigning values to individual forests such as Mangatū.[120]

It is possible, however, to estimate the portion of the 1992 sale proceeds attributable to Mangatū. In his evidence to the Tribunal, Crown witness Michael Marren used the figures available to estimate the per hectare proceeds of the sale. To do this he took the $366 million proceeds for the 38 forests, divided it by the estimated stocked area (the area with trees planted on it) of 97,453 hectares, and subtracted the Crown costs for the sale process of $24.23 per hectare. The result was proceeds of $3731.42 per hectare.[121] As outlined above, the area that the government originally planned to plant in exotic forests was 16,000 acres (6,475 hectares). However, officials also estimated that 1500 acres (607 hectares) of this would be unplantable, so the total stocked area on which the 1959 estimates were based was 14,500 acres (5868 hectares).[122] Multiplying 5868 hectares by the per hectare proceeds of $3731.42 results in a figure of just under $22 million. We are thus able to conclude that the Crown sold cutting rights to 14,500 acres (5868 hectares) of the Mangatū State Forest in 1992 for an estimated $22 million.

The above figure assumes that the forest at Mangatū was valued at the average of the entire package of 38 forests sold in 1992. There are reasons to think that the actual price for Mangatū was somewhat lower than the average. For example, Donn Armstrong, in his evidence to the Tribunal, categorised 88 per cent of the Mangatū State Forest as 'hauler land' – steep land 'requiring more expensive extraction equipment than more easy contoured land which can be managed using ground base harvesting techniques which are cheaper to operate'.[123] In addition, there is a water and soil covenant on the forest which imposes

118. Since the mid-1980s, Government agencies include a capital charge in capital expenditure proposals as a proxy for alternative uses of the assets, such as selling them and retiring debt.
119. Document 140(a), pp 399–400. The majority of the forest area sold was in Southland and on the East Coast.
120. Ibid, pp 401–402
121. Document 127, p 12
122. Document A18(a), vol 12, p 8270
123. Document 128, pp 5–6

obligations that potentially add to costs.[124] Dr McEwen outlined one aspect of this in his evidence to the Tribunal:

> Talking to the forest manager on Sunday one of the things they do is they harvest in a lower catchment and they leave trees in the headwaters and then five years later they go back. Once they have got the forest re-established in the lower part of the catchment they will go back and they will harvest the top. So you are always keeping parts of it in trees and that all adds to the cost of the operation.[125]

This evidence indicates that the estimate of $22 million calculated above may be slightly on the high side. It is, however, the best estimate we have of the sale price of that part of the Mangatū State Forest located (more or less) on the land purchased to establish it in the 1960s.

As outlined earlier, in 1959 officials estimated it would cost £1.1 million to establish a 14,500 acre (5868 hectare) forest on 16,000 acres of land at Mangatū.[126] This equates to just under $30 million in 1992 dollars.[127] It therefore appears that, if the Crown sold 14,500 acres (5868 hectares) of the forest for $22 million in 1992, it sold it for less than it cost to establish. The assumptions made in these calculations have been fairly conservative, as the costs were likely to have been higher than assumed and the sale price lower. Making the best we can of the limited evidence before us, it seems appropriate to conclude that the Crown made a loss on the sale of the forest it established on lands purchased from the Mangatū Incorporation. It is not possible for us to be confident about the extent of that loss.

We do not have evidence on our record of inquiry as to whether or not the Crown made profits on the Mangatū State Forest before selling the cutting rights in 1992. The first rotation of trees was planted over a 17-year period, from 1961 to 1978. Much of the planting in the early 1960s was in a variety of species, including poplar, Corsican pine (*Pinus nigra*), and cypress. From the mid-1960s, radiata pine began to dominate, and was soon almost the only tree planted.[128] Dr McEwen indicated that harvesting would generally take place after 29 to 35 years of planting.[129] This appears to have happened in the case of Mangatū, as harvesting of the first rotation began in 1990, and replanting began in 1991. The Crown, through its forestry company Timberlands, may therefore have extracted some profit from the forest for two years before it was sold. However, the comparatively limited planting of radiata pine in the early years means that any profits were likely to have been small once the

124. It appears that only seven of the 38 forests in the 1992 sale had water and soil covenants on them, these being Mangatu, Ruatoria, Tokomaru, Pouto, Mangaokewa, Lismore Hill, and Waitarere: doc I33, pp 26–27.
125. Transcript 4.29, p 276
126. Document A18(a), vol 12, p 8241
127. Figure calculated from the Reserve Banks online consumer price index calculator.
128. Document K5, pp 20–21
129. Ibid, p 22

cost of harvesting and replanting is taken into account. Some of the first rotation was still unharvested in early 2012, and much of that was considered unlikely to ever be harvested.[130]

The evidence indicates that the Crown did not recoup its investment when it sold the cutting rights to the Mangatū State Forest in 1992, and made little profit before selling those rights. On that analysis, limited by the evidence before us, it appears that the owners did not suffer economic prejudice in this regard.

4.3.4 Conclusion on the extent of the prejudice

The Mangatū owners clearly suffered grave cultural and spiritual prejudice as a result of the sale of the 1961 land. The incorporation was established to keep ancestral land in the control of its owners and descendants. Until 1961, it had been remarkably successful in achieving that goal, despite a backdrop of massive land alienation in Tūranga and numerous challenges to its economic viability. The sale of the 1961 land marked a break from that proud legacy and it is clear that the pain from that event continues to resonate amongst the community of Mangatū owners. The owners had not wanted to sell, particularly so soon after they had resumed control of their land from the East Coast Commissioner. They had presented several alternatives to the Crown that would not have involved them breaking their connection to the land. The Crown pressed ahead regardless, failing to consult on alternatives in any meaningful way, insisting that sale was the only option and denying the owners a role in the afforestation of their ancestral lands. Even in the 1960s, the Crown failed to recognise the tino rangatiratanga of Te Aitanga a Māhaki, as it had consistently since its first incursion into the district a century before. The owners suffered significant cultural and spiritual prejudice as a result.

However, we do not consider that the incorporation ultimately suffered financial or economic prejudice as a result of the 1961 sale. The incorporation's farming operations were clearly affected by the sale of the 1961 land, but a number of factors mitigated the prejudice this caused. The Crown paid a fair price for the 1961 land. The payment received allowed the incorporation to pay out a special dividend to its owners. Subsequently, the incorporation gradually purchased replacement lands of better quality. There were alternatives to sale that might have proved viable had the Crown given them serious consideration, particularly an arrangement under section 64 of the Forests Act 1949. But while those alternatives would have maintained the owners' connection with their land, we are not able to conclude that those alternatives would have been of any economic benefit to the owners. The limited evidence available suggests that the Crown invested a significant amount of capital in the establishment of the Mangatū State Forest. It is unlikely that the Crown recouped that

130. Ibid, pp 20–22

investment when it sold the cutting rights to the forest in 1992, and the profits from early cuttings before the sale would at best have been modest.

In conclusion, we find that the Mangatū owners did not suffer financial or economic prejudice as a result of the 1961 sale, but that they did suffer grave cultural and spiritual prejudice.

4.4 What are the Current Circumstances of the Mangatū Incorporation?

Finally, we consider the current circumstances of the Mangatu Incorporation, particularly its governance, representativeness, financial position, and cultural activities. These matters are important for our consideration of the incorporation remedies application because, as we discussed in chapter 2, we need to be sure that the incorporation is an appropriate body to receive redress. This means that it must represent the people who suffered the prejudice, and it also must have the capacity to receive redress. The current circumstances of the applicants are also a relevant consideration to the question of what is necessary to compensate for or remove the prejudice by restoring their social, cultural, and economic wellbeing. In this section, we also address submissions made by the Crown that the incorporation is not a 'Treaty compliant entity' and is therefore unsuitable to be the recipient of a binding recommendation for return of CFL land.

4.4.1 Governance, representativeness, financial position, and cultural activities

The Mangatū Incorporation is currently governed by the provisions of the Te Ture Whenua Māori Act 1993. A management committee of seven owners is elected on a three-yearly basis, 'a legacy from the initial seven committee members when the Mangatu No 1 Block was constituted as an incorporation in 1893.'[131] The committee meets five or six times per year, and receives reports at those meetings from the incorporation's commercial subsidiaries.[132] Mr Haronga told us that the committee strives to be inclusive:

> We do adhere to the philosophy that owners are entitled to raise issues about the way the Incorporation is run because it is their incorporation. For instance, owners who have matters of importance to raise will generally attend a Committee of Management meeting to discuss their concerns with us directly. Owners also have certain rights to challenge the Committee in the Māori Land Court, although I can recall this happening only once in the time that I have been on the Committee of Management.[133]

131. Document 117, pp 21–22
132. Document 136, p 4
133. Ibid, p 4

In 2012, the Mangatū Incorporation had around 5100 owners, with the numbers growing through successions by 50 to 100 per year. The incorporation does not have addresses for approximately 2000 of its owners. The dividends for these owners are held in trust, and the incorporation has recently begun to use the internet to attempt to reconnect with lost owners.[134] Data presented to this Tribunal indicates that the distribution of shares held by shareholders in the incorporation has been very uneven since at least 1962. For example, in 1962, nearly 2 per cent of shareholders each held more than 500 shares. However, the shareholding of this 2 per cent represented 25 per cent of the total shares in the incorporation.[135] This is probably ultimately a reflection of Native Land Court decisions on the allocation of interests in the blocks in the early 1920s.

In recent years, there has been an increase in shareholding by whānau trusts, since these were finally provided for in the Te Ture Whenua Māori Act 1993. In 2011, nearly 15 per cent of Mangatū Incorporation shares were held by whānau trusts.[136] Whānau trusts have allowed for a 'retribalisation' of ownership to occur over the past 25 years:

> We encourage our owners to set up whānau trusts to stop fragmentation of their ownership interests and thus preserve them for future generations and no doubt this will continue into the future.[137]

Not all owners have been happy with the incorporation's policy in respect of whānau trusts, with Ngā Ariki Kaipūtahi in particular criticising restrictions on trusts' ability to apply for education and kaumatua grants.[138] Mr Haronga acknowledged that '[t]here is considerable debate over the benefits whānau trust members can enjoy. It is an area of policy that will evolve to be more inclusive over time'.[139]

The incorporation considers it is important to identify who among the current owners suffered the prejudice from the 1961 sale, and who therefore are to be compensated. Due to the legislative changes in the 1960s which allowed strangers to purchase shares, as well as amalgamations with other blocks, the incorporation's ownership list has significantly expanded since the 1961 sale. This means that the incorporation now also represents people who were not directly prejudiced by the 1961 sale. To address this, the incorporation is seeking return of the 1961 land only to the 1961 owners and their descendants. In order to identify these owners, the incorporation has outlined a process to track changes to its register since 1961 and verify successors. The incorporation also proposes 'a publicity campaign

134. Transcript 4.28, p 151
135. Document K16; doc K16(b)
136. Document I17, pp 22–33
137. Ibid, p 22
138. Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, vol 2, p 695. Mr Haronga noted that Mr Lloyd had reiterated this complaint at a recent annual general meeting: see transcript 4.28, p 156.
139. Document I17, p 22

to find those 1961 owners who no longer own their shares and are no longer known to us.'[140] Shares and benefits would then be distributed to owners, as Mr Haronga explained:

> The process followed with the Mangatu 3 and 4 blocks and Kaiwhakareirei incorporation amalgamations with Mangatu No 1 block was that separate valuations were undertaken to determine the share value for each entity. A simple calculation was then made to determine how many Mangatu 3, or Mangatu 4, or Kaiwhakareirei Incorporation shares would be needed to exchange for Mangatu 1 block shares. I would expect a similar independent valuation process to occur here and additional shares would be issued to the 1961 owners or their successors.[141]

Mr Haronga told us that he expected that 'a special dividend to commemorate the event' would be paid, noting that 'such a one off payment could be made out of the cash flow earnings of Mangatu based on the expanded share base'.[142] He also mentioned the possibility of retaining some compensation as capital for replanting purposes, 'the value [of which] would then be issued as further Mangatu shares'.[143]

The incorporation is today in a strong financial position, with a significant asset base and a diverse range of commercial activities. In the 2011 financial year, the incorporation's net equity totalled $162 million and its before tax profit was $10.6 million.[144] As at June 2012, the incorporation employed 267 staff (consisting of 125 permanent and 141 casual staff). Of those staff, 74 were Māori and seven were Māhaki.[145] Mr Haronga expressed a desire during our hearings to employ more owners: 'We think we've reached a level of sustainability to re-engage more seriously with our people, particularly with the right skills. And if they are the best person for the job, we want them working for us.'[146] In pursuit of this goal, the incorporation, in partnership with Ravensdown Fertiliser Cooperative, has recently instituted several three year education scholarships for shareholders and their children to study agribusiness subjects at university.[147]

In recent years, the operations of the incorporation have diversified markedly. Since the early 1990s it has been transitioning to a 'sustainable business model' in an environment characterised by numerous challenges, including commodity market volatility. Since 2000, the 18 individual stations under incorporation management have been merged into a single entity. The incorporation has also established a food wholesaling and exporting company.[148] Mr Haronga told the Tribunal: 'Our commercial operations may seem far removed from

140. Document K6, pp 24–26
141. Document I17, pp 28–29
142. Document K6, p 30
143. Document K13, p 4
144. Document K6(j), p 3
145. Transcript 4.28, p 156
146. Ibid
147. Document K6(j), pp 5–6
148. Document I17, p 19

Land use	Area (ha)	Percentage of total
Farming	22,404	53
Exotic forest	4464	10
Native forest	15,101	36
Vineyard	31	1
Total land in use	42,000	100

Current land use by the Mangatū Incorporation

Mangatu Incorporation's early world, but the common thread is our continuing determination to control our own destiny'.[149] This shows the efforts of the incorporation to re-establish the autonomy that was lost during the difficult years after Wi Pere's death.

The table above outlines the current land use by the incorporation.[150] The farming operations are primarily sheep and beef farming.[151] Just over 10 per cent of the usable land is in exotic forestry, and over a third of the usable land is planted in native forest. Mr Haronga told the Tribunal that the native forest was 'mainly the rugged land in the ranges' that was being replanted under a sustainable management plan to restore the land. 'Our programme will clear the exotic flora and fauna and nurture the native trees.'[152] This programme is funded by selective harvesting of native timber.[153] These forests are managed for the incorporation by PF Olsen Limited.[154]

Mr Haronga told us that the incorporation, were it to receive a binding recommendation in its favour for return of the 1961 land, would integrate the forestry on the 1961 land into its neighbouring exotic forest.[155] During our second week of hearings, he presented a map of the Mangatū Forest showing the forest's management compartments and suggested that a 'give and take' approach could be taken to a recommendation for return of the 1961 land:

> So [that] the boundary would follow the logical management of the forest; so rather than being straight it would be crooked to reflect that, but still reflect 8626 acres.[156]

Mr Haronga emphasised that the incorporation is not simply a corporate body, but an entity with 'a long, proud history of a social, cultural heritage that goes back since 1893'.[157]

149. Ibid, p 21
150. Ibid, p 19
151. Ibid, p 18
152. Transcript 4.28, p 75
153. Transcript 4.29, p 17
154. Document K6, p 14
155. Ibid, pp 21–22
156. Transcript 4.29, p 26; doc L5
157. Transcript 4.29, p 28

4.4.1

Lewis Moeau, former secretary of the incorporation, told us that '[t]ikanga Māori was part of the culture of Mangatu':

> I believe that the Mangatu Incorporation was being managed in a truly bi-cultural manner – that is the inculcation of Māori cultural practices along with prudent business management practices and trusteeship.[158]

Mr Haronga referred to the community activities of the incorporation:

> I want to reinforce the point that a successful business model is not inconsistent with us operating from a strong tikanga foundation. Being successful improves our ability to strengthen our culture and support our marae. For as long as I can remember, Mangatu has always paid a significant amount each year to support the education of our rangatahi, the health and wellbeing of our kaumātua, tangi grants, and marae grants. We will carry on with this as it is our tradition to look after our people.[159]

The annual reports provided by the incorporation to our inquiry show that funds have been consistently allocated for community activities. The amounts provided for kaumatua grants and donations (including marae grants) more than doubled between 2006 and 2011.[160]

However, Mr Haronga acknowledged in his evidence that there was a need for the incorporation to 're-engage' with the community of owners, implying that some distance had grown between the incorporation's management and its owners.[161] Under cross-examination, Mr Haronga explained that difficult business decisions were one reason for the development of this distance:

> We basically went from 18 farms to one farm. I mean things were happening like one farm flush with feed, another farm no feed, animals starving, it's unacceptable in the modern day practice of animal husbandry. So we had to change a lot of practices and that's when the distance started to happen, yes.[162]

As previous Tribunals have noted, these are common tensions for Māori incorporations. The central North Island Tribunal considered that managing the tensions 'between the 'community' or 'social functions' of trusts and incorporations, on the one hand, and their duties and responsibilities, on the other' is 'an ever-present challenge.'[163]

158. Document 116, pp 2, 5
159. Document 117, pp 20–21. Evidence on the incorporation's support for community and charitable purposes was provided in the appendix to Mr Haronga's evidence: see document 117(h).
160. Document K6(e), p 15; doc K6(j), p 11
161. Document 117, p 30
162. Transcript 4.28, pp 161–162
163. Waitangi Tribunal, *He Maunga Rongo*, vol 2, p 793

4.4.2 Is the Mangatū Incorporation a 'Treaty compliant entity'?

(1) *Submissions*

The Crown argued in our hearings that the Mangatū Incorporation is not a suitable body for a resumption recommendation, as incorporations are a structure 'containing elements found to have been in breach of Treaty principles'. The Crown submitted that the Tribunal should instead recommend return of the land to a 'Treaty compliant entity'.[164] Counsel cited the Taranaki report (which we discuss below) as evidence 'that the Tribunal favours the restoration of tribal or community interests over those of shareholders in incorporations'.[165] Crown witness Andrew McConnell from the Office of Treaty Settlements reiterated the Tribunal's earlier finding that the process of individualisation of community landholding was in breach of the Treaty. The incorporation, 'being a body of individual shareholders with varying shareholdings (reflecting in some cases the alienations and purchase of shares over time) is inconsistent with the notion of community ownership of land'.[166]

Counsel for Mangatū Incorporation invited us to reject the Crown's argument as an attempt to prejudice the incorporation for a situation the Crown itself had created. The system of individual tenure was imposed by the Crown against the wishes of Māori and so the 'Crown bears the responsibility for cleaving Māori from their customary tenure'.[167] As Mr Haronga told the Tribunal, '[t]hat is the system that was inflicted upon us, and 119 years later it is simply not possible to wind back the clock. Our tipunā wanted to protect, nurture and develop their Māori land in a collective structure but were not able to'.[168]

Counsel further submitted that the Mangatū owners' connection to the land extends before 1881 to the hapū and whānau that had mana whenua. The incorporation was formed to protect the interests of those hapū and whānau. Further, 'in the 130 years since its inception Mangatu Incorporation has evolved a mana and identity in its own right, and its history spans generations of the whānau of Mangatu'. The incorporation is not simply a body of individual shareholders as the Crown contends, but an organisation with 'a sense of obligation to the Te Aitanga a Māhaki community', and to act in accordance with tikanga Māori.[169]

(2) *Tribunal jurisprudence*

The Taranaki Tribunal, which the Crown cited as demonstrating that the Tribunal prefers hapū or iwi restoration over incorporation shareholders, had to decide whether compensation for the loss of rents or loss of use of the greater part of the reserved land through the perpetual leasing scheme would more appropriately be awarded to the Parininihi-ki-Waitotara (PKW) Incorporation or to hapū affected by Treaty breaches. The PKW

164. Document M10, p 7
165. Ibid, p 16
166. Document I30, p 12
167. Document M7, pp 18–19
168. Document I36, p 5
169. Document M7, pp 18–19

Incorporation was established in 1976 to take over the administration of perpetually leased lands. The lands were originally part of the Taranaki confiscated lands which the Crown returned to Māori while vesting management of them in the Public Trustee. The hapū were shut out of decision-making about these lands and about their alienation for many decades. In 1963, the Māori Land Court amalgamated all the Māori owners into one title (the PKW reserve) so that hapū owners no longer held their interest in their home area but instead had an interest in every reserve throughout Taranaki.[170] Owners were allocated shares in the PKW Incorporation in proportion to their original landholding. By this time only 25 per cent of the reserved lands, that is, a small part of the confiscated lands, remained. The incorporation angered some owners by then refusing to buy out leaseholds to regain control of the land and instead sold some 20 per cent of its land between 1976 and 1990.[171]

Faced with the division these actions had caused, and aware of strong feelings among hapu groups over their inability to recover ancestral lands or to control lands in their own areas, the Tribunal concluded that the formation of the incorporation 'completed the process of divorcing the owners from their traditional lands'. The Tribunal found that it was the hapū who had suffered the prejudice, and ultimately recommended that the hapū be compensated:

> Had Maori law prevailed, as it should have, all reserves would have been held for the benefit of the hapu. How could individuals be further compensated now, when they were not directly entitled in the first instance?[172]

However, the Tribunal has, in other inquiries, been more favorably disposed towards incorporations. In 2001, the Tribunal upheld a claim of the PKW Incorporation that was not in conflict with claims of iwi and hapū.[173] In 1991, the Ngai Tahu Tribunal made recommendations in favour of the Mawhera Incorporation in relation to pounamu and the Arahura river bed.[174] In *Tauranga Moana, 1886–2006: Report on the Post-Raupatu Claims*, the Tribunal noted that incorporations, along with trusts, 'are a vehicle which can effectively promote land development' and 'provide collective management structures for . . . land'. In this way, incorporations were 'a positive and empowering mechanism'.[175] In *He Maunga*

170. The Tribunal identified 10 main distinctive 'hapu aggregations' within three waka areas in Taranaki: Waitangi Tribunal, *The Taranaki Report: Kaupapa Tuatahi* (Wellington: GP Publications, 1996), p 315.

171. Ibid, pp 269–271, 273

172. Ibid, pp 270–271, 276

173. Waitangi Tribunal, *Taranaki Maori, Dairy Industry Changes, and the Crown* (Wellington: Legislation Direct, 2001), pp 4, 8

174. Waitangi Tribunal, *The Ngai Tahu Report 1991*, 3 vols (Wellington: Brooker and Friend Ltd, 1991), vol 3, pp 1061–1062

175. Waitangi Tribunal, *Tauranga Moana, 1886–2006: Report on the Post-Raupatu Claims*, 2 vols (Wellington: Legislation Direct, 2010), vol 1, pp 225–226

Rongo: Report on Central North Island Claims, the Tribunal stated that incorporations, along with trusts, had been 'popular and effective management structures'.[176]

The Te Tau Ihu Tribunal thought there was 'indeed much force' in the Taranaki Tribunal's comments. However, it noted that those comments were made in the context of a serious dispute between some Taranaki iwi and the PKW Incorporation. In the Te Tau Ihu context, the Wakatū Incorporation had a more harmonious relationship with local iwi and had assisted iwi in bringing claims to the Tribunal. The Tribunal recognised the importance of 'the Crown's desire to negotiate directly with iwi', but noted:

> the very important role that the Wakatu Incorporation has had in initiating and supporting claims to the Tribunal from Te Tau Ihu Maori. Furthermore, Crown actions that have directly affected the shareholders of the Wakatu Incorporation since 1977 would need to be, and would appropriately be, resolved between the Crown and the incorporation.[177]

(3) *Incorporations and the Crown's settlement framework*

In the case of Mangatū Incorporation, the Crown is unwilling to settle directly with the owners. However, the Crown is not always so reluctant to deal directly with incorporations. During our second week of hearings, counsel for Mangatū Incorporation cited a memorandum of understanding between the Crown and the Atihau–Whanganui Incorporation (AWI) to illustrate the Crown's inconsistent treatment of incorporations.[178] In that case, the Crown made an ex-gratia payment intended 'to provide economic benefits to AWI, the wider community, and New Zealand as a whole by facilitating AWI's ability to resume its ownership of and develop the vested lands'. The agreement did not include any concession of Treaty breach and the payment was not intended to settle any claim.[179] In reply submissions, counsel also pointed to examples where the Crown has allowed settlement redress to be vested in incorporations, such as the reserved land perpetual lease settlements and the recent settlement with the descendants of the owners of the Maraeroa A and B blocks.[180]

(4) *Tribunal comment*

We do not accept the Crown's submission that the Mangatū Incorporation is not a 'Treaty compliant entity' and therefore unsuitable to receive a binding recommendation in its favour.

We note first that, in our view, the Taranaki Tribunal's finding with respect to the PKW Incorporation is neither determinative for this case nor indicative of the Tribunal's general

176. Waitangi Tribunal, *He Maunga Rongo*, vol 2, p 799
177. Waitangi Tribunal, *Te Tau Ihu o te Waka a Maui: Report on Northern South Island Claims*, 3 vols (Wellington: Legislation Direct, 2008), vol 2, pp 934–935
178. Transcript 4.29, pp 308–310
179. Document I8, p 1
180. Document O4, p 11; see Maraeroa Blocks A and B Blocks Claims Settlement Act 2012 and Maraeroa Blocks A and B Blocks Incorporation Act 2012

approach to Māori incorporations. We consider that the Crown's position that incorporations are not 'Treaty compliant' entities is incorrect, and in any event is inconsistent with the Crown's readiness to deal with or vest settlement redress in incorporations.

The circumstances in Taranaki were, in any case, quite different to what we face in this inquiry. As we have already emphasised several times in this chapter, the Mangatū Incorporation was established for the purpose of keeping ancestral land in the control of its owners and their descendants. It was established as an evolutionary mechanism to achieve a pragmatic solution to hapū and whānau land-owning aspirations which were otherwise frustrated by the alienation of their land at the hand of the Crown and Native Land Court. It should also be remembered that, as we were reminded by kuia Ingrid Searancke, the incorporation 'was established as a hapu construct, it was born out of the hapu, hence our whakapapa is the woven thread that binds us as kin with ahi ka in the hapu'.[181] It is evident that that heritage still plays an influential role in the operation of the incorporation today. To characterise the incorporation as simply 'a body of individual shareholders' is therefore unfair.

4.5 Conclusion

The Mangatū Incorporation has a well-founded claim in relation to the 1961 sale of Mangatū 1 lands. The incorporation owners are entitled to a remedy for that breach and the prejudice suffered. While we have found that the incorporation did not suffer financial or economic prejudice as a result of the 1961 sale, the owners did suffer the grave cultural and spiritual prejudice of a loss of their ancestral land and the diminishment of their tino rangatiratanga. That is the prejudice which any recommendation for redress must compensate for or remove.

The question of what redress will compensate for or remove the prejudice suffered by the incorporation is complicated, however. Redress under the restorative approach is concerned not only with past loss, but also with what is required to restore claimants to a position of the strength for the future. And recommendations for redress are not made in a vacuum. Where rights are so closely intertwined, and where there have been such serious Treaty breaches which remain unaddressed over a century after they were committed, as in Tūranga, redress for one claimant inevitability affects the redress available to another. For those reasons, before we determine the incorporation's remedies application, we must first examine the remedies applications of the three Māhaki cluster claimants.

181. Document 04, p 9 fn 22

CHAPTER 5

THE APPLICATIONS OF TE AITANGA A MĀHAKI AND AFFILIATES, NGĀ ARIKI KAIPŪTAHI, AND TE WHĀNAU A KAI

5.1 Introduction

In this chapter, we consider the three remaining applications for remedies involving resumption of the Mangatū Crown forest licensed (CFL) lands in our inquiry district. Following the Supreme Court's decision in *Haronga*, three groups – Te Aitanga a Māhaki and Affiliates (TAMA), Ngā Ariki Kaipūtahi, and Te Whānau a Kai – lodged applications for resumption of the Mangatū CFL lands. As outlined earlier, these three applicants represent hapū and iwi who were involved in the original Tūranga district inquiry, and who had until 2011 all been involved in settlement negotiations with the Crown under the mandate of TAMA.

In chapter 3, we identified the extent to which these three applicants' claims in our inquiry are well founded. We did so by relating the findings of Treaty breach from the Tūranga report to the applicants before us. Our task in this chapter is different. In this chapter, we begin by analysing how, and to what extent, the Crown's Treaty breaches have prejudiced – or harmed – the three applicants. We then proceed to discuss the current circumstances of the three applicants. In order to assess both the suitability of the applicants to receive and manage the redress that they have sought and what redress is appropriate, we focus on their governance structures, representativeness, and financial position. Finally, we examine the Crown's settlement policy and its most recent settlement offer to the Māhaki cluster. These are the three steps necessary before we can approach the issue of determining what remedies are necessary to restore all the claimants, which is the subject of our concluding chapter.

5.2 What Was the Nature and Extent of the Prejudice Suffered by TAMA, Ngā Ariki Kaipūtahi, and Te Whānau a Kai?

5.2.1 Introduction

In this section we analyse the nature and extent of the prejudice suffered by TAMA, Ngā Ariki Kaipūtahi, and Te Whānau a Kai as a result of the Crown's breaches of the principles of the Treaty. We begin our discussion by summarising the parties' submissions as

to the particular prejudice that has been suffered as a result of Crown breaches. In light of those submissions we outline our approach to the task of deciding the nature and extent of prejudice.

5.2.2 Submissions on prejudice

(1) *TAMA*

TAMA submitted that the claimants it represents had suffered 'murder . . . execution . . . deportation, persecution, land confiscation, detribalisation' which were 'all at the worst end of the scale of Crown breach.'[1] The prejudice suffered by the claimants was 'long standing, deep and significant', resulting in such impacts as 'loss of te reo, lack of leadership, poor education, poor health, poor housing, lack of employment'.[2] Indeed, counsel contended that '[i]n terms of prejudice, TAMA is not comparable to any other. Who else were murdered, summarily executed, deported, executed, confiscated on this scale? No-one.'[3]

TAMA's submissions on prejudice focused first on the effects of Crown actions between 1865 and 1869, and then on the consequences of the loss of land.[4] Speaking to these submissions, counsel suggested that the Crown's actions in the 1860s, including invasion and confiscation of iwi lands, and the murder, persecution, and deportation of its people, were purposeful and systematic, and would today 'be called crimes against humanity'.[5]

Counsel for TAMA went on to argue that 'the prejudice arising from these actions, both independently and cumulatively, is self-evident. On one level is the irremediable human loss to those who depended on those victims, among other things, to provide for them and . . . the corresponding consequence that their tatae or whakapapa lines died with them.'[6] Counsel argued that the claimants suffered a 'profound loss of confidence' as the legacy of these actions.[7]

Counsel submitted that the scale of land loss suffered by TAMA through the operation of the Poverty Bay Commission and the Native Land Court, was 'unprecedented', so that TAMA's ties to their traditional lands have been severed or severely weakened, and their 'very identity' remains threatened. TAMA's development and the transmission of their culture and traditions concerning their lands has been prevented.[8] Counsel submitted that unless redress included return of the iwi's traditional lands this threat would remain.[9]

1. Transcript 4.30, p 154
2. Ibid, p 158
3. Document O1, p 2
4. Document M9, pp 7–11; doc M9(a), p 14
5. Document M9, pp 3–4; transcript 4.28, p 373
6. Transcript 4.28, p 374
7. Ibid
8. Ibid
9. Ibid

(2) *Ngā Ariki Kaipūtahi*

Submissions from counsel for Ngā Ariki Kaipūtahi focused solely on the specific harm done to Ngā Ariki Kaipūtahi as a result of how title to Mangatū was determined. Counsel cited the Tūranga report finding that 'it is still open to the Crown to apologise for the wrongs suffered by Ngariki at the hands of the land court, and to compensate them for the significant loss of mana and land which they have suffered'.[10]

These Tribunal findings reflected Ngā Ariki Kaipūtahi submissions to the original Tūranga inquiry which had developed these points at length. The submissions noted the presence of Ngā Ariki Kaipūtahi individuals at Waerenga a Hika, and amongst the Whakarau. But they focused on the wrongful exclusion of Ngā Ariki Kaipūtahi from the title to Mangatū land determined by the Native Land Court in 1881, as well as their continued neglect when Parliament intervened in 1917 to ensure that Te Whānau a Taupara, but not Ngā Ariki Kaipūtahi, gained additional interests in Mangatū.[11]

Counsel for Ngā Ariki Kaipūtahi submitted that the prejudicial consequences of these Crown acts and omissions were that 'their interests in the block which represents most of their customary lands, were and are miniscule in comparison to their customary rights, which were guaranteed by the Treaty'.[12] Counsel submitted that 'the lasting impact' has been the 'denigration' of Ngā Ariki Kaipūtahi mana and identity.[13]

(3) *Te Whānau a Kai*

Te Whānau a Kai submitted that: 'It was of the essence of Te Whānau a Kai's case in the Tūranga inquiry that Te Whānau a Kai were an uncompensated raupatu claimant group who had never received any redress for the confiscation of their lands by the Crown."[14] Their claims concerned 'war, detention without trial on the Chatham Islands, executions at Ngatapa, confiscation of land at Patutahi, the effects of the Native Land Court, and more besides'.[15]

Counsel submitted that as Te Whānau a Kai individuals were among the Whakarau, and those killed at Ngātapa, they had well-founded claims in respect of those general issues.[16] But, counsel emphasised, some findings in the Tūranga report are 'highly specific to and particular to Te Whānau a Kai'. These findings relate to 'the confiscation by the Crown of the Patutahi and Muhunga blocks as a part of the Poverty Bay cession', which as counsel emphasised are a raupatu for which Te Whānau a Kai have never been compensated.[17]

10. Document J11, pp 3–4; doc M8, p 2
11. Document H8, pp 3–4, 10–26
12. Document C36, pp 6–8
13. Ibid, p 8
14. Document M6, paras 1.3, 8.2; quoting doc I20, p 6
15. Document M6, para 9.3
16. Ibid, paras 9.5–9.6
17. Ibid, paras 9.7–9.10

Counsel also noted the Tribunal's findings in the Tūranga report as to the effects of the Native Land Court on Te Whānau a Kai land holdings, and its findings in the Te Urewera report as to the alienation of the Tahora and Paharakeke blocks, in which Te Whānau a Kai had interests. We discuss the Te Urewera Tribunal's findings in relation to Tahora 2C3(2) in section 5.2.5(2) below. In relation to Paharakeke, counsel cited the Tribunal's finding that the Crown's purchase of that block in 1961 was not consistent with the Crown's duty of active protection, and that:

> The Maori owners of Paharakeke and Manuoha were prejudiced by this Treaty breach, having been short-changed by £18,000, a substantial figure at the time.[18]

(4) *The Crown*

The Crown's submissions acknowledged the need for the Tribunal to 'have regard to the extent of prejudice caused to each party from the reported breaches. This will involve an assessment of relative seriousness and comparability of well-founded claims in addressing all the circumstances of the claims.'[19] The Crown submitted that this task had not been fully completed by the 2004 Tūranga report, since, in the Crown's submission, that report 'does not, in large part, articulate expressly what prejudice resulted from Crown breaches of the Treaty, and to whom'.[20] The Crown submitted that: 'At best, interpretation of the 2004 report is required to infer prejudice, and the degree of prejudice, in the subjects reported on by the Tribunal.'[21]

The Crown more particularly submitted that the 2004 report 'did not attempt comparative analysis of the prejudice suffered by each of these layers of Treaty breach affecting what is now the Mangatu Crown forest land'.[22]

The Crown's own submissions as to the comparative nature and extent of prejudice focused solely on the Mangatū lands, and the rights of Māori communities with customary rights in those lands. The Crown submitted that: 'The 1961 purchase grievance relating to the Mangatū 1 land is not as significant in its possible prejudice as the tribal-level grievances affecting the same land'. The Crown submitted that there are

> two foundational breaches that affected all Māori communities with customary rights in Mangatū lands. . . . These were the cession of land under duress in 1869 and secondly the imposition of a tenure system at odds with custom and community rights to land.

18. Document M6, para 9.15, quoting Waitangi Tribunal, *Te Urewera: Pre-publication, Part III* (Wellington: Waitangi Tribunal, 2012), p 881
19. Document M10, p 13
20. Document M10(a), p 17
21. Ibid
22. Ibid, p 18

The Crown considered that these, the 'most significant grievances that relate directly to the land' are

> connected with the impairment of community level interests in land through the creation and operation of individuated ownership. The impairment of tribes' ability to operate autonomously is a serious underlying grievance. It can be remedied by transfer of land to tribal-level interests.[23]

However, the Crown generally submitted that the scale of remedies sought by all the applications for resumption before the Tribunal is excessive in light of the severity of Treaty breaches found.[24]

5.2.3 Our approach to the task of deciding the nature and extent of prejudice

Our task is to determine the nature and extent of prejudice caused to each party by the breaches reported by the Tribunal in the Tūranga report. This involves interpretation of the findings of that Tribunal and, where necessary, the consideration of additional evidence. We must make a comparative analysis of the degree of prejudice inflicted on the different parties. Our view and approach has the express support of the Crown and does not run counter to what the applicant groups urged upon us.

The Crown's submissions focused only on breaches directly affecting the Mangatū lands, and the rights of Māori communities with customary rights in those lands. But, and as we concluded in chapter 2, we must consider all the circumstances of the case, including the prejudice suffered by Māori communities throughout Tūranga arising from Crown breaches beyond those affecting the Mangatū lands. In this crucial respect, we agree with the applicants' submissions as set out in this chapter.

Distinguishing the particular prejudice suffered by each of these three groups is not an easy task. All the Tūranga peoples have shared many of their most significant experiences of engaging with the Crown. The Tūranga report specifically emphasised, for example, that 'most Treaty breaches relating to the events of 1865 apply equally to all Turanga Maori'.[25] The Tūranga report noted similarly that: 'All iwi and hapu were affected to a significant degree by the operation of the Native Land Court.'[26]

The experiences of the three claimant groups discussed in this chapter are still more closely aligned. Indeed, in the Tūranga report, the Tribunal expressed the view that although Te Whānau a Kai and Ngā Ariki Kaipūtahi have 'a number of distinctive claims, they are both so closely bound up in the Mahaki complex that the claims they share with

23. Document M10, pp 14–15
24. Ibid, p 6
25. Waitangi Tribunal, *Turanga Tangata Turanga Whenua: The Report on the Turanganui a Kiwa Claims*, 2 vols (Wellington: Legislation Direct, 2004), vol 1, p 123
26. Ibid, vol 2, p 746

their whanaunga outweigh . . . those which are distinct'.[27] The Tribunal specifically included Ngā Ariki Kaipūtahi's Mangatū claim in this assessment.

We outline as far as is possible on the evidence before us the nature and extent of the harm caused to the claimants by the Crown's Treaty breaches. We do so by following the pattern established in chapter 3, where we confirmed that the applicants in our inquiry had well founded claims with respect to two major sets of Crown Treaty breaches that were identified in the Tūranga report: war and its aftermath; and the arrival of the Native Land Court and of land purchasers. We analyse first the nature and extent of the specific prejudice each applicant suffered as a result of these two sets of Crown breaches. We move on to assess the broader prejudice these breaches cumulatively caused to the applicants, in terms of political, economic, and social and cultural impacts.

5.2.4 What was the extent of specific prejudice that TAMA, Ngā Ariki Kaipūtahi, and Te Whānau a Kai suffered in respect of the Crown's actions during the 1860s war and its aftermath?

As noted above, the Tribunal considered that some of the most substantial Crown breaches prejudicially affected all Tūranga iwi to a significant degree, including most Treaty breaches relating to the 1865 hostilities which represented the Crown's effective arrival in the Tūranga district. However, the Tribunal took care wherever possible to distinguish the groups most affected in respect of the Crown's actions, first at Waerenga a Hika and its aftermath, then its treatment of Te Kooti and the Whakarau, including the terrible events at Ngātapa.

(1) *Waerenga a Hika and its aftermath*

In the Tūranga report, the Tribunal found that most of the Treaty breaches relating to the events of 1865, notably the Crown's error in judging Tūranga Māori to be in rebellion, and its subsequent attack on them, applied equally to all Tūranga Māori. Although the Tribunal had no specific evidence that identified the tribal affiliations of those who were killed in the conflict at Waerenga a Hika in 1865, it still attempted 'the painful but necessary task' of trying to quantify such losses.[28]

As we noted in chapter 3, the Tribunal found that the majority of the more than 70 casualties at Waerenga a Hika would have been Te Aitanga a Māhaki. The casualties would 'doubtless' have included some Te Whānau a Kai, 'because they were likely to have supported their Mahaki relatives'. Te Whānau a Kai people were also possibly at the pā from the outset, and others likely arrived during the siege with Rongowhakaata reinforcements. It appeared certain that some descendants of Rawiri Tamanui (Ngā Ariki Kaipūtahi) fought at Waerenga a

27. Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, vol 2, p 742
28. Ibid, vol 1, p 123

Hika.[29] Owen Lloyd told us that Pera Te Uatuku, son of Rawiri Tamanui, went to the aid of those who were besieged in Waerenga a Hika.[30] We also know that Pera Te Uatuku and two of his relations were some of the first prisoners sent to Wharekauri. There was insufficient evidence before the Tribunal to conclude if any Ngā Ariki Kaipūtahi men were killed.[31]

It was painful but necessary for the Tribunal to try to number the dead; we consider it more painful still to dwell in any detail on what those deaths have meant, and still mean, in the memories of their people. The full impact of such losses cannot be captured in numbers. As counsel for Te Aitanga a Māhaki reminded the Tribunal in debates over the numbers of their people who had died on Wharekauri during the original district inquiry, 'whatever the actual rate, this cannot take into account the fact that these people died in exile, in humiliating and demeaning circumstances, far from their turangawaewae, held indefinitely and without trial'.[32]

It is self-evident that Te Aitanga a Māhaki in particular suffered grave consequences from the sudden loss of so many men. But, just as important, we consider the prejudicial impacts of the Crown's actions at Waerenga a Hika extended far beyond what the Tribunal referred to in the Tūranga report as an 'unprecedented' loss of life. The presence of Crown forces in Tūranga created district-wide upheaval, and generally disrupted the fabric of all of the people's lives. Crops were not planted as they should have been prior to the battle, while afterwards Crown forces were reported as conducting widespread 'looting and pillaging'.[33] Bruce Stirling's evidence to the Tribunal was that, as a result, by the winter of 1866, many Tūranga Māori 'were reported to be, "in a state of absolute want," subsisting on wild turnips, and a few even died of starvation'.[34]

Significant long-term political, economic, and social and cultural prejudice also resulted from Waerenga a Hika, which we discuss further in section 5.2.6. Crucial among these impacts was, as the Tribunal put it, that 'the autonomy of Turanga Maori was challenged and finally overthrown'.[35] Indeed, the Tribunal considered that through these events the whole 'course of Turanga history . . . changed forever'.[36]

(2) *The Crown's treatment of Te Kooti and the Whakarau*

The Crown's treatment of those exiled to Wharekauri and detained there in the wake of Waerenga a Hika, and the events that followed the return of the Whakarau to Tūranga,

29. Ibid, pp 123–124
30. Document C23, p 14
31. Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, vol 1, pp 123–124
32. Document H1, p 43
33. Document A26, pp 69–70
34. Document A23, p 113, quoting Judith Binney, *Redemption Songs: A Life of Te Kooti Arikirangi Te Turuki*, (Auckland: Auckland University Press with Bridget Williams, 1995), p 120
35. Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, vol 1, p 62
36. Ibid, p 104

involved Crown breaches that prejudicially affected all of TAMA, Ngā Ariki Kaipūtahi, and Te Whānau a Kai.

In the Tūranga report, the Tribunal found that '[t]he unlawful arrest, deportation, and detention of the Whakarau . . . was a calculated strategy' designed to facilitate the confiscation of Māori land, and to 'solve the "Native question" in the district once and for all'.[37]

The Tribunal specifically found that of the first 90 detainees sent to Wharekauri in March 1866, all but one – Te Kooti Rikirangi himself – were Te Aitanga a Māhaki. Evidence before the Tribunal suggested that a total of 154 Te Aitanga a Māhaki were present on Wharekauri (comprising 84 men, 40 women, and 30 children). However, the Tribunal noted that this figure may have included Te Whānau a Kai and Ngā Ariki Kaipūtahi.[38] It subsequently described '[m]ost of the Whakarau' as being 'Mahaki, Te Whanau a Kai, and Ngariki'.[39] The Tribunal therefore found that Rongowhakaata and the Māhaki cluster were the hapū and iwi 'most particularly affected' by the treatment of the Whakarau.[40]

Evaluating the prejudice caused by the detention of the Whakarau on Wharekauri requires considering both the short and longer term contexts. In the immediate sense, the Whakarau were treated poorly. The prisoners, many with inadequate clothing, had to build their own housing upon arrival and, as rations were inadequate, grew much of their own food. Judith Binney records that 'in the oral traditions it is still remembered how they had to yoke one another, including women and children, to the ploughs so as to pull them. They hated the indignity so much that they regularly broke their tools'.[41] Rutene Irwin, a Te Aitanga a Māhaki kaumatua, told the Tribunal during our original hearings of the experiences of his great-grandmother Meri Puru, who went to Wharekauri as a child with her parents:

> After the fall of Waerenga a Hika, they were caught and taken as prisoners. My great-grandmother was a girl of about seven or eight when she was taken to the Chatham Islands together with her mother and father . . . They spent the whole two years there. Her mother Wikitoria had been pregnant when she went over there, and the baby was born, and the baby died and is buried there.
>
> . . . . .
>
> Sometimes on rainy nights we would sit inside our kauta, and she (my grandmother) would do her karakia . . . She talked mostly about the food and the rongoa, and they were always hungry and partly starving. And she would cry and we would cry with her.[42]

37. Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, vol 1, p 193
38. Ibid, pp 174–175
39. Ibid, p 367
40. Ibid, vol 2, p 744
41. Judith Binney, *Redemption Songs: A Life of Te Kooti Arikirangi Te Turuki* (Auckland: Auckland University Press, 2012), p 63
42. 10 December 2001 hearing, tape 3, quoted in Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, vol 1, p 192

At least in part as a result of the treatment meted out to them, 22 people died on Wharekauri. Ten can be confirmed as Te Aitanga a Māhaki.[43]

One far-reaching result of the Whakarau's indefinite and inhumane detention was to so deepen the sense of injustice amongst the exiles themselves that they organised their daring and dramatic escape under the leadership of Te Kooti. That escape was largely bloodless. However, Te Kooti and the Whakarau subsequently perpetrated atrocities at Matawhero and elsewhere in Tūranga involving the murder of over 50 Māori and Pākehā. While condemning those actions in no uncertain terms as unjustifiable, the Tribunal considered that they too could be understood in a broader sense as 'the legacy of Waerenga a Hika and Wharekauri'.[44] The Tribunal, contemplating the awful, unanticipated consequences of the Crown's determination to force a military confrontation with Tūranga peoples at Waerenga a Hika, concluded that what followed was 'not peace and order but, ultimately, retribution and death'.[45] The Tribunal also condemned the actions of the Crown not only in detaining the Whakarau indefinitely, but in mounting military pursuits to prevent them from finding sanctuary in Taupō as Te Kooti had intended, and introducing a process for the 'systematic theft' of the land of the Whakarau. The Tribunal concluded that the Crown might have defused the situation in any one of several ways and that, therefore, 'the Turanga tragedy need never have happened'.[46]

The detention of the Whakarau between 1866 and 1868 impacted the Te Aitanga a Māhaki community in many ways. While precise figures are unavailable, it seems about 200 Te Aitanga a Māhaki remained in Tūranga, meaning that the 154 Te Aitanga a Māhaki then detained on Wharekauri represented about 40 per cent of the total iwi.[47] As Brian Murton concluded, therefore: 'From a demographic perspective alone, without even considering the economic, social, and cultural disruption that it created, this act of transportation severely impacted on Te Aitanga-a-Mahaki.'[48] Professor Murton recorded that afterwards the iwi lived in fewer places, cultivated less land, used less of their resources in the Waipaoa Valley, and occupied less of their territory.[49]

The Tribunal concluded that during the siege of Ngātapa, and the pursuit and summary execution of prisoners which happened in its wake, Crown forces killed between 150 and 194 men of the Whakarau, their allies, or their captives.[50] The Tribunal found that the deaths caused by the assault on Ngātapa included the innocent captives of the Whakarau, which actions by the Crown were dishonourable, unreasonable, in bad faith and 'failed actively

43. Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, vol 1, p 364
44. Ibid, p 216
45. Ibid, p 123
46. Ibid, p 216
47. Document A26, p 70
48. Ibid
49. Ibid, p 77
50. Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, vol 1, p 244

to protect the lives of innocent Maori'.[51] The executions without trial of between 86 and 128 unarmed prisoners were 'acts incapable of justification'.[52]

The Tribunal was unable to make any precise findings as to the tribal affiliations of the people who died at Ngātapa or who were executed subsequently. However it concluded that 'the hapu and iwi most particularly affected by these events were Rongowhakaata and the Mahaki cluster'.[53] We note that, while a large proportion of Te Kooti's prisoners were Rongowhakaata people, men, women, and children were also seized at the Te Whānau a Kai kainga of Patutahi.[54] People from these two groups, in addition to the Whakarau, are very likely to have been amongst those executed at Ngātapa.

The immediate prejudice suffered through the loss of life at Ngātapa is all too plain. As the Tūranga report concluded: 'To be blunt, the Ngatapa executions are a stain upon the history of this country, and it is long past time for them to be put right.'[55]

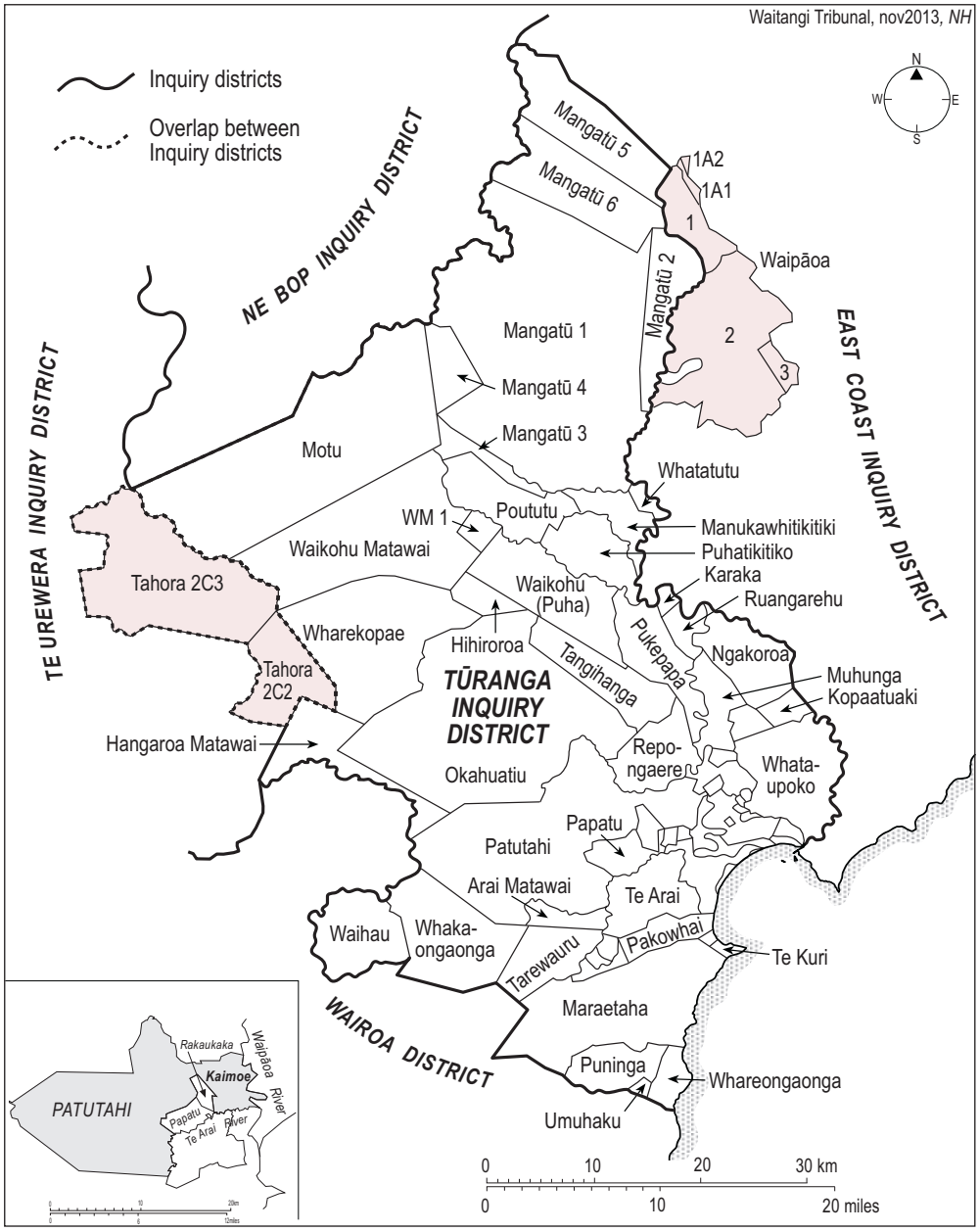
(3) *Tūranga deed of cession 1868 and Crown-retained lands*

The Tribunal found that Rongowhakaata and Te Whānau a Kai were particularly affected by the 1868 Tūranga deed of cession, as were Te Aitanga a Māhaki in relation to Te Muhunga.

In the Tūranga report, the Tribunal found that the purported cession of 1.195 million acres (483,599 hectares) to the Crown by the deed of cession in 1868 was 'obtained under duress, in breach of the principles of the Treaty, and was ineffective in extinguishing Maori title'.[56] It further found that the Crown's retention of a total of 56,141 acres (22,719 hectares) was 'in substance a confiscation'.[57] Of the confiscated land, the Te Muhunga block in which Te Aitanga a Māhaki had interests comprised 5,395 acres (2,183 hectares). However, traditional interests in the bulk of the confiscated land – 50,746 acres (20,536 hectares) in the combined Patutahi and Te Arai blocks – were shared between Rongowhakaata and Te Whānau a Kai.[58]

Therefore, of the applicants before us, it is clear that Te Whānau a Kai suffered most markedly as a result of the Crown's retention of confiscated lands. Indeed, Wi Pere, presenting their claim to the Clarke Commission in 1882 considered that Te Whānau a Kai 'had been rendered virtually landless' in the district, principally in consequence of this confiscation.[59] The Clarke commission did recommend the award of 500 acres (202 hectares) to landless Te Whānau a Kai, largely as a sympathy gesture; though Wi Pere also agreed to give up claims to Patutahi if an award were made.[60] Despite the commission's stipulation that the

51. Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, vol 1, p 247
52. Ibid, p 247
53. Ibid, vol 2, p 744
54. Ibid, vol 1, pp 203–206
55. Ibid, p 247
56. Ibid, vol 2, p 744
57. Ibid
58. Ibid, vol 1, p xxi, pp 336–337
59. Ibid, p 295
60. Ibid, pp 295–296, 330, vol 2, pp 457, 839



Map 5: Land blocks within and adjacent to the Tūranga inquiry district

Map 6: Inset source: Waitangi Tribunal, *Turanga Tangata Turanga Whenua: The Report on the Turanganui a Kiwa Claims*, 2 vols, Wellington: Legislation Direct, 2004, map 17

land should be 'of fair average quality (having due regard to fair proportions of flat and hilly country)', the land given by the Crown 'was not of anything approaching an average quality for that block, but instead they were given a block immediately complained of by Wi Pere as "nothing but pumice; no food will grow there. That is the reason why they have not been

already purchased by Europeans."'[61] Pere was permitted to make a second selection, but it appears that there was little to choose from. The lands in question, section 91, are 'steep, infertile and virtually unusable hillsides on the Poverty Bay approaches to the Gentle Annie crossing up to Waerenga a Kuri and the watershed leading to Hawke's Bay'.[62]

This confiscation was the subject of protracted and very bitter complaint. Both Rongowhakaata and Te Whānau a Kai made numerous petitions to the Crown to have their lands restored to them. Despite these petitions, the Crown and Native Land Court refused to acknowledge that Te Whānau a Kai had distinct rights in Patutahi. Eventually, the Native Land Court recognised only the rights of Te Whānau a Kai members who could claim Rongowhakaata whakapapa; and only those Te Whānau a Kai members were entitled to compensation for their losses. After years of delay, the Crown in 1950 negotiated an agreement that purported to settle the long-standing grievances over the loss of confiscated land in the Patutahi block for a sum of £38,000. However, the Crown settled only with Rongowhakaata, and Te Whānau a Kai were excluded.[63]

As noted in chapter 3, the Tribunal considered that Te Whānau a Kai had substantial interests, alongside Rongowhakaata, in the Patutahi block. The Tribunal made particular findings as to the extent of Te Whānau a Kai's loss in that block.[64] It noted that Te Whānau a Kai's interests included use of rich river flat lands at Kaimoe (see map 5 inset). Te Whānau a Kai witnesses had been able to describe (in 1950), the locations at Kaimoe of their former 'urupa, pa, tuna, cultivations, and kainga, particularly along the Whakaahu Stream'.[65] It concluded that the relative proportions of 60:40 that Rongowhakaata and Te Whānau a Kai, respectively, had themselves negotiated in 1950 'still seems to provide the most robust guideline as to proportions in the Patutahi grievance today. As the Tribunal remarked: 'No doubt it was arrived at by these communities with due consideration of the traditional rights on each side.'[66]

Te Whānau a Kai has suffered significant prejudice through the confiscation of large areas of land, including economically important land. In addition, as the Tūranga report concluded in respect of these confiscated lands, they have had to suffer a long wait as 'the Crown made mistakes, covered them up, made mistakes in the covering up, and covered up those mistakes. In the event, Māori were left to endure over 120 years of unnecessary complaint, with all of the wasted resources, effort, and hope that this must have entailed.'[67]

61. Document C1, pp 38–39
62. Ibid, p 39
63. Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, vol 1, pp 333–335
64. Ibid, pp 336–338
65. Ibid, p 336
66. Ibid, pp 337–338
67. Ibid, p 338

(4) *The Poverty Bay Commission*

The Tribunal found that, although the interests of Ngāi Tāmanuhiri and Rongowhakaata had been particularly affected by the operation of the Poverty Bay Commission, all iwi and hapū were affected to some extent.

For those deemed 'rebels', the main prejudice suffered as a result of the Poverty Bay Commission was the loss of their land interests. The evidence suggests that almost all of the Whakarau were excluded from awards by the Poverty Bay Commission, regardless of hapū or iwi affiliation. Only nine Te Aitanga a Māhaki and Rongowhakaata male prisoners can be identified as having been awarded land by the Poverty Bay Commission.[68] Six of these men were described as having been 'released', meaning that they were 'presumably considered "safe" or "rehabilitated"'.[69] It is likely that the women and children sent to Wharekauri were also excluded from titles awarded by the commission.[70] Of Ngā Ariki Kaipūtahi, the Tribunal noted that:

> Ngariki Kaiputahi individuals detained on Wharekauri were unlikely to have received interests in land passed through the Poverty Bay Commission, because no blocks that included their customary interests were brought to the commission (with the exception, perhaps, of the Whirikoka block, outside the hearing district).[71]

The Tribunal did not have sufficient evidence to reach any firm views regarding the fate of those from Te Aitanga a Māhaki or Te Whānau a Kai who may have been deemed 'rebels' but had not been sent to Wharekauri.[72] However, the evidence did indicate that the blocks awarded to these groups by the commission had considerably reduced ownership lists. For instance, the Ngakora block (12,360 acres; 5,002 hectares) was awarded by the commission to 33 owners; the similarly sized Tangihanga block (11,600 acres; 4,694 hectares) was awarded by the Native Land Court to 71 owners a few years later.[73] This suggests that many non-Whakarau 'rebels' were also excluded from the commission's awards. Had it not been for the commission's confiscatory function, these people would have been included. Those deemed 'rebels', Whakarau and non-Whakarau alike, all suffered the loss of their land by a process that was not fair or transparent:

> Once a list of owners had been prepared by the claimants and submitted, it was accepted as a matter of course. We cannot accept that this was an appropriate treatment for alleged 'rebels'. These 'agreed' lists were prepared either using the problematic Wyllie list of 'rebels', or by those who stood to gain directly by the exclusion. There is no evidence that those

68. The nine men were included on an 1869 list of prisoners, which listed a total of 123 Te Aitanga a Māhaki and Rongowhakaata adult male prisoners.
69. Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, vol 1, pp 364–365
70. Ibid, p 365
71. Ibid, p 364 fn 97
72. Ibid, pp 365–366
73. Ibid

excluded were consulted, let alone consented to their exclusion. Nor is there any evidence that the successors of those killed (whether as fighters or prisoners) consented to the exclusion of their parents from the list. Any 'rebels' excluded from titles were entitled to have the allegations against them tested in a public and independent forum against a consistent set of fair rules. The claimants argued and the Crown accepted that this did not happen.[74]

The confiscation also had inter-generational impacts. The descendants of those deemed 'rebels', whether or not they had been sent to Wharekauri, were also deprived of their interests in land. The confiscation affected 'equally harshly' the children and descendants of those whose interests were lost to them. 'Those descendants still have no land in Turanga.'[75]

'Loyal' Māori also suffered prejudice as a result of the operations of the Poverty Bay Commission. The deed of cession had specifically promised compensation for rights lost by Māori in the Crown's retained lands. No such compensation was ever paid.[76]

5.2.5 What was the extent of prejudice that TAMA, Ngā Ariki Kaipūtahi, and Te Whānau a Kai suffered after the arrival of the Native Land Court and land purchasers?

After the arrival in Tūranga of the Native Land Court and of land purchasers in 1875, three-quarters of the district was purchased within 35 years. This happened in the face of valiant attempts by Tūranga Māori to keep ancestral land in their control, most importantly by the establishment of the Rees Pere trusts, the New Zealand Native Land Settlement Company, the Carroll Pere trust, and the Mangatū Incorporation.

As discussed in chapter 3, the Tribunal found in the Tūranga report that the Crown had made numerous and severe breaches of Treaty principles in the establishment and operation of 'the entire system of native land titles'.[77] In addition, the Tribunal found that, through the failure to provide for community title and management, and for adequate protection mechanisms, the Crown was substantially responsible for the failure of the various trusts through which Tūranga Māori had tried to evade that system. What, then, was the prejudice that resulted to TAMA, Ngā Ariki Kaipūtahi, and Te Whānau a Kai?

(1) *The Native Land Court and the new native title*

The Tribunal concluded that: 'All iwi and hapu were affected to a significant degree by the operation of the Native Land Court.'[78]

74. Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, vol 1, p 366. Settler James Wyllie provided W S Atkinson, the Crown agent representing the Crown during the commission's hearings, with a list of 'rebel' names entitled the 'Rongowhakaata List of Claimants to Land under the Provisions of the Deed of Cession'. There was no such list for Te Aitanga a Māhaki: p 351.
75. Ibid, p 367
76. Ibid, p 368
77. Ibid, p xxv
78. Ibid, vol 2, p 746

At a very basic level, the operation of the Native Land Court caused economic and social disruption for Tūranga Māori. In some years, hearings were held almost continuously. But even when they were not, hearings still often coincided with the 'season for cultivating or for carrying out other types of seasonal agricultural work'.[79] This affected the amount of food not only available for community consumption, but also for sale. The hearings themselves, which frequently required traveling some distance, further disrupted community life, particularly by exacerbating and encouraging division amongst Māori as they sought to have their interests in land recognised by the Court.[80]

However, it is clear that the most critical outcome for Tūranga Māori of the operation of the Native Land Court in the district, was the alienation of substantial amounts of their land. The Tūranga report found that: 'Most iwi appear to have lost at least 70 per cent of their land base to sales in the first 25 years.'[81] Te Whānau a Kai lost much more than this, and as we pointed out in chapter 3, were rendered virtually landless in Tūranga by 1882.[82] Although Te Aitanga a Māhaki and Ngā Ariki Kaipūtahi 'managed to retain proportionately more land, most of it in Mangatu, the overall level of sales was still extremely high'.[83] Approximately 280,000 acres (113,310 hectares) of the Te Aitanga a Māhaki rohe (including the lands of Ngā Ariki Kaipūtahi and Te Whānau a Kai) had been bought by private purchasers by 1912.[84]

Tūranga Māori had 'almost nothing to show' in return for this loss of land. The proceeds from these sales went, not to communities (which might have utilised single large payments for capital investment), but to individuals, often over a lengthy period; they were 'too small to spend [on] anything but consumption'.[85] And since individuals could not generally access development opportunities, or otherwise gain an income from their lands, there were few alternatives to sale.

The Native Land Court continued the transformation of Tūranga first set in motion by the events at Waerenga a Hika, 'from an almost entirely Maori district to one in which they were a minority both demographically and economically'.[86] In that way, its impacts extend far beyond the specific losses described above to include broader political, economic, and social and cultural prejudice. We discuss these impacts below in section 5.2.6.

79. Document A26, p 100
80. Ibid, pp 113–114
81. Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, vol 2, p 474
82. Ibid, p 511
83. Ibid
84. Ibid, pp 405, 472. It should be noted that some of the lands sold had been acquired by the Rees Pere trust or its successors.
85. Ibid, p 536
86. Ibid, vol 1, p xxiii

5.2.5(2)

(2) *The Tūranga Trust Lands, 1878–1955*

The Tribunal found that all claimant iwi and hapū lost to some extent in the failure of the Tūranga trusts. Te Whānau a Kai 'lost heavily in the sale of their Tahora blocks'.[87]

Tūranga Māori had made determined efforts to resist the Native Land Court and the subsequent operations of Crown and private land purchasers. The most notable of these efforts were the Tūranga trusts, which sought to derive maximum benefit from the lands that remained in Māori control. Ultimately, however, the trusts and the New Zealand Native Land Settlement Company failed and Tūranga Māori suffered further land loss. While the failure of the Land Settlement Company cannot be attributed to the Crown, the Tribunal found that the Crown Treaty breaches were crucial in the failure of the Rees Pere trusts, and played a significant role in the failure of the Carroll Pere trust.

Te Aitanga a Māhaki and Ngā Ariki Kaipūtahi had the most at stake in the trusts' fate, as so much of their remaining lands 'were bound up in the Rees Pere trusts (and their successors) and the Mangatu blocks'.[88] For Te Aitanga a Māhaki, the evidence is that:

- of the 115,000 acres of Mahaki land held by the [New Zealand Native Land Settlement] [C]ompany in 1883, a substantial amount (39,330 acres) was quickly sold during the 1880s;
- of the 76,741 acres vested in the East Coast Native Trust Lands Board, 50,200 acres was sold, that is nearly two-thirds of Mahaki land;
- land returned to Te Aitanga a Mahaki amounted to 12,861 acres in 1954, plus the 13,616-acre Mangaotane station, that is 26,477 acres

In all, Te Aitanga a Māhaki lost around 100,000 acres (40,469 hectares) in the trusts and the company.[89]

For Te Whānau a Kai, the loss of their Tahora blocks during the period when they were administered by the East Coast Commissioner was particularly serious. As we discussed in chapter 3, two Tahora blocks within our inquiry district – Tahora 2C2, section 2 and Tahora 2C3, section 2 – totalled an area of 19,173 acres (7,759 hectares) when they were passed into the Carroll Pere trust in 1896 and then the East Coast Native Trust Lands Board.[90] Only 5,279 acres (2,136 hectares) – 27 per cent of the original acreage – was returned to the beneficial owners in 1955.[91]

Because a report on the blocks was not completed in time for consideration by the Tribunal in its Tūranga inquiry, the Tribunal noted that 'findings in respect of Tahora blocks cannot be made until the Urewera inquiry has completed its investigation'.[92] The Te Urewera Tribunal found that the sale by East Coast Commissioner Coleman during the

87. Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, vol 2, p 747
88. Ibid, p 511
89. Ibid, p 582
90. Ibid, p 579
91. Ibid
92. Ibid

1920s of around one-sixth of Tahora 2C was 'entirely inappropriate'.[93] Most of the sales were in Tahora 2C3(2), Te Whānau a Kai land.[94] The sale was not of unproductive land or to raise capital or pay off debts, but rather (it was alleged) because the purchaser was a client of Coleman's law firm.[95] The Tribunal found the Crown in breach of the Treaty principle of active protection, for failing to investigate the allegations against Coleman properly, and for failing to prevent the sales until their propriety was clear and the wishes of the owners were known.[96] The burden of loss of the 1920s sales by the East Coast Commissioner, it found, 'fell much more heavily on the owners of 2C3(2), Te Whānau a Kai and Ngati Hine, who lost 90 percent of this land'.[97] In response to the Crown's argument that the return of two-thirds of Tahora 2 as working farms in 1953 offset, or mitigated, some of the claimants' grievances, the Tribunal found that:

> the return of other Tahora 2C land to its owners as developed farms did not remove the prejudicial effects of these Treaty breaches, which were confined to the owners of Tahora 2C2(3). The success of the trust in developing and returning land might have offset legitimate sales for the trust's purposes, but not these sales (which, as we have seen, were not for the trust's purposes at all.) The fact that the owners were paid was no true compensation for the loss of their ancestral land without their consent.[98]

In the Tūranga report, the Tribunal's overall conclusion on the Tūranga trusts was summed up in its phrase: 'the price of community control'. The price that Tūranga peoples paid for the Crown's removal of community land management rights through the native land legislation, and for their own attempt to re-establish those rights, was a high one. At the outset, Pere and Rees had to fight the high financial costs of repurchase of quality land, and of getting their schemes off the ground, obstruction on the part of the Crown, and the unforeseen impact of the depression of the late 1880s. The outcome was further widespread loss of land, followed by loss of control of the remaining lands over several decades.

(3) *The 1881 Mangatū title determination*

The 1881 Mangatū title determination by the Native Land Court had specific prejudicial effects on Ngā Ariki Kaipūtahi. In the Tūranga report, the Tribunal found that the 1881 judgment was 'unsafe' and that the Crown's subsequent statutory intervention in 1917 to allow Te Whānau a Taupara, but not Ngā Ariki Kaipūtahi, to reargue their ownership in

93. Waitangi Tribunal, *Te Urewera: Pre-publication, Part 11* (Wellington: Waitangi Tribunal, 2009), p 940
94. Ibid, pp 913, 931. When the Native Land Court determined title to Tahora 2 block (a large area of land) in 1889, it awarded Tahora 2C to individuals of Te Whānau a Kai, Ngāti Maru, Ngāti Hine, and Ngāti Rua (the latter three were identified to us as hapū of Te Whānau a Kai).
95. Ibid, pp 931, 940
96. Ibid, p 941
97. Ibid, p 931
98. Ibid, p 941

the block breached the Treaty. The result for Ngā Ariki Kaipūtahi was 'significant mana and practical loss'.[99]

The 1881 determination perpetuated 'the myth that by conquest Ngariki Kaiputahi lost all but its occupation sites' and reduced their rights in Mangatū disproportionately.[100] Ngā Ariki Kaipūtahi also suffered a loss of mana in the course of the share allocation process in the Native Land Court. Because the court relied on the 1881 judgment which declared all Ngāriki to be conquered (including Ngā Ariki Kaipūtahi), individuals who had previously affiliated to Ngā Ariki Kaipūtahi began to stress their Ngāti Wahia identity. In the wake of the admission of Te Whānau a Taupara to the ownership lists, the Ngā Ariki Kaipūtahi shareholding in Mangatū 1 was reduced, more so (proportionately) than that of Ngāti Wahia. Again, in these circumstances, owners who had the option of identifying as Ngāti Wahia, took it – and stood in court to confirm the purported 'conquest' and 'subservience' of Ngāriki and Ngā Ariki Kaipūtahi.[101] Thus the mana of Ngāriki was damaged and their share in the ownership of Mangatū further diminished.

Witnesses for Ngā Ariki Kaipūtahi at both the original Tūranga inquiry hearings and our hearings evoked the wrongs they had suffered. Mr Lloyd told us about the importance of the Mangatū land to Ngā Ariki Kaipūtahi, which they call 'Ukaipo – mother's milk'. He pointed to a number of sacred sites, nine pā sites, and six urupā within the Mangatū lands.[102] The 1881 title determination had 'produced a rift in the local tribes. In a sense it made Nga Ariki Kaiputahi virtual refugees on their own land'.[103] Irene Renata, quoting her evidence before the original district inquiry, told us that '[w]e are still hurting. The wound is not healed':

> It is a matter of being able to choose one's identity. People are saying we do not exist, that we are Wahia. I want to encourage our rangatahi to be proud to stand and say we are of Ngariki Kaiputahi. At this time we are being denied our heritage by Mahaki. I exist, I am Ngariki Kaiputahi and no-one can say I am lost! I have been wounded too long. I want that wound to heal.[104]

The prejudice flowing from the loss of land and mana suffered by Ngā Ariki Kaipūtahi continues today. In his evidence, historian Bryan Gilling gave some examples of the modern practical prejudice suffered by Ngā Ariki Kaipūtahi, including being subject to accusations of being merely a 'historical hapu', and the economic implications of not having a landbase.[105] Mr Lloyd also talked of the 'uneasy relationship' between Ngā Ariki Kaipūtahi

99. Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, vol 2, p 695
100. Ibid, p 748
101. Ibid, p 692
102. Document I21, p 7
103. Ibid, p 11
104. Document I22, p 2
105. Document I24, pp 30–31

and the incorporation.[106] The few Ngā Ariki Kaipūtahi who now live on the papakainga on the Mangatū Incorporation land do so on the incorporation's terms and thus lack security of tenure. Mr Lloyd stated that '[t]he loss of much of our tribal land base has devastated us. Those who were left with little or nothing had to focus on surviving from day to day.'[107]

During our inquiry, Ngā Ariki Kaipūtahi presented evidence produced by Gareth Kiernan and David Grimmond of Infometrics that sought to estimate the total economic loss suffered by Ngā Ariki Kaipūtahi as a result of the 1881 Mangatū title determination and the subsequent allocation of shares. Their analysis attempted to quantify the economic loss that Ngā Ariki Kaipūtahi have suffered from being allocated only four percent of the shares in the Mangatū Incorporation rather than some larger allocation. They estimated that if, for example, Ngā Ariki Kaipūtahi were actually entitled to a 10 per cent ownership in the incorporation, their historical and future losses could amount to $9.1 million. If they were entitled to 60 per cent, their losses could be $122.6 million.[108]

The calculations done by Messrs Kiernan and Grimmond were based largely on actual and estimated dividend payouts by the Mangatū Incorporation to its shareholders. We conclude first, from evidence adduced during cross-examination in our hearings, and secondly, from the facts which we have set out in chapter 3, that their estimated Mangatū dividends for the period before 1950 had little valid basis.[109] In particular, the Infometrics researchers failed to take into account the financial state of the incorporation that caused it to be placed under the administration of the East Coast Commissioner. As a result, the losses attributed by the researchers to Ngā Ariki Kaipūtahi because its shareholding had been reduced were also over-stated.

In the Tūranga report, the Tribunal emphasised that 'we are unable now to say what rights would have been allocated if Ngariki Kaiputahi had been able to properly reargue their case'.[110] All the same, we accept that it is highly likely Ngā Ariki Kaipūtahi have suffered significant economic loss as a result of the 1881 Mangatū title determination. By receiving a smaller allocation in the ownership of Mangatū Incorporation than they should have, Ngā Ariki Kaipūtahi have lost out on dividends that would have otherwise accrued. It is unnecessary for us to quantify economic loss with any degree of precision, however, as we are not taking a damages approach to remedies as would a Court in a civil case. The circumstances before us warrant that the restorative approach, which is concerned not only with past loss but also with what is required to restore an iwi or hapū to a position of strength in the future, is more appropriate for our consideration of remedies. The economic loss

106. Document 121, p 11
107. Document C23, p 15
108. Document K9, p 3; doc K9(a), p 1. The authors note that $13.6 million needs to be deducted from their figures to account for the 6 per cent ownership eventually allocated to Ngā Ariki Kaipūtahi, and we have made that calculation in the figures presented here.
109. Transcript 4.29, pp 69–89
110. Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, vol 2, p 694

evidence presented by Messrs Kiernan and Grimmond is therefore of limited utility for the task before us.

It is evident that the Crown's Treaty breaches have had a lasting and significant prejudicial impact on Ngā Ariki Kaipūtahi. They have been disconnected from their whenua and denied a shareholding in the incorporation that accurately reflects their customary interests in Mangatū. Today, their rights in the Mangatū land are limited to a shareholding in the incorporation as part of the wider community of owners. We conclude that the social, cultural, and economic well-being of Ngā Ariki Kaipūtahi has suffered as a result of the Crown's Treaty breaches.

5.2.6 The nature and extent of political, economic, and social and cultural prejudice suffered by TAMA, Ngā Ariki Kaipūtahi, and Te Whānau a Kai

In the discussion above, we outlined the specific prejudice suffered by TAMA, Ngā Ariki Kaipūtahi, and Te Whānau a Kai as a result of the Crown's Treaty breaches in Tūranga. These include the loss of life that occurred during the conflicts of the 1860s, and the loss of land that resulted from the deed of cession and the operations of the Poverty Bay Commission, the Native Land Court and Crown and private land purchasers, and the failure of the Tūranga trusts.

It is clear, however, that the prejudice suffered by these groups went far beyond these particular impacts. The losses of life and land caused by the Crown's Treaty breaches also resulted in serious disruptions to the lives, communities, and futures of Tūranga Māori. We have already spoken of the loss of autonomy Tūranga Māori suffered as a result of the Crown's breaches. But there were other impacts. These include, but are not limited to, demographic decline, the loss of resources, the loss of development potential, and social dislocation and disruption.

We turn now to these broader impacts: political, economic, social, and cultural. Our discussion below is general, referring in broad terms to the prejudicial effects suffered by Tūranga Māori. However, we strongly emphasise that all three applicants before us suffered prejudice in these respects. As Professor Murton put it during our hearings at the original district inquiry:

> At a general level, the economic and social experience of all Turanga Maori is the same. All were enmeshed in the same web of Crown policies and legislation. All encountered the same institutions and authorities. All became caught up in various schemes and projects and all have had to deal with the same offices of the Crown.[111]

111. Transcript 4.2, p 39

(1) *Political impacts*

In a broad sense, there were two main political impacts of the Crown's Treaty breaches in Tūranga: the crushing of Māori autonomy, and the damage caused to the Crown– Māori relationship.

The Tūranga report emphasised the dramatic upheaval that resulted from the Crown's Treaty breaches following its first incursion into the district in 1865:

> Taken together, the deed of cession and the [Poverty Bay] commission signaled the final accession of Turanga Maori to the newly imposed absolute authority of the Crown. British law was in place and the institutions of settler Government were permanently established in the new town of Gisborne. The majority of Maori who had resisted Crown aggression from 1865 to 1869 were dead or, if still alive, had been deprived of their lands. The vast body of Maori land in the district had either been transformed into a Crown-derived title through the commission, or was about to commence that process in the new Native Land Court.[112]

Tūranga Māori had gone to great lengths to protect their autonomy and to preserve the peace before Waerenga a Hika. We note in particular the Tūranga-wide runanga which had been so active before the hostilities with the Crown commenced. The runanga offered Māori a forum to exercise their autonomy, to advance their trade interests, and protect their land. In the Tūranga report, the Tribunal observed that:

> the Crown lost a very great opportunity to work with the leadership there when it failed to apply section 71 of the Constitution Act 1852 in this area. That Act, passed by the British Parliament to establish representative institutions in New Zealand, provided for the Governor to proclaim districts in which native 'Laws, Customs, and Usages' should be 'maintained for the Government of themselves'.[113]

The Crown could have chosen to develop a positive relationship with Tūranga Māori, 'acknowledging the authority of runanga as expressed through their rangatira'. But it did not.[114] Instead, the Crown sought and achieved the 'destruction of Turanga independence'.[115]

Several factors contributed to the Crown's destruction of Māori autonomy. First, the Crown had decided to take the opportunity afforded by the presence of its forces on the East Coast, and the end of hostilities further up the coast, to end the 'troubles' in the region and enforce peace. Donald McLean, for instance, 'saw the invasion of Turanga as an opportunity to address within a single campaign Pai Marire and Maori self-determination sentiments along the entire East Coast as far as Turanga'. The Tribunal considered that: 'In the end, it was simply the case that, if the Crown were going to break the independent

112. Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, vol 1, pp xxii–xxiii
113. Ibid, p 59
114. Ibid, p 60
115. Ibid, p 114

mindset of Turanga Maori, that was the perfect time to do it.'[116] This was achieved through its forces' siege of Waerenga a Hika, leading to the surrender of 400 people, and the deportation of over 100 men to Wharekauri; and the subsequent military defeat of Te Kooti and the Whakarau at Ngātapa.

The second factor was the imposition of Crown authority over the lands of Tūranga Māori. This was evident soon after Waerenga a Hika in its stated intention of confiscating Tūranga Māori land, eventually replaced by its insistence on securing a cession. The impact of the Crown's newly imposed authority was felt first in the wake of the cession, as the Poverty Bay Commission set about its work of trying 'rebels' and confiscating their lands and returning lands to 'loyal' Māori in Crown-derived titles. The operations of the commission – and the submission of Tūranga Māori to its authority – were:

> the first non-military evidence that the relationship between Turanga Maori and the Crown had changed from a horizontal relationship between related but largely autonomous polities, into a vertical relationship between a single sovereign and its individual subjects.[117]

In the wake of the Poverty Bay Commission, the Crown further imposed its authority over Māori land through the operation of the native land legislation in Tūranga. There was little room for the exercise of Māori autonomy in the Native Land Court. The court simply removed Māori communities from decisions about their land. This meant that, even before alienation, Tūranga communities had lost control of their land and resources. The Tūranga report drew a connection between the exclusion of Māori communities from decisions in respect of their land entitlements and their subsequent impoverishment: 'That is when they are stripped of their former power to act as communities in the protection and promotion of their rights. In the context of the native title system . . . this occurred long before the land was alienated and the modest proceeds were dissipated by individualised right-holders.'[118]

Where land was retained by Māori, they found it was difficult to keep control of it. The determined attempts of owners to protect their lands from the keen attention of the Government, by placing them in the Tūranga trusts, only resulted in their losing more land. Yet communities made their lands over to the trusts not only because they wanted to maximise the economic return from their land, but also because 'the schemes were rooted in their own political and cultural landscape. They offered a role for local leadership and an alternative to the fragmentation of their assets in individual dealings'.[119] In that way, the trusts were an expression of Māori autonomy. But, as had happened so many times, their efforts were thwarted. The Crown failed to support the trusts and when it finally intervened

116. Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, vol 1, p 107
117. Ibid, p 394
118. Ibid, vol 2, p 739
119. Ibid, p 583

to rescue trust lands – partly to protect the Bank of New Zealand from collapse – did so on terms which excluded Māori from participation in the management of their lands:

> For all owners, the intervention of the Crown in 1902 to ensure the repayment of the [Bank of New Zealand's] debt, and to save what could be saved of the trust lands, meant loss of control of their lands and exclusion from them for nearly 50 years. In that the trusts had promised increased community control, this was a bitter pill to swallow.[120]

The shattering of Māori autonomy in Tūranga tainted the Crown–Māori relationship. In the Tūranga report, the Tribunal emphasised that Māori need not have, and indeed, should not have, lost their autonomy as they did. The Treaty had guaranteed that Māori title, and Māori authority, over their lands would be respected. The Tribunal maintained that:

> the Crown's right to make laws for the regulation of Maori title could not be used to defeat that title or Maori control over it. On the contrary, the Crown's powers were to be used to protect Maori title and facilitate Maori control.[121]

Instead, the basis of the Crown's future relationship with Tūranga Māori was decided at Waerenga a Hika. The Crown's conduct in this battle, in deporting so many Māori in its aftermath, and in detaining them for an indeterminate period without any prospect of trial, 'proved highly destructive of the long-term aim' of 'living in amity', creating an 'extreme sense of grievance' and a sense of 'angry despair'.[122] The events at Ngātapa then exposed 'how thin the veneer of the rule of law could be in colonial New Zealand'. This was particularly so given the Crown's failure to actively protect the lives of innocent Māori, who had been guaranteed all the rights and privileges of British subjects as promised by article 3 of the Treaty, and the Crown's failure to then bring the perpetrators of the executions to account.[123] The utter mistrust that Tūranga Māori had come to feel toward the Crown was exacerbated by what came subsequently, with the imposition of the deed of cession, the Poverty Bay Commission, the Native Land Court, and the Crown's determination to purchase Tūranga lands. For Tūranga Māori branded as 'rebels', deprived of their lands and marginalised by law and their communities, the damage to their relationship with the Crown was even greater.

The Crown failed, at a broad level, to foster its relationship with hapū and iwi as they tried to hold their own in the face of the trespass of parliament on their 'traditional prerogatives' such as deciding their customary entitlements to land themselves; Māori 'met in large gatherings, they protested, they petitioned Parliament, they extracted promises from progressive politicians, they took matters into their own hands and established kaunihera,

120. Ibid, p 584. The Bank of New Zealand held the mortgage for the New Zealand Native Land Settlement Company and had been facing wider financial difficulties throughout the 1890s: p 547.
121. Ibid, p 534
122. Ibid, vol 1, p 123
123. Ibid, p 247

runanga and komiti'. But the Crown 'viewed all this with suspicion and sometimes hostility', and failed to support Māori institutions which, in the post war environment, were seen 'as potential threats to the authority of the Crown and the progress of settlement'.[124] Tūranga Māori would pay dearly for the Crown's unwillingness to accept the significance of the Treaty guarantee of tino rangatiratanga.

(2) *Economic impacts*

The Crown's Treaty breaches in Tūranga also had a prejudicial effect on the economic well-being of Tūranga Māori. Before the imposition of the Crown's authority in the 1860s, Tūranga Māori had sought to engage with the colonial economy 'with enthusiasm':

> They rapidly increased their wheat production during the 1840s and were exporting wheat, maize, pork, onions, and potatoes to Auckland. Before long, they expanded their export trade to the Australian gold market.[125]

Māori had 'the advantages of extensive lands, large labour pools, and several schooners of their own', and 'provided competition for settler producers'.[126] Through their runanga, Tūranga Māori also sought from the 1850s to assert control over their resources, charging 'ships for entering the river at Turanganui, for fresh water taken from it per bucket, and for timber'.[127]

As we have outlined above, however, as a result of the Crown's Treaty breaches, Tūranga Māori lost both their autonomy, and their land and resources. These losses severely curtailed the ability of Tūranga Māori to engage with – and to control their engagements with – the colonial economy, and to achieve fair returns on their remaining land and resources. Moreover, they were in many cases prevented from doing do so by legislation that was often inconsistent, arbitrary, and in breach of Treaty guarantees.

It was the rapid loss of land that most affected the economic well-being of Tūranga Māori. The lands ceded to and retained by the Crown under the deed of cession were some of the most fertile and productive in the entire district.[128] 'Loyal' Māori, who were supposed to be compensated for those of their lands retained by the Crown, were not; 'rebel' Māori, for the most part, lost their land interests entirely. The Native Land Court process, and the Crown and private purchasing that followed, were also devastating to Māori economic well-being. The native title system afforded Māori very little choice but to sell; indeed, there was 'concerted, and for most ordinary Maori landowners, unbearable statutory pressure to sell'.[129] Moreover, as we have indicated above, the prices paid for Māori land were low, both

124. Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, vol2, p 425
125. Ibid, vol 1, p 49
126. Ibid
127. Ibid
128. Ibid, p 386
129. Ibid, vol 2, p 536

because of the high burden of court and survey costs, and the unwieldy legislation that governed alienation, which made the purchase of individual interests in land still in customary title a risky proposition for buyers. This resulted in the perverse outcome that, although:

> sale or lease was the only means by which Maori could apply their only capital asset to earn profits. . . . the new title system did not allow Maori to secure a reasonable share of the capital value of this asset when they did so.

The Tribunal concluded that: 'For Maori, the cost of transferring title was high and the market value of that title was low.'[130]

Not only this, but the Crown's system of Māori land administration was:

> so complex, inefficient and contradictory as to be inconsistent with the equal treatment guarantee under article 3 of the Treaty. That is, it was inherently discriminatory to subject Maori landowners to a system of administration that was so unworkable.[131]

The Commission on Native Land Laws, which reported in 1891, remarked on the 'startling' evidence that had been presented to the commissioners:

> Every question, by its answer, disclosed fresh abuses; every subject of discussion revealed some skeleton hitherto concealed. The actions of Judges, lawyers, and conductors; the adjournments, fees, and rehearings of the Courts; the demoralisation and ruin of the Maoris while attending distant Courts, were all commented upon.[132]

Tūranga Māori were thus prejudiced by a system which not only failed to recognise their rights but which was poorly designed, difficult to work within, and actually worked against their interests.

As we have already discussed, very little land was left in Māori ownership at the end of this process. As Professor Murton reported, most of the lands Tūranga Māori retained were of lesser quality than those sold, 'difficult to work and difficult to access'.[133] Subsistence crops could be grown on the remaining lands, but 'the opportunities [for Tūranga Māori] to participate in commercial agriculture in the twentieth century . . . [were] restricted by the loss of land of high horticultural potential'.[134] Some land, particularly in the upper Waipaoa catchment area, was 'suitable for large scale pastoralism' but required development first.[135]

For the lands that Māori did retain, there were hurdles other than their poor quality. In particular, the lack of an effective trust mechanism for the communal management of Māori

130. Ibid, p 521
131. Ibid, p 469
132. 'Report of the Commission Appointed to Inquire into the Subject of the Native Land Laws', AJHR, 1891, vol 2, sess 2, G-1, p xiii
133. Document A26, p 115
134. Ibid, p 116
135. Ibid, p 118

land 'almost completely marginalised Maori enterprises and Maori communities'.[136] This is especially evident in the fate of incorporations, for which general legislative provision was made in 1894. Te Aitanga a Māhaki, still determinedly pursuing economic development, led the way: by 1910, they had established 48 incorporations, containing 26,807 acres (10,848 hectares) of mostly unutilised land. Legislative changes in 1905 improved the opportunities for incorporations to raise finance, and protected Māori land from foreclosure if loans could not be repaid (the land was to be leased instead). Nonetheless, borrowing remained difficult, especially for the majority of incorporations which administered small blocks.[137] Despite the odd success, the experience for many of these incorporations was grim:

> Fourteen of the incorporations had sold their lands by 1932 . . . Of the 48 original Te Aitanga a Mahaki incorporations, only three were not subject to sale or lease during the first half of the twentieth century. It is unlikely that these were being developed. There is no record of an application for a mortgage over these lands. What is more likely is that they were isolated, uneconomic and their owners lacked the management skills required for success.[138]

Meanwhile, the Crown had further marginalised Māori enterprise by bringing Māori land under the administration of district Māori land boards from 1905, when it was increasingly anxious to be seen to make 'unused' Māori land available to settlers. Despite their name, only one of the three board members had to be Māori (though not a representative of the owners). Even this requirement was abolished from 1913. The Tairawhiti district, within which Tūranga fell, was one of two land districts selected to test the 'efficacy' of compulsory vesting of Māori land in the board.[139] Thus remaining Māori land whose owners were not incorporated, or which had not been vested in the Tūranga trusts and finally in the East Coast Native Trust Lands Board (and sold or leased), was leased by the Tairawhiti district Māori land board. By 1908, the board had arranged 160 leases of Te Aitanga a Māhaki land, amounting to over 29,000 acres (11,736 hectares). The average annual rental for such leases was assessed nationally at five shillings per acre, but might well have been smaller where hill country land was involved and there were many owners in a block.[140] The land remained effectively out of the control of Māori owners for nearly two generations, though nominally in Māori ownership.

The economic benefit of continuing ownership was thus often minimal, and for most Tūranga Māori who owned shares in blocks, it was very difficult to extract a sufficient income from their land interests. This difficulty was exacerbated by the number of owners in a block inexorably increasing with successions to owners in each generation, and the

136. Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, vol 2, p 536
137. Ibid, pp 502–503
138. Ibid, p 504
139. Ibid, pp 497–499
140. Ibid, pp 497–498

corresponding fractionation of shares.[141] Although little benefit was gained from these land interests, the Crown still regarded them as an asset, and reduced other entitlements available to Māori owners. This is highlighted by the example of Rupi Wawatai, a widow with four children who:

> wrote a series of letters to the Native Minister between December 1927 and February 1932 . . . Mrs Wawatai's rents from 10 blocks amounted to only £19 5s a year, plus £16 which she received from her shares in Mangatu. Because of her land interests, her pension was reduced from £130 to £49, hence her appeals to the Native Minister.[142]

Unable to extract reliable incomes from their diminishing lands, Tūranga Māori instead had to move into rural wage labour to supplement their incomes. Professor Murton found that, from the 1880s on:

> The vast majority of Te-Aitanga-a-Mahaki came to be involved in productive activities at the base of the agrarian pyramid in the region: they became casual and seasonal wage labourers, usually in conjunction with small-scale, often subsistence, farming.[143]

Younger men in particular would leave their communities during summer to participate in '[b]ush-felling, sheep-shearing, grass-seed cutting, . . . bush-burning and grass-seed sowing'.[144] A core of older residents remained behind to engage in subsistence agriculture.[145] Rural wage labour continued to be the major source of employment for Māhaki people into the twentieth century, as was echoed in evidence presented to our hearings by John Ruru, a witness for TAMA. Mr Ruru told us of his early life in Te Karaka in the 1950s:

> Our family, like most Mahaki families, were labourers and employees of one kind or another, whether scrub cutting, fencing, sheep shearing or driving machinery.
>
> Our people just did not have the money or access to capital to start and operate a business for themselves. They were labourers employed by others, usually pakeha.[146]

Professor Murton acknowledged that, through their labour, Tūranga Māori 'played a vital role in the general development of the regional economy'. However, he considered that, in the long run, 'this may have hindered their own economic progress'.[147] Tūranga Māori had been denied the opportunity to have more direct control over their lands by 'paternalistic policies and the prevalent notion among politicians that Maori were incapable of administering their lands in a fiscally responsible manner' and were instead forced into wage labour

141. Document A26, p 495
142. Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, vol 2, p 498, fn 263
143. Document A26, p 119
144. Ibid, p 404
145. Ibid, p 405
146. Document I25, p 1
147. Document A26, p 119

to earn a living. In the process, 'the emergence of a knowledgeable and experienced cadre of business managers, resource managers, agricultural experts, accountants, lawyers, and the like, [was delayed] by decades'.[148]

(3) *Social and cultural impacts*

The hostilities of the 1860s caused enormous disruption to the lives of Tūranga Māori. Tūranga Māori lost a high proportion of their male population in the conflicts. In 1860, the Tūranga Māori population had been around 1,500. Counsel for TAMA pointed out that in the Tūranga report, the Tribunal had identified up to 213 deaths as a result of the hostilities of the 1860s.[149] If the population had remained steady at 1,500 until 1865 (and, given that the population had dramatically declined since the 1840s due to introduced diseases, this seems unlikely), then nearly 15 per cent of Tūranga Māori were killed by the Crown during these hostilities.

The sudden loss of so many men, as counsel for TAMA pointed out, was an incalculable loss to those whom they provided for. Some 'whakapapa lines died with them'.[150] Professor Murton considered that the 'transportation of nearly half the iwi to the Chathams for more than two years created huge gaps in community organisation and structure'.[151] The deaths of many of those exiles, then and subsequently, must have had an even greater, and more lasting, impact. Among those lost were 'many leaders, at a time when leadership was crucial'.[152] Tūranga Māori were thus left in a severely weakened state even before the Crown began to assert its autonomy in other realms of their lives.

The Crown's Treaty breaches manipulated existing, and opened new, fractures in Tūranga Māori society. In Poverty Bay Commission hearings, 'loyalist' Māori were pitched against 'rebel' Māori, who were now seen by their relatives as a liability in such a court. In the Tūranga report, the Tribunal found that 'through adding names of "loyals" to ownership lists, removing "rebel" names or a combination of both, the self-policing approach cleverly exploited existing tensions within the Maori community to the Crown's ultimate advantage'.[153] This resulted in stigmatisation of 'rebels' that 'persisted into the twentieth century in a variety of ways'.[154] The Native Land Court process and subsequent land alienation exacerbated these divisions.[155]

Tūranga communities suffered in the wake of the Crown's land confiscations and then the operation of its native land legislation which individualised the sale of land. Communities

148. Document A26, p 492
149. Document J12, p 5
150. Transcript 4.28, p 374
151. Document A26, p 78
152. Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, vol 2, p 512
153. Ibid, vol 1, p 363
154. Document A26, p 79
155. Ibid, pp 103–104, 113–114

were disempowered by that legislation, which overrode the power of chiefs, in accordance with tikanga, to represent and protect their hapū interests, and failed to recognise the rights of communities to veto the sale of individual interests.[156] It is evident from the scale of land alienation that communities' own protective mechanisms had been completely undermined, since: 'no rational community bound by kinship, would choose to sell land to a level that threatened the continued existence or well-being of that community, if there were reasonable alternatives'.[157] But their well-being was gravely undermined, because the land legislation, with all its flaws, was 'capable of producing only landlessness and poverty'.[158] The Crown in fact was well aware that its land system would 'lead to widespread Maori landlessness and through this the destruction of Maori communities'.[159] But it was, at best, indifferent to this prospect; at worst, the Crown welcomed it.

Communities were also undermined as Māori suffered a devastating demographic decline at the same time as colonial society in Tūranga expanded. The Tribunal observed that these 'cataclysms' were the 'critical causes for the shrinkage in communities so evident in Turanga in the generation which followed these events'.[160] Overall, the widespread loss of land had a profound impact on 'the structure and viability of Turanga communities'.[161] The number of communities declined, as did their populations:

> blocks which had been occupied were gradually tied up in leases and rendered unavailable for continued occupation. In 1881, Te Aitanga a Mahaki, Ngariki Kaiputahi, and Whanau a Kai were living in at least 10 communities: Tarere, Toroa, Waerenga a Hika, Parihimanihi, Rakaiketeroa, Waituhi, Kaitara, Tapuihikitia, Taihamuti, and Mangatu. Only five small communities now remain.[162]

As we discussed above, the shrinking land base of Tūranga Māori also increasingly forced many into wage labour and poverty. According to Professor Murton, they were thus left:

> ever vulnerable to the vicissitudes of the market, unable to gain access to appropriate education, and more likely to be living in conditions which made them more vulnerable than poor Pakeha to a range of health problems. Poor housing and bad sanitation were . . . the crucial linkage between poverty and poor health. Because of poverty, Te Aitanga-a-Mahaki families were also likely to suffer from poor nutrition.[163]

156. Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, vol 2, p 443
157. Ibid, p 511
158. Ibid, p 521
159. Ibid, p 532
160. Ibid, p 512
161. Ibid
162. Ibid
163. Document A26, p 639

5.2.7

The loss of lives and land also had serious cultural implications for Tūranga Māori. Professor Murton emphasised the cultural and spiritual importance of land, which he called 'a repository of cultural meaning':

> It is a known territory bounded by known markers, it is the location of the spiritual residence of ancestors and of the newly born, and it is where whanau and hapu identity emerged . . . The concept of turangawaewae land as the ancestral home, sustaining whanau and hapu with its varied resources and bearing through the mauri of its denizens, physical and immaterial, the spiritual and psychological well-being of its human inhabitants remains important. Indeed, the concept may have become even more significant as Te Aitanga-a-Mahaki have dispersed to the far corners of New Zealand and the world. Turangawaewae, literally 'a place to stand', and especially a place to which one returns, has become even more important as a cultural metaphor.[164]

As previous Tribunals have recognised, the loss of land experienced by Māori, combined with their demographic decline, would inevitably have resulted in loss of cultural knowledge.[165] The Te Urewera Tribunal, pointing to the impact of the shrinking of tribal takiwā within which hapū established and exercised their customary rights, said:

> When people no longer lived on the land, or hunted its resources, or made journeys across it, few new places could be named; many old names could be easily forgotten. There would be no new waiata about events that took place on the land. People would be separated from wahi tapu. No new tipuna whare would be built.[166]

Claimants in the Tūranga inquiry told us of similar losses of 'waiata, haka, whaikorero, the making of korowai, and the harvesting of traditional food sources, [and] rongoa.'[167] During our remedies hearings, Anthony Tapp, giving evidence for TAMA, said that he had 'not been brought up to be instilled with the knowledge and experience of our ancestors. We were not handed down the treasured knowledge of our whakapapa. There was no place that was open to go and learn.'[168]

5.2.7 Conclusion on the nature and extent of the prejudice suffered by TAMA, Ngā Ariki Kaipūtahi, and Te Whānau a Kai

Te Aitanga a Māhaki, Ngā Ariki Kaipūtahi, and Te Whānau a Kai all suffered serious and lasting prejudice as a result of the Crown's Treaty breaches.

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164. Document A26, p 664
165. See, for instance, Waitangi Tribunal, *Te Tau Ihu o te Ika a Maui: Report on Northern South Island Claims*, 3 vols (Wellington: Legislation Direct, 2008), vol 3, pp 1040–1055.
166. Waitangi Tribunal, *Te Urewera: Pre-publication, Part II*, p 820
167. Document C23, p 15
168. Document I9, p 2

We considered first the specific prejudice that these groups suffered as a result of the Crown's Treaty breaches. In the Tūranga report, the Tribunal emphasised strongly that the loss of life caused by the hostilities of the 1860s 'must have severely affected Te Aitanga a Mahaki, Te Whanau a Kai, Ngariki and Rongowhakaata communities in particular'.[169] The hostilities were followed by the deed of cession, which resulted in the Crown retaining lands owned by Te Aitanga a Māhaki (at Te Muhunga) and Te Whānau a Kai (at Patutahi). The arrival of the Native Land Court, and of Crown and private purchasers, greatly increased the pace of land loss experienced by these groups. Through land purchasing and the failure of the Tūranga trusts, Te Aitanga a Māhaki lost a substantial portion of their rohe. Te Whānau a Kai were rendered virtually landless in Tūranga, with the loss of their Tahora blocks during the period of control by the East Coast Commissioner proving an especially bitter blow. Ngā Ariki Kaipūtahi, meanwhile, were prejudiced by the unsafe 1881 Mangatū title determination and the Crown's breach in passing legislation to allow Te Whānau a Taupara, but not Ngā Ariki Kaipūtahi, to reargue their rights in the block.

We then examined the broader prejudice that resulted from the Crown's Treaty breaches in terms of political, economic, social, and cultural impacts. With their autonomy crushed, and their opportunities for advancement in colonial society sharply curtailed by loss of land and resources, Tūranga Māori suffered a dramatic demographic decline. They also found it increasingly difficult to support and sustain their whānau. They were disconnected from their whenua, unable to utilise their lands effectively in the colonial economy, and had to turn to wage labour to supplement their incomes. The result was that they frequently lived in impoverished conditions, susceptible to disease and poor health.

The prejudice that flowed from the Crown's Treaty breaches is still evident today. Professor Murton cautioned that 'it is too simplistic to claim that there was a direct causal relationship' between land loss and the poverty experienced by Tūranga Māori.[170] However, he noted that:

> the conjunction of the operation of the political economy, both of New Zealand and globally, plus the continuing loss of entitlements (access to land and resources) and the process of disempowerment (loss of the right to control their own land and livelihood) progressively marginalised Te Aitanga-a-Mahaki, creating a 'population at risk'.[171]

These latter processes are linked to the Crown's Treaty breaches and the prejudice flowing from those breaches. The Crown's actions contributed to the poverty that Tūranga Māori later experienced.

The connection between the Crown's breaches and the current circumstances of the applicants was echoed by witnesses in our hearings. Robyn Rauna spoke in support of

169. Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, vol 2, p 512
170. Document A26, p 512
171. Ibid, p 639

tama, though we note that her affiliations – to Te Whānau a Kai, Nga Potiki, Te Whānau a Taupara, and Wahia hapū of Te Aitanga a Māhaki – reflect the interrelationships, then as now, between these groups.[172] Ms Rauna told us that Māhaki people continue to be 'over-represented in all of the negative statistics, concerning health, education, housing, employment, poverty and crime'.[173] She went on to state that:

> For me there is a direct link from the historical Crown grievances of the 1860's and onwards, to the lot of our people today. That early murdering, invasion of our lands, exile of our people, taking of our lands by cession, amounted to the utter subjugation of our people. As a result we are treated like servants to the Crown in our country. We have lost our confidence, we have become caught up in a vortex of hopelessness.[174]

This Tribunal considers this powerful testimony to be an indictment of the Crown's policies in Tūranga and the resulting prejudice to Māori.

5.3 What Are the Current Circumstances of the Applicants?

In this section we address several issues. First, if the Tribunal is to recommend the resumption of any land under section 8HB to any Māori as redress for their well-founded claims, it needs to be certain that it has correctly identified the entity which truly represents the claimants. In short, we need certainty as to an entity's mandate to settle claims. Secondly, the Tribunal must be confident that any such entity is ready and able to receive and manage any redress. We must be satisfied of these two things before we make any binding recommendation. The statutory scheme requires that unless a negotiated arrangement is reached in just 90 days, any recommendation that the Tribunal might make under section 8HB must take effect. Furthermore, as we have adopted the restorative approach as the framework for our consideration of remedies, the current circumstances of the applicants are also a relevant consideration to the question of what is necessary to restore their social, cultural, and economic well-being.

It needs to be acknowledged at the outset that these three claimants, for the most part, have not settled their grievances with the Crown. With the exception of a fisheries settlement for Te Aitanga a Māhaki, they have not had the benefit of a capital injection that accompanies settlement. As we have discussed, many Māhaki people remain in a position of economic and social deprivation. Their social and economic activities, and their ability to exercise their tino rangatiratanga, are thus limited.

172. Document I11, p 2
173. Ibid, p 3
174. Ibid, pp 3–4

5.3.1 What are the current circumstances of TAMA?

Te Aitanga a Māhaki and Affiliates (TAMA) is a body specifically formed to negotiate the claims of the Māhaki cluster with the Crown. It currently holds the mandate to settle the claims of the five claimant groups of Te Aitanga a Māhaki, Te Whānau a Kai, Ngā Ariki Kaipūtahi, Te Whānau a Wi Pere and Wi Haronga-Ngati Matepu.[175] TAMA is not a permanent body and is expected to be replaced by a post-settlement governance entity.[176] The provisional title of this body is the Te Aitanga a Māhaki and Affiliates Settlement Trust. Were TAMA to proceed to a negotiated settlement with the Crown, the Settlement Trust is the body that would be charged with receiving and managing any assets received as part of that settlement.

However, there is some question as to whether TAMA's mandate will continue to encompass Ngā Ariki Kaipūtahi and Te Whānau a Kai.

In June 2011, following the Supreme Court decision that directed our inquiry to take place, the Crown suspended negotiations with TAMA pending the outcome of the Mangatū Incorporation claim. The imminent Tribunal hearing encouraged other groups to file claims themselves, and TAMA's mandate began to unravel. On 18 February 2012, at a hui at Matawai Marae, TAMA formally supported the withdrawal of the Te Whānau a Kai and Ngariki claimant groups from the TAMA mandate. TAMA's reasons for supporting the withdrawal of these groups included the fact that both had chosen to file separate resumption claims relating to the Mangatū State Forest, and the wish of Te Whānau a Kai claimants to pursue their interests in the neighbouring Te Urewera inquiry district as well.[177]

However, the Crown did not support the withdrawal of Ngariki and Te Whānau a Kai claimants from the TAMA mandate. On 1 March 2012, Willie Te Aho for TAMA and Owen Lloyd for Ngā Ariki Kaipūtahi met with the Minister for Treaty of Waitangi Negotiations to discuss the possible withdrawal. The Minister responded that: 'As TAMA currently holds the Crown recognised mandate for all five TAMA constituent groups, the Minister of Māori Affairs and I are unable to endorse an alternative mandate at this point.' The Minister noted that an alternative mandate would require Cabinet approval, which was unlikely given the Tribunal proceedings then in train and the consequent suspended negotiations.[178]

The official position, then, is that TAMA still holds a mandate to negotiate on behalf of all its constituents. However, Crown witness Andrew McConnell from the Office of Treaty Settlements acknowledged in his evidence that TAMA will need to reconfirm its mandate before it can resume settlement negotiations.[179] The result is that we are left in considerable uncertainty as to who TAMA – and their proposed recipient entity – will represent in the future.

175. Document 118, paras 23, 24.1, 26.2
176. Document K8, p 6
177. Document 138, p 3
178. Document 138(a), p 2
179. Document 130, para 66

5.3.2

Te Aitanga a Māhaki do, however, have an alternative entity in the Te Aitanga a Māhaki Trust ('the Māhaki Trust'). As it is a mandated iwi organisation under the Māori Fisheries Act 2004, it is unlikely that the Māhaki Trust would be an appropriate recipient entity for redress from binding recommendations. However, the trust does demonstrate the capacity of Te Aitanga a Māhaki. Its trustees are drawn from the 11 Te Aitanga a Māhaki marae. In turn, the Māhaki Trust 'provides appointments to other Iwi organisations, like for instance Te Runanga a Turanganui a Kiwa and Te Hauora o Turanganui a Kiwa'.[180] The trust manages the tribe's 'multimillion dollar' fisheries settlement through the Te Aitanga a Māhaki Trust Asset Holding Company Limited, and has done so profitably. Ms Rauna acknowledged that the '[f]isheries [settlement] certainly helps, but the problems of our people are significant and intergenerational'. She pointed out that Te Aitanga a Māhaki still lack a 'robust economic base' to help their people.[181]

As at the time of our second week of remedies hearings in October 2012, the Māhaki Trust had a register of 9,627 people. Ms Rauna noted that this needed 'to be updated in terms of nga tangata kua mate, and of additions'.[182] The Māhaki Trust also utilises the Tuhono register to maintain and update the membership information held in its database. Ms Rauna considered that 'the subtraction of the deceased names on the original list, and adding the names on Tuhono who are not on the Mahaki Trust list, will more than take the aggregate number to at least 10,000'.[183] Re-engagement with lost Māhaki descendants is an important part of the activities of both TAMA and the Māhaki Trust; both hold regular Hui a Iwi to keep in contact with their people.[184]

Ms Rauna emphasised that '[o]ur capacity of human capital is . . . deep and wide ranging'.[185] She noted that this was especially true in forestry:

> we have the specific luxury (among others) of having Mr John Ruru as part of our tribal knowledge and resource base. In his former role as district forest conservator, he ran the Mangatu forest. He understands how to manage the liabilities that come with this Crown forest land. He can be contracted to provide that service, and he is willing to do so.[186]

5.3.2 What are the current circumstances of Ngā Ariki Kaipūtahi?

While Ngā Ariki Kaipūtahi are a distinct tribal entity, with their own claims, it is less clear who can rightfully claim to have a mandate from the community to negotiate their claims

180. Document K8, p 7
181. Ibid, p 12; doc I11, p 5
182. Ibid, p 9
183. Ibid, p 10
184. Ibid, pp 13–14
185. Ibid, p 12
186. Ibid

with the Crown, or to receive any redress that might derive from negotiations or the current remedies process.

First, as noted above, there is the as yet unresolved issue of whether Ngā Ariki Kaipūtahi will remain under the collective umbrella of TAMA. Secondly, it is unclear just who can rightfully claim to represent the various claims of Ngā Ariki Kaipūtahi. Before the Tribunal began its hearings in the original district inquiry, three separate claims were filed on behalf of Ngā Ariki Kaipūtahi. Wai 499 was filed on 24 March 1995 by Tanya Rogers on behalf of the members of 'Ngariki Kaiputahi o Mangatu'.[187] Wai 507 was filed on 26 April 1995 by Owen Lloyd on behalf of 'Ngarikikaiputahi Hapu'. An amended Wai 507 claim was filed in August 1995. The third claim, Wai 874, was filed by 'the kaupapa of Edward Mokopuna Brown' on behalf of 'Ngariki iwi' and received by the Tribunal on 21 July 2000.[188] An amended statement of claim was submitted in March 2001.[189]

The presence of multiple Ngā Ariki Kaipūtahi claims raised questions of mandate at an early stage in the Tūranga inquiry. In response to the Presiding Officer's directions in March 2000, counsel for Wai 507 informed the Tribunal that that claim was intended to replace Wai 499, the claimants of which 'have not the mandate of the Trust and its beneficiaries.'[190] However, Wai 499 had not yet been withdrawn.[191] The Tribunal requested clarification of the status of Wai 499 in relation to Wai 507. In response, their counsel informed the Tribunal in August 2000 that Wai 499 was a cross-claim to Wai 507 and that mandate issues were under discussion.[192] As those issues were being discussed, Mr Brown lodged Wai 874, which caused the presiding officer to note that there were already two claims 'which purport to [be] made on behalf of Ngariki Kaiputahi'.[193] He requested counsel for Wai 874 to clarify the status of the new claim.[194] Mr Brown's counsel described it as a co-claim to Wai 499 and a cross-claim to Wai 507.[195] Shortly after, the claimants for Wai 499 and Wai 507 agreed to present as joint claimants.[196] A similar agreement was eventually struck with the claimants for Wai 874.[197] In the Tūranga report, Mr Brown's claim was described as 'a Ngariki Kaiputahi claim on behalf of some of the members of that kin group'.[198]

It is clear that, at some levels, this cooperation between the Ngā Ariki Kaipūtahi claimants has continued. During settlement negotiations, the claimants appear to have continued

187. Claim 1.6, p 1
188. Claim 1.7; claim 1.12
189. Claim 6
190. Paper 2.2; claim 1.7(a), p 3
191. Paper 2.5, p 8
192. Paper 2.55, p 2
193. Paper 2.65, p 1
194. Ibid
195. Paper 2.69, p 2
196. Paper 2.74, p 1
197. Paper 2.134, p 1, noted at 5 June 2001 that counsel were 'hopeful that a co-operative approach will soon be in place'. By 29 June 2001, such an approach seems to have been in place, see paper 2.151, p 1
198. Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, vol 1, p 13

to work together. The Ngā Ariki Kaipūtahi particularised claim for relief for our remedies inquiry was submitted jointly and counsel worked together during our hearings. However, it became apparent during the course of our hearings that mandate issues remain unresolved. The division between the Wai 507 and Wai 874 claimants appears to have reemerged, with two bodies – the Ngā Ariki Kaipūtahi Whānau Trust and the Ngā Ariki Kaipūtahi Tribal Authority – apparently claiming to hold the mandate for the hapū.[199] Owen Lloyd presented evidence to this Tribunal on behalf of Wai 507.[200] Tanya Brown/Rogers and David Brown presented evidence on behalf of Wai 499 and Wai 874.[201] In the leadup to our second week of hearings, counsel informed us that efforts were being made 'towards a conclusive mandate hui that will finalise the unified leadership for Nga Ariki Kaiputahi'.[202] Such a hui had not been held by the time our hearings ended, however.

We turn now to the issue of whether any Ngā Ariki Kaipūtahi entity has the appropriate governance structures and financial capacity to receive redress by way of a resumption recommendation. The uncertainty surrounding the Ngā Ariki Kaipūtahi mandate is also evident in its governance. As noted above, two bodies claim to hold the mandate for Ngā Ariki Kaipūtahi. However, we note here that most of the evidence we received related to the Ngā Ariki Kaipūtahi Whānau Trust represented by Owen Lloyd rather than the Ngā Ariki Kaipūtahi Tribal Authority represented by David Brown. The evidence we did receive suggests Mr Brown has had difficulty gaining funding for his organisation and the activities he would like to pursue.

The Ngā Ariki Kaipūtahi Whānau Trust was established in May 1995 pursuant to the Te Ture Whenua Māori Act 1993. Owen Lloyd told us that the trust was established:

> for the benefit of all the descendants of Rawiri Tamanui. It has a maximum of nine trustees, who are representatives of six tupuna: Ruahinekino (Mokeke), Paiharehare, Rawiri Tamanui II, Harata, Mereaira (Mutu) and Heni Matekino 6 children. Each of these tupuna is descended from Pera Te Uatuku, the only son of Rawiri Tamanui to have living issue.[203]

The trustees are empowered to:

> apply the assets of the trust for the purpose of promoting the health, social and cultural and economic welfare, education and vocational training and general advancement of our beneficiaries, as well as for 'Maori community' purposes as provided for in section 218 of Te Ture Whenua Maori Act 1993.[204]

199. For some of these divisions, see transcript 4.28, pp 206, 213, 274, 276–277.
200. Document I21, p 1
201. Document I39, p 1
202. Paper 2.454, p 2
203. Document I21, p 14
204. Document C23, pp 21–22

It was also intended that the trust would continue the work of the late Edward Mokopuna Brown in amalgamating individual Ngā Ariki Kaipūtahi shares in the Mangatū Incorporation.[205] Since its establishment, the trust has worked at establishing a register of Ngā Ariki Kaipūtahi descendants (which we discuss below), holding wananga, and prosecuting Waitangi Tribunal claims.[206] Members of Ngā Ariki Kaipūtahi are also representatives on a wide range of community organisations, such as:

> arts in public places, Tairawhiti district police Maori advisory group, the District Council freshwater advisory group, and the local leadership body. We sit alongside Mahaki, Rongowhakaata, and Tamanuhiri iwi at formal ceremonial hui, and on the District Council development group for tourism, in partnership with Ngati Porou whanui forestry trust, to name but a few.[207]

In recent years, efforts have also been made to institute a new form of governance for the tribe, the details of which Marcus Lloyd presented during our hearings.[208]

The Ngā Ariki Kaipūtahi Whānau Trust is in the process of verifying its register in preparation for settlement. This has involved recording the whakapapa for each Ngā Ariki Kaipūtahi whānau, and has been ongoing for around 5 years.[209] As at June 2012, the trust had a confirmed register of 1870 individuals, including around 600 children.[210] Ngā Ariki Kaipūtahi was also involved in the preparation of a roll of beneficiaries for TAMA.[211]

Ngā Ariki Kaipūtahi is not in a strong financial position. The Ngā Ariki Kaipūtahi Whānau Trust generally has no income other than dividends from the Mangatū Incorporation.[212] The activities of the trust rely in large part on volunteers. Occasional funding from agencies such as Te Puni Kōkiri supplements '[t]he iwi office, secretarial work, filing system, computers, telecommunications and transport'.[213] The preference of Ngā Ariki Kaipūtahi for funds over land as part of a remedies package is illustrative of the depth of their need in this regard.

Ngā Ariki Kaipūtahi do not as yet have an entity specifically designed to receive settlement or forestry redress. Counsel pointed out that it would be premature to establish a recipient entity at this stage. Not only are such entities costly to establish, but their type and scope also depends on the size and nature of the redress the entity is to manage. The difficulties Ngā Ariki Kaipūtahi have experienced in confirming a mandated leadership body have provided a further hurdle to establishing a recipient entity. In recognition of the difficulties their lack of a recipient entity might cause in the current process, Ngā Ariki

205. Document I21, p 14
206. Document C23, p 22
207. Document I21, p 16
208. Ibid, p 15; doc I23(c)
209. Paper 2.454, p 3
210. Document I21, p 15
211. Paper 2.454, p 3
212. Ibid
213. Document I21, pp 16–17

5.3.3

Kaipūtahi propose that, were the Tribunal minded to make a recommendation for return of the Mangatū CFL lands in favour of Ngā Ariki Kaipūtahi, the Tribunal utilise a 'custodian trustee . . . such as the Guardian Trust, until a suitable vehicle has been devised and received the approval of the Tribunal'.[214] Because Ngā Ariki Kaipūtahi do not propose that they should ultimately receive a large amount of land, they 'have not concentrated on the commercial capacity in relation to Mangatu forest and/or plans to manage the forest'.[215]

Despite their financial position, Ngā Ariki Kaipūtahi have in recent decades developed a vibrant, active community. Mr Lloyd told us about the regular hui that Ngā Ariki Kaipūtahi hold:

> In terms of regular hui, we meet every first Saturday of the month where [we] hold a hapati (sabbath (church)) under the hahi wairua Tapu (branch of the Ringatu Church) followed by a general hui to discuss topics of the day and also agended topics, we meet monthly as a people to discuss our marae and what's happening around the community (eg oil exploration and fracking at the present) we meet monthly as a school board (all students are of NKP extraction) we are presently developing a kura a iwi, we have a whanau o Mangatu kapahaka group who perform at local competitions and are active in writing and performing items retelling of our history and life on the Mangatu. We keep in touch with the whanau whanui through facebook and we have over 300 on line.[216]

Those involved in the trust provide assistance at tangi, birthdays, and other hui.[217] We note the commitment of the group of Ngā Ariki Kaipūtahi who attended our remedies hearings in both Gisborne and Wellington.

5.3.3 What are the current circumstances of Te Whānau a Kai?

As with Ngā Ariki Kaipūtahi, we are uncertain as to whether Te Whānau a Kai will remain within the mandate of TAMA. Mr Hawea expressed a particular concern at 'being arbitrarily reduced to an "affiliate" of Māhaki' within TAMA, and indicated to us 'that any agreements made by TAMA do not reflect the position of Te Whānau a Kai'.[218] However, we also note that, during our hearings, Te Whānau a Kai indicated a willingness to return to settlement negotiations with the Crown, albeit with a preference that they maintain a 'separate voice' at those negotiations.

Te Whānau a Kai have organised themselves into a trust, the Te Whānau a Kai Hapū Trust, which was formed in 1996.[219] Governance is exercised by 10 trustees, who are elected

214. Paper 2.454, pp 2, 4
215. Ibid, p 4
216. Document I21, p 16
217. Ibid, p 16
218. Document I20, p 12
219. Document A56, p 7

every three years. Each of the five Te Whānau a Kai marae is represented by two trustees.[220] An annual general meeting is held each year, attracting an average of around 20 to 30 attendees.[221] The trustees also meet at least once a month.[222]

The Te Whānau a Kai Hapū Trust has about 1200 registered members. According to Mr Hawea, 'there have been some difficulties in maintaining a register, due to the costs involved'. Mr Hawea predicted that 'the number of registered members will increase dramatically, once Te Whanau a Kai gain the resources through a settlement to engage with more of its members'.[223]

Te Whānau a Kai are not in a strong financial position. They lack the resources necessary to maintain their iwi register or to conduct membership drives. These resourcing problems have been exacerbated '[i]n recent years, whilst the negotiations have been delayed'.[224] The financial records provided to the Tribunal by Te Whānau a Kai indicate that funding for settlement negotiations, until they were suspended in 2011, had provided the vast bulk of funding for Te Whānau a Kai.[225] Mr Watene Horsfall, a chartered accountant, acts as financial adviser for Te Whānau a Kai; one of the trustees acts as treasurer. Their accounts are independently audited each year.[226]

Te Whānau a Kai do not as yet have an entity specifically designed to receive settlement or forestry redress. As with Ngā Ariki Kaipūtahi, this is because of the high cost of establishing such an entity and the need for certainty as to what redress it would manage. For similar reasons, Te Whānau a Kai have not yet devised detailed plans for the forest land were it to be returned to their ownership:

> we would need to have considerably better information as to what sections of the Crown forest licence might be returned before it is worth putting resources into developing any plan for considering the management, development or other matters relating to the forest. This would all be speculative at this point.[227]

Mr Hawea noted a preference that the CFL lands be returned to Te Whānau a Kai directly, but indicated a willingness to consider professional management or a joint venture with the other parties were it to prove a more cost effective outcome.[228]

The community activities of Te Whānau a Kai are constrained by these financial difficulties. Mr Hawea told us:

220. Document I20, p 4
221. Document K7(g)
222. Document I20, p 4
223. Document K7, p 1
224. Ibid
225. Documents K7(b)–(f)
226. Document I20, p 5
227. Document K7, p 4
228. Ibid, p 5

5.4

> The Trustees are very aware of the support from our community. We get a very good response to meetings, with a lot of our support for our Trustees. Te Whānau a Kai has an increasingly strong identity; we are very happy that through our work on our claims there has been a resurgence of the Te Whānau a Kai identity. We would like to do a lot more, but again, we struggle with lack of resources.[229]

However, we note that Te Whānau a Kai, led by Mr Hawea, have shown a determination to seek justice by engaging in Tribunal processes.

5.4 The Crown's Settlement Context

Finally, before we move on to determine whether binding recommendations for return of the Mangatū CFL lands should be made in favour of some or all of the parties before us, we need to consider the Crown's broader settlement policy and the most recent offer made by the Crown to settle the grievances of the Māhaki cluster claimants. As we discussed in chapter 2, the settlement context is relevant to our consideration of 'all the circumstances of the case', as required by section 6(3) of the Treaty of Waitangi Act. This is because binding recommendations may have an effect on future negotiations, including what is available to other parties for settlement.

5.4.1 The Crown's settlement policy

The Crown policy in settling Treaty grievances with claimant groups is to make comprehensive settlements with 'large natural groupings', usually united by whakapapa and geographic proximity. The policy aims to settle as many claims as possible at once, and to settle those claims at a wider group level rather than with individuals and whānau. The reasons for wanting comprehensive settlements are outlined in the Office of Treaty Settlements publication *Ka Tika ā Muri, Ka Tika ā Mua*, usually referred to as 'the Red Book'.

> Settlements made 'bit by bit' over a long time-span would risk leaving the sense of wrong to linger, and might never achieve a sense of final resolution. Comprehensive settlements also reduce the costs and time involved in negotiations and implementation for both the Crown and claimant groups.[230]

The reasons for the large natural groupings policy were explained by former Office of

229. Document I20, p 5

230. Office of Treaty Settlements, *Ka Tika ā Muri, Ka Tika ā Mua: He Tohutohu Whakamārama i ngā Whakataunga Kerēme e pā ana ki te Tiriti o Waitangi me ngā Whakaritenga ki te Karauna – Healing the Past, Building a Future: A Guide to Treaty of Waitangi Claims and Negotiations with the Crown*, 2nd ed (Wellington: Office of Treaty Settlements, 2004), p 21

Treaty Settlements director Paul James in his evidence to the East Coast Settlement Tribunal in 2009:

> Such an approach helps to reduce overlapping claim issues and fragmentation. It is more likely to enable groups to achieve an effective economic base and so attempt to remedy the prejudice caused by Treaty breaches. It also allows a settlement package to cover a wider range of redress than might otherwise be possible. This in turn means that the settlement is more likely to meet a greater number of the claimants' objectives.[231]

Mr James said that it is possible to recognise distinct whānau or hapū interests within a wider settlement. This highlights the balancing act that confronts the Crown and settling groups. They need to negotiate a comprehensive settlement of claims without overlooking or ignoring the interests of the smaller groups that make up the large natural grouping. That said, the Waitangi Tribunal has endorsed the Crown policy of settling with large natural groups, albeit with some qualifications, in at least six reports.[232] In the Tūranga report, the Tribunal encouraged the negotiated settlement of all Tūranga claims by large groups (Rongowhakaata, Ngāi Tāmanuhiri, and the Māhaki cluster), possibly at a district-wide level. The rifts that have appeared within TAMA, as exemplified in our inquiry, illustrate that negotiating settlements in this way, while desirable, can be a challenging task.

5.4.2 What is on offer?

Although a district-wide settlement was not achieved, negotiations in Tūranga have continued on a large natural grouping basis, with settlements having been completed with Rongowhakaata and Ngāi Tāmanuhiri. TAMA is currently mandated to settle the remaining Tūranga claims on behalf of those claimants yet to settle. As things stand, the Crown is currently offering to TAMA, and the groups it represents, a package of redress totalling $31.64 million (plus interest since 2008), along with various items of cultural redress not included in this sum.[233] A negotiated settlement would also include a historical account and a Crown apology for its Treaty breaches.

The current offer includes a number of items of cultural redress, such as funding for cultural revitalisation, statutory acknowledgements over reserves and waterways, new official geographic names of 65 features, and protocols and agreements with relevant ministries

231. Wai 2190 ROI, doc A107, pp 2–3

232. Waitangi Tribunal, *The Mohaka ki Ahuriri Report*, 2 vols (Wellington: Legislation Direct, 2004), vol 2, pp 606–607, 697–698; Waitangi Tribunal, *The Tāmaki Makaurau Settlement Process Report* (Wellington: Legislation Direct, 2007), p 87; Waitangi Tribunal, *The Te Arawa Mandate Report* (Wellington: Legislation Direct, 2004), p 111; Waitangi Tribunal, *The Pakakohi and Tangahoe Settlement Claims Report* (Wellington: Legislation Direct, 2000), p 65; Waitangi Tribunal, *The Whanganui River Report* (Wellington: Legislation Direct, 1999), p 13; Waitangi Tribunal, *The East Coast Settlement Report* (Wellington: Legislation Direct, 2010), p 57

233. Document I30, p 6

and organisations. Four properties are also proposed to be transferred as cultural redress, including the quarter-acre former Patutahi Health Clinic site to Te Whānau a Kai (along with $250,000 to establish the property as a cultural base). One hundred thousand dollars has been set aside for the erection of 'a memorial to those Tūranga iwi who lost their lives as a result of past Crown actions'.[234]

From the settlement quantum they will have the opportunity to purchase a variety of commercial assets currently in Crown ownership. This includes the whole of the Mangatū Forest, which comes with $9.5 million in accumulated rentals in addition to the quantum on offer. We have noted elsewhere that the accumulated rentals that come with CFL land make such land a desirable asset for claimants. The guaranteed ongoing income stream is, we assume, also an attraction. Twelve properties are proposed for transfer at no consideration; a number of other properties will be available on a right of first refusal basis.[235]

The shape of any settlement package is of course a matter for negotiation between the Crown and the claimants. What has been arrived at thus far is the product of a long process of negotiation and discussion between the parties, including those groups that have already settled. We consider that, at the very least, the current offer is a foundation for further negotiations.

5.5 Conclusion

Te Aitanga a Māhaki, Ngā Ariki Kaipūtahi, and Te Whānau a Kai have all suffered significant and lasting prejudice as a result of the Crown's Treaty breaches in Tūranga. These breaches, stemming from the Crown's incursion into the district in 1865 at Waerenga a Hika and then the arrival of the Native Land Court and land purchasers, resulted in the loss of life, land, and autonomy for Tūranga Māori. Nearly 150 years later, the people of Te Aitanga a Māhaki, Ngā Ariki Kaipūtahi, and Te Whānau a Kai still feel the prejudicial effects of these events. No redress can erase the memories of the pain left by the hostilities that resulted from the Crown's breaches, and the loss of so many whose lives were cut short. Yet something can and must be done to address the loss of land and autonomy suffered by Te Aitanga a Māhaki, Ngā Ariki Kaipūtahi, and Te Whānau a Kai, and to establish them on a path to future prosperity. That is the prejudice which any recommendation for redress must compensate for or remove.

Now that we have examined the specific remedies applications of all the parties before us, we can proceed to determine whether the Tribunal should make binding recommendations for return of the Mangatū CFL lands within our inquiry district in favour of one or more of the applicants.

234. Document M10(a), pp 49–51
235. Ibid, pp 51–52

CHAPTER 6

THE TRIBUNAL'S CONCLUSIONS

6.1 Introduction

In this chapter, we set out our decisions on all the applications for binding recommendations and our guidance to the parties as to what steps they may wish to take from this point. We begin by reminding ourselves of the statutory prerequisites for the Tribunal to make binding recommendations and the purpose of making recommendations under section 6(3) of the Treaty of Waitangi Act (TOWA). We consider the applications and whether it is appropriate to make binding recommendations for each of them. We also give our views as to the steps the parties should take following on from our decisions to move toward settlement as quickly as possible.

As we set out in chapter 2, the applicants for binding recommendations must show that:

- the claim is well-founded;
- the claim relates to Crown forest licensed (CFL) land;
- the remedy ought to include the return to Māori ownership of the whole or part of the land; and
- the group or groups of Māori to whom the land is returned are clearly identified as appropriate to receive the land in compensation.

The Tribunal has a discretion whether to grant a binding recommendation or not: when exercising that discretion section 6(3) of the TOWA requires us to consider 'all the circumstances of the case'.[1]

In exercising this discretion, we must decide whether binding recommendations are required to restore the applicants to well-being and whether they provide fair, equitable, and proportional redress as among the applicants. Restoration has three elements:

- restoring the economic, cultural, and social well-being of the applicant;
- restoring the honour of the Crown; and
- restoring the relationship between the Treaty partners.

We also consider it important that the relationships between the applicant groups before us are not damaged by any remedial recommendations we might make. Restoration of a group's well-being is not just a question of providing an economic base on which that

1. Reaffirmed by the Supreme Court in *Haronga v Waitangi Tribunal* [2012] 2 NZLR 53, paras 89–91.

group can rebuild. Whanaunga who do not share in the benefits of a binding recommendation should not be left with a sense of having been dealt with unfairly or inequitably. If that were the case, the applicant group's cultural well-being would not be restored. Despite the important distinctions between the groups in our inquiry, their experience of Crown actions, and thus of Treaty grievances in Tūranga is largely a shared one. They also share a number of whakapapa connections and affiliations. These connections and their shared history provide a good foundation for kotahitanga. The opportunities for their tamariki and mokopuna will be greatly increased if the claimants can work together on the basis of a settlement of their grievances that they all broadly consider is fair.

In the next section, we reiterate our decisions on whether the claims before us are well-founded and relate to CFL land as the basis of our jurisdiction for granting a binding recommendation. We go on to consider whether any of the parties should receive a binding recommendation.

6.2 Well-founded Claims Relating to the Land

In chapter 3, we discussed whether each of the four applicants has a well-founded claim, and whether their claims relate to the Mangatū CFL lands. We confirmed that the findings set out in the Tūranga report established that all four applicants have well-founded claims. That they have that status was reinforced by the evidence we heard in our subsequent hearings into the applications for binding recommendations. No one disputed that Mangatū Incorporation, TAMA and Ngā Ariki Kaipūtahi have claims that relate to the Mangatū CFL lands. In respect of Te Whānau a Kai we noted their whakapapa connections to the other claimant groups, and the involvement of Peka Kerekere and other Te Whānau a Kai people in the formative stages of the incorporation and as shareholders. Te Whānau a Kai acknowledge that they are 'part of Mahaki'. On that basis we concluded that Te Whānau a Kai has a claim that 'relates to' the CFL lands. All the applicants therefore have the basic statutory requisites needed to be considered eligible for a binding recommendation.

We must now consider whether, in order to restore the applicants to a reasonable position in a manner that is fair and equitable to all parties, binding recommendations are an appropriate remedy for any of the parties. As part of our consideration of whether the remedy is appropriate we also need to ensure that we do not create fresh grievances.

6.3 Are Binding Recommendations an Appropriate Remedy?

In chapters 4 and 5, we outlined what the parties were seeking, the extent of the prejudice they had suffered, and their current circumstances. Comprehensive remedial

recommendations involve removing the prejudice and restoring as far as is practicable the applicants' economic, cultural, and social well-being. At the hapū and iwi level that would include ensuring the claimant groups' mana and rangatiratanga in the district are acknowledged, thus restoring a measure of the autonomy that the Crown's 'policies and enacted laws [were] specifically designed to destroy'.[2] Restoring Māori communities' autonomy is the basis for restoring the Treaty relationship.

However, we are not at the stage of considering a comprehensive remedies package. While other applicants have broader remedial needs corresponding to the wider scope of their claims, the incorporation is only seeking a binding recommendation for return of the 1961 land in respect of its claim, At the incorporation's request and so as to comply with the Supreme Court direction to hear the incorporation's application urgently, our hearings are currently limited to the question of whether to grant a binding recommendation in respect of the Mangatū CFL land. Nevertheless, in order to arrive at a conclusion that is fair and equitable between the parties, the Tribunal has to take the entire set of the applicants' circumstances into account, even though we are not being called upon at present to provide a full range of remedial recommendations.

We will look first at the incorporation's application, and then at those of the other groups.

6.3.1 The Mangatū Incorporation's application

In chapter 3, we considered the incorporation's claim and reaffirmed the conclusion reached in the Tūranga report that the Crown's actions in acquiring the 1961 land represented a breach of the principles of the Treaty. In chapter 4, we analysed the extent of prejudice and found that the shareholders suffered grave cultural and spiritual prejudice because of the loss of the land, especially considering that the incorporation was set up with the overriding purpose of keeping the land in the hands of the owners and their descendants. However, we determined that on balance, no financial and economic prejudice was suffered by the shareholders, and that the incorporation today is in a strong financial position.

It is clear that to remove the prejudice suffered by the shareholders of the incorporation the 1961 land, or at least a part of it, should be returned to them. The question is how this is best done.

The incorporation seeks a binding recommendation so as to regain ownership of the land, but as we have said a number of times before, a binding recommendation carries with it monetary compensation. In order to determine whether a binding recommendation is the most appropriate remedy we consider that there are a number of issues we must resolve. The first is whether a binding recommendation for return of the whole of the 1961 land with the accompanying monetary compensation would be fair and proportionate redress to the

2. Waitangi Tribunal, *Turanga Tangata Turanga Whenua: The Report on the Turanganui a Kiwa Claims*, 2 vols (Wellington: Legislation Direct, 2004), vol 2, p 739

incorporation. This raises further questions of fairness both within the incorporation itself, and in respect of other claimants. The second is, if we consider that the whole package of redress that comes with a binding recommendation is not proportionate redress, whether we can return the 1961 land without the monetary compensation that comes with a binding recommendation. The third issue is whether we can divide the land to give a portion of it to the incorporation while leaving a portion to provide redress for other applicants. Finally we also consider the practical considerations we face in making a binding recommendation related to the Mangatū CFL lands. Each of these issues involves complex questions which we consider separately below.

(1) *Does a binding recommendation provide proportionate redress?*

The incorporation took the view that in respect of its claim the equation for determining fair redress is straightforward. In closing submissions, counsel put it thus:

Prejudice	=	loss of the 1961 Land
Removing prejudice	=	return of the 1961 Land[3]

The simplicity of the equation is attractive. In fact it could be applied equally to every claim for Treaty breach involving loss of land put before the Tribunal. For many claimants, however, return of the land related directly to their claim is not possible because the land is no longer in Crown hands, and the Tribunal cannot make recommendations relating to private land.[4] It is only because the 1961 land happens to be CFL land that we can consider its return to the incorporation. That fact also gives us an opportunity to consider that land as redress for other claimants.

As we set out in chapter 2, a binding recommendation provides not only for return of the land but also for the payment of accumulated rentals held by the Crown Forestry Rental Trust (CFRT) and, pursuant to the provisions of the Crown Forest Assets Act (CFAA), schedule 1 compensation. In the case of the Mangatū Incorporation, it would receive:

- the 1961 land now valued at $3.68 million;[5] and
- accumulated rentals estimated at $2.75 million.[6]

Schedule 1 compensation can be calculated using one of three methods – the clause 3(a) method, the clause 3(b) method or that under clause 3(c). Based on the evidence given by Mr Marren, the Crown's forestry valuation expert, the incorporation would automatically receive 5 per cent compensation of:

- $359,210 based on method 3(a)

3. Document M7, p 13
4. Treaty of Waitangi Act 1975, s 6(4A)
5. Document I28, pp 3, 13
6. Approximately $9.5 million is held in accumulated rentals for the entire Mangatū forest. The area of the forest within the Mangatū 1 block makes up 3,588 hectares, or 29 per cent, of the total 12,509 hectares. Twenty-nine per cent of that $9.5 million is $2.75 million.

- $1,400,977 over 28 years based on method 3(b); or
- $848,300 based on method 3(c).[7]

Under cross-examination from the incorporation's counsel, Mr Marren agreed that the figures were indicative only, as until the Tribunal made a decision the actual amounts could not be calculated. He also advised that the amounts were based on the filing date of Mr Haronga's claim, Wai 1489, of 31 July 2008. If the date of filing were taken as the date at which the original Mangatū afforestation claim, Wai 274, was filed then the 5 per cent amount would be:

- $896,885 based on method 3(a);
- $3,575,927 over 28 years based on method 3(b); and
- $6,031,900 based on method 3(c).

The method of calculating the compensation is chosen by the successful applicant, but we think it would be quite unusual for an applicant to choose an amount at the lower end of the scale. We also note that if the Tribunal were to make a binding recommendation in favour of the incorporation, then the incorporation proposes calling evidence from its adviser which sets the compensation figures 'markedly higher', although the differences are 'smoothed out' if the original claim date is taken.[8] It should be remembered that while the Tribunal can recommend compensation over and above the 5 per cent figure, we cannot reduce compensation below 5 per cent.

Return of the land would certainly assuage the cultural and spiritual prejudice suffered by the shareholders of the incorporation, as a result of the deeply felt loss of ancestral land. However, in our view, the argument for paying compensation over and above the purchase price which the incorporation received in 1961 is problematic. As we found in chapter 4, the incorporation suffered no economic and financial prejudice. The incorporation did receive purchase money (estimated to be $3.3 million in today's terms) at the time the Crown acquired the land, and as we concluded in chapter 4 the price was a reasonable one, certainly falling within the range of values that would be considered fair. The incorporation might have obtained direct returns from investment of the purchase price, but these were not realised because the incorporation chose instead to pay out a dividend (although there would have been direct benefits to the shareholders by such a payment). In these circumstances the accumulated rentals, which in many ways correspond to the returns the incorporation could have had from the purchase price, are, in our view, beyond what is required to give redress to the incorporation.

The schedule 1 compensation represents compensation for the fact that a claimant receives the land back subject to the encumbrance of the forestry licence. But we must also take into account that the licence represents an income to the claimant while it enures. Moreover, because of the erosion hazard, the existing water and soil covenants, resource

7. Document 127(a), para 28
8. Document M7, p 39

management consent conditions, and the provisions of the regional land and district plan, the Mangatū land is limited in its use to forestry.[9] As this land will not be used for anything but forestry, there is minimal opportunity cost for the owners in terms of not being able to convert the land to other more profitable uses. In these circumstances the schedule 1 compensation would provide a return to the incorporation over and above the redress that we consider is required to remove the prejudice caused by the loss of the 1961 lands.

Furthermore, in chapter 4 we showed that the present economic situation of the incorporation is healthy, in that it has some $160 million of net assets. The incorporation is to be congratulated for overcoming the setbacks and barriers that it faced in its early years. However, monetary compensation is not essential to achieve a restoration of the incorporation's financial well-being; nor is it warranted. We agree with the Crown that benchmarking the 1961 grievance against other comparable twentieth century Crown purchase behaviour would likely see modest remedies for the 1961 grievance.

In our view, were we to make a binding recommendation for the return of the 1961 land, the attached monetary compensation would constitute disproportionate redress to the incorporation. On its own, this would be reason enough for us to determine that we ought not to grant a binding recommendation for the return of the *whole* of the 1961 land. However, there are a number of other circumstances that support our conclusion.

(2) *Fairness of redress within the incorporation?*

We also have concerns about how equitable the distribution of the proceeds of a binding recommendation would be within the incorporation. Mr Haronga's evidence was that, while the shareholders of the incorporation would need to be consulted about the destination of the monetary compensation from a binding recommendation, it would probably be paid out in additional shares and 'possibly a special commemorative dividend'.[10]

However, the shareholding in the incorporation is not evenly spread over the hapū members of Te Aitanga a Māhaki who make up that shareholding. In fact there is a concentration of shareholding in some owners, so that within the incorporation membership itself, the redress would not be evenly or equitably distributed.[11] While the loss of the larger shareholders in 1961 would have been greater than the loss to the smaller shareholders, they would also have received a correspondingly larger dividend when the purchase price was paid out. If the 1961 land was returned to the incorporation, the larger shareholders' interest in the land would be correspondingly greater than that of the smaller shareholders, and that is to be expected. But the cultural and spiritual prejudice was suffered by the shareholders equally – the owner of a smaller interest in land feels the cultural and spiritual loss of their interest as keenly as a larger shareholder. Any distribution by shareholding of the monetary

9. Document M4, pp 3–4; docs M4(a)–(h)
10. Transcript 4.29, p 21
11. Documents K16, K16(a), K16(b)

compensation attaching to a binding recommendation would mean that larger shareholders benefit more than others. We query whether distribution of the monetary redress on the basis of shareholding would be equitable in these circumstances.

More significantly the shareholders in the incorporation would benefit from a binding recommendation in their individual capacities. They would also be entitled to benefit from the rest of the Māhaki settlement by reason of their hapū affiliations; but not all Māhaki members are shareholders in the incorporation. That means that there would be a distinct difference in the way different classes of claimants were compensated. As a matter of principle we struggle to see the justification for this outcome. The breach suffered by the members of the incorporation was serious, but so were many other breaches suffered by all claimants in the Tūranga district. It is only by the happenstance of the location of the forest that this difference in possible redress arises. It seems to us that the members of the incorporation would, as a result, gain disproportionately in comparison to other claimants. This is simply unfair.

(3) *Fairness to other claimants*

At a broader level we must consider the question of the fairness of a binding recommendation in favour of the incorporation in the context of the total quantum the Crown has offered to the rest of the claimants. Although the figures presented in evidence by the Crown in respect of the schedule 1 compensation are indicative only, nevertheless it is clear that the total value of the package which Mangatū Incorporation would receive pursuant to a binding recommendation represents, at the minimum compensation level, close to one-fifth of the total quantum of the Māhaki package offered by the Crown.

The incorporation has recognised the prejudice that would be caused to other claimants if the amount of compensation the incorporation received through a binding recommendation was deducted from the total quantum the Crown offered to the rest of the claimants. The problem is that the Tribunal has no power to ensure that the settlement quantum is not reduced.

Even if the Crown were minded to preserve the settlement for the other claimants, real questions of fairness and proportionality clearly arise as to the relative level of redress that the other claimants might receive. The claims for which TAMA is seeking redress include the district-wide claims relating to the attack on Waerenga a Hika, the arrest and deportation of close to a quarter of the adult male population of Tūranga, the summary execution of prisoners at Ngātapa, the forced deed of cession, and the loss of control over their lands in the wake of the Crown's imposition of the Poverty Bay Commission and the Native Land Court. The prejudice flowing from these claims is, in every sense of the word, incalculable. The specific claims of Te Whānau a Kai include substantial loss of interests in land both within the Tūranga district and in the Te Urewera inquiry district. Te Whānau a Kai also filed claims in the East Coast district which may never be heard. Ngā Ariki Kaipūtahi suffered losses

in respect of the very land which makes up the Mangatū forest. Both these latter groups are part of the cluster of claimants who have suffered prejudice from the Crown's wider breaches as well.

If we were to make a binding recommendation in favour of the incorporation it would be generously compensated for the 1961 breach. The settlement package offered to other claimants by the Crown is not full compensation, but is a package intended to restore the claimant groups' well-being and their relationship with the Crown. There is an inherent material difference in the economic value of the redress the different groups would receive if we were to recommend return of the land to the incorporation as a binding recommendation. We consider that the difference between the generous compensation that the shareholders of the incorporation would receive as compared to the other claimants, given the extent and seriousness of their breaches and the prejudice flowing therefrom, would be inequitable and unfair to other claimants.

We do not consider that it is practicable for the Crown to increase the total settlement package in order for there to be some congruency between the redress the incorporation would receive under a binding recommendation and the redress to others. We say this because, by invoking this separate pathway for redress under the forestry settlement, the incorporation is asking for return of the land on an acre-for-acre basis plus monetary compensation. The land losses suffered by the other claimants as a result of Treaty breaches were immense. To be fair to those claimants they would also need to receive an acre for every acre lost plus monetary compensation.

If we then factor in redress for claims arising from the Crown's destruction of the autonomy of Tūranga hapū and iwi, both by force as at Waerenga a Hika, and by policies and laws designed to usurp the right of Tūranga communities to decide their own questions of land title and to protect their land from alienation, we are looking at a very large settlement indeed. Previous Tribunals have adopted a restorative approach to remedies because, amongst other reasons, dollar for dollar, acre-for-acre redress was not politically possible or economically affordable. The Crown settlement policy does not provide for such redress, and there is very little likelihood that the Crown would or could make an exception in this case. The fact that other Māori groups have settled on the basis of the Crown's current settlement policy means that the Crown cannot now act inconsistently with that policy.

(4) *Could the Tribunal also make binding recommendations for other applicants?*

What about the possibility that the Tribunal might at least be able to prevent any discrepancies between settlements for claims within the Māhaki cluster by making other binding recommendations? The incorporation argued that it sought only one-quarter of the total CFL land, leaving the balance available for the remainder of the claimant groups.[12] The

12. Document M7, p 25

Waipāoa block is the area of the Mangatū forest which falls into the East Coast inquiry district. No Tribunal inquiry has taken place in that district so that there are no findings of well-founded claims there. Nor do we have any evidence as to those hapū or iwi who may have customary interests in the Waipāoa block. In fact we simply do not know all the other claims that might 'relate to' that land. We acknowledge that there has been a settlement in the East Coast district but it is still possible that there are other claims not settled under that legislation. This has two implications. The first is that since there are no well-founded claims in that district we do not have the statutory prerequisite to make a binding recommendation in relation to the Waipāoa block. The second is that without being certain that we are apprised of all the claims and the associated evidence in relation to the block we could not properly make any binding recommendations.

That leaves just under half of the forest within our inquiry district, that is, the Mangatū 2 block (4,080 hectares), which could be the subject of binding recommendations in favour of other claimants. But this raises further problems. In the first place it would be very difficult for the Tribunal to determine the relative value to be assigned to the prejudice suffered by each group of applicants in order to determine the relative portions each should get in this remaining part of the forest. This would mean making invidious comparisons between the different types of losses, between the general district-wide historical claims and the more specific claims.

Secondly, if the Mangatū 2 block represents the majority of Crown land left in the district the other applicants would unquestionably be in a worse position than the incorporation if we had to divide that block between them. As we noted above, the Māhaki cluster lost a far greater amount of land through various Crown breaches than 4,080 hectares. We do not have enough evidence at this stage of the remedies process to determine what other land in the district might be the subject of section 8A recommendations (binding recommendations in respect of current or former State enterprise land, not being CFL land). However, we do not have much doubt that there is insufficient other land available to provide acre for acre redress. Thus we cannot guarantee that the redress we could deliver by way of binding recommendations to the other claimants would be proportionate to that received by the incorporation.

A further aspect to the issue of fairness within the inquiry district as a whole is that making binding recommendations that increase the size of redress to the Māhaki cluster is problematic when we take into account the levels at which the Ngāi Tāmanuhiri and Rongowhakaata settlements have been agreed. The Māhaki cluster settlement would not just be larger than those, it would be significantly larger. The Tūranga report suggested settlement proportions that appear to have influenced the Crown as to the relative sizes of the settlements as between the Māhaki cluster and the other two iwi groups.[13] In addition

13. Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, vol 2, pp 750–751

the Crown adjusted the Māhaki percentage of the regional Tūranga settlement package upwards slightly during negotiations, and that is the basis on which the other two groups have settled.[14] Even if the other groups take a generous attitude towards an increase in the Māhaki settlement, we consider that in the long term it would cause real risk to the durability of settlements in the region if the Tribunal were to make binding recommendations that undercut those relativities. The same concern applies if the Crown were significantly to increase the settlement to the Māhaki cluster.

Although the incorporation application only asks for a binding recommendation for the whole of the 1961 land, the Tribunal's consideration of the matter does not simply end there. Two further possibilities arise. First, to return the land to the incorporation's shareholders without the monetary compensation. Secondly, to divide the land, so as to reduce the amount of monetary compensation in order to provide a fairer outcome. We consider these two possibilities in the next sections.

(5) *Can the 1961 land be returned without monetary compensation?*

The impetus for the incorporation in bringing the application is to obtain return of the land. However, the statutory provisions are such that if we make a binding recommendation for return of the land the monetary elements automatically follow as a matter of law. Section 36 of the CFAA states:

> (1) Where any interim recommendation of the Waitangi Tribunal under the Treaty of Waitangi Act 1975 becomes a final recommendation under that Act and is a recommendation for the return to Maori ownership of any licensed land, the Crown shall—
>
> (a) return the land to Maori ownership in accordance with the recommendation subject to the relevant Crown forestry licence; and
>
> (b) pay compensation in accordance with Schedule 1.

The wording of the statute does not give an option to the Crown about payment of the schedule 1 compensation. It says 'the Crown *shall* pay'. It is not a part of the Tribunal's role under the CFAA to order the compensation to be paid or not. The legislation simply directs the Crown to pay it. Our jurisdiction under section 8HB(1) of the TOWA is simply to make the recommendation regarding the return of the land. While schedule 1 to the CFAA does give the Tribunal jurisdiction to recommend compensation of more than 5 per cent, we cannot reduce the 5 per cent amount (see appendix III).

Similarly, the accumulated rentals that accompany the return of CFL land are not governed by the TOWA. The provisions in relation to the accumulated rentals are contained in the CFRT deed and the Tribunal has no power to alter those provisions.

14. Document 130, p 6

Section 8HB(1)(a) allows the Tribunal to make a binding recommendation subject to terms and conditions. The Supreme Court itself said:

> [The Tribunal] may return part only of the land or specify the Māori or group of Māori to whom the 1961 lands or the balance of the Mangatu forest should be returned. Although compensation under sch 1 goes with the land, the Tribunal may recommend return with or without additional compensation and in any event may order terms or conditions. (It may be, for example, that some adjustment to any additional compensation or the imposition of terms or conditions is considered if the Tribunal finds that the price paid to Mangatu Incorporation in 1961 was fair.) The Tribunal has ample power to impose terms and conditions and to adjust interests if that seems necessary.[15]

Although the Supreme Court in the *Haronga* case was not required to consider the question of the compensation which might accompany a binding recommendation, so that its comments are obiter, the wording used in this passage from the Court's majority judgment is instructive. The Supreme Court has recognised that the automatic 5 per cent schedule 1 compensation goes with the land, and the Tribunal has no power to alter that. The only additional compensation the Tribunal is able to adjust in relation to the incorporation is the schedule 1 compensation over 5 per cent. But we have already determined that, taken with the accumulated rentals, the 5 per cent automatic compensation would provide more redress than the incorporation requires for restoration of its well-being.

We have considered whether we could make the recommendation conditional upon the incorporation returning the monetary elements of the compensation or passing it on to other claimants. The incorporation did not suggest this possibility; rather it was something that occurred to us after considering the proposal by Ngā Ariki Kaipūtahi. However, there are considerable problems with splitting the monetary compensation from the land in this way, the chief one being that such an arrangement appears to run counter to the intentions of the forestry settlement. As we mentioned in chapter 2, the land, accumulated rentals and schedule 1 compensation are a package deal. When a binding recommendation is made the land is returned to the successful Māori applicant subject to the encumbrance of a forestry licence – the schedule 1 compensation offsets the encumbrance. The accumulated rentals represent the compensation to the successful applicant for the return that they could have received from the land if it had been returned to them at the time of the sale of the forests. The monetary compensation is thus tied to the land, and was never intended to be separated from the land. That is why we say that it is a package deal. The provisions of the forestry settlement seem to mean that if the Tribunal wishes to adjust the amount of monetary compensation an applicant might receive then it can only be done by adjusting the amount of land the applicant receives.

15. *Haronga v Waitangi Tribunal* [2012] 2 NZLR 53, 90

Nor does the scheme of the legislation seem to allow for a splitting of the compensation from the land, so that an applicant gets the land only. For example, section 8 HB makes it clear that the recommendation we make to the Crown is about the land: the section says that we may include in our recommendation under section 6(3) a recommendation for return of *the land*. Recommendations the Tribunal makes under section 6(3) are recommendations to the Crown. We do not see how it would or could work to make a recommendation to the Crown for return of the land to the incorporation subject to a condition that the incorporation returns the monetary compensation or passes it on to other claimants. This would be tantamount to imposing a condition which would have the effect of defeating a statutory entitlement.

In the absence of any ability to enforce a condition that the incorporation passes on the money, the Tribunal would need to rely on the good faith of the parties to make the proposal work. We cannot do that: there would be too many uncertainties involved. We note that if all the parties were engaged in settlement negotiations then there are opportunities for adjustments of this kind to be made. They are just not possible under the current statutory regime if a binding recommendation is made.

(6) *Can the land be divided to provide a fairer outcome?*

We now consider whether a binding recommendation to divide the 1961 land, and return a portion of it to the incorporation is the best way to provide redress for the cultural and spiritual prejudice suffered by the shareholders of the incorporation. There are, however, two sets of difficulties in adjusting the land interests:

- assessment of just how much of the 1961 land to apportion to the incorporation as compared with other claimant groups; and
- practical difficulties if the land were to be divided on the ground.

The issue of how to assess the amount of land to be apportioned involves the question of how we can provide fair, equitable, and proportional redress to the various claimants, without creating fresh grievances. In considering these matters we have looked at whether we could give a divided interest (a properly surveyed-out portion of the land with separate title) to the incorporation as well as the possibility of giving an undivided interest. In the end the same question arose – what is to be the amount of the interest whether divided or undivided? This question also brings us up against the claims and interests of other claimants, and how to assess the effect of those claims in terms of the land to be given to the incorporation.

In relation to what would be appropriate redress for the claims of TAMA, it will be remembered that, as a result of the deed of cession, Te Aitanga a Māhaki lost the Te Muhunga block of 5,395 acres (2,183 hectares). Nearly half their rohe was alienated following the operations of the Native Land Court. About 100,000 acres (40,500 hectares) were lost

by TAMA claimants through sales by the New Zealand Land Native Settlement Company, the 1891 mortgagee sale, sales by the Carroll Pere trust and sales by the East Coast Native Trust Lands Board.[16] While the Crown does not bear the major responsibility for the losses through the Company, the same cannot be said for the failures of the Tūranga trusts.

The specific claims of Ngā Ariki Kaipūtahi and Te Whānau a Kai also complicate the question before us. They mean that we cannot deal with the redress for the incorporation claim in isolation. One issue concerns the nature of each claimant group's interest in the land. For instance, which particular part of the 1961 land should be returned to the incorporation when Ngā Ariki Kaipūtahi have argued that they have an interest in all of the forest including the 1961 land? The incorporation argued that the Tribunal should be wary about giving too much weight to the Ngā Ariki Kaipūtahi claim – that it should not be allowed to displace the incorporation's claim. In particular, the incorporation submitted:

(a) As the Tūranga report found, it is impossible to say what share of land Ngā Ariki Kaipūtahi would have received if they had been able to reargue their case, and it is too late to argue for a rearrangement of rights in Mangatu now.[17]

(b) Ngā Ariki Kaipūtahi did not have exclusive possession of the land but were a small group who shared land 'intermingled with the other hapū' with whom they shared whakapapa connections.[18]

(c) By the end of the remedies hearings, Ngā Ariki Kaipūtahi sought compensation more than land.[19]

We deal with each of these submissions in turn.

In respect of (a), the Tūranga report was referring to the possibility of rearranging the shareholding, not in the Mangatū CFL lands, but in the Mangatū land held privately by the incorporation. As the Tūranga report also noted the Tribunal does not have jurisdiction to make recommendations affecting private land.[20] The Tribunal's findings nevertheless clearly indicate that the effect on Ngā Ariki Kaipūtahi of the Native Land Court decision with regard to Mangatū lands was significant.[21]

In respect of (b), even if Ngā Ariki Kaipūtahi did not have exclusive possession of the land, the trouble is that the incorporation's own title to the 1961 land ultimately stemmed from the 1881 decision of the Native Land Court which the Tribunal has found to be unsafe. Returning the land solely to the incorporation would, in our view, operate to compound the prejudice that Ngā Ariki Kaipūtahi suffered from the original 1881 court decision, and the Crown's subsequent legislative intervention in 1917. That intervention resulted in the inequitable reduction of Ngā Ariki Kaipūtahi shares after the Crown empowered the Native

16. Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, vol 1, p xxi, vol 2, pp 405, 472, 580–582; doc H1, p 79
17. Document M7, p 32
18. Ibid
19. Ibid, pp 25, 32–35
20. Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, vol 2, p 694
21. Ibid, p 691

Land Court to investigate the title of members of Te Whānau a Taupara hapū with the view of adding them to the list of owners of Mangatū 1 and 4 blocks.

In respect of (c), we agree that the Tribunal ought to pay attention to the redress that the claimants themselves ask for, rather than imposing the Tribunal's own ideas of what redress the claimants need. Ngā Ariki Kaipūtahi suggested that they be given redress for their grievances by way of a binding recommendation that would return the land and would bring with it monetary compensation. Most of the land would then be transferred by Ngā Ariki Kaipūtahi to the incorporation and other claimants. In our view the stance taken by Ngā Ariki Kaipūtahi was an attempt to find a conciliatory way to meet the Mangatū Incorporation shareholders' desire for return of the land, while at the same time obtaining the wherewithal needed to restore their own hapū to economic, cultural, and social well-being. That said, Ngā Ariki Kaipūtahi were clear that they sought some land as a focus for their community, as well as compensation. It was also clear that Ngā Ariki Kaipūtahi sought land as a way to help re-establish themselves as a distinctive group, albeit one with strong connections to other groups.

That leaves the Tribunal in the position of being unable to disregard the effect of the Ngā Ariki Kaipūtahi claim on the incorporation's application, but without any easy way to resolve these issues within our jurisdiction to make binding recommendations.

The incorporation's stance in relation to the Te Whānau a Kai claim was that such a claim should not be allowed to displace the claims of those with direct customary rights in the land. The incorporation submitted that there was CFL land in the Waipāoa block and also other land available that could be resumed under section 8A of the TOWA to satisfy Te Whānau a Kai's needs for redress.[22] The argument that those with stronger customary interests should be given priority over those with a weaker connection to the land would have more sway if the Tribunal could be sure that the Crown did in fact have sufficient other land available to provide fair and equitable redress to Te Whānau a Kai. But we simply cannot be sure of that. The Waipāoa block is outside the Tūranga inquiry district and, as we have already said, is not the subject of Tribunal findings. It is certainly possible for Te Whānau a Kai to make an application for a binding recommendation in relation to other land within the district, but again there is no guarantee that they would succeed with that application, or that, if they did, it would provide them with redress that is proportional to the redress that the incorporation would receive. However, the current hearings are confined to the Mangatū forest within the Tūranga inquiry district and so we are left with the same problem of determining how to divide the forest to ensure equitable redress for each claim.

We have considered the possibility of reducing each claimant's share in the land on a pro rata basis. If we could accurately determine, or even come to a reliable approximation of, the land interests lost by each claimant, and determine the percentage proportions each

22. Document M7, pp 35–37

claimant's loss bears to the others, then we might be able to divide the forest amongst the claimants roughly according to those percentages. But a number of difficulties arise with such a process.

First, we have already noted that we cannot accurately determine the shares Ngā Ariki Kaipūtahi would have had in the Mangatū lands if no Treaty breach had occurred, so we could not be sure as to the proportion that should be allocated to them. Secondly, we would be relying to some extent on the allocation of interests made by the Native Land Court in respect of each claimant, but the system of title and tenure imposed by the Native Land Court in accordance with the provisions of the native land legislation was part of the problem. The court's decision in 1881 in respect of Ngā Ariki Kaipūtahi is a compelling example of why we would not be able to rely confidently on the court's assessment of interests. The Tūranga report says:

> We voice a note of caution when dealing with the records of the Native Land Court, particularly if they are not combined with other, oral sources. It is unwise for Native Land Court records to be relied upon uncritically. As is the case with traditional evidence adduced in the Tribunal, we need to be conscious of the context in which evidence was given before the court, the kinds of imperatives operating when cases were being argued, and the importance of the internal consistency of evidence.[23]

The third problem is that claimants do not always agree with other claimant groups as to the interests each held in particular land blocks. An example of a disagreement of this sort is demonstrated by the manner in which the ratio of compensation for the Patutahi blocks was fixed on a 60:40 basis in favour of Rongowhakaata. Te Whānau a Kai say that they 'reluctantly agreed to this split as [they] did not have much of a choice at the time'.[24] Clearly, some period for discussion and negotiation would be required to settle other such disagreements, but we have no certainty that they would be able to be settled. Even if they could, this would involve further delay.

The fourth problem is that even if we could overcome the inherent uncertainties involved in reliably determining the interests in blocks of land which passed out of the hands of the various hapu in the nineteenth and early twentieth century, the fact is that under customary tenure these interests were fluid anyway.

In short, we do not consider that we *could* accurately determine the interests that each claimant has lost, bearing in mind that in Tūranga shared whakapapa connections and relative proximity would have meant that there were overlapping interests in various areas. If we decided to try to pro rata the redress based on incomplete information and possibly flawed previous assessments, we think we would be heading down an unconstructive and

23. Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, vol 1, p 19
24. Document M6, para 9.10

possibly divisive road. Such an exercise would bear some similarity to the Native Land Court's operations, and we wish to avoid that if at all possible.

In addition, we would still be at a loss as to how to factor in redress for the general district-wide historical claims. Those claims do not lend themselves to any kind of pro rata calculation, and redress for those Treaty breaches must be considered in a different way altogether. Nor are we certain of what other redress is available to the Crown to provide in respect of these wider claims. All these problems point to the wisdom of having a comprehensive settlement process which applies a restorative approach – where what the claimants need to restore their well-being and their relationship with the Crown is considered rather than a possibly endless investigation of the exact delineation of their losses.

After considering the possibility of making a binding recommendation in respect of part of the 1961 land, we have come to the view that it would be extremely difficult to determine what share would offer fair and proportionate redress to the shareholders in the incorporation when taking into account the prejudice they suffered, as compared to that suffered by other claimants. There are also practical difficulties associated with dividing the CFL land, which we now go on to discuss.

(7) *Practical difficulties in dividing the land*

Forestry is a difficult industry to manage successfully due to the long period between having to pay the costs of establishing a forest and receiving the return when it is harvested, generally in 30 plus years time. This means that an applicant group receiving this form of redress needs to have high quality organisational capabilities. Further, if the applicant group means to take over the management of the forest, rather than licensing a forestry company, it will also need a strong capital base to be able to cope with the vicissitudes of the forestry industry. We consider that the incorporation is of a size and capability to handle this sort of redress. The incorporation already manages forests of its own. However, there are other practical difficulties that would need to be faced in managing the forest on the 1961 land.

Mr Haronga's evidence was that, if a binding recommendation were made to return the 1961 lands to the incorporation, then it would separate that land out from the rest of the Mangatū CFL lands to work it with the incorporation's own forestry holdings (see chapter 4).[25] But we received evidence from John Ruru (a witness for TAMA) and Mr Marren (a Crown witness) about the practical difficulties of dividing up a working forest along the boundary of the 1961 land. Mr Ruru has worked in forestry for most of his working life. He was the officer in charge of Mangatū forest in 1975 and established the last part of the Mangatū forest in 1978. He has also been a member of the committee of management of Mangatū Incorporation. He advised the Tribunal that, because of the topography of the land, the straight line boundary between the Mangatū 1 and Mangatū 2 block was not a

25. See doc 117

practical boundary on which to divide the forest, and that it was difficult to manage one block separately from the other. Mr Ruru also advised that the costs of access to the forestry infrastructure would be more expensive if the forest was divided in two than if it was kept as a single block.[26] We accept Mr Ruru's evidence.

Mr Marren is a forestry consultant with many years experience in forestry. The main part of his evidence related to the methods of calculation of compensation under schedule 1 of CFAA, but he also gave evidence about some of the practical difficulties in dividing up the forest. When asked about the possibility of dividing the forest he said:

> It does have difficulties because the forest has been run as a whole. The compartment boundaries have been set up for the forest as a whole. The roads have been set up for the forest to run as a whole. Now especially in hauler country, which is a steep country, often a skid site will extend both sides of the road. So the logic is for economics your harvest might be in compartments 2 and 3 or 12 and 13, side by side areas at the same time. Now if you're going to do this sort of division, you need to get on the ground with the forest manager to actually ensure it's going to work for them currently and future. Because if you impose this sort of thing on the current forest manager, the first thing he'll ask for is a rent reduction 'cos it adds to their cost of operation. And that is neither an interest for either side of the line, 'cos you want to preserve your rental string. Equally, when you look at the forest map a number of the roads cross those boundaries so there has got to be reciprocal agreements for road access.[27]

Later, he was asked whether it would be possible for neighbours in the forest to deal with their parts of the forest separately. Mr Marren replied:

> In this instance, they'd struggle to go their own separate ways; the way the road network is set up if it came to an impasse in a block on certain spots. And that has happened elsewhere . . . But you can see, if you look down in here [*pointing to a map in evidence*], there's a roading network coming through here. Now you can't – it is very limited opportunity to come back up this way so you're actually coming down. Similarly in some of these sides, further roads here, you've got this artificial boundary line coming down through here and you've got some roads virtually going around on a contour. Now you can't get up to the next road without coming back down. I stand to be corrected by John Ruru of course. But in essence a contour road, you can't get – without coming back to the common point you can't sort of just suddenly decide to drive off uphill.[28]

So clearly management and access issues arise if the Mangatū CFL lands are divided. Earlier in his evidence Mr Marren had also pointed out that the Crown did not have proper

26. Transcript 4.28, p 413
27. Transcript 4.29, pp 192–193
28. Ibid, p 193

legal definitions of the land blocks in the forest.[29] Although he did not say so, the Tribunal saw this as another indication that the forest was run as a single unit and that there would be survey issues and costs to the forestry operation to deal with if there were to be a division of the forest on the ground by splitting off the 1961 land.

A final practical matter that we can hardly overlook is that the Mangatū forest is situated on difficult, erosion prone land. The 1961 land includes the Mangatū and Tarndale slips which are still continuing to erode. While much of the forest is able to be harvested if the forest is carefully managed as a whole, there are certain areas that will never be harvested because of the erosion danger, the topography (particularly high, steep parts of the forest) and because it is uneconomic to harvest such areas. Thus the uneven nature of the forest and the variability of the land raise considerable problems in determining how to divide the forest equitably.

The practical difficulties of dividing the forest on the ground are likely to be costly and time-consuming and it would be hard to do it fairly. There would also be significant survey, title and management costs. While these practical problems may be able to be solved and would not, on their own, be determinative, in our view they weigh in the balance against a division of the 1961 land.

(8) *Conclusion on the Mangatū Incorporation's application*

We acknowledge that the incorporation has a well-founded claim in relation to a Treaty breach involving the loss of thousands of acres of land. The incorporation was founded with the purpose of trying to retain as much land for the Māori owners as possible, and the thought that this is the only land they have lost is a bitter one for the owners. Their desire to regain the land is entirely understandable and their application for a binding recommendation must have looked like a straightforward way to try to achieve that. Moreover we consider that the incorporation is of a size and organisational capability to receive redress which involves the ownership and management of a forest of variable quality sited on difficult, erosion-prone country. Our decision not to grant the incorporation's application has not been taken lightly.

Our main reasons for declining the Mangatū Incorporation's application for a binding recommendation for the return of the whole of the 1961 land are:

(a) The return of the land together with the accompanying accumulated rentals and schedule 1 compensation, even at the 5 per cent level, is more than what is necessary to compensate for or remove the prejudice suffered by the incorporation shareholders.

(b) The whole package of land and monetary compensation that the incorporation would receive pursuant to a binding recommendation would be disproportionate compared to the total settlement package that was offered by the Crown to the Māhaki cluster to

29. Transcript 4.29, pp 187–188, 192

remedy serious Treaty breaches. Redress that seems to unduly favour one claimant is likely to create fresh grievances which will impede the restoration of the incorporation's relationship with other claimants and their relationship with the Crown.

(c) A binding recommendation for the whole of the 1961 land provides acre for acre redress. If the same criterion of an acre of redress for each acre lost as a result of Treaty breaches is applied to other applicants of the Māhaki cluster then the increase in the settlement package would be very large. In our view, such an increase would not be sustainable either economically, practically, or politically. It would undermine the basis on which other settlements have been concluded. Nor could the Tribunal guarantee that such an increase would happen. That is especially so because the settlement packages offered to Ngāi Tāmanuhiri and Rongowhakaata, the other main claimant groups in the Tūranga district, were negotiated relative to each other and the Māhaki cluster settlement package. We have insufficient evidence to know whether it would be economically feasible either.

(d) The restorative approach seeks to restore the economic, social, and cultural well-being of the claimant, rather than to punish the Crown. The incorporation does not require economic or financial restoration.

(e) The statutory schemes of the CFAA and TOWA do not allow us to adjust (except upwards) the monetary compensation that would pass with the land to the incorporation so that we cannot deduct the monetary compensation so as to provide the incorporation with redress that is proportionate to the redress other claimants will receive.

(f) As for the possibility that the 1961 land be divided, and a portion of it be returned to the incorporation, the problems of determining what would be a fair and equitable portion of the land for the incorporation as compared to other claimants weigh against granting a binding recommendation in respect of a share of the 1961 land. The practical problems associated with dividing the land, while not determinative, also count against making a binding recommendation. We consider that the uncertainties involved in granting a portion in the land are such that we should not exercise our discretion in this way.

The difficulties associated with providing even a portion of the 1961 land to the incorporation strongly suggest that these matters require constructive discussion, compromise, negotiation and reasonable agreement amongst all the parties. We are not persuaded that the process we are currently engaged in, which is focused on whether to make a binding recommendation in favour of the incorporation, lends itself at all to such negotiations. Although there is a 90-day negotiation period before an interim recommendation of the Tribunal becomes final, that period only begins after the Tribunal has made a recommendation, and there is no incentive to those favoured by such a recommendation to negotiate with other claimants. If the Tribunal *were* minded to make a recommendation so as to give a portion of the 1961 land to the incorporation we would be basing our decision on

incomplete and possibly flawed information. In such circumstances we recognise that it is only the claimants who can decide what is fair and equitable among themselves. It is their right and responsibility to do so.

We have determined that we should apply the restorative approach. The issue then becomes one of putting in place what is required for the various groups to prosper in the future, rather than trying to disentangle all the errors of the past. That means that redress involving return of land becomes a possibility not just for the incorporation but also for the other claimants. If the claimants are prepared to negotiate with the Crown and to compromise with each other then there is clearly another avenue by which the incorporation can obtain return of the land, or some of it, without the need for a binding recommendation – one which would allow all the claimants to decide how to apportion the land fairly themselves. We take this into account in considering the other applications for binding recommendations, bearing in mind that the issues of fair and equitable redress that arose in relation to the incorporation's application discussed above, will also apply to other applications.

6.3.2 Ngā Ariki Kaipūtahi's application

As we noted in chapters 3 and 5, Ngā Ariki Kaipūtahi have a well-founded claim that relates directly to the Mangatū 1 block (in which the 1961 land is situated) and the Mangatū 4 block. The claim centres upon the impact of an unsafe Native Land Court decision of 1881, and the subsequent failure of the Crown to allow Ngā Ariki Kaipūtahi to reargue their case in 1917 when Te Whānau a Taupara were afforded the opportunity by legislation to have their rights inquired into by the Native Land Court. Ngā Ariki Kaipūtahi's share in the land was also disproportionately diminished when Te Whānau a Taupara were given shares in the land. The Tūranga report found that Ngā Ariki Kaipūtahi suffered prejudice involving significant damage to their identity and mana, and diminution of their share of the ownership of the land.[30]

We heard further evidence from Ngā Ariki Kaipūtahi witnesses as to the customary importance of the Mangatū lands, on which were located a number of wāhi tapu (sacred sites). Ngā Ariki Kaipūtahi also provided evidence regarding the economic prejudice they suffered. While we have found that their evidence is problematic in relation to their economic losses, Ngā Ariki Kaipūtahi's own minimum figure of loss was $9.1 million, rising to $122.6 million depending on the amount of shareholding they might otherwise have had if the Treaty breaches had not occurred.[31] The Tūranga report said that 'we are unable now to say what rights would have been allocated if Ngariki Kaiputahi had been able to properly reargue their case',[32] but we are in no doubt that they have suffered considerable economic

30. Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, vol 2, p 124
31. Document K9(a), p 1
32. Ibid, p 694

loss in respect of this claim. Thus Ngā Ariki Kaipūtahi have a significant claim in their own right in respect of their specific Mangatū land grievance.

They also share in the general district-wide historical claims of the Māhaki cluster. We need not repeat here the extent and seriousness of those breaches and the prejudice that resulted from them. Full redress to Ngā Ariki Kaipūtahi therefore concerns not only the Mangatū land claim, but also these other claims. The difficulty of establishing the amount of land and economic redress needed for the Mangatū land claim, together with the need for other kinds of redress for Ngā Ariki Kaipūtahi make it all the more apparent that a comprehensive settlement of their claims is required.

Restoration for Ngā Ariki Kaipūtahi will need to take account of the different kinds of prejudice they suffered, so there will certainly be a need for money sufficient to provide an economic base to sustain and strengthen their community. As the Tūranga report noted an apology from the Crown for what happened to Ngā Ariki Kaipūtahi in respect of their specific claim is also called for.[33] Clearly, redress would also include some land to recognise the land loss suffered as a result of this Treaty breach and to support their wish to regain their mana on the land.

At the opening of our remedies hearings, Ngā Ariki Kaipūtahi put forward a proposal for providing them with redress through a binding recommendation. The Tribunal must give serious consideration to remedies the applicants themselves seek on the basis that they know best what is needed to restore and nurture the well-being of their hapū. We must therefore begin by considering whether Ngā Ariki Kaipūtahi's proposal is workable. We also need to consider whether the redress sought by Ngā Ariki Kaipūtahi is fair and proportionate, taking into account the circumstances and needs of other applicants. Practical matters, such as whether the Ngā Ariki Kaipūtahi groups who appeared before us have a mandate to represent all Ngā Ariki Kaipūtahi people, and whether they have the capacity and capability to receive and to manage the redress they seek, must also be taken into account.

(1) *Is Ngā Ariki Kaipūtahi's proposal workable?*

In closing submissions, Ngā Ariki Kaipūtahi reaffirmed the proposal made during hearings that the Tribunal could recommend that all the Mangatū CFL land in the district be returned to Ngā Ariki Kaipūtahi. That recommendation would be subject to the condition that Ngā Ariki Kaipūtahi would pass that land on to other claimants as directed by the Tribunal, while retaining the monetary compensation that accompanies a return of the land. They also sought to retain a small block of land (100 hectares) as well as the capital endowment.[34] Mr Lloyd for Ngā Ariki Kaipūtahi characterised their proposal that they receive money and only a small block of land as 'a very big compromise'.[35] In dealing with this

33. Ibid, p 695
34. Document M8, pp 5–6
35. Transcript 4.29, pp 97–98

proposal it was not altogether clear to us whether Ngā Ariki Kaipūtahi saw this as compensation for the specific Mangatū claim alone or for all their claims.

The Crown's indicative figures for schedule 1 compensation for the forest within the Tūranga district are given only in respect of the Wai 274 claim, not the Ngā Ariki Kaipūtahi claims (Wai 499 and Wai 507). However, for our purposes in this stage of the remedies process, we consider that the calculations in respect of the Ngā Ariki Kaipūtahi claim can be approximated to the figures for the Wai 274 claim, as any difference would be as a result of the date of filing of the claims. All Ngā Ariki Kaipūtahi claims were filed much earlier than Mr Haronga's Wai 1489 claim. Bearing in mind that qualification, the compensation at 5 per cent for the Wai 274 claim would be approximately $896,885 at a minimum (clause 3(a) method of calculation) and at a maximum of $6,031,900 (clause 3(c) method). At 100 per cent, the maximum schedule 1 compensation figure is $120,638,000. The figures calculated for the Ngā Ariki Kaipūtahi would, we think, be more similar to these figures than those calculated for the Wai 1489 claim. The accumulated rentals would then be added to this compensation.

Is it possible for the Tribunal to make a binding recommendation such as that proposed by Ngā Ariki Kaipūtahi – that the land be returned to them with the monetary compensation, on condition that they pass the land on to the incorporation or other claimants? In considering the incorporation's application we have already set out why, in our view, the intention of the forestry settlement and the purpose and scheme of the legislation does not allow us to make a condition that would split the land from the monetary compensation. Following through the same sort of reasoning here, a binding recommendation we make to the Crown would provide that land should be returned to Ngā Ariki Kaipūtahi. That recommendation triggers the automatic payment pursuant to the CFAA of 5 per cent of the schedule 1 compensation. The accumulated rentals follow the destination of the land under the provisions of the CFRT deed. These payments represent redress for economic losses associated with the failure to return the land at the time the Crown sold the forest, and the fact that the land is returned subject to the encumbrance of the forestry licence.

The Crown is required by the CFAA to pay the schedule 1 compensation, but we do not see how the Crown can then ensure that Ngā Ariki Kaipūtahi passes on the land to the incorporation or other claimants. As we reasoned earlier, a binding recommendation in favour of Ngā Ariki Kaipūtahi which contains a condition that requires Ngā Ariki Kaipūtahi to pass the land on to other claimants is tantamount to defeating the statutory entitlement that our recommendation is supposed to have conferred on Ngā Ariki Kaipūtahi. We are simply not satisfied that such a condition would be enforceable as a matter of law, except, perhaps, by relying on the good faith of the applicant. With respect we consider that there is too much uncertainty in that course of action for us to contemplate it. Thus we consider that Ngā Ariki Kaipūtahi's proposal is not in accordance with the statutory scheme or the intention underpinning the forestry settlement.

(2) *Fair redress?*

Even if we are wrong about whether the Ngā Ariki Kaipūtahi proposal complies with the statutory scheme, we are still faced with the issue as to what constitutes fair and equitable redress for Ngā Ariki Kaipūtahi, when their claims are considered in comparison to the other claims in the district. In Ngā Ariki Kaipūtahi's case the Tūranga report specifically makes the point that it is not possible to say what rights would have been allocated to Ngā Ariki Kaipūtahi in the Mangatū blocks had the 1917 legislation allowed them to properly reargue their case,[36] so we are unable to calculate the actual loss in a robust way. Moreover how would we go about balancing interests between these claimants and other claimants of larger groups? How do we balance the redress needed for the specific claim of Ngā Ariki Kaipūtahi with the redress needed for wider general claims of the whole Māhaki cluster?

If we granted the recommendation and Ngā Ariki Kaipūtahi did in fact pass the land on to other claimants, we could not be sure that other claimants would get a similar level of redress for their claims – claims which also include the wider district claims and the loss of many thousands of acres of land. We say this bearing in mind that the Mangatū forest is probably the most significant piece of commercial redress available in the district. If other claimants cannot receive a proportionate level of redress to Ngā Ariki Kaipūtahi, that would inevitably create a new grievance because of the inequity between claimants. As the Tūranga report says, 'a new injustice should not be generated to correct a past injustice'.[37]

In terms of apportioning (dividing) the land or the monetary compensation by way of a partial return of land the same arguments apply to Ngā Ariki Kaipūtahi as applied to the incorporation. First, a comparison would need to be made between the different claims as to their relative significance and the relative seriousness of the breaches, and then we would need to translate those factors into an amount of land that each party would get. We have already shown, when discussing the incorporation's application, why a pro rata allocation of a portion of the Mangatū land would be nigh on impossible just in relation to the applicants' claims that relate to land loss arising from Crown Treaty breaches alone. The problems with attempting such an allocation, as we have already shown, include quantifying the amount of land lost by each group. We would also have to use possibly flawed and incomplete Native Land Court records to establish an understanding of the customary interests held by the different groups in the land. If we try to take into account the general district-wide claims it becomes clear that trying to calculate the allocation to be made to each applicant on this basis is of dubious merit. A further consideration is that if parties disagree with the allocation the Tribunal makes, they have only 90 days to come to agreement about a different allocation. We have grave doubts as to whether this is sufficient time for them to reach an agreement given the difficulties involved. We are not willing to exercise our discretion to recommend a return of a part of the land to Ngā Ariki Kaipūtahi, given all the uncertainties

36. Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, vol 2, p 694
37. Ibid, p 695

associated with determining what fair and equitable redress would be in terms of the portion of the land each applicant should get.

There are also practical considerations to take into account if we were of a mind to divide the CFL land on a pro rata basis. We have already canvassed them when considering the incorporation's application, so we need not repeat them here. Suffice it to say that there would be considerable difficulties and cost involved in giving separate title to part of the land, if that was what the applicants wanted. Even if the applicants would accept undivided interests in the land, so that survey was not necessary and access issues were not a problem, that requires the forest to be managed as a whole. That in turn would require some cooperation between the parties, which might not be easy to attain if the process of determining the interest for each claimant group was troubled by disagreement. While these practical considerations on their own are not sufficient to decline the application for a binding recommendation they weigh in the balance against making such a recommendation.

The issue of what is fair redress to Ngā Ariki Kaipūtahi needs to be considered in the wider context of all the breaches and prejudice identified in the Tūranga report and in our hearings. The redress or partial redress that each party obtains is dependent on the total available redress, and negotiation and agreement between the parties as to what is fair and equitable, bearing in mind the different claims and the extent of prejudice involved. It is far better for the claimants to agree on that themselves – rather than that we impose upon them our view of the relative prejudice suffered and the relative levels of redress to be given to the claimants.

(3) *Ngā Ariki Kaipūtahi's capability and capacity to receive redress*

A further matter weighs with us in considering Ngā Ariki Kaipūtahi's application. As set out in chapter 5 three separate claims were filed on behalf of Ngā Ariki Kaipūtahi, which raised the question during the first stage of this inquiry as to whether the claims were all on behalf of Ngā Ariki Kaipūtahi. Following discussions between the claimants agreements were eventually struck that allowed the claimants to work together during those hearings.[38] While that cooperation has continued on certain levels, for instance they were able to work together during settlement negotiations, it became apparent during our hearings that the division between the claimants still remains to be resolved.[39] We are faced with two distinct groups – the Ngā Ariki Kaipūtahi Whānau Trust and the Ngā Ariki Kaipūtahi Tribal Authority – who have their own separate formal structures and who both claim to hold a mandate for the hapū. The Tribunal cannot be certain as to who truly represents Ngā Ariki Kaipūtahi, and therefore would have difficulty in identifying the Māori or group of Māori to whom the land should be returned under section 8HB.

38. Papers 2.74, 2.134
39. For some evidence of the divisions between the claimants, see transcript 4.28, pp 206, 213, 274, 276–277.

We would also have some concerns about awarding redress in the Mangatū forest to a smaller group such as Ngā Ariki Kaipūtahi, given the practical difficulties associated with managing it, and the size and organisational capacity needed to do so. The Ngā Ariki Kaipūtahi Whānau Trust (the Whānau Trust) has existed for 18 years and has made great efforts to make contact with Ngā Ariki Kaipūtahi descendants, and to nurture their identity as a hapū, including setting up administrative systems and representing the hapū in community organisations. However, the Whānau Trust was not set up for the purposes of receiving settlement redress or to undertake commercial or investment activities.

Any recipient entity for Ngā Ariki Kaipūtahi would need to show that it represented all Ngā Ariki Kaipūtahi people, so that some resolution of the differences between the Ngā Ariki Kaipūtahi Tribal Authority and the Whānau Trust would be required before we could consider making a binding recommendation to return land to a recipient entity. We do not think that the 90-day period between making an interim recommendation and the recommendation becoming final is sufficient to address these important issues of mandate and representation. We would have had to find some way to work through the legislation if we otherwise thought that a binding recommendation should be made in favour of Ngā Ariki Kaipūtahi, but the legislation does not allow the flexibility that might be needed to resolve mandate issues.

We considered the suggestion made during hearings that a custodial trustee could be nominated to receive the proceeds of a binding recommendation until Ngā Ariki Kaipūtahi had developed a suitable recipient entity. The difficulty with this suggestion is that the statute requires us to identify the group of Māori to whom the land is to be returned, and while there are two different entities claiming to represent Ngā Ariki Kaipūtahi the issue of identification would not be resolved by appointing a custodial trustee.

Ngā Ariki Kaipūtahi might be able to overcome all these practical difficulties but the evidence before us did not persuade us that this might be achieved easily or in a timely manner.

(4) *Conclusions on Ngā Ariki Kaipūtahi's application*

We acknowledge that there is a need for the claims of Ngā Ariki Kaipūtahi to be settled and settled promptly. While they are a small group, they undoubtedly have a distinct and significant well-founded claim relating to the 1881 title determination of Mangatu 1 block, the consequences of that determination, the Crown's intervention to partly reopen the question of title, and the Crown's subsequent dealings with that land. The rights of Ngā Ariki Kaipūtahi in the Mangatū land are currently limited to a shareholding in the incorporation as part of the wider community of owners, and their use of resources on the land is limited by the operations of the incorporation. They suffered loss of land, mana and rangatiratanga that has prejudiced them for nearly a century. They also have claims as part of the general district-wide historical Māhaki claims.

6.3.2

Although there are limits to what can be done today to alleviate this prejudice, it is clear that something can and should be done. That said we do not consider it appropriate to grant a binding recommendation in favour of Ngā Ariki Kaipūtahi. In summary, our reasons are:

(a) The Tribunal's findings as to the prejudice suffered as a result of the 1881 court decision and subsequent events relating to the allocation of shares in the Mangatū 1 and 4 blocks indicate that the land loss Ngā Ariki Kaipūtahi suffered cannot now be reasonably identified or quantified.

(b) The calculation of the economic losses flowing from the loss of land is therefore subject to considerable uncertainty.

(c) Even if their loss could be accurately identified and quantified, it would be very difficult to make a reliable assessment of the land lost as a result of Treaty breaches on which to base a fair and equitable pro rata division of the CFL land between Ngā Ariki Kaipūtahi and other applicants. We lack sufficient evidential basis either from the Native Land Court records or from customary evidence to make such an assessment. There is also great complexity and difficulty in determining what would be fair, equitable and proportionate redress for Nga Ariki Kaiputahi's Mangatū land claim and all their other claims, as compared to what the other Māhaki cluster applicants should receive for all their claims. If the actual losses cannot be clearly established or, in fact are unquantifiable, such a determination becomes impossible.

(d) The uncertainties over who exactly represents Ngā Ariki Kaipūtahi mean that we would have difficulty identifying the proper recipient entity to whom the land should be returned.

If the aim of redress for Ngā Ariki Kaipūtahi is to restore their wellbeing a binding recommendation would certainly restore land and money to them, but whether it would restore their mana or their relationship with the Crown and other Tūranga groups is much more uncertain. Redress to Ngā Ariki Kaipūtahi needs to be fair and equitable as compared with the redress other Māhaki cluster groups will receive. We have already observed that we are not in a position to be able to ensure that a binding recommendation in respect of a portion of the Mangatū CFL land and the accompanying monetary compensation would constitute fair and equitable redress for them. Nor are we convinced that Ngā Ariki Kaipūtahi presently have the capability and capacity to receive the redress. Finally, we are not prepared to make a binding recommendation when we do not have the evidence on which we could recommend comprehensive, fair and equitable redress for all claimants. In our view, in all the circumstances of the case, we should not exercise our discretion to grant a binding recommendation to Ngā Ariki Kaipūtahi.

A better approach is for Ngā Ariki Kaipūtahi to overcome the legacy of their internal divisions, which have impeded the resolution of their mandate issues and which set them at a real disadvantage in pursuing settlement of their claims. Only once this is achieved can they effectively engage with the other Māhaki cluster claimants, and enter a negotiated

settlement process with the objective of obtaining comprehensive redress which will deliver them a better future. As with the incorporation's claim, we consider that discussions and negotiations between the parties provide another reasonable avenue to pursue, and will allow the claimants themselves to determine what is fair and equitable between them. The settlement negotiation process also offers much more flexibility than a binding recommendation, so that the parties need not be hamstrung by a Tribunal recommendation with which they disagree, leaving them with only 90 days to negotiate something better.

6.3.3 Te Whānau a Kai's application

Te Whānau a Kai have well founded historical claims that are closely bound up with the general district-wide historical Māhaki claims. Apart from those claims relating to the events at Waerenga a Hika and their aftermath, the story of Te Whānau a Kai centres on the loss of almost their entire Tūranga land base in an appallingly short period of time.[40] Mr Hawea, the main witness for Te Whānau a Kai before us, characterised the land loss they suffered as a result of the actions of the Poverty Bay Commission as 'a principal uncompensated raupatu claim in New Zealand today'[41] – a clear indication to us of the deep sense of grievance felt by Te Whānau a Kai. Counsel for Te Whānau a Kai said this was 'a burning issue' for them, along with numerous others.[42] The economic, spiritual, and cultural consequences of these losses would have been as shattering to their community as any great crisis occasioning loss of homes and livelihoods is to people of any era.

But in Te Whānau a Kai's case their losses were not occasioned by the impact of an environmental disaster, but by the Crown's deliberate and wide-scale breaches of the Treaty. Without resources to support them, the loss to Te Whānau a Kai of their way of life, and the fading of their mana and their rangatiratanga would have been inevitable. It is not to be wondered at that of all Te Whānau a Kai's grievances 'the most painful . . . to them is the suppression of their very identity'.[43] The prejudice experienced by Te Whānau a Kai stems directly from the Crown's determination to impose its own unbridled authority on the district, thus destroying at an early point the basis for a Treaty relationship with Te Whānau a Kai.[44] Te Whānau a Kai have experienced serious breaches, and suffered significant prejudice. They seek a comprehensive settlement of all these claims, whether that includes a binding recommendation or not.

In a comprehensive settlement a restorative approach is necessary to address prejudice which has affected not only Te Whānau a Kai's economic, cultural, and spiritual well-being, but their political autonomy as a distinct, independent group. Te Whānau a Kai reminded

40. Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, vol 2, p 511
41. Document I20, p 7
42. Document M6, para 1.3
43. Ibid, para 1.7
44. Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, vol 2, p 737

us that they have participated separately in their own right in this and in the Te Urewera inquiry, and '[in] their own name they have fought for justice and redress right throughout the 20th century'.[45] As with Ngā Ariki Kaipūtahi, land is an essential element of redress, as is a reasonable putea to assist Te Whānau a Kai to nurture and revitalise their community. Te Whānau a Kai also want the ability 'to receive and manage their own redress rather than have other people manage it for them or make agreements with the government . . . on their behalf'.[46] Other elements of redress will also be required in order to provide a comprehensive settlement of their claims.

The issues that are relevant to assessing the Te Whānau a Kai claim are similar to those we have already considered in relation to the incorporation and Ngā Ariki Kaipūtahi. We must determine whether the redress sought by Te Whānau a Kai is proportionate to the prejudice they suffered and whether making a binding recommendation in their favour would be fair and equitable to other applicants. We also consider whether there is a mandated Te Whānau a Kai recipient entity that is appropriate to receive the redress, and whether there are other avenues which they could pursue to receive fair redress.

(1) *Proportionate and fair redress?*

Te Whānau a Kai acknowledged that even if the Tribunal granted them a binding recommendation in respect of the Mangatū forest they would still have to turn to the Crown for the other redress they need.[47] Their main concern was not the method by which they received redress, but that they *should* receive it, and as soon as possible. In their view the incorporation's application for a binding recommendation had the effect of compounding the delays already faced by Te Whānau a Kai in obtaining justice for the wrongs done them, and it was clear that Te Whānau a Kai would have preferred to continue with negotiations rather than be diverted into this alternative pathway. However, once the incorporation chose to trigger this process Te Whānau a Kai saw no alternative but to participate in order to ensure that their own interests were not harmed if the Tribunal made a binding recommendation in favour of others. Te Whānau a Kai also considered that if binding recommendations were going to be made, they were as entitled as anyone.[48]

In these remedies hearings, Te Whānau a Kai initially put forward a suggestion that a 40 per cent share in the forest would be reasonable commercial redress for their grievances, but this was never seriously pursued. For completeness, we will briefly assess this proposal in order to determine whether it would provide fair and equitable redress to Te Whānau a Kai.

45. Document M6, para 1.7
46. Ibid, para 1.2
47. Ibid, para 1.11
48. Ibid, paras 1.9–1.11, 3.2

In terms of acre-for-acre redress, a 40 per cent share in the CFL within the Tūranga district would equate to approximately 3067 hectares in the round. This figure would obviously be greater if we were considering the acreage for the entire Mangatū CFL land, including the land in the East Coast inquiry district. But, since we do not have the jurisdiction to consider a binding recommendation for return of the land outside the district we will just deal with the proposal so far as our jurisdiction allows. The amount of 3067 hectares is well below the total land losses suffered by Te Whānau a Kai by reason of Crown breaches. The monetary compensation accompanying a binding recommendation would provide further redress for Te Whānau a Kai's future development. In that sense the redress is not out of kilter with what they lost.

However, the same difficulties with the redress that we could give by way of binding recommendations apply to Te Whānau a Kai as to the incorporation and Ngā Ariki Kaipūtahi. We cannot give 40 per cent of the Mangatū CFL land to Te Whānau a Kai and still be certain that we have sufficient to provide proportionate redress to the incorporation, Ngā Ariki Kaipūtahi, and the claimants represented by TAMA. We only need to consider some of the breaches and prejudice inflicted on one other applicant to see why giving redress of this size to Te Whānau a Kai would, in the current process, be fraught with difficulty. It will be remembered that, as a result of the deed of cession, Te Aitanga a Māhaki lost the Te Muhunga block of 5,395 acres (2,183 hectares). Many thousands of acres were lost by TAMA claimants as a direct result of the Crown's Treaty breaches, through the 1891 mortgagee sale, sales by the Carroll Pere Trust and sales by the East Coast Native trust Lands Board.[49] Nearly half the Māhaki rohe was alienated following the operations of the Native Land Court. Te Whānau a Kai also suffered loss of lands as a result of the Treaty breaches concerned in these same processes. As a first point, we are not able to give acre-for-acre redress to both Te Whānau a Kai and TAMA.

We also considered the possibility of reducing each claimant's share in the land on a pro rata basis (which is how we perceive the suggestion of a 40 per cent allocation), starting with the amount of land each claimant lost and then reducing the land returned pro rata to equal the amount of land redress available in the district. As we have shown earlier the problems involved in such an approach include determining accurately the actual land lost. We have already referred to the caution needed in dealing with possibly flawed Native Land Court decisions, the fluid nature of customary interests, and the need for sufficient cogent customary evidence. These problems, taken together with the difficulty in how to determine appropriate commercial redress for the general, district-wide historical claims, and the relatively short 90-day negotiation period if parties disagree with the Tribunal's recommendation, combine to convince us that this is not a tenable option.

49. Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, vol 1, p xxi, vol 2, pp 405, 172, 580–582; doc H1, p 79

We have previously outlined the practical difficulties involved in dividing up the land, including survey and access costs, and operational issues related to management of the forest.

We are therefore of the view that we could not give fair and equitable redress to Te Whānau a Kai by making a binding recommendation in their favour either on the basis of acre-for-acre redress, or on the basis of a pro rata calculation of the land to be allocated to them. There are other factors which also weigh against making a binding recommendation in favour of Te Whānau a Kai, which we will now discuss.

(2) *Appropriate recipient entity for Te Whānau a Kai*

We have considered Te Whānau a Kai's readiness to receive, and capacity to manage, forestry assets. Te Whānau a Kai have made considerable efforts to take part in the Tūranga and Te Urewera inquiries and in negotiations. That attests to the energy and resilience of their leadership. But while Tribunal inquiries do help claimants to prepare for settlement, there is a considerable amount of work that needs to be done in order to move to the stage where there is a settlement entity ready to receive the assets. The Crown's settlement process begins with claimant groups seeking a mandate from their people to negotiate, and recognition of the mandate by the Crown. Those seeking a settlement are also required to develop a settlement entity which has legal capacity, and whose governance and accountability mechanisms satisfy the Crown's requirements.

Te Whānau a Kai has a register of members, numbering around 1,200 people. Their mandate was tested, along with other claimants' during the interlocutory stage of the Tūranga inquiry. However, since that time TAMA and its predecessors have held the mandate to negotiate a settlement with the Crown for the Māhaki cluster, including for Te Whānau a Kai. We have been advised by TAMA that Te Whānau a Kai seem to have revoked that mandate by applying for a binding recommendation and that TAMA is supportive of Te Whānau a Kai's choice.[50] Te Whānau a Kai indicated that they have not yet put in place a settlement entity to receive redress because of the cost involved in doing so when they cannot be sure that they will receive a binding recommendation from the Tribunal.

Had the Tribunal been of a mind to make a binding recommendation in Te Whānau a Kai's favour we would have had to consider issues of renewal of mandate for Te Whānau a Kai from those it represents, and also the need for Te Whānau a Kai to put in place an appropriate settlement entity to receive the redress. We hasten to say that the lack of current capacity and capability would not have deterred us from making a binding recommendation if we considered that Te Whānau a Kai should receive a binding recommendation. But we would have had to try to find some way through the legislation, which, in our view, does not provide sufficient time between the making of an interim recommendation and its

50. Document 138, p 3

finalisation for these questions to be satisfactorily answered. We would not make a recommendation that might become final before these matters were fully resolved.

(3) *Conclusion on Te Whānau a Kai's application*

Te Whānau a Kai, while a smaller group in our inquiry, have claims that range from some of the most serious breaches of the Treaty that have occurred in Aotearoa, to others that, while significant in themselves, need to be seen as part of a picture of cumulative and escalating land loss resulting in the destruction of their economic, cultural and political autonomy and their distinctive identity. Te Whānau a Kai are seeking to regain those things along with fair redress in terms of land and monetary compensation.

On another level, Te Whānau a Kai's wish is to be left no worse off after this inquiry than before. However, they felt compelled to take part in this remedies process because of concerns that the assets and cash available for settlement might be greatly depleted if the Tribunal were to make binding recommendations in favour of other applicants.

In setting out the reasons for our decision we have been conscious of Te Whānau a Kai's stance in this inquiry but nevertheless, have made our decision based upon the requirement that we must ensure any redress we give is equitable among the claimants. In summary we have decided not to grant Te Whānau a Kai a binding recommendation for the following reasons:

(a) Acre-for-acre redress is not possible because that would leave insufficient land in the forest for settling other claimants' grievances on a proportionate basis, and while the amount of other land the Crown may have available in the district is not clear to us, we are reasonably sure that it would not be sufficient to give redress to all claimants on this basis.

(b) Making a pro rata assessment of what redress can be given by way of binding recommendations to each of the applicants is fraught with difficulty, not least because we have incomplete probative evidence on which to make such an assessment. Accordingly, we cannot accurately calculate the amounts of land lost in consequence of Crown Treaty breaches by each of the claimants in the district, so that an accurate and fair pro rata assessment is not able to be made.

(c) Te Whānau a Kai's participation in these remedies hearings arose from a concern that if binding recommendations were to be made in respect of the incorporation or Ngā Ariki Kaipūtahi, then Te Whānau a Kai's position would be harmed and, to guard against this, they would also seek a binding recommendation. However, we have not granted binding recommendations for those groups.

(d) Te Whānau a Kai need a comprehensive settlement because of the nature of the breaches and prejudice they have endured and that can only be fully achieved through a return to negotiations with the Crown. Te Whānau a Kai are willing to return to negotiations, so that this is an alternative avenue of redress that they can pursue.

(e) Although not determinative, issues such as renewal of the mandate of Te Whānau a Kai and the establishment of a suitable recipient entity, raise practical difficulties that would need to be addressed before we could contemplate making a binding recommendation in their favour.

We were moved by the passion with which Mr Hawea, Te Whānau a Kai's main witness, told us of Te Whānau a Kai's story and the efforts they were making to take part in inquiries and negotiations to protect what remains of Te Whānau a Kai's identity, and to regain some part of their once extensive rohe. They have maintained this struggle despite their lack of financial wherewithal and it is imperative that they are enabled to proceed with settlement negotiations. Their need for redress, and as soon as possible, could not be more plain. They are prepared to enter into discussions and negotiations.

Te Whānau a Kai were quite open in our hearings about their unwilling participation in our remedies process. To quote their counsel, they 'were not expecting to be here and would much rather be spending their time negotiating a settlement with the government'.[51] In closing submissions counsel stated that Te Whānau a Kai 'remain open-minded about any collective solution'[52] and that they 'wish to return to negotiations with the Crown as soon as possible'.[53] This stance means that there is another avenue by which Te Whānau a Kai can seek redress, one that they expected to follow, whether they got a binding recommendation or not. Now that the Tribunal has determined not to make a binding recommendation in favour of the incorporation and Ngā Ariki Kaipūtahi we anticipate that Te Whānau a Kai will feel assured that their interests will not be harmed by returning to negotiations.

That said, Te Whānau a Kai made clear their desire for a separate voice to complete the negotiation and settlement of the balance of their redress, 'especially their cultural redress'. In closing submissions counsel stated that Te Whānau a Kai did not expect a separate Claims Settlement Act, but they do wish to sit at a 'separate table' with the Crown.[54] What was not clear was whether Te Whānau a Kai wished to renegotiate those parts of the settlement package that were already on offer through TAMA.[55] Further discussions between the parties will no doubt clarify these points. Despite what might be Te Whānau a Kai's dissatisfaction with aspects of the negotiations, there is, in our view, a reasonable prospect that a settlement can be concluded with them.

We see this as the best way forward for Te Whānau a Kai to obtain a settlement. Even though Te Whānau a Kai and others will likely need to compromise, such discussions and agreements amongst whanaunga are an expression of their mana and rangatiratanga, and part of re-establishing their identity and autonomy, and their relationships with each other. A determination to find an agreed resolution must be paramount.

51. Document M6, para 1.2
52. Ibid, para 12.3
53. Ibid, para 13.2
54. Ibid, para 13.3
55. Document L2

We mention one further issue for Te Whānau a Kai. Mr Hawea brought to our attention the difficulty for Te Whānau a Kai in negotiating through TAMA because Te Whānau a Kai's rohe spans three inquiry districts as a result of the way in which the Tribunal inquiry district boundaries were decided. The Tribunal's district boundaries are administrative devices and it is quite possible, as has occurred with Te Whānau a Kai, that hapū and iwi have cross-boundary claims. That would not be such a problem if the Crown's settlement policy was not predicated on negotiations with large natural groupings. Te Whānau a Kai are in the large natural grouping of the Māhaki cluster which is focussed on settling claims in the Tūranga district. Te Whānau a Kai fear that because of their cross-boundary rohe they are in danger of falling through the cracks, and that they will not receive redress for the entirety of their claims across all districts. Binding recommendations would not assist Te Whānau a Kai in this respect because our jurisdiction in these remedies hearings is limited to Tūranga. However, the Crown is now aware of the issue. We consider that the Crown will need to ensure that all Te Whānau a Kai's claims are justly and fairly settled. We will return to this matter in our final conclusions in this chapter.

6.3.4 TAMA's application

TAMA's application is based on its representation in our remedies hearings of all the Māhaki cluster claimants who have not made applications for binding recommendations. The claims included in the application are the comprehensive Māhaki claim, Wai 283, as well as the Wai 274 claim relating to the Mangatū block. The claims TAMA represents are, in terms of their scope and the numbers of people affected, the most wide-reaching of all the claims before us, as they address the general district-wide historical claims that affected each of the applicants and all the Māhaki cluster claimants in the Tūranga district. We have already referred a number of times in this report to the extent and seriousness of the Treaty breaches these claims involved. In relation to general district-wide historical claims, which the Māhaki cluster was involved in together with Rongowhakaata and Ngāi Tāmanuhiri, the Tūranga report found breaches of the Treaty because of:

- 'the large number of Turanga Maori unlawfully attacked and imprisoned or deported, by the Crown' – a quarter of the male population imprisoned or deported;
- 'the unprecedented number of Turanga Maori killed in Crown–Maori conflict' – around 43 per cent of the adult male population of the area;
- 'the unprecedented number of Maori executed by the Crown and the manner of those executions';
- the 'unquantified but substantial area of land unlawfully confiscated';
- 'the unquantified but significant area of land lost' through the Poverty Bay Commission;
- 'the imposition of a defective land tenure system;'

6.3.4

- 'the unquantified but large area of land lost to Turanga Maori through the pressure which the Native Land Court title and transfer systems placed on owners to sell their lands individually and at less than fair market values'; and
- 'the refusal of the Crown to introduce appropriate mechanisms to provide for community management of Maori lands'.[56]

The Tūranga report also said:

> While the confiscation aspect of the claim was not as large as those of Taranaki and Waikato, the treatment of the people in Turanga was, in our view, significantly worse. The illegal imprisonment of a quarter of the adult male population on Wharekauri is bad enough. But the loss in war of an estimated 43 per cent of the adult male population of Turanga, including the illegal execution of a third to a half of that number, is a stain on our national history and character. To this must be added the long term debilitating effect of the Poverty Bay Commission and the Native Land Court. The fact that Turanga Maori made numerous unsupported attempts to avoid the constraints of unfair laws and extract fair value from their lands aggravates matters in our view.[57]

These comments should leave no one in any doubt that the prejudice arising from these breaches matches the seriousness of the breaches themselves. TAMA's counsel referred to the 'long standing, deep and significant'[58] nature of the prejudice suffered by the Māhaki claimants. As we mentioned earlier, the mental, emotional and physical trauma suffered by Tūranga people as a result of the Crown's waging of an unjust war, was followed by the long-term loss of land with all the spiritual, cultural, and economic consequences that involves. TAMA witnesses gave evidence about the loss of te reo, poor education, poor health, poor housing, and lack of employment of present day Māhaki people. Although we have insufficient evidence before us to find that a direct connection can be drawn between their situation today and the breaches committed by the Crown in the past, no one can deny that these breaches in the mid-late nineteenth and early twentieth centuries left Te Aitanga a Māhaki without the leadership and the resources to meet the challenges brought by the influx of settlers and the entry into a modern economy. The combination of the Crown's legislation, policies and actions also left Tūranga Māori, including the Māhaki cluster, bereft of their political autonomy, their mana, and their rangatiratanga, leaving the Treaty relationship that should have existed between the Crown and Māori in tatters.

In respect of these claims, which are without question at the most serious end of the spectrum of Treaty breaches, TAMA is seeking a comprehensive settlement with a full suite of recommendations under section 6(3), and including a recommendation under section 8HB in respect of the Mangatū CFL land within the Tūranga district. For the purposes of

56. Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, vol 2, p 749
57. Ibid, p 750
58. Document M9, p 14

these remedies hearings, which were limited to the question of whether to make binding recommendations in relation to the CFL lands, TAMA sought such a recommendation in respect of the Mangatū 2 block of the forest. If the incorporation's application failed, TAMA's application was also in respect of the 1961 lands in Mangatū 1 as well. Given that we have determined not to make a binding recommendation in favour of the incorporation we intend to treat the 1961 land claim from now on as part of the claims represented by TAMA.

The limitation of our hearings to binding recommendations in respect of the Mangatū CFL land at this stage of the remedies process meant that we did not receive as much evidence as would be needed for a comprehensive set of recommendations; we do not have a complete picture of what is needed to restore the Māhaki cluster communities to wellbeing. The Mangatū land is seen as part of the commercial redress they are seeking and the evidence was directed to supporting that sort of redress. A full remedies process would involve looking at a range of commercial and cultural redress, with further evidence to support that. In general terms we would expect that redress to include an apology, commercial redress including cash and return of CFL lands, cultural redress in respect of wāhi tapu and taonga of importance to the Māhaki cluster, and redress that would assist in restoring their political autonomy by making provision for their participation in decision-making in the district at all governmental levels.

Consideration of that comprehensive redress we leave aside – we may return to it if TAMA does decide to ask for a comprehensive remedies hearing after receiving this report. What we must determine is whether we can and should make a recommendation now for return of the Mangatū CFL land within the Tūranga district. The issues we must therefore consider are whether making a binding recommendation in respect of the Mangatū CFL land that falls within the Tūranga district would be proportionate redress for the claimants TAMA represents, and would be fair and equitable bearing in mind the other applicants' interests. We also need to consider practical issues such as TAMA's mandate and whether there is an appropriate recipient entity to receive redress.

(1) *Fair redress?*

Our consideration of the TAMA application is informed by the knowledge that the Crown has already offered TAMA the opportunity to purchase the whole of the Mangatū forest, including the land lying outside the Tūranga district. TAMA would pay for the forest using either the accumulated rentals from the CFRT and/or the proceeds of their settlement. The Crown's evidence showed that the value of the entire forest, including the land in the East Coast inquiry district, is $15,014,300 freehold value, and $11,434,000 encumbered value (the encumbrance being the forestry licence.)[59] The quantum of the Crown's settlement offer to TAMA in total was $32 million. When that offer was made TAMA held the mandate for Te

59. Document 128, p 3

Whānau a Kai and Ngā Ariki Kaipūtahi, so that the Crown's offer was intended as redress for their claims as well. The incorporation was not a separate participant in the settlement negotiations, but, in light of the fact that the Wai 274 claim was about the Treaty breach involving the 1961 land, clearly the Crown's offer was meant to cover that breach.

We consider that redress for TAMA should include return of all the CFL land or, if Te Whānau a Kai or others choose to revoke its mandate, a significant part of it. The difference between the Crown's settlement offer and what TAMA seeks through the Tribunal process is that, if the application for a binding recommendation is successful, TAMA would receive the Mangatū CFL land within the district, accumulated rentals and schedule 1 compensation. TAMA would not, through the binding recommendations process, receive all the other forms of redress that the Crown can give, so that elements needed for a restoration of their tino rangatiratanga, their communities' well-being, and the relationship with the Crown would be absent.

The Crown's evidence on the valuation of the forest within the Tūranga district was $10,210,300 freehold value, and $7,861,000 encumbered value.[60]

The indicative figures show that, at the automatic 5 per cent figure, schedule 1 compensation for TAMA would be:

- $896,885 under clause 3(a);
- $3,575,927 under clause 3(b); and
- $6,031,900 under clause 3(c).

At 100 per cent compensation, the figures are:

- $17,937,700 under clause 3(a),
- $71,518,550 under clause 3(b); and
- $120,638,000 under clause 3(c).[61]

Accumulated rentals in respect of the land within the Tūranga district are estimated at $5.8 million.[62]

Total redress TAMA would receive from a binding recommendation – including the encumbered value of the land, the accumulated rentals, and the schedule 1 compensation – could be between:

- $19,692,900 (using the clause 3(c) figure at 5 per cent); and
- $134,299,000 (using the clause 3(c) figure at 100 per cent).

Thus, the redress TAMA might receive from a binding recommendation could, at the lower end of the schedule 1 compensation, fall within the Crown's settlement offer, or could far outstrip it at the higher end. However, there are a number of problems associated with

60. Document 128, p 3
61. Document 127(a), paras 28, 31, 42
62. Approximately $9.5 million is held in accumulated rentals for the entire Mangatū forest. The area of the forest within the Tūranga inquiry district makes up 7,668 hectares, or 61 per cent, of the total 12,509 hectares. $5.8 million is therefore 61 per cent of that $9.5 million.

making a binding recommendation to TAMA, which raises the question: how fair would such redress be to the other applicants?

The first problem is that TAMA's mandate is not as stable as it was when entering settlement negotiations. We could not help noticing during our remedies hearings that a fracturing was occurring between the applicants, where at the beginning of settlement negotiations there had been a sufficiently unified Māhaki cluster to carry negotiations forward. We must bear in mind that in making a binding recommendation we are required by the statute to identify the Māori group or groups in whose favour the recommendation is made. Just who TAMA represents is unclear at this point in our process.

TAMA's approach has been an inclusive and flexible one, welcoming those claimants who wish to be represented by TAMA but also being prepared to support their separation from the TAMA mandate if that is what they want. If all applicants were happy to reconfirm TAMA's mandate the Tribunal could more confidently make a recommendation in TAMA's favour and leave it to the claimants to agree on a fair and equitable division of the proceeds between themselves. However, if the Māhaki cluster cannot agree on a single representative to carry forward the application for a binding recommendation, we would be left with the issue of how to ensure other claimants not included in the TAMA grouping would receive fair and equitable redress.

If one or more groups remain outside TAMA we would need to consider what portion of the CFL land is appropriate redress for TAMA as compared to redress for the claims of these other claimants. As we have noted before, the Tribunal cannot give acre-for-acre redress to the parties – such redress is not practicable, given the size of the losses due to Treaty breaches and the availability of Crown resources in the district. Nor is a pro rata division of the forest tenable because of the problems in establishing the exact losses of the applicants when we lack the necessary evidence, and considering the difficulty in assigning a value to the general district-wide historical claims that equates to the amount of land or monetary compensation to be given by way of redress. If we were minded to make a binding recommendation we would have to be sure that we did not leave the Crown in the position of being unable to offer fair and equitable redress to unsuccessful applicants.

We would also be concerned as to how the Crown would deal with smaller groups who choose not to go with TAMA. The Crown's settlement policy of negotiating with large natural groupings has been in place for some time. The Tribunal could not guarantee that any smaller groups would receive a settlement, and the uncertainty about that gives us considerable concern.

Given these concerns, we would be obliged to conduct a comprehensive remedies process if TAMA sought comprehensive recommendations from the Tribunal without having reconfirmed its mandate to represent the other applicants. All applicants entered this stage of the remedies process knowing that it was focussed solely on the applications for binding recommendations concerning the Mangatū CFL land, and they produced evidence accordingly.

That does not disadvantage the incorporation because it was not seeking a comprehensive remedy, but redress solely for the loss of the 1961 land. However, Te Whānau a Kai and TAMA have stated plainly that they seek comprehensive redress. It would be wrong to make a binding recommendation for TAMA, without giving them and others the opportunity to produce the evidence to support comprehensive remedies. That is because without that evidence we might well miscalculate the level of redress required to restore TAMA or others or both to wellbeing.

Thirdly, the Māhaki cluster entered negotiations along with Ngāi Tāmanuhiri and Rongowhakaata on a district-wide basis and the three groups signed an agreement in principle (AIP) with the Crown in 2008.[63] The AIP included a quantum for the district settlement of $59 million, which was to be shared between the three groups.[64] A further $5.95 million has since been added to that figure.[65] The relativities in terms of the division of the quantum were generally based on the percentage figures given in Tūranga report. Following further talks the percentage amount offered to TAMA was 49 per cent, while Rongowhakaata was offered 34 per cent and Ngāi Tāmanuhiri 17 per cent.[66] Rongowhakaata and Ngāi Tāmanuhiri have since settled on the basis of those figures and legislation has been passed to finalise the settlements.[67]

Although evidence was presented that Rongowhakaata at least were not concerned that the Māhaki cluster applications for binding recommendations might see them receive a greater quantum than was envisaged during settlement negotiations,[68] that does not alleviate the Tribunal's responsibility to ensure that the redress is fair and equitable on a district-wide basis. The Tūranga report investigated breaches for all claimants, and made findings that most breaches affected all claimants. The Tribunal would have to take a very cautious approach to making a binding recommendation which might seriously disrupt the relativities between the other iwi groups in the district.

(2) *Appropriate recipient entity for TAMA claimants*

One matter that is relevant to TAMA's application is the question of whether there is an appropriate recipient entity to receive the land and monetary compensation flowing from a binding recommendation, and to manage the forestry asset as it is released from the forestry licence. TAMA represents a large claimant group, with approximately 10,000 eligible members.[69] Its size means that it is generally representative of Te Aitanga a Māhaki people and their claims. It has held the mandate for negotiations with the Crown and managed

63. Document 130, p 5
64. Ibid
65. Ibid, p 6
66. Ibid
67. Ibid. The legislation enacting the settlement for both iwi received the royal assent on 31 July 2012.
68. Per oral evidence of Willie Te Aho, negotiator for Rongowhakaata: transcript 4.28, p 433.
69. Document K8, p 9; doc 18, p 5

to carry the claimants a long way towards the conclusion of a settlement agreement. That attests to the capability and organisational skills of the people involved. TAMA is also fortunate to have John Ruru, a highly experienced forester, to give advice on forestry matters. TAMA has been taking steps to put in place a settlement entity that meets Crown requirements for receiving redress. However, that process was not completed at the time of our hearings. While not a determinative factor in our deliberations, the Tribunal would nevertheless need to be assured that a suitable settlement entity could be put in place before any binding recommendation for return of the land became final. If it were only a question of finalising the settlement entity then that would seem to us to be possible within the 90-day negotiating period. However, the process of setting up such an entity also hinges on TAMA confirming its mandate. That leaves us with some uncertainty on this matter.

Another important matter is that TAMA seeks a comprehensive settlement, which includes not only a quantum sum but also all other types of redress that the Crown offers through settlement negotiations. Thus TAMA would expect to receive an apology, commercial redress, cultural redress including properties of cultural significance, and provisions which would enable them to take part in decision-making at all levels in relation to their taonga. A binding recommendation in relation to the Mangatū CFL land will only provide commercial redress. TAMA will have to return to negotiations with the Crown to receive the other types of redress. The Crown on the other hand has indicated its readiness to resume negotiations with TAMA once its mandate is confirmed.[70] We therefore consider that there is another avenue for redress that TAMA could follow, rather than granting a binding recommendation now.

(3) *Conclusions on TAMA's claim*

TAMA has a well-founded claim in respect of the Treaty breaches committed by the Crown in acquiring the 1961 lands, but it also represents claimants who have suffered serious prejudice from grave misconduct on the part of the Crown which was contrary to the principles of the Treaty. They continue to suffer from the economic deprivation caused by the widespread loss of land, and also loss of control for long periods, even over the lands that were retained, which continued into the twentieth century. The prejudice from these breaches is, as we have said earlier, incalculable. The claimants have been unable to take part in decision-making relating to their whenua because of the grievous injuries to their mana and rangatiratanga and the loss of their political autonomy caused by the Crown's imposition of government on its terms, rather than on the terms laid out in the Treaty. As the Tūranga report has already stated these claimants need substantial redress, and they need it as soon as possible. At present, they are still waiting for the settlement necessary to be able to restore

70. Document 130, p 12

their hapū and iwi, their whānau and communities to a state where they can take a full part in a Treaty relationship with the Crown.

In general, the Tribunal considers that the provision of redress for well-founded claims should be negotiated with the Crown. This was made clear to all parties during the Tūranga inquiry. Indeed, the presiding officer issued a memorandum-directions saying:

> It is important to remind all parties that the Tribunal process is not an end in itself. It is a means by which the claimants and the Crown can be assisted in achieving a durable and just settlement of such of the claims as may be found to have substance. The Tribunal is anxious therefore to encourage the parties to focus on these matters and to adopt processes, particularly at the pre-hearing stage, which expedite that outcome.[71]

The Tūranga report stated that a district-wide settlement was desirable and, in order to assist negotiations, gave tentative suggestions as to how the Treaty settlement might be apportioned between the various claimant groups.[72] While settlement negotiations have been paused by the Crown while this litigation is ongoing, we cannot agree with counsel for TAMA that negotiations have broken down to such an extent that Tribunal intervention is necessary at this stage to resolve the impasse. Substantial progress in negotiations was made prior to Mr Haronga making his application for an urgent hearing. While issues such as the stabilising of TAMA's mandate will need to be addressed, we cannot see that there will be insurmountable difficulties in returning to negotiations with the Crown.

Having considered these matters, we do not propose to make a binding recommendation at this point. Instead, we adjourn TAMA's application for the time being. Our reasons for doing so are:

(a) TAMA has in fact been offered redress in the form of an option to purchase the whole of the Mangatū Crown forest in the settlement offer made by the Crown, including the CFL land lying outside the Tūranga district in the Waipāoa block. The purchase would be funded either from accumulated rentals or from the proceeds of the settlement. Such an offer is comparable to offers accepted by other iwi.

(b) TAMA seeks comprehensive redress which can only be achieved through settlement negotiations with the Crown. While the Tribunal can make binding recommendations in relation to the CFL land and resumable lands, only the Crown can provide the other forms of redress which are as necessary to the restoration of the claimants' wellbeing and the Treaty relationship as is economic redress.

(c) The Tribunal would need to conduct a comprehensive remedies process to ensure that we had all the necessary evidence to make decisions as to the level of redress we would need to deliver through binding recommendations, and to be able to make the other nonbinding recommendations needed for a comprehensive settlement.

71. Paper 2.2, p 1
72. Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, vol 2, pp 741 – 742, 750–751

(d) TAMA's mandate to represent claimant groups such as Te Whānau a Kai and Ngā Ariki Kaipūtahi would need to be re-confirmed, otherwise the Tribunal could not be sure as to the identity of the Māori group to receive the redress.

(e) TAMA has not yet completed the setting up of a settlement entity to receive redress (although this factor is not determinative).

(f) The Crown is willing to re-enter negotiations so that another avenue is available to TAMA to obtain redress.

The decision to adjourn the TAMA application provides the parties and the Tribunal with an opportunity to discuss constructive suggestions for a way forward in negotiations with the Crown. We go on to discuss these in the next section.

6.3.5 Summary of our determinations

To summarise, we have dismissed the applications for binding recommendations made by the incorporation, Ngā Ariki Kaipūtahi, and Te Whānau a Kai. We have made these decisions for a number of reasons, some of which on their own would be sufficient grounds for refusing to make binding recommendations. Taking all these reasons together, and in all the circumstances, they present an overwhelming case against making binding recommendations.

We have adjourned the application made by TAMA pending either a return to settlement negotiations with the Crown, or if that fails, a full comprehensive remedies process before the Tribunal.

There are several reasons why we dismissed the incorporation's application. First a binding recommendation would have provided disproportionate redress to the incorporation. In addition, if we divided up the 1961 land, we could not determine with certainty what would provide a fair and equitable portion to the incorporation that would leave sufficient CFL land for other applicants. We also considered that the nature and extent of the claims of other applicants as compared to the incorporation's claim meant that any decisions as to what is fair and equitable would be better decided by agreement amongst the claimants, rather than being imposed by the Tribunal upon everybody.

The difficulties of determining what fair and equitable redress would be for a smaller group like Ngā Ariki Kaipūtahi meant that we decided we ought not to exercise our discretion to grant a binding recommendation in their favour. We found support for that view when we considered the difficulties associated with the present lack of clarity as to who represents Ngā Ariki Kaipūtahi, and therefore our inability to be able to accurately identify the group of Māori to whom the land was to be returned.

Te Whānau a Kai have a comprehensive claim requiring comprehensive redress. A binding recommendation does not provide comprehensive redress and a further stage of hearings would be required before the Tribunal would be prepared to make comprehensive

recommendations, whether they included a binding recommendation or not. This would inevitably involve considerable delay. We dismissed the application by Te Whānau a Kai because of the difficulties of determining what portion of the forest would provide Te Whānau a Kai with fair redress.

We did not dismiss TAMA's application because they were originally mandated to negotiate on behalf of all the Māhaki cluster claimants and during negotiations strove to represent them all. We consider that there is a reasonable chance that they can stabilise and renew their mandate and re-enter negotiations with the Crown. In that regard Te Whānau a Kai have said that they are still open to a collective resolution of these issues. The Crown is still willing to negotiate with TAMA provided that its mandate is reconfirmed. If negotiations cannot be resumed or are not successful then TAMA has the option of returning to the Tribunal for comprehensive remedies hearings, with the attendant delays.

6.4 The Pathway to Settlement

At this juncture, and given the reasons for our decisions on the applications, it would be premature for us to make recommendations. Nevertheless, these hearings have reminded us of the depth of the needs of all claimant groups to receive settlement redress as soon as possible.

Given the prejudice suffered by the incorporation, the most appropriate form of redress for its shareholders would be return of at least some of the 1961 land. We urge that the incorporation's specific claim for the 1961 land be considered and settled as part of the wider claims settlement context, rather than as an individual case.

For other claimant groups who have lost most of their land and resources, and who struggle to maintain their distinctive hapū identities with minimal financial support, relief cannot come too soon. For them, as also for the incorporation, further delay would be highly undesirable.

We strongly encourage all the claimants to reunite and return to negotiations with the Crown as soon as possible. We come back to the wisdom and foresight of Wi Pere in setting up the incorporation – he sought to involve all the hapū with interests in the land in its protection, rather than to see the people and the land divided. Those hapū included Ngā Ariki Kaipūtahi and Te Whānau a Kai. We hope wise counsel will once more prevail and that claimants will join together for the same cause.

Settlement negotiations can provide a range of redress which can answer the claimants' wider need for restoration of their political, economic, and cultural well-being. Negotiations will also allow them to regain a measure of autonomy, because the Crown can ensure that hapū mana and rangatiratanga in respect of their resources is recognised at all levels of government. As the Tūranga report said: 'The importance of fostering the autonomy of Maori

communities as promised in the Treaty cannot be overstated.'[73] Moreover, settlement negotiations allow much more flexibility in the way redress is structured, and in the timeframes needed for claimant groups to reach agreements with each other and with the Crown.

By contrast, the process of applying for and receiving a binding recommendation follows a strict statutory formula and the Tribunal cannot depart from it, even though the parties themselves may want changes in order to achieve a resolution. It would be far better for the applicants to negotiate with the Crown for as large a settlement package as possible, and then agree with each other as to how to divide any proceeds, than for the Tribunal to impose a solution by way of a binding recommendation. Any compromises that are made, and all settlements require compromises, should be made by the hapū and iwi involved – they are the ones with the mana and rangatiratanga to make such agreements, not the Tribunal. We think that is the shortest route to all parties receiving fair redress.

That said, these remedies hearings have undoubtedly disrupted the working arrangements between the claimants, and a lot of effort will be required to re-establish them. We think the Crown could play a constructive role in supporting the claimants to renew discussions with each other so that they could then move on to renew settlement negotiations. The Crown has already indicated that it would be prepared to support facilitation or mediation between the claimants, including the incorporation.[74] We suggest that all parties move quickly to take up this offer as it is vitally important for all those involved in this inquiry to re-gather momentum in the settlement process. We would see the Crown's support as including funding the claimants to have discussions with each other, as well as facilitation and/or mediation assistance. We welcome the Crown's expressed willingness to consider innovative strategies to help progress matters.

In that vein, we think the Crown should engage with TAMA, with the smaller applicant groups, and with the incorporation in discussions leading to renewal of formal negotiations. Te Whānau a Kai indicated that they did not require separate Claim Settlement legislation, but that they would still like to talk to the Crown at a 'separate table'.[75] This is a positive suggestion. We consider that it is worth exploring different avenues to find a workable way forward.

In our view, the Crown must recognise the particular position of Te Whānau a Kai, who have claims in three inquiry districts. The Crown must ensure that all these claims are accounted for in any settlement. The Crown should provide Te Whānau a Kai with cultural redress that endows them with land. Loss of land is a particular grievance for Te Whānau a Kai, and the Crown's offer of only a quarter acre section in cultural redress is clearly insufficient.

73. Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, vol 2, p739
74. Document I30, p7
75. Document M6, para 13.3

6.4

We also note that Crown counsel expressed particular concern about the Treaty breaches affecting Ngā Ariki Kaipūtahi during our hearings, and we trust this concern and acknowledgment will not be lost sight of in negotiations. In particular, we emphasise Ngā Ariki Kaipūtahi's need for both a land endowment and an economic base to support their community into the future.

We remind the Crown that negotiators for TAMA made previous attempts to conclude a deal involving a transfer of the 1961 land to the incorporation together with an increase in the quantum of the settlement that took into account the loss of that land to the wider claimant groups. The Minister of Treaty of Waitangi Negotiations rejected the proposal in June 2009 on the basis that it seemed to involve a duplication of redress for grievances that were already included in the settlement.[76] The Minister indicated that the issue of the 1961 lands was an internal matter for the claimants to decide.

We agree to this extent with the Minister: that it would be best for the applicants to decide the matter between themselves. However, during our hearings the applicants each articulated certain specific objectives that they wished to achieve for their communities. The incorporation's main wish is to regain the 1961 land. Ngā Ariki Kaipūtahi wish to have an area of land as turangawaewae to be a focus for their community, and to have sufficient economic resource to be able to maintain their identity and connections with their members in the long term. Te Whānau a Kai are seeking fair redress which takes account of their claims in their entirety, rather than being split amongst different large natural groupings. TAMA of course is seeking full redress for the claimants it represents. All groups seek recognition of their distinctiveness as a way to recover the autonomy that was so completely undermined when the Crown first entered the district.

With the further information that has emerged during these remedies hearings it would be an opportune time for the Crown to review the elements of redress within the extant settlement offer to see what adjustments could be made to give the claimants more hope that some of their specific objectives could be achieved. It may be that sensible and practicable adjustments to the overall settlement are all that is required to bring these matters to a resolution. A generous approach by the Crown, with an easing of some of the restrictions that the negotiators were labouring under, may assist the claimants to see a return as a unified group to settlement negotiations as the most practical and timely course for the applicant groups to take. It would also enhance the restoration of the Crown's honour.

We are aware that maintaining relativities with the other settlements in the district will also be a concern for the Crown. The Tribunal no longer has jurisdiction to make recommendations relating to the contents of the Rongowhakaata and Ngāi Tāmanuhiri settlements. Again, we consider that a generous approach, especially if undertaken voluntarily by the Crown, could not but enhance the future Treaty relationship with Tūranga Māori.

76. Document 132(a), pp 356–357

6.5 Final Commments

We strongly encourage the applicant groups to begin the discussions that are needed to mend their relationships with each other and proceed to further negotiations with the Crown. We suggest that the Crown provide the necessary resources to enable them to do that. That would include Crown funding for mediation if the Treaty partners consider this a constructive step forward. We also urge the Crown to resume settlement negotiations with all applicant groups as soon as possible. We know that the road ahead will not be easy for any of the parties, but we consider that there are positive signs that a negotiated settlement can still be achieved.

In the event that settlement negotiations are not successful, we reserve leave to the claimant groups to apply to the Tribunal for a comprehensive remedies process.

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Dated at Wellington this 18th day of December 2013

S T A Milroy, presiding officer

T Castle, member

J W Milroy, member

A Parsonson, member

THE SEAL OF THE WAITANGI TRIBUNAL

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APPENDIX I

SELECT RECORD OF INQUIRY

Record of Hearings

Tribunal members

The Tribunal comprised Judge Stephanie Milroy (presiding), Tim Castle, Professor Wharehuia Milroy, and Dr Ann Parsonson.

Counsel

Counsel appearing were:

- Brendan Brown, Roger Drummond and Karen Feint for the Mangatū Incorporation.
- John Kahukiwa for Te Aitanga a Māhaki and Affiliates.
- Thomas Bennion, Kathy Ertel and Bryce Lyall for Ngā Ariki Kaiputahi.
- Richard Boast for Te Whānau a Kai.
- Craig Linkhorn, Virginia Hardy, Rachel Hogg, and Mia Gaudin for the Crown.

The hearings

Our hearings were held from 18 to 22 June 2012 at Te Poho o Rāwiri marae, Gisborne, 8 to 11 October 2012 at the Gisborne Conference Centre, Gisborne, and 27 to 29 November 2012 at the Waitangi Tribunal, Wellington.

Record of Proceedings

Statements of claim

SOC1 Wai 274, Wai 283

Wai 274 is a claim by Eric John Tupai Ruru concerning the Mangatu block, 21 February 1992
Wai 283 is a claim by Eric John Tupai Ruru and others representing Te Aitanga a Māhaki concerning East Coast raupatu, 13 March 1992

(a) Te Aitanga a Mahaki and Affiliates, first amended statement of claim, 9 November 2011

App1

(b) Te Aitanga a Mahaki and Affiliates, second amended statement of claim, 21 January 2012

(c) Te Aitanga a Mahaki and Affiliates, third amended statement of claim, 2 August 2012

SOC3 Wai 499, Wai 507

Wai 499 is a claim by Tanya P Rogers concerning the Mangatū 1 block (now known as the Mangatū 1, 3, and 4 blocks), 24 March 1995

Wai 507 is a claim by Owen R Lloyd concerning the Mangatū block, 11 March 1995

(a) Ngariki Kaiputahi, particulars of relief sought, 4 November 2011

(b) Ngariki Kaiputahi, further particulars of relief sought, 31 January 2012

SOC6 Wai 874

A claim by David Brown, presenting Te Iwi Ngariki, concerning the Mangatū 1 block, not dated

(b) Ngariki Kaiputahi, particulars of relief sought, 4 November 2011

(c) Ngariki Kaiputahi, further particulars of relief sought, 31 January 2012

SOC8 Wai 892

A claim by David Thomas Hawea concerning Patutahi, Muhunga, and other lands and resources (Te Whanau a Kai), 27 November 2000

(a) David Thomas Hawea, particularised claim for relief, 4 November 2011

(b) David Thomas Hawea, claim for relief, 21 February 2012

Papers in proceedings

2.297 Judge Joseph Williams, minute recusing himself from hearing the remedies application, 30 May 2011

2.298 Chief Judge Wilson Isaac, memorandum directing the Registrar to conduct a review of the record for the Tūranganui a Kiwa inquiry and seeking the views of the parties on the desirability of mediation, 3 June 2011

2.299 Brendan Brown QC and Karen Feint, memorandum responding to memorandum 2.298, 15 June 2011

2.300 Craig Linkhorn, memorandum responding to memorandum 2.298, 22 June 2011

2.301 John Kahukiwa, memorandum responding to memorandum 2.298, 24 June 2011

2.302 Baden Vertongen and Laura Carter, memorandum responding to memorandum 2.298, 24 June 2011

2.303 Thomas Bennion, memorandum responding to memorandum 2.298, 24 June 2011

2.304 John Kahukiwa, memorandum responding to memorandum 2.298, 24 June 2011

2.305 Barney Tūpara, memorandum responding to memorandum 2.298, 24 June 2011

2.306 Spencer Webster and Carey Manuel, memorandum responding to memorandum 2.298, 24 June 2011

2.307 Alan Knowsley, memorandum responding to memorandum 2.298, 24 June 2011

2.308 Karen Feint, memorandum responding to matters raised in memorandum 2.298, 1 July 2011

2.309 Chief Judge Wilson Isaac, memorandum regarding proposed mediation and appointing Judge Stephanie Milroy as Presiding Officer, 5 July 2011

2.310 Judge Stephanie Milroy, memorandum seeking submissions on pre-hearing matters, 11 July 2011

2.311 Chief Judge Wilson Isaac, memorandum appointing Tim Castle to the Tūranganui a Kiwa Tribunal panel, 12 July 2011

2.312 John Kahukiwa, memorandum responding to memorandum 2.310, 22 July 2011

2.313 Virginia Hardy and Rachel Hogg, memorandum responding to memorandum 2.310, 22 July 2011

2.314 Damien Stone and Nathan Milner, memorandum responding to memorandum 2.310, 22 July 2011

2.315 Thomas Bennion, memorandum responding to memorandum 2.310, 22 July 2011

2.316 Karen Feint, memorandum responding to memorandum 2.310, 22 July 2011

2.317 Laura Carter, memorandum responding to memorandum 2.310, 22 July 2011

2.318 Karen Feint, memorandum responding to matters raised in memoranda 2.313 and 2.315, 27 July 2011

2.319 John Kahukiwa, memorandum responding to matters raised in memorandum 2.318, 28 July 2011

2.320 Judge Stephanie Milroy, memorandum convening a judicial conference to discuss the number of parties to the inquiry, process, discovery, timeframes for filing, and any other preliminary matters, 4 August 2011

2.321 Joel Bristow, notice of 10 August 2011 judicial conference concerning the scope of the remedies hearings, procedure and timeline for filing, and other interlocutory matters, 2 August 2011

2.322 Richard Boast and Laura Carter, memorandum regarding research for remedies hearing, 4 August 2011

2.323 Spencer Webster and Jade Tapsell, memorandum regarding the status of the Rongowhakaata claim, 9 August 2011

2.324 Thomas Bennion, memorandum of oral submissions made at judicial conference, 10 August 2011

2.325 Judge Stephanie Milroy, memorandum directing counsel to file memoranda detailing the oral submissions made at judicial conference, 11 August 2011

2.326 Tavake Afeaki, memorandum of oral submissions made at judicial conference, 12 August 2011

2.327 Thomas Bennion, memorandum of further oral submissions made at judicial conference, 12 August 2011

2.328 Virginia Hardy and Rachel Hogg, memorandum of oral submissions made at judicial conference, 12 August 2011

2.329 Tavake Afeaki, memorandum of oral submissions made at judicial conference, 12 August 2011

2.330 Barney Tūpara, memorandum of oral submissions made at judicial conference, 12 August 2011

2.331 Laura Carter, memorandum of oral submissions made at judicial conference, 12 August 2011

2.332 Karen Feint, memorandum of oral submissions made at judicial conference, 12 August 2011

2.333 John Kahukiwa, memorandum of oral submissions made at judicial conference, 12 August 2011

2.334 Barney Tūpara, memorandum amending errors in memorandum 2.330, 15 August 2011

2.335 Laura Carter, memorandum regarding further research and the Tribunal's ability to make recommendations for resumption, 16 August 2011

2.336 Thomas Bennion, memorandum applying for hearing on resumption order by Ngā Ariki Kaipūtahi claimants, 22 July 2011

2.337 Judge Stephanie Milroy, memorandum regarding the Ngā Ariki Kaipūtahi application for remedies hearing, 25 August 2011

2.338 Judge Stephanie Milroy, memorandum regarding the scope of the remedies hearing and submissions of counsel following the judicial conference held on 10 August 2011 at the Waitangi Tribunal, 26 August 2011

2.339 Laura Carter, memorandum responding to memorandum 2.338, 26 August 2011

2.340 Thomas Bennion, memorandum responding to memorandum 2.338, 2 September 2011

2.341 Karen Feint, memorandum responding to memorandum 2.338, 2 September 2011

2.342 John Kahukiwa, memorandum responding to memorandum 2.338, 5 September 2011

2.343 Judge Stephanie Milroy, memorandum regarding the scope of the inquiry, the inquiry timetable and discovery, 9 September 2011

2.344 Karen Feint, memorandum responding to memorandum 2.343, 3 October 2011

2.345 LG Powell and RN Smail, memorandum responding to memorandum 2.298, 29 June 2011

2.346 Judge Stephanie Milroy, memorandum providing further details regarding the scope of the inquiry and housekeeping matters, 14 October 2011

2.347 John Kahukiwa, memorandum regarding discovery and exchange of information, 21 October 2011

2.348 John Kahukiwa, memorandum seeking leave to file late, 4 November 2011

2.349 John Kahukiwa, memorandum responding to memorandum 2.346, 4 November 2011

2.350 Laura Carter, memorandum responding to memorandum 2.346, 4 November 2011

2.351 Judge Stephanie Milroy, memorandum granting leave to file late, 7 November 2011

2.352 John Kahukiwa, memorandum responding to memorandum 2.346, 9 November 2011

2.353 Laura Carter, memorandum regarding filing and transfer of reports on to the Wai 814 record of inquiry, 11 November 2011

2.354 Barney Tūpara, memorandum responding to memorandum 2.346, 4 November 2011

2.355 Judge Stephanie Milroy, memorandum convening a judicial conference, adding reports to the Wai 814 record of inquiry and addressing representation of TAMA and Ngā Ariki Kaipūtahi, 17 November 2011

2.356 Judge Stephanie Milroy, memorandum adding particularised claims for relief to the Wai 814 record of inquiry, 17 November 2011

2.357 Virginia Hardy and Craig Linkhorn, memorandum responding to particularised claims for relief, 18 November 2011

2.358 Virginia Hardy and Craig Linkhorn, memorandum regarding Crown statement of response, 18 November 2011

2.359 Judge Stephanie Milroy, memorandum setting filing date and confirming judicial conference, 22 November 2011

2.360 Joel Bristow, notice of 12 December 2011 judicial conference concerning preliminary issues including the claimants' particularised claims for relief, the Crown's response to these claims and the Tribunal's draft statement of issues, 23 November 2011

2.361 Laura Carter, memorandum responding to memoranda 2.358 and 2.359, 25 November 2011

2.362 John Kahukiwa, memorandum responding to memoranda 2.358 and 2.359, 25 November 2011

2.363 Karen Feint, memorandum regarding resumption and the disclosure of relevant information, 25 November 2011

2.364 Karen Feint, memorandum concerning second amended application for resumption, 25 November 2011

2.365 John Kahukiwa, memorandum regarding Eric John Tupai Ruru's affidavit and schedule of discovery documents, 25 November 2011

2.366 Thomas Bennion, memorandum responding to memorandum 2.358 and providing further particulars of relief, 30 November 2011

2.367 Judge Stephanie Milroy, memorandum regarding matters arising from claimant counsels' memoranda, clarifying the nature of the proceeding, and producing a draft statement of issues for comment and submission by the parties, 6 December 2011

2.368 Virginia Hardy and Craig Linkhorn, memorandum detailing amended statement of response to particularised claims for relief, 6 December 2011

2.369 Virginia Hardy and Craig Linkhorn, memorandum regarding amended Crown statement of response, 6 December 2011

2.370 Barney Tūpara, memorandum regarding 12 December 2011 judicial conference and status of Wai 915 claim, 9 December 2011

2.371 Thomas Bennion, memorandum regarding 12 December 2011 judicial conference, 12 December 2011

2.372 Judge Stephanie Milroy, memorandum following 12 December 2011 judicial conference and setting new inquiry timetable, 13 December 2011

2.373 John Kahukiwa, memorandum of oral submissions made at judicial conference, 16 December 2011

2.374 John Kahukiwa, memorandum of oral submissions made at judicial conference, 16 December 2011

2.375 Virginia Hardy and Craig Linkhorn, memorandum of oral submissions made at judicial conference, 19 December 2011

2.376 Karen Feint, memorandum of oral submissions made at judicial conference, 19 December 2011

2.377 Thomas Bennion, memorandum responding to memorandum 2.367 and detailing oral submissions made at judicial conference, 22 December 2011

2.378 Richard Boast and Laura Carter, memorandum responding to memorandum 2.367 and regarding issues raised at judicial conference, 19 December 2011

2.379 Judge Stephanie Milroy, memorandum regarding the second draft statement of issues and research, 20 January 2012

2.380 Judge Stephanie Milroy, memorandum regarding research, 27 January 2012

2.381 Laura Carter, memorandum regarding the filing of further particularised claims for relief and legal aid issues, 31 January 2012

2.382 John Kahukiwa, memorandum seeking leave to file further amendments to the Wai 995 claim, 31 January 2012

2.383 Judge Stephanie Milroy, memorandum granting leave to file at a later date and setting down a tentative inquiry timetable, 10 February 2012

2.384 Judge Stephanie Milroy, memorandum regarding particularised claims for relief, 13 February 2012

2.385 Laura Carter, memorandum responding to memorandum 2.383, 17 February 2012

2.386 Virginia Hardy and Craig Linkhorn, memorandum responding to memorandum 2.383, 17 February 2012

2.387 John Kahukiwa, memorandum responding to memorandum 2.383, 17 February 2012

2.388 Karen Feint, memorandum responding to memorandum 2.383, 17 February 2012

2.389 Thomas Bennion, memorandum responding to memorandum 2.383, 17 February 2012

2.390 Judge Stephanie Milroy, memorandum granting leave for Crown to file further submissions, 17 February 2012

2.391 Virginia Hardy and Craig Linkhorn, memorandum responding to parties' submissions regarding inquiry timetable, 20 February 2012

2.392 Judge Stephanie Milroy, memorandum regarding recent memoranda filed and setting inquiry timetable, 23 February 2012

2.393 James Johnston and Alan Knowsley, memorandum regarding the geographical boundaries of the application for remedies, 23 February 2012

2.394 Judge Stephanie Milroy, memorandum adding a further particularised claim for relief to the Wai 814 record of inquiry, 1 March 2012

2.395 John Kahukiwa, memorandum clarifying representation of Ngā Ariki Kaipūtahi and TAMA, 28 February 2012

2.396 Virginia Hardy and Craig Linkhorn, memorandum detailing second amended statement of response to particularised claims for relief, 6 March 2012

2.397 Karen Feint, memorandum seeking Tribunal directions on process to determine Schedule One of the Crown Forest Assets Act 1989 compensation and the filing of technical evidence, 12 March 2012

2.398 Judge Stephanie Milroy, memorandum responding to memorandum 2.393, raising jurisdictional issue and setting filing dates, 14 March 2012

2.399 Judge Stephanie Milroy, memorandum responding to memorandum 2.397 and seeking submissions in response, 21 March 2012

2.400 John Kahukiwa, memorandum responding to memoranda 2.398 and 2.399 and the final statement of issues, 21 March 2012

2.401 Laura Carter, memorandum responding to memorandum 2.399, 21 March 2012

2.402 Laura Carter, memorandum responding to memorandum 2.399, 21 March 2012

2.403 Virginia Hardy and Craig Linkhorn, memorandum responding to memorandum 2.399, 21 March 2012

2.404 Judge Stephanie Milroy, memorandum regarding the Tribunal's final statement of issues, scope of inquiry and addressing evidential matters, 23 March 2012

2.405 Thomas Bennion, memorandum responding to memoranda 2.398 and 2.399, 23 March 2012

2.406 Craig Linkhorn, memorandum responding to memorandum 2.398, 28 March 2012

2.407 Karen Feint, memorandum responding to memorandum 2.404, 29 March 2012

2.408 Laura Carter, memorandum seeking an extension to file claimant briefs of evidence, 29 March 2012

2.409 Judge Stephanie Milroy, memorandum regarding valuation evidence under the Crown Forest Assets Act 1989 and the filing of further evidence, and convening a teleconference, 2 April 2012

2.410 Thomas Bennion, memorandum seeking an extension to file claimant briefs of evidence, 3 April 2012

2.411 Kathy Ertel, memorandum seeking leave to file claimant briefs of evidence late, 3 April 2012

2.412 Laura Carter, memorandum responding to memorandum 2.409, 4 April 2012

2.413 John Kahukiwa, memorandum seeking an extension to file claimant briefs of evidence, 5 April 2012

2.414 Judge Stephanie Milroy, memorandum granting parties extensions to file briefs of evidence and adjusting the inquiry timetable, 5 April 2012

2.415 Karen Feint, memorandum filing briefs of evidence, 11 April 2012

2.416 Judge Stephanie Milroy, memorandum following teleconference on East Coast boundary, 13 April 2012

2.417 Kathy Ertel, memorandum raising issue of whether the Tribunal has determined there are well founded claims in the Tūranga inquiry and seeking an amendment to the hearing plan, 18 April 2012

2.418 Judge Stephanie Milroy, memorandum responding to memorandum 2.417 and seeking submissions in response, 20 April 2012

2.419 Kathy Ertel, memorandum seeking leave to file claimant briefs of evidence late, 20 April 2012

2.420 Karen Feint, memorandum filing draft brief of evidence and seeking leave to file final brief of evidence late, 20 April 2012

2.421 Kathy Ertel, memorandum seeking further leave to file claimant briefs of evidence late, 23 April 2012

2.422 Judge Stephanie Milroy, memorandum regarding filing dates of claimant briefs of evidence, 24 April 2012

2.423 John Kahukiwa, memorandum responding to memoranda 2.418 and 2.417, 26 April 2012

2.424 Richard Boast, memorandum seeking leave to file an amended brief of evidence for Keith Katipa, 27 April 2012

2.425 Virginia Hardy, memorandum responding to memoranda 2.418 and 2.417, 30 April 2012

2.426 Karen Feint, memorandum responding to memoranda 2.418 and 2.417, 30 April 2012

2.427 Thomas Bennion, memorandum responding to memoranda 2.418 and 2.417, 30 April 2012

2.428 Judge Stephanie Milroy, memorandum regarding well-founded claims and procedural matters, 4 May 2012

2.429 Virginia Hardy, memorandum regarding confidentiality orders over Mangatū Incorporation evidence and filing dates, 9 May 2012

2.430 Judge Stephanie Milroy, memorandum regarding hearing planning matters, 17 May 2012

2.431 Joel Bristow, notice of 18 to 22 June 2012 hearing concerning remedies applications, 24 May 2012

2.432 Thomas Bennion, memorandum seeking leave to file further attachments to the evidence of Owen Lloyd, 24 May 2012

2.433 Virginia Hardy, memorandum filing briefs of evidence for Crown witnesses and seeking extension to file the final version of evidence for Andrew McEwen, 25 May 2012

2.434 Judge Stephanie Milroy, memorandum releasing Mangatū Blocks document bank and summary report, and addressing other matters, 29 May 2012

2.435 Kathy Ertel, memorandum regarding the jurisdiction of Wai 1489, and seeking leave to file further evidence and defer the hearing of the Ngā Ariki Kaipūtahi evidence, 29 May 2012

2.436 Karen Feint, memorandum concerning the hearing timetable, Crown evidence and confidential documents, 1 June 2012
(a) Hearing timetable, 1 June 2012

2.437 Richard Boast, memorandum regarding issues to be discussed at 11 June teleconference, 8 June 2012

2.438 Karen Feint, memorandum filing briefs of evidence in reply of Alan Haronga and Bruce Stirling, 11 June 2012

2.439 Richard Boast, memorandum seeking leave to file further supporting information to the amended brief of evidence of Keith Katipa, 13 June 2012

2.440 John Kahukiwa, memorandum regarding hearing planning, admission of evidence and cross examination, 13 June 2012

2.441 Thomas Bennion, memorandum regarding admission of evidence, 13 June 2012

2.442 Karen Feint, memorandum regarding admission of evidence, 13 June 2012

2.443 Virginia Hardy and Craig Linkhorn, memorandum regarding admission of evidence, 14 June 2012

2.444 Richard Boast, memorandum regarding admission of evidence, 14 June 2012

2.445 Karen Feint, memorandum regarding revised hearing timetable, 14 June 2012

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2.447 Judge Stephanie Milroy, memorandum regarding the scheduling of a second hearing week, 29 June 2012

2.448 Judge Stephanie Milroy, memorandum regarding matters arising from the first hearing week, 6 July 2012

2.449 John Kahukiwa, memorandum filing an amended statement of claim and excerpts from Geoffrey Robertson QC, *Crimes against Humanity: The Struggle for Global Justice* (London: Penguin, 1999), 2 August 2012

2.450 Kathy Ertel, memorandum filing supplementary evidence relating to Edward Mokopuna Brown, 3 August 2012

2.451 John Kahukiwa, memorandum responding to memorandum 2.448 and seeking leave to file further evidence and submissions, 3 August 2012

2.452 Craig Linkhorn, memorandum responding to memorandum 2.448 and filing further evidence, 6 August 2012

2.453 Karen Feint, memorandum responding to memorandum 2.448, filing further evidence, seeking confidentiality orders in relation to Mangatū Incorporation annual reports, and making submissions on options for resumption of Crown forest land, 6 August 2012

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2.455 Deborah Edmunds and Keitaria Haira, memorandum responding to memorandum 2.448 and seeking leave to file further evidence and submissions, 6 August 2012

2.456 Judge Stephanie Milroy, memorandum regarding requests for filing extensions, 7 August 2012

2.457 Deborah Edmunds and Richard Boast, memorandum regarding additional evidence and submissions on possible options for resumed land, 7 August 2012

2.458 Craig Linkhorn, memorandum responding to memorandum 2.453 and regarding further confidentiality orders sought by the Mangatū Incorporation, 7 August 2012

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2.460 Judge Stephanie Milroy, memorandum registering an amended statement of claim, 9 August 2012

2.461 Craig Linkhorn, memorandum opposing confidentiality of evidence sought by Te Whānau a Kai and seeking directions for disclosure of relevant information, 16 August 2012

2.462 John Kahukiwa, memorandum responding to memorandum 2.448, filing third statement of evidence of Robyn Rauna and seeking confidentiality of certain materials, 21 August 2012

2.463 Karen Feint, memorandum responding to memoranda 2.458 and 2.461, 22 August 2012

2.464 Karen Feint, memorandum seeking leave to file evidence of Dr Merata Kawharu and Raaniera Te Whata as evidence in reply, 8 June 2012

2.465 Thomas Bennion, memorandum responding to memorandum 2.448 and filing further evidence, 24 August 2012

2.466 Craig Linkhorn, memorandum responding to confidentiality sought by Ngā Ariki Kaipūtahi and TAMA and memorandum 2.463, 27 August 2012

2.467 John Kahukiwa, memorandum responding to memorandum 2.446, 30 August 2012

2.468 Judge Stephanie Milroy, memorandum regarding evidence, confidentiality and hearing planning, 31 August 2012

2.469 Thomas Bennion, memorandum regarding evidence and issues of whakapapa, 5 September 2012

2.470 Karen Feint, memorandum filing evidence for Mr Haronga, regarding the need for disclosure directions as requested by the Crown, and requesting further disclosure from the Crown on the stocked areas of the Mangatū forest, 10 September 2012

2.471 Simon Hirini, memorandum responding to application for resumption, 6 August 2012

2.472 Joel Bristow, notice of 8 to 12 October 2012 hearing concerning remedies applications, 21 September 2012

2.473 John Kahukiwa, memorandum regarding cross-examination of witnesses during week 2 hearings, 21 September 2012

2.474 Richard Boast and Keitaria Haira, memorandum regarding cross-examination of witnesses during week 2 hearings, 21 September 2012

2.475 Karen Feint, memorandum regarding cross-examination of witnesses during week 2 hearings, 21 September 2012

2.476 Craig Linkhorn, memorandum regarding cross-examination of witnesses during week 2 hearings, 24 September 2012

2.477 Thomas Bennion and Kathy Ertel, memorandum regarding cross-examination of witnesses during week 2 hearings, 27 September 2012

2.478 Craig Linkhorn, memorandum filing proposed timetable for week 2 hearings, 27 September 2012
(a) Proposed timetable for week 2 hearings, 27 September 2012

2.479 Judge Stephanie Milroy, memorandum regarding evidence, submissions and hearing planning matters, 3 October 2012
(a) Week 2 remedies hearing timetable, 3 October 2012
(b) Table of the documents granted limited confidentiality, 3 October 2012

2.480 Kathy Ertel, Bryce Lyall and Thomas Bennion, memorandum regarding the issues set out in the 11 October 2011 judicial conference agenda, 10 October 2012

2.481 Judge Stephanie Milroy, memorandum regarding matters of evidence and submissions following the second hearing week and closing submissions, 18 October 2012

2.482 Craig Linkhorn, memorandum filing third brief of evidence of James Brent Parker and seeking an extension to file further evidence and submissions, 25 October 2012

2.483 Kathy Ertel, memorandum responding to memorandum 2.481 and seeking leave to file submissions late, 25 October 2012

2.484 Richard Boast, memorandum responding to memorandum 2.481, 25 October 2012

2.485 Karen Feint, memorandum responding to memorandum 2.481, 25 October 2012

2.486 John Kahukiwa, memorandum responding to memorandum 2.481, 26 October 2012

2.487 Judge Stephanie Milroy, memorandum regarding requests for filing extensions, 26 October 2012

2.488 Kathy Ertel, Bryce Lyall and Thomas Bennion, memorandum responding to memorandum 2.481, 29 October 2012

2.489 Kathy Ertel, Bryce Lyall and Thomas Bennion, memorandum responding to memorandum 2.481 and filing additional evidence of Infometrics, 29 October 2012

2.490 Judge Stephanie Milroy, memorandum regarding requests for filing extensions, 30 October 2012

2.491 Craig Linkhorn, memorandum regarding procedural issues and seeking an extension to filing further evidence, 2 November 2012

2.492 Judge Stephanie Milroy, memorandum granting a further extension to counsel for the Crown to file further evidence, 7 November 2012

2.493 Craig Linkhorn, memorandum responding to memorandum 2.490 and regarding evidence filed by counsel for Mangatū Incorporation relating to negotiations between the New Zealand Forest Service and Māori land trusts, 9 November 2012

2.494 Karen Feint, memorandum responding to memorandum 2.493 and regarding evidence filed by counsel for Mangatū Incorporation relating to negotiations between the New Zealand Forest Service and Māori land trusts, 12 November 2012

2.495 Craig Linkhorn, memorandum regarding the second brief of evidence of Donn Armstrong and new evidence on erosion in the East Coast, and responding to memorandum 2.494, 14 November 2012

2.496 Judge Stephanie Milroy, memorandum regarding process issues, 14 November 2012

2.497 Karen Feint, memorandum filing timetable for closing hearings, 23 November 2012
(a) Timetable for closing hearings, 23 November 2012

2.498 Richard Boast and Keitaria Haira, memorandum regarding the fourth brief of evidence of Andrew McConnell, 27 November 2012

2.499 Judge Stephanie Milroy, memorandum regarding the filing of reply submissions, 30 November 2012

2.502 Richard Boast, memorandum filing reply to Crown closing submissions, 7 December 2012

2.503 Judge Stephanie Milroy, memorandum regarding evidence provided in Mangatū Incorporation reply submissions, 11 March 2013

2.504 Karen Feint, memorandum filing document requested in memorandum 2.503, 20 March 2013

Hearing transcripts

4.28 Transcript of first remedies hearing, 18–22 June 2012, Te Poho o Rawiri Marae, Gisborne
(a) Transcript of first remedies hearing including translations and Māori content, 18–22 June 2012, Te Poho o Rawiri Marae, Gisborne

4.29 Transcript of second remedies hearing, 8–11 October 2012, Gisborne Conference Centre, Gisborne

4.30 Transcript of closing submissions, 27–29 November 2012, Waitangi Tribunal, Wellington

Audio recordings

5.15 First remedies hearing, 18–22 June, sound recording – Floor
(a) First remedies hearing, 18–22 June, sound recording – English

Record of Documents

A Documents received up to first week of Tūranga hearings

A18 Kathryn Rose, 'The Te-Aitanga-a-Mahaki Land 1890–1970: Alienation and Efforts at Development', Research report, 2000

(a) Supporting documents to doc A18, 18 vols, various dates

A26 Brian Murton, 'Te Aitanga a Mahaki, 1860–1960: The Economic and Social Experience of a People', Research report, 2001

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A27 Jacqueline Haapu, 'Te Ripoata O Mangtau, The Mangatu Report', Research report, September 2000

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F1 Ashley Gould, 'Afforestation at Mangatu (Issue 26)', March 2002

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I1 Judith Binney, 'Encircled Lands Part One: A History of the Urewera from European Contact Until 1878', overview report, April 2002

(a) Supporting papers

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I2 Judith Binney, 'Encircled Lands Part Two: A History of the Urewera 1878 – 1912', overview report from, June 2002

I3 Peter Boston and Stephen Oliver, 'Tahora', commissioned research report, Wellington: Waitangi Tribunal, June 2002

I4 Brent Parker, 'Tahora No 2 Block', report, January 2005

(a) Supporting documents

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(b) Supporting map
(c) Supporting documents
(d) Supporting documents

15 Michael Macky, 'Tahora and the East Coast Trust', report, January 2005
(a) Supporting documents, 8 April 2005

16 Vincent O'Malley, 'The Whānau ā Kai Lands', commissioned research report, Wellington: Crown Forestry Rental Trust, October 2008

17 Richard Towers, 'Te Whānau ā Kai Customary Interests within the Waiariki District', commissioned research report, Wellington: Crown Forestry Rental Trust, March 2009

18 Wirangi Tarewa Pera, brief of evidence, 4 April 2012

19 Anthony (Tony) Tapp, brief of evidence, 5 April 2012

110 Albert Horsfall, brief of evidence, 5 April 2012

111 Robyn Mere Rauna, brief of evidence, 11 April 2012

112 Rutene Irwin, brief of evidence, 5 April 2012
(a) Mangatu Blocks Incorporation and Group, Mangatū Annual Report 1993, p 16
(b) 'The Twelve Trustees of Mangatu No 1 Block 1881', typescript, not dated

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114 Vacated

115 Ingrid Searancke, brief of evidence, 5 April 2012

116 Lewis Ruihi Moeau, brief of evidence, 5 April 2012
(a) Mangatū Incorporation, 'Te Mana o Te Aitanga ā Māhaki', booklet, not dated

117 Alan Haronga, brief of evidence, 5 April 2012
(a) 'Te Aitanga ā Māhaki Rangatira Whakapapa', typescript, not dated
(b) 'Map of Te Aitanga ā Māhaki Land Blocks and related hapū', map, not dated

(c) 'Māhaki Pā, Marae and Urupā on Mangatū Lands', map, not dated
(d) 'Māhaki Pā, Marae and Urupā on Mangatū Lands' , map, not dated
(e) '1881 Native Land Court Hearing – List of Rangatira and Tohunga', typescript, not dated
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(g) Sir Henara Ngata, affidavit, 7 November 2011
(h) John Woods, 'Mangatu Blocks Incorporation History', typescript, not dated
(i) 'Final list of Original Owners for Mangatū No 1 Block', typescript, not dated
(j) 'Mangatū 1961 List of Owners', typescript, 24 September 1962
(k) 'List of Whānau Trusts – February 2011', typescript, February 2011
(l) 'Te Rau Tau o Te Whenua o Mangatū 1893 – 1993', booklet, 1993

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119 Keith Katipa, brief of evidence, 20 April 2012
(a) Gisborne Native Land Court minute book 7, April 1881, pp 199 – 201, 202, 213–14, 215, 216, 217, 262
(b) Gisborne Native Land Court minute book 7, 1881, pp 121–22
(c) Gisborne Herald Article, typescript, not dated
(d) Mangatu No 1 Empowering Act 1893
(e) Crown Forestry Rental Trust, 'Map 1 Gisborne Inquiry District', map, not dated
(f) Tui Connections to Ngā Ariki, typescript, not dated
(g) Horouta (labelled 'Ngā Whakapapa, Chart 88'), typescript, not dated
(h) Mangatū in whānau groupings and list of Mangatū owners, typescript, not dated
(i) 'Te Whānau a Kai', typescript, not dated
(j) 'Gisborne MB 17 P361: Succession to Tiopira Koreke', typescript, not dated

120 David Hawea, brief of evidence, 20 April 2012
(a) 'Te Whānau a Kai Trust: Deed of Trust', trust deed, November 2000
(b) David Hawea, brief of evidence, 24 November 2011 (also recorded as Wai 894, #137)
(c) Ōpōtiki Native Land Court minute book 5, 1889, pp 298 – 306

121 Owen Lloyd, brief of evidence, 20 April 2012
(a) Te Karere Video
(b) Janet Grossman (Ministry of Social Development) to Owen Lloyd, 18 April 2012
(c) 'Nga Ariki Kaiputahi Charter', draft charter, February 2012
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(e) Kel Sanderson, Mathew Arcus, Fiona Stokes of Business and Economic Research Limited (BERL), 'Functions And Costs Of Operating A Post-Settlement Governance Entity', report to Crown Forestry Rental Trust, December 2007

122 Irene Renata, brief of evidence, 20 April 2012

(a) Ngā Ariki Kaipūtahi video

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(a) Curriculum Vitae of Marcus Lloyd

(b) 'Edward Mokopuna Brown', Powerpoint presentation, not dated

(c) 'Ngā Ariki Kaipūtahi: Constitution Presentation', Powerpoint presentation, not dated

124 Dr Brian Gilling, brief of evidence, 20 April 2012

125 Eric John Tupai Ruru, brief of evidence, 26 April 2012

126 Bernard Paul Quinn, brief of evidence, 20 April 2012

(a) Forests Agreement, 20 July 1989

(b) Forestry Working Group, 'Sale of the Crown's Commercial Forestry Assets', report to the Minister of Finance and the Minister for State-Owned Enterprises, 1988

(c) Paul Quinn, memorandum concerning national hui on Crown's commercial forestry assets, 25 January 1989

(d) Paul Quinn, memorandum concerning information seminar on sale of the Crown's commercial forestry assets, 27 April 1989

(e) 'Report on Consultations between Officials and Maori Representatives : The Treaty of Waitangi and the Forestry Sale', memorandum to Cabinet State Agencies Committee, 28 June 1989

(f) Crown file notes, April-June 1989

(g) Tim Sanders, file note of the 30 May 1989 meeting to discuss Treaty and forestry issues, 1 June 1989

(h) Paul Quinn, memorandum concerning 9 June 1989 meeting to discuss Treaty and forestry issues, 12 June 1989

(i) Māori forestry proposal, 21 June 1989

(j) Reactions and concerns of officials to Māori forestry proposal

(k) Revised Māori forestry proposal, 22 June 1989

(l) Further revisions to Crown and Māori positions, 23 June 1989

(m) 'Sale of State Commercial Forests : Draft Agreement between the Crown and Māori on the Treatment of Land Claims in the Sale of the Crown's Commercial Forestry Assets', 25 June 1989
(n) 'Sale of State Commercial Forests: Draft Agreement between the Crown and Māori on the Treatment of Land Claims in the Sale of the Crown's Commercial Forestry Assets', 27 June 1989
(o) 'Sale of State Commercial Forests : Draft Agreement between the Crown and Māori on the Treatment of Land Claims in the Sale of the Crown's Commercial Forestry Assets', 28 June 1989
(p) New Zealand Treasury, 'Income from State Asset Sales', New Zealand Treasury, 30 September 1999, www.treasury.govt.nz/government/assets/saleshistory/index.html

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(a) 'Appendix 1', typescript, not dated

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132 Index to the Crown bundle of resumption documents, vol 1, 25 May 2012
(a) Crown bundle of resumption documents, vol 1, 25 May 2012

133 Andrew Durrad McEwen, brief of evidence, 31 May 2012
(a) Chart of significant events, 31 May 2012

134 Anthony (Tony) Tapp, second brief of evidence, 8 June 2012
(a) Whakapapa of Ngā Ariki Kaiputahi
(b) Whakapapa of Parewhero

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(c) Gisborne Māori Land Court minute book 46, 24 November 1921, p 202

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I36 Alan Parekura Torohina Haronga, second brief of evidence, 11 June 2012

(a) 'Ngāriki Lists in Mangatu 1 Block', typescript, not dated

(b) 'Summary of Mangatū Māori Land Court Hearings 1881–1960', typescript, not dated

I37 Robyn Mere Rauna, brief of evidence, 8 June 2012

I38 William Stirling Te Aho, second brief of evidence, 13 June 2012

(a) Minister for Treaty of Waitangi Negotiations to Willie Te Aho, 1 March 2012

I39 Tanya Brown/Rogers and David Brown, brief of evidence, 2 May 2012

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(a) Crown bundle of resumption documents, vol 2, 31 May 2012

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J1 Brendan Brown QC and Karen Feint, synopsis of opening submissions, 18 June 2012

(a) *Haronga v Waitangi Tribunal* [2011] 2 NZLR 53

(b) Section 8HB of the Treaty of Waitangi Act 1975

J2 'Mangatu Whanau Claim for the Return of its Whenua', Powerpoint presentation, 17 June 2012

J3 'Mangatu Whanau Claim for the Return of its Whenua', Powerpoint presentation, 18 June 2012

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J5 'Te Pou a Haokai Mandating Wananga, 20th, 21st, 22nd February 2004 Resolutions', typescript, February 2004

J6 'Chronology of steps taken in pursuit of claim', typescript, not dated

J7 Alan Haronga to the Minister in Charge of Treaty of Waitangi Negotiations, 26 August 2008

J8 'Mangatu Incoporation – Distribution of Shareholdings 1962', charts, not dated

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J10 Owen Lloyd, John Ruru and Ronald Nepe to Minister in Charge of Treaty of Waitangi Negotiations, 13 March 2009

J11 Tom Bennion and Kathy Ertel, opening submissions for Ngā Ariki Kaipūtahi, not dated

J12 John Kahukiwa, opening submissions for Te Aitanga a Māhaki and Affiliates, 21 June 2012

J13 Richard Boast, opening submissions for Te Whānau a Kai, 13 July 2012
(a) David Hawea, Powerpoint presentation, 28 January 2012

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K1 Geoffrey Robertson QC, *Crimes against Humanity: The Struggle for Global Justice* (London: Penguin, 1999), pp 84–85, 310–311

K2 Supplementary evidence relating to Edward Mokopuna Brown, typescript, not dated

K3 Keith Katipa, revised brief of evidence, 3 August 2012
(a) 'Summary of Mangatū in whānau groups', typescript, not dated
(b) Whakapapa of Te Whānau a Kai, typescript, not dated

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K5 Andrew McEwen, second brief of evidence, 6 August 2012

K6 Alan Haronga, evidence in response to Waitangi Tribunal directions, 6 August 2012
(a) 'Mangatu Blocks Incorporation shareholder by location', typescript, 13 July 2012
(a)(i) 'Mangatu Blocks Incorporation Shareholder Location', typescript, 13 July 2012
(b) 'Mangtau Blocks – list of AGM attendees for 2008 – 2012', typescript, not dated

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(c) Geometrics, map illustrating current land use between farming and forestry, map, not dated.

(d) T M G Pohatu (deputy registrar, Māori Land Court) to the chairperson, Mangatu Blocks Incorporation, 6 August 2012

(e) Mangatu Blocks Incorporation and Group, Mangatū Blocks Annual Report 2006

(f) Mangatu Blocks Incorporation and Group, Mangatū Annual Report 2007

(g) Mangatu Blocks Incorporation and Group, Mangatū Annual Report 2008

(h) Mangatu Blocks Incorporation and Group, Mangatū Annual Report 2009

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(j) Mangatu Blocks Incorporation and Group, Mangatū Annual Report 2011

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(a) Te Whānau a Kai membership list, typescript, 26 July 2012

(b) 'Te Whānau a Kai Hapū Trust Financial Reports for the year ended 30 June 2007', financial report, 28 November 2008

(c) 'Te Whānau a Kai Hapū Trust Financial Reports for the year ended 30 June 2008', financial report, 28 November 2008

(d) 'Te Whānau a Kai Hapū Trust Financial Reports for the year ended 30 June 2009', financial report, 23 April 2010

(e) 'Te Whānau a Kai Trust Annual Report for the year ended 30 June 2010', Annual report, 15 November 2010

(f) 'Te Whānau a Kai Trust Annual Report 2011', Annual report, 22 August 2011

(g) Te Whānau a Kai Trust Annual General Meeting attendance records 2005–2011, typescript, various dates

(h) Te Whānau a Kai Hui a Iwi attendance sheets 2006, 2007, 2009, 2010, typescript, various dates

(i) 'Twenty Questions for Governance – Matters Required in Disclosure Material For Governance Entities', typescript, not dated

(j) Extract from Office of Treaty Settlements, *Ka Tika ā Muri, Ka Tika ā Mua: He Tohutohu Whakamārama i ngā Whakataunga Kerēme e pā ana ki te Tiriti o Waitangi me ngā Whakaritenga ki te Karauna – Healing the Past, Building a Future: A Guide to Treaty of Waitangi Claims and Negotiations with the Crown*, 2nd ed, Wellington: Office of Treaty Settlements, 2002, pp 44–49

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(l) Office of Treaty Settlements, *Ka Tika ā Muri, Ka Tika ā Mua: He Tohutohu Whakamārama i ngā Whakataunga Kerēme e pā ana ki te Tiriti o Waitangi me ngā Whakaritenga ki te Karauna – Healing the Past, Building a Future: A Guide to Treaty of Waitangi Claims and Negotiations with the Crown*, 2nd ed (Wellington: Office of Treaty Settlements, 2002), pp 92–93

(m) Crown Forestry Rental Trust, *Aratohu mō ngā Rōpū Kaitono: Guide for Claimants Negotiating Treaty Settlements* (Wellington: Crown Forestry Rental Trust, 2007), pp 55–94

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(a) Te Aitanga a Mahaki (Amended) Deed of Trust, 17 August 2003

(b) Te Aitanga a Mahaki (Amended) Deed of Trust, 17 September 2005

(c) Deed of Trust of Te Aitanga a Māhaki and Affiliates Settlement Trust, not dated

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(f) 'Index – AGM attendance records of the Mahaki Trust', index, not dated

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(g) 'Te Aitanga a Māhaki Settlement Trust Registration Form', typescript, not dated

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K12 'Whakapapa Comparisons – Ngā Ariki Kaipūtahi', typescript, not dated

K13 Alan Haronga, fourth brief of evidence, 10 September 2012
(a) 'Mangatū Blocks Incorporation – list of owners as at July 2012 by surname', typescript, July 2012
(b) 'Mangatu Blocks Incorporation', map prepared by PF Olsen, 8 March 2012

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(a) 'Forestry Emissions Unit Trust', trust deed, 19 April 2011

K16 Andrew McConnell, third brief of evidence, 3 October 2012
(a) James Brent Parker, second brief of evidence (with incorrect data and graphs removed), 3 August 2012
(b) 'Mangatū Incorporation – Distribution of shareholdings 1962', chart, not dated

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L1 Gisborne Native Land Court minute book 8, 29 August 1883, pp 446–448

L2 'Response to Evidence from David Hawea given on 9 October 2012 to the Waitangi Tribunal', typescript, 9 October 2012

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L4 Craig Linkhorn, opening submissions for the Crown, 8 October 2012

L5 'Forest Map: Mangatu Forest: Mangatu Block', map prepared by Ernslaw One, April 2012

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(b) New Zealand Forest Research Institute, 'The Trees Come Back', DVD, 1979/80

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M1 James Brent Parker, third brief of evidence, 25 October 2012

(a) 'Appendix D: List of Incorporation land that has been acquired by the Crown for the purposes of Mangatū Forest or disposed of', typescript, not dated

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(b) Gisborne District Council Planning Map r47b, 20 January 2009

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(a) 'Appendix I – Valuation Department, Rural Land Market: January to December Periods 1959–1961 #3312', typescript, various dates

(b) 'Appendix II – Valuation Department, Rural Land Market: January to December Periods 1962–1963 #3493', typescript, various dates

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(f) 'Appendix IV – Valuation Department, Sale Analysis – Post Land Sales – Rural – Sales Return for Counties Revised 1961 #4202', typescript, various dates

M6 Richard Boast, closing submissions for Te Whānau a Kai, 20 November 2012

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M8 Kathy Ertel and Thomas Bennion, closing submissions for Ngā Ariki Kaipūtahi, 21 November 2012

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(a) John Kahukiwa, Annotated version of closing submissions for Te Aitanga a Māhaki and Affiliates, 5 December 2012

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(a) Appendices to Crown closing submissions, 26 November 2012

N Documents received during closing submissions

N1 Keith Katipa, brief of evidence, 27 November 2012

O Documents received after closing submissions

O1 John Kahukiwa, submissions in reply for Te Aitanga a Māhaki, 6 December 2012

O2 Kathy Ertel and Thomas Bennion, submissions in reply for Ngā Ariki Kaipūtahi, 6 December 2012

O3 Richard Boast, submissions in reply for Te Whānau a Kai, 7 December 2012

04 Karen Feint, submissions in reply for The Proprietors Mangatū Blocks Incorporated, 7 December 2012

05 The New Zealand Forest Service, 'Leasing of Maori Land for Afforestation', report, 16 March 1964

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APPENDIX II

STATEMENT OF ISSUES

The following is reproduced from paper 2.404.

Questions, Part I (Jurisdictional or Threshold Question):

This question relates to whether the Tribunal has jurisdiction to make recommendations (either binding or non-binding) for claims/claimants applying to be heard in this remedies hearing.

(1) Did the Tūranga Report find that the applicant's claim was 'well-founded'? (s 6(3) TOWA)

Questions, Part II (Resumption and Apportionment):

These questions relate to the factors to be considered by the Tribunal in determining whether to make binding recommendations concerning Mangatū Crown forest licensed land (CFL land) and, if so, the apportionment as between the applicant parties.

(1) What is the nature and degree of relationship or nexus between the applicant's well-founded claim and Mangatū CFL land? How should the Tribunal weigh the degree of nexus in considering the making of binding recommendations? (s 8HB(1) TOWA)

(2) If there is no direct relationship (or nexus) between the applicant's well-founded claim and Mangatū CFL land, how should the Tribunal weigh the applicant's customary interests in Mangatū land (where it is satisfied of these), for the purposes of identifying the Māori or group of Māori to whom that land or part of that land should be returned? (For the avoidance of doubt, the phrase 'Mangatū land' refers to the general area on which the Mangatū Crown forest now stands, including those areas adjacent to the forest which originally formed part of the Mangatū blocks.)

(3) Is a binding resumption recommendation required to compensate for or remove the prejudice pertaining to the well-founded claim?

(4) What is the 'dimension and composition' of the applicant party or entity? In other words, is the applicant group a suitable recipient entity of a resumption recommendation? In particular:
   (a) does the applicant group represent those prejudiced by Treaty breaches?
   (b) what is the size of the group in terms of notional iwi/hapū/entity population or potential beneficiaries?; and
   (c) how many individuals are currently registered members of the applicant group?;
   (d) what is the nature of the applicant group's structure, organization and governance? Is it, for example, incorporated or unincorporated? How are its trustees or officers elected or appointed and discharged of their duties/position? How is the group/entity governed and what financial and accounting control and reporting mechanisms are there which protect beneficiaries' interests?

(5) What terms and conditions should the Tribunal attach to any resumption recommendation, (including terms concerning the effect of the Emissions Trading Scheme), if any?

(6) Which valuation method has the applicant group nominated under clause 3 of the First Schedule of the Crown Forest Assets Act 1989? What is the specified amount under that method?

(7) What further compensation, if any, should the Tribunal recommend pursuant to clause 2(b) of the First Schedule of the Crown Forest Assets Act 1989 (in addition to the 5% minimum)?

(8) If the Tribunal were to make resumption recommendations in favour of more than one distinct group or entity, what different allocation models might be appropriate? For example, the Tribunal might:
   (a) allocate the Mangatū CFL land to more than one applicant or Māori group in joint or multiple ownership as tenants in common in the land, divided in either equal or unequal shares as the Tribunal determines; or
   (b) divide the land and allocate the divided portions to various Māori groups; or
   (c) allocate the land to one Māori group, but acknowledge the relationship of another group or groups with the land in a specified manner; or
   (d) allocate the land to one Māori group or incorporated entity and within this entity allocate to different groups particular percentage shareholdings; or
   (e) consider any other solutions proposed by one or more of the parties.[1]

1. This wording is taken, with modifications, from para 6(14), Sch 2, Central North Island Forests Land Collective Settlement Act 2008. These questions are not and do not purport to establish a set model; they do however ask questions that might also be helpfully asked in this proceeding, which is a comparable context.

Questions, Part III (Other Considerations Altering or Weighing Against Possible Resumption Recommendations):

(9) These questions relate to other factors to be weighed by the Tribunal, in considering resumption recommendations under s 8HB TOWA and in the exercise of its comprehensive remedial jurisdiction under s 6(3) TOWA.

(a) If the Tribunal determines that there are well-founded claim(s) that merit the making of resumption recommendations concerning Mangatū CFL land, should any of the following considerations modify or amend the recommendations that the Tribunal might be disposed to make (or in fact weigh against making binding recommendations altogether)?

(b) What was the nature or content of the claim, the Treaty breach and the prejudice found by the Tribunal?

(c) How significant were the Treaty breaches and prejudice suffered by the applicant or interested party? Were there mitigating factors, such as compensation or partial compensation paid at the time?

(d) What was/is the nature and extent of the applicant or interested party's customary interests in the Mangatū area? To what extent were/are the applicant or interested party's marae, kainga or wāhi tapu situated on Mangatū land?

(e) How much land did the applicant or interested party lose from within the Tūranga inquiry district and adjacent districts as a result of Crown Treaty breaches?

(f) How much commercial redress property in any form (SOE memorialised land, CFL land or otherwise) is available to remedy Treaty breaches which occurred in the Tūranga inquiry and adjacent districts and/or in the 'Māhaki cluster' area of interest?

(g) How should the Tribunal weigh an applicant or interested party's well-founded claims of Treaty breach and prejudice from adjacent inquiries in determining the appropriateness and/or apportionment of resumption or other redress?

(h) What is the extent of prejudice that applicant or interested parties will suffer if they were to be excluded from the benefit of binding resumption recommendations made by the Tribunal? Will they, for example, still have other redress avenues, including non-binding Tribunal recommendations and/or direct negotiations and settlement with the Crown? How should the Tribunal weigh these factors against the appropriateness of making resumption recommendations in the first instance?

(i) In addition to resumption recommendations what other (non-binding) recommendations should the Tribunal make, if any, taking into account the above and any other relevant factors?

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APPENDIX III

SCHEDULE 1 TO THE CROWN FOREST ASSETS ACT 1989

SCHEDULE 1 s36

COMPENSATION PAYABLE TO MAORI

1 Compensation payable under section 36 shall be payable to the Maori to whom ownership of the land concerned is transferred.

2 That compensation shall comprise—

(a) 5% of the specified amount calculated in accordance with clause 3 as compensation for the fact that the land is being returned subject to encumbrances; and

(b) as further compensation, the remaining portion of the specified amount calculated in accordance with clause 3 or such lesser amount as the Tribunal may recommend.

3 For the purposes of clause 2, the specified amount shall be whichever of the following is nominated by the person to whom the compensation is payable—

(a) the market value of the trees, being trees which the licensee is entitled to harvest under the Crown forestry licence, on the land to be returned assessed as at the time that the recommendation made by the Tribunal for the return of the land to Maori ownership becomes final under the Treaty of Waitangi Act 1975. The value is to be determined on the basis of a willing buyer and willing seller and on the projected harvesting pattern that a prudent forest owner would be expected to follow; or

(b) the market stumpage, determined in accordance with accepted forestry business practice, of wood harvested under the Crown forestry licence on the land to be returned to Maori ownership from the date that the recommendation of the Tribunal for the return of the land to Maori ownership becomes final under the Treaty of Waitangi Act 1975. If notice of termination of the Crown forestry licence as provided for under section 17(4) is not given at, or prior to, the date that the recommendation becomes final, the specified amount shall be limited to the value of wood harvested as if notice of termination had been given on that date; or

(c) the net proceeds received by the Crown from the transfer of the Crown forestry assets to which the land to be returned relates, plus a return on those proceeds for the period between transfer and the return of the land to Maori ownership.

4 For the purposes of clause 3(c), if the land to be returned is included within an area that was offered for sale as a single lot, the transfer proceeds in relation to each hectare of land returned to Maori ownership shall be not less than an amount equal to the average price per hectare of the forest lot specified in the selling process; except that—

(a) where a bid is accepted for a number of lots as 1 parcel, the average price shall be based on the price for the total parcel; and

(b) where the lot concerned had an average age of less than 5 years, the average price applied shall be the average price of all lots transferred within the same Crown Forestry Management Limited administrative district existing at the time of transfer.

Schedule 1 clause 4(b): amended, on 31 May 1996, by clause 3 of the State-Owned Enterprises (Crown Forestry Management Limited) Order 1996 (SR 1996/122).

5 For the purposes of clause 3(c), the return on the proceeds received by the Crown shall be—

(a) such amount as is necessary to maintain the real value of those proceeds during either—

(i) in the case where the claim was filed before the transfer occurred, a period of not more than 4 years from the date of transfer of the Crown forestry assets; or

(ii) in the case where the claim was filed after the date of transfer of the Crown forestry assets, the period from the date of transfer of the Crown forestry assets to the date of expiration of 4 years after the claim was filed; and

(b) in respect of any period after the period described in subparagraph (i) or subparagraph (ii) of paragraph (a) on 1 year New Zealand Government stock measured on a rolling annual basis, plus an additional margin of 4% per annum.

For the purposes of this clause, a claim shall be deemed to be filed on such date as is certified by the Registrar of the Tribunal.

6 The period of 4 years referred to in clause 5 may be extended by the Tribunal where the Tribunal is satisfied—

(a) that a claimant with adequate resources has wilfully delayed proceedings in respect of a claim; or

(b) the Crown is prevented, by reasons beyond its control, from carrying out any relevant obligation under the agreement made on 20 July 1989 between the Crown, the New Zealand Maori Council, and the Federation of Maori Authorities Incorporated.

7 All payments under this schedule, other than payments for the purposes of clause 3(b), shall be made within 2 months after the date of the Tribunal's recommendation, or such later date as the Tribunal may direct, or the parties may agree.

8 All payments for the purposes of clause 3(b) shall be calculated at 3 monthly intervals and shall be paid within one month of the relevant 3 monthly period.

9 Payments under this schedule, other than payments made for the purposes of clause 3(c) on which interest is payable in accordance with clause 5(b), shall not bear interest.

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GLOSSARY

hapū	kin groups claiming common descent
hui	meeting, gathering, assembly
iwi	tribe, people
kāinga	villages
kaitiaki	trustee or guardian
kaumātua	elder
kuia	elderly lady
mana	authority, prestige, reputation, spiritual power
mana whenua	customary rights and authority over land and taonga; the iwi or hapū which holds mana whenua in an area
marae	enclosed space or courtyard in front of a wharenui where formal welcomes and community discussions take place; also the area and buildings surrounding the marae
pā	fortified village, or more recently, a village
Pākehā	New Zealander of European descent
papakāinga	original home, home base
rangatahi	young people
rangatira	tribal leaders, chiefs
raupatu	confiscation
rohe	territory, traditional tribal area
tangata whenua	indigenous people of the land; local people with strong whakapapa links to the area
tangi	funeral rights for the dead
taonga	a treasured possession, including property, resources, and abstract concepts such as language, cultural knowledge, and relationships
tikanga	traditional rules for conducting life, custom, method, rule, law
tino rangtiratanga	the greatest or highest chieftainship; self-determination, autonomy; control, full authority to make decisions
tipuna	ancestor
urupā	burial ground, cemetery, graveyard
wāhi tapu	sacred place
whakapapa	genealogy, ancestral connections, lineage
whānau	family, extended family
whanaunga	company of travellers
whenua	land, placenta

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