THE

MANGATŪ

REMEDIES REPORT 2021

Embargoed till midday, Friday 1 October 2021

For Crown, claimants, interested parties, and media only

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THE MANGATŪ REMEDIES REPORT 2021

PRE-PUBLICATION VERSION

WAI 814

WAITANGI TRIBUNAL REPORT 2021

ISBN 978-0-9951403-0-1 (PDF)

www.waitangitribunal.govt.nz
Typeset by the Waitangi Tribunal
Published 2021 by the Waitangi Tribunal, Wellington, New Zealand
25 24 23 22 21 5 4 3 2 1
Set in Adobe Minion Pro and Cronos Pro Opticals

Ngā Waiata a Rāwiri 85

He hōnore, he korōria
He maungārongo ki te whenua
He whakaaro pai ki ngā tāngata katoa

He pono e tata ana Tana whakaoranga
Ki te hunga e wehi ana ki a Ia
Kia noho ai te korōria ki tō tātou whenua.
Kua tūtaki te mahi tohu rāua ko te pono
Kua kihi ki a rāua te tika me te rongomau
E tipu ake te pono i te whenua
E titiro iho te tika i te rangi.

Āe, ka hōmai e Ihowa te mea pai
Ka tukua mai ōna hua ki tō tātou whenua
Ka haere te tika ki mua i a Ia
Hei whakatau i a tātou ki te ara o Ōna hīkoinga

Kāore ko te rongo i ngā waiata
Mō Mangatū
E tīorooro ana ki runga
o ōna wāhi tapu
o ōna tohu whenua
o ōna iwi, ōna mana –
Ki te whaiao, ki te ao mārama –
Tihei mauri ora

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Minister for Māori Development

The Honourable Andrew Little
Minister for Treaty of Waitangi Negotiations

Parliament Buildings
WELLINGTON

29 September 2021

Tuia ai i runga
Tuia ai i rāro
Tuia ratou kua wehea atu
Ki te Pō-urirui, ki te Pō-tangotango, ki te Pō-i-oti-atu.
Rātou kua whetūrangingia
Ki ngā mana, ngā wehi, ngā ihi, ngā tapu o te Pō
Kua wānanganangangia te Ao;
Kua wānanganangangia te Pō,
Paimārire ki a tātou katoa

We enclose our report in respect of remedies sought by Te Aitanga a Māhaki and the Mangatū Incorporation, Ngāriki/Nga Ariki Kaipūtahi, and Te Whānau a Kai. All were claimant groups affected by the Crown Treaty breaches inquired into in the Tribunal's 2004 report, *Turanga Tangata Turanga Whenua*. Te Rangiwhakataetaea–Wi Haronga–Ngāti Matepu participated in this Inquiry as an interested party.

In accordance with our statutory duty pursuant to section 8HB of the Treaty of Waitangi Act 1975, we have heard the claimants and the Crown on the applications for binding recommendations for the return to the claimants of the Mangatū Crown forest licensed land that lies within the Tribunal's Tūranganui a Kiwa Inquiry District.

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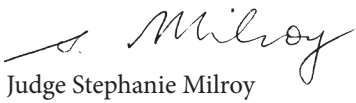
For the reasons given in our report, we have made an interim recommendation for the return of all this land and the payment of all available compensation to the claimants. The recommendation is subject to terms and conditions set out in summary in chapter 8 of our report. We have also included some non-binding recommendations of a general nature to assist the Crown and claimants in their settlement negotiations.

Heoi anō, kia piki te kaha, te māramatanga, te whakaoranga ki runga ki koutou, tātou katoa. Noho mai rā i raro i ngā manaakitanga a Te Wāhi Ngaro.

Nāku noa, nā



Judge Stephanie Milroy
Presiding Officer

PREFACE

This is a pre-publication version of the Waitangi Tribunal's *Mangatū Remedies Report 2021*. As such, all parties should expect that, in the published version, headings and formatting may be adjusted, typographical errors rectified, and footnotes checked and corrected where necessary. Maps, photographs, and additional illustrative material may be inserted. The Tribunal reserves the right to amend the text of these parts in its final report, although its main findings will not change.

ABBREVIATIONS

AIP	agreement in principle
app	appendix
CA	Court of Appeal
CFAA	Crown Forest Assets Act 1989
ch	chapter
cl	clause
CFL	Crown forest licensed
CPI	consumer price index
doc	document
ed	edition, editor
GDP	gross domestic product
LLP	Limited liability partnership
ltd	limited
memo	memorandum
NZLR	*New Zealand Law Reports*
NZPD	*New Zealand Parliamentary Debates*
NZU	New Zealand Unit
p, pp	page, pages
para	paragraph
PC	Privy Council
PPA	potentially productive land area inside a commercial forest
PSGE	post-settlement governance entity
pt	part
ROI	record of inquiry
SC	Supreme Court
SOC	statement of claim
SOE	State-owned enterprise
TAMA	Te Aitanga a Māhaki and Affiliates
TOWA	Treaty of Waitangi Act 1975
TOWSE	Treaty of Waitangi (State Enterprises) Act 1988
ROI	record of inquiry
s, ss	section, sections (of an Act of Parliament)
v	and
vol	volume
Wai	Waitangi Tribunal claim

Unless otherwise stated, footnote references to briefs, claims, documents, memoranda, papers, submissions, and transcripts are to the Wai 814 record of inquiry. A full copy of the index is available on request from the Waitangi Tribunal.

AHORANGI TE WHAREHUIA MILROY

At this time, as we publish our 2021 decision on the Mangatū Remedies Inquiry, we remember our beloved kaumātua Ahorangi Te Wharehuia Milroy (Ngāi Tūhoe, Ngāti Koura) who sadly passed away in 2019. Professor Milroy was a member of the Inquiry panel from the very beginning – from 2000 – for the Tribunal's Tūranganui a Kiwa District Inquiry, which reported in 2004. Te Wharehuia then continued as a member of this Inquiry panel, reconvened in 2011, to consider afresh several applications for a binding decision by the Tribunal for the return to Māori ownership of the Mangatū CFL Land. Te Wharehuia stepped down from our panel deliberations in 2017.

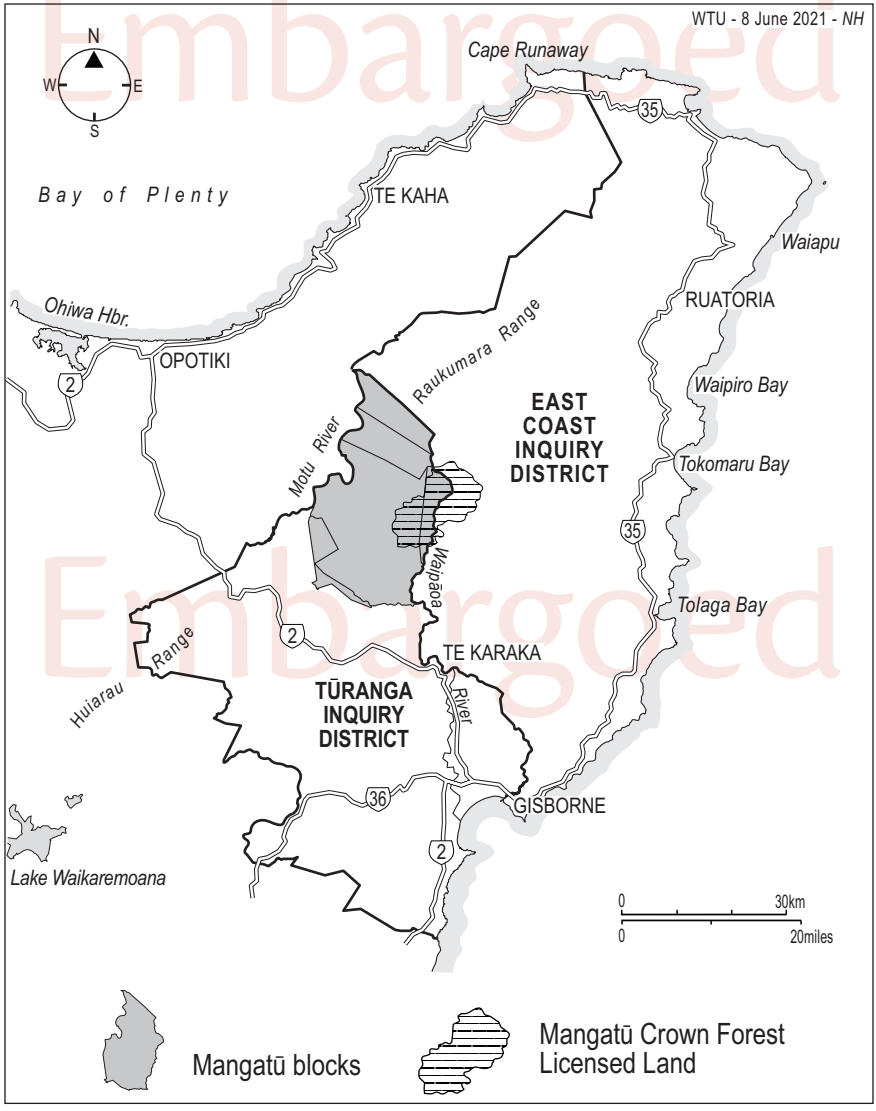
Among many other contributions to Aotearoa New Zealand, Te Wharehuia is still remembered for his ability to use traditional whakatauki in new ways, including composing some of his own. He often expressed the wish that the importance of oral traditions in Te Ao Māori would continue to be recognised.

Whakahokia te reo mai i te mata o te pene, ki te mata o te arero

Bring the language back from the tip of the pen to the tip of the tongue

We wish to pay tribute to Te Wharehuia to acknowledge his constant awhi, manaaki and aroha; and his skilled guidance and commitment to us, to this kaupapa, and to the objective that our work should be robust, withstand knowledgeable scrutiny and accord with tikanga.

I tēnei wā ka hoki ngā mahara ki tō tātou nei hoa ki a Te Wharehuia
Ahakoa ko tana tinana kei tua o te ārai
Ko tōna wairua kei konei tonu he whakapakari i ā tātou mahi
Nō reira, e Te Wharehuia moe mai rā.



The Tūranga Inquiry District and Crown forest licensed land

WAIATA WHAKATAKI

He honore, he korōria ki te Atua; he maungārongo ki te whenua

CHAPTER 1

INTRODUCTION

Overview of this Inquiry and Summary of Findings

1 This is the report and decision of the Waitangi Tribunal on applications from four claimant groups who seek the return of the Mangatū Crown forest licensed (CFL) lands, located in the north of the Tūranganui a Kiwa Inquiry District. The claimants are Te Aitanga a Māhaki and the Mangatū Incorporation,[1] Ngāriki Kaipūtahi, Ngā Ariki Kaipūtahi (we refer to these two groups as Ngāriki/Ngā Ariki Kaipūtahi[2]), and Te Whānau a Kai. They have asked the Tribunal to exercise its statutory power to make a binding recommendation requiring the Crown to return CFL land to Māori ownership, effectively for the first time, under section 8HB of the Treaty of Waitangi Act 1975 (TOWA).

2 Remedies inquiries are held when the Tribunal has already found a claim or claims to be well-founded. Claimants then seek specific Tribunal recommendations on the actions the Crown should take to remedy the prejudice they have suffered as a result of the Crown's breaches of the principles and provisions of the Treaty of Waitangi. They are typically convened (as is the case with this Inquiry), following a historical inquiry into claims, when a claimant applies to the Tribunal to exercise its binding powers to order the return of CFL land or State-owned enterprise (SOE) land. Remedies inquiries then proceed on an urgent basis. However, the Tribunal may also make remedies recommendations under section 8HB as part of a district or historical inquiry where it makes findings on claims that meet the statutory requirements.[3]

3 Te Aitanga a Māhaki, Ngāriki/Ngā Ariki Kaipūtahi, and Te Whānau a Kai previously participated in the Tribunal's Tūranganui a Kiwa District Inquiry (the Tūranga Inquiry), which began in 2000. In that Inquiry, the Tribunal found a wide range of Treaty of Waitangi breaches by the Crown, including

1. Te Aitanga a Māhaki and the Mangatū Incorporation participated jointly in the Inquiry.
2. We initially received two separate remedies applications from Ngāriki Kaipūtahi and Ngā Ariki Kaipūtahi claimants.
3. See 'Guide to Practice and Procedure of the Waitangi Tribunal', Waitangi Tribunal Practice Note, May 2012, pp 4–5, 32

its acquisition of parts of the land now comprising the Mangatū State Forest. However, the Tribunal's report *Turanga Tangata Turanga Whenua: The Report on the Turanganui a Kiwa Claims* (2004) made no recommendations for specific redress – such as the return of the land – to compensate claimants for the prejudice caused by those particular breaches.

4 Our present Remedies Inquiry was convened in 2011, following the Supreme Court's decision in *Haronga v Waitangi Tribunal*. Alan Haronga, had applied to the Tribunal in 2008 on behalf of the Mangatū Incorporation for an urgent remedies hearing. Mr Haronga sought a binding Tribunal recommendation requiring the Crown to return parts of the Mangatū CFL lands to compensate claimants for the prejudice caused by the Crown's Treaty breaches in relation to that land.[4] The Tribunal declined Mr Haronga's application but, following a judicial review and two subsequent appeals, the Supreme Court ruled in Mr Haronga's favour. The Court directed the Tribunal to urgently hear the Mangatū Incorporation's claim and its application for the return of the Mangatū CFL land.[5] Te Aitanga a Māhaki, Ngāriki/Ngā Ariki Kaipūtahi, and Te Whānau a Kai subsequently filed applications also seeking binding recommendations that would require the Crown to return the Mangatū CFL land.

5 The central issue this report addresses is: should the Tribunal make an interim binding recommendation under section 8HB of the TOWA for the return of all or part of the Mangatū CFL land to Māori ownership? If so, how much of the CFL land should be returned, and to whom? If not, the Tribunal must recommend that all or part of the CFL land not be liable for return to Māori ownership.

6 Answering these core questions requires us to first determine whether the claims and claimants meet a four-step legal test for binding recommendations under section 8HB(1) of the Act. In summary, the test requires that:

(a) The claim relates to the CFL land.
(b) The claim is well-founded.
(c) The action to be taken under section 6(3) to compensate for or remove the prejudice caused by the breach should include the return to Māori ownership of the whole or part of the land.
(d) Some or all of the groups to whom the land should be returned are identified as appropriate for that purpose.[6]

7 We make determinations on each of these prerequisites in chapters 4, 5 and 6 of this report. Once we determine that they have been met, we proceed to make our overall recommendation. In summary, we make an interim binding recommendation under section 8HB(1)(a) of the TOWA that the Crown return the whole of the Mangatū CFL land within the Tūranganui a Kiwa Inquiry District to the ratified governance entities representing each

4. Statement of claim for the Mangatū Incorporation, 31 July 2008, Wai 1489 ROI, #1.1.1
5. *Haronga v Waitangi Tribunal* [2012] 2 NZLR 53 (SC), para 111
6. *Attorney-General v Haronga* [2017] 2 NZLR 394 (CA), para 60

of Te Aitanga a Māhaki, Ngāriki/Ngā Ariki Kaipūtahi, and Te Whānau a Kai claimants. Further, we set out the proportion of shares in the land each party is to receive, and also terms and conditions for the return of the land. Under section 8HC, our recommendation is interim for 90 days, after which time it will become binding on the parties. If the claimants and the Crown reach an alternative settlement during this period, the Tribunal 'shall cancel or modify its interim recommendations, and, if necessary, may make a final recommendation, as the case may require (see chapter 3, paragraph 8).

8 As the preceding discussion suggests, this report is the culmination of a long and complex procedural history. We set out that history in full below, along with other key contextual information intended to help the reader better understand the nature and limits of the Tribunal's task, key terms and concepts used in our report, and how the report is organised.

Key Terms and Concepts Used in this Report

1961 land: An area of 8,522 acres (3,449 hectares) in Mangatū 1 that was acquired by the Crown for afforestation purposes in 1961. This area contains all of the CFL land in the Mangatū 1 block

1989 Forests Agreement: An agreement negotiated between the Crown and the New Zealand Māori Council and the Federation of Māori Authorities Incorporated following the Court of Appeal's judgment in the 1989 *Forests* case. The agreement allowed the Government to grant forestry licences for the harvesting of the existing tree crop on Crown land. In exchange, the Waitangi Tribunal could recommend the return of CFL land to Māori ownership, along with additional financial compensation.

afforestation: The process of establishing a forest on land not previously forested.

CFAA: Crown Forest Assets Act 1989

CFL *land:* Crown forest licensed land. This is Crown-owned land where a licence has been sold under the CFAA providing the licensee the right to use the land for any purpose including the harvesting, planting, management, or processing of trees on the land.

Crown forestry licence: A forestry right granted under the CFAA to harvest the trees standing on Crown forest land. It lasts up to 35 years, or until the trees are felled, whichever is sooner.

interested party: Under section 8HD of the TOWA, an interested party may be any Māori who satisfies the Tribunal that he or she, or any group of Māori of which he or she is a member, has an interest in the Inquiry apart from any interest in common with the public.

iterative process: The Tribunal-led process through which the claimants in this Inquiry prepared themselves to receive any interim Tribunal recommendation under section 8HB of the TOWA, and ratified legal entities to receive such a recommendation. It took place between July 2019 and August 2021, and involved a number of judicial conferences, mediation between parties, and claimant groups working to establish and ratify governance entities.

governance entity: A legal entity established to represent the interests of a specified claimant community through the management and governance of assets held on their behalf, and through any other activities carried out for the benefit of the claimant community.

NZUs: New Zealand Units are credits traded under the Emissions Trading Scheme. Under the scheme, registered landowners can incur a liability when they harvest any forest planted after 1989. A post-1989 forest earns NZUs as it grows. For forests planted before 1990, they may be harvested and replanted with no need to surrender NZUs.

PPA: The potentially productive land area inside a commercial forest.

'real value' period: The period provided for under clause 5(a) of Schedule 1 of the CFAA where the dollar value that the Crown received from the sale of forestry assets is adjusted for inflation in order to maintain its 'real value'.

restorative approach: The Tribunal's approach to identifying appropriate remedies to compensate for or remove the prejudice associated with Crown breaches of the Treaty.

returning officer: An independent person appointed to oversee elections, collect and verify votes, and to announce the results.

Schedule 1 compensation: The financial compensation that accompanies any CFL land returned to Māori ownership under section 8HB of the TOWA.

SOE: State-owned enterprise

stumpage: The value of standing trees. Stumpage is often derived from the sale value of logs by deducting all costs incurred in the harvesting and transportation of the log to the point of sale.

TOWA: Treaty of Waitangi Act 1975

TOWSE: Treaty of Waitangi (State Enterprises) Act 1988

tenants in common: An arrangement in which two or more people have ownership interests in a property. Each owner may have an equal or a different interest in the property.

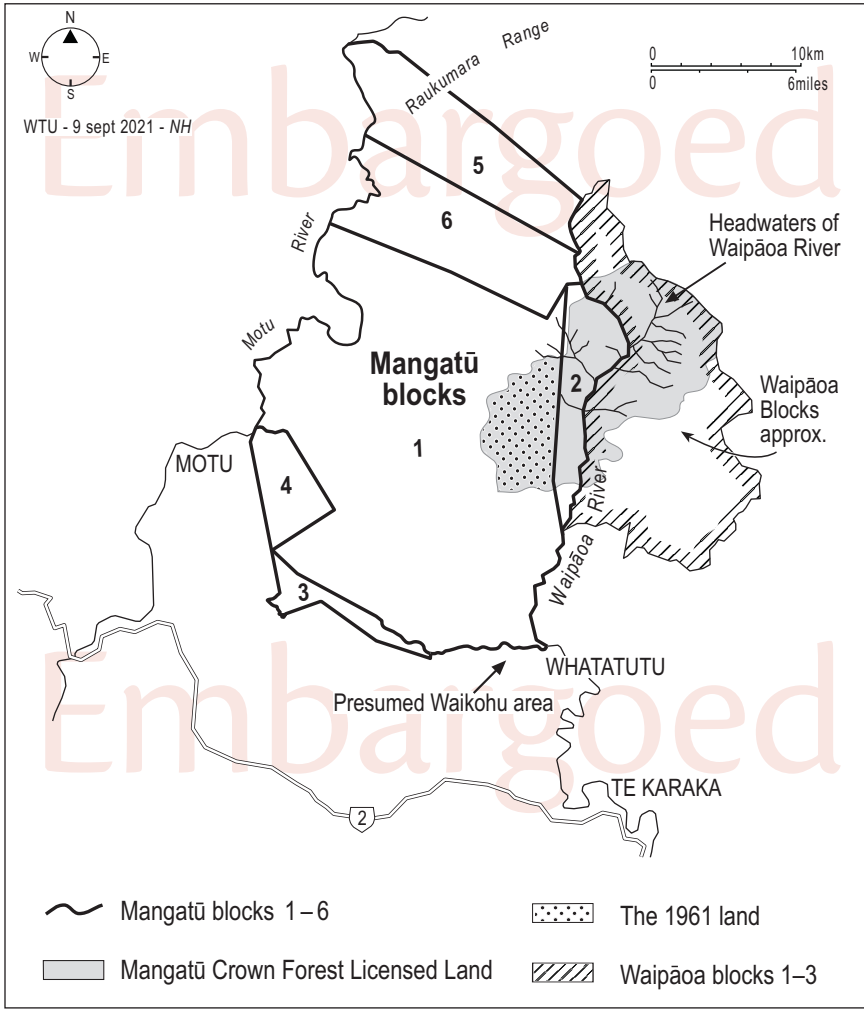
Mangatū CFL Land

The Mangatū CFL land is located in the north of the Tūranga district. It includes areas of both the Mangatū 1 and Mangatū 2 blocks, and extends east into the Waipāoa blocks which are outside of the Inquiry district. The land is defined by hilly terrain, interspersed with occasional river flats.[1] Between 1890 and 1920, the land was cleared of its indigenous forest cover to allow pastoral production. However, the area's distinctive geology meant the land was susceptible to erosion and soil run-off, which increased dramatically in the years after it was cleared.[2]

The headwaters of the Waipāoa River reach across Mangatū 1 and Mangatū 2. From there, the river runs south along the eastern boundary of Mangatū 1 and Mangatū 2 towards its mouth in Tūranga. Historically, river aggradation and silt build-up in this catchment has substantially increased the risk of flooding in the lower reaches of the river system. Severe flooding damaged the Gisborne flats during the decades after the land was cleared. The Mangatū CFL land was retired from farming and afforested by the Crown from the 1960s as part of a wider effort to address land degradation in the catchment and to protect flood control measures on the Waipāoa River.[3]

Today, the Mangatū forest is commercially productive with a legal area of 30,910 acres (12,474 hectares), of which 8,903 acres (3,603.2 hectacres) are in Mangatū 1 and 10,065 acres (4,073.5 hectares) are in Mangatū 2. The remainder of the CFL lands are in the Waipāoa blocks, to the east of Mangatū 2, and outside of the Tūranga district.[4] The Crown first sold the cutting rights to this CFL land in 1992 to IT Rayonier. Cutting rights were subsequently sold to Ernslaw One in 2004, which remains the current licensee.[5]

1. Waitangi Tribunal, *Turanga Tangata Turanga Whenua: The Report on the Turanganui a Kiwa Claims*, 2 vols (Wellington: Legislation Direct, 2004), vol 2, p 659
2. In particular, the crushed argillite and bentonite clay that make up much of the Mangatū lands was identified as particularly erodible in the 1950s by a panel of experts established by the Soil Conservation and Rivers Control Council: Waitangi Tribunal, *Turanga Tangata*, vol 2, p 697
3. Waitangi Tribunal, *Turanga Tangata*, vol 2, p 697
4. The total area of CFL land in the Tūranga Inquiry district is 7676.8 hectares: evidence of Michael Marren, 23 November 2018, #P32(c), p 9
5. Evidence of Andrew McEwen, 6 August 2012, #K5, para 23.5; evidence of Stuart William Chandler, 30 July 2018, #P34, para 6



The Mangatū blocks and the Mangatū Crown forest licensed land

Background to the Inquiry – the Procedural History

2000–04: The Tūranga District Inquiry

9 The Tūranga District Inquiry was the first to proceed under the Tribunal's 'new approach' to historical claims and involved an intensive interlocutory process.[7] The Tribunal heard Tūranga-wide claims, as well as the specific claims of Tūranga iwi including Te Aitanga a Māhaki, Rongowhakaata, Ngāi Tāmanuhiri, Te Whānau a Kai, and Ngāriki/Ngā Ariki Kaipūtahi. A number of whānau claims were also heard, including claims from Te Whānau a Wi

7. Waitangi Tribunal, *Turanga Tangata*, vol 1, p 2

Pere and Ngā Uri o Te Kooti.[8] Seven hearings were held in Tūranga between November 2001 and June 2002, and the Tribunal released its report in October 2004.

10 In the Tūranga report, the Tribunal made factual findings on a wide range of historical issues arising from Crown conduct in the district. The Tribunal considered that the Crown's Treaty breaches in the district, and their far-reaching consequences, formed a single story of extreme prejudice suffered by all Tūranga Māori.[9] The Tribunal found that the Crown's conduct gave rise to some of the most serious Treaty breaches in New Zealand, specifically designed to destroy Māori autonomy in Tūranga.[10] Particularly egregious were the unlawful attack on Waerenga a Hika pā, the killings there, the subsequent unlawful detention of captives on Wharekauri (Chatham Islands), and the imposition of the Crown's native land regime in Tūranga. The latter consolidated the Crown's authority and facilitated the transfer of Māori land and resources to the settler population, the Tribunal found.[11]

11 In this Remedies Inquiry, we are greatly indebted to the work of the Tūranga Tribunal. In this report, we can provide only a summary of the Tribunal's findings in that District Inquiry, and readers should refer to the Tūranga report for the full account of the Crown's Treaty breaches in the district.

12 Some of the claims heard in the Tūranga Inquiry involved the Mangatū lands directly – for example, the Ngāriki/Ngā Ariki Kaipūtahi claim concerning the Native Land Court's determination of title for Mangatū 1 in 1881, which claimants said 'created a gross injustice by effectively disinheriting Ngariki Kaiputahi of its rightful ancestral interests'.[12] Another claim concerned the Crown's acquisition of 8,522 acres (3,448.7 hectares) of land in Mangatū for erosion control purposes in 1961, while failing to disclose its intentions to use the land for commercial forestry as well.[13]

13 When reporting on the wider claims of Tūranga hapū and iwi, the Tribunal did not make specific recommendations to remedy the prejudice suffered as a result of all the Crown's breaches, including those that relate to the Mangatū CFL lands. It recommended instead that the Crown and claimants enter settlement negotiations for that purpose.[14]

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8. Waitangi Tribunal, *Turanga Tangata*, vol 1, pp 12–13
9. Waitangi Tribunal, *Turanga Tangata*, vol 1, p 38
10. Waitangi Tribunal, *Turanga Tangata*, vol 2, p 739
11. Waitangi Tribunal, *Turanga Tangata*, vol 1, pp xv–xxvii
12. They were only known as Ngāriki Kaiputahi during the Tūranga District Inquiry: Statement of claim for Ngariki Kaiputahi, 18 April 2001, SOC #3, para 39
13. Cabinet originally approved the purchase of 8,646 acres for £82,137 in 15 May 1961. However, the final deed of sale was for 8,522 acres at a price of £80,958, this reflected the same price per acre as £9 10s 0d,: Waitangi Tribunal, *Turanga Tangata*, vol 2, p 724; 'Memorandum of Transfer', Crown bundle of resumption documents, #132(a), pp 362–364
14. Waitangi Tribunal, *Turanga Tangata*, vol 2, pp 741–742

2004–08: Settlement negotiations and application for an urgent remedies hearing

14 After the release of the Tūranga report, Tūranga claimants began settlement negotiations with the Crown. In 2004, a body was formed to represent the Te Aitanga a Māhaki, Ngāriki/Ngā Ariki Kaipūtahi, and Te Whānau a Kai claimants: Te Pou a Haokai. The Crown recognised Te Pou a Haokai's deed of mandate to settle the claims of its constituent groups in August 2005. By 2007, Te Pou a Haokai had been included in the Tūranga-wide body, Tūranga Manuwhiriwhiri, which was formed to collectively negotiate settlement of the claims in Tūranga.[15] Te Pou a Haokai would later become Te Aitanga a Māhaki and Affiliates (TAMA) following the dissolution of Tūranga Manuwhiriwhiri.[16]

15 The collective and the Crown signed an Agreement in Principle in August 2008, which confirmed the entire Mangatū CFL land would be offered to Te Pou a Haokai for purchase out of the proceeds of their settlement.[17] In response to this proposal, Alan Haronga, the chairman of the Mangatū Incorporation, filed an application with the Waitangi Tribunal for an urgent hearing. Under section 8HB of the TOWA, he sought the return of the CFL land to the Incorporation, rather than to the wider tribal collective, by way of a binding Tribunal recommendation.[18] The Tribunal rejected Mr Haronga's application for an urgent hearing.[19] Following unsuccessful discussions between the parties involved in the settlement negotiations, the Mangatū Incorporation filed a second urgent remedies application in September 2009, again seeking the return of the CFL land.[20] The Tribunal also declined this second application.[21]

2009–11: Judicial review and the Supreme Court's *Haronga* decision

16 On behalf of the Mangatū Incorporation, Mr Haronga sought judicial review of the Tribunal's decision in the High Court. In a judgment delivered on 23 December 2009, Justice Clifford did not accept the Mangatū Incorporation's argument that the Tribunal's power to make binding recommendations for the return of CFL land 'sits outside or is to take precedence over the general claims process'.[22] In its 19 May 2010 judgment, the Court of Appeal also

15. Evidence of William Stirling Te Aho, 13 April 2012, #I18, para 26.3
16. Evidence of William Stirling Te Aho, #I18, para 26.6
17. Evidence of Andrew McConnell, 31 May 2012, #I30, paras 28–31
18. Statement of Claim for the Mangatū Incorporation, 31 July 2008, Wai 1489 ROI, #1.1.1
19. Judge Craig Coxhead, memorandum declining application for urgent remedies hearing, 28 August 2008, Wai 1489, ROI, #2.5.4, pp 9–10
20. Statement of Claim for the Mangatū Incorporation, 17 September 2009, Wai 1489 ROI, #1.1.1(a)
21. Judge Stephen Clark, memorandum declining application for urgent remedies hearing, 21 October 2009, Wai 1489 ROI, #2.5.10
22. *Haronga v Waitangi Tribunal* High Court Wellington CIV 2009–485–2277, 23 December 2009, para 103

dismissed the Mangatū Incorporation's appeal, agreeing with the High Court that 'the introduction of the power to make binding recommendations did not change the Tribunal's role substantively'.[23] The Court of Appeal held that the Tribunal had assessed Mr Haronga's application for urgency on its merits and that effective remedies remained open through the settlement process.[24]

17 Mr Haronga then successfully appealed to the Supreme Court. The Court directed the Tribunal to hear the Mangatū Incorporation's application for remedy of its claim (Wai 1489) urgently. The Court found the Tribunal was obliged to determine the specific issue of whether the Mangatū land the Crown acquired in 1961 'should be resumed, and if so, to whom and on what terms and conditions' (the Court's reasoning is discussed further in chapter 3, see paragraphs 13–15).[25]

2011–14: The Tribunal's Remedies Inquiry

18 Following the direction of the Supreme Court, the Tribunal chairperson issued memorandum–directions on 3 June 2011 setting out the steps the Tribunal would take to comply with the Court's orders.[26] Soon after, the chairperson appointed Judge Stephanie Milroy as the presiding officer of the reconvened Remedies Inquiry.[27] The Tūranga Tribunal panel members Professor Te Wharehuia Milroy and Dr Ann Parsonson were joined by Mr Tim Castle, who was appointed to replace Dame Margaret Bazley.[28]

19 Before the Remedies Inquiry began, the Tribunal received additional applications for binding recommendations from other claimant groups seeking similar remedies to the Mangatū Incorporation. Te Aitanga a Māhaki and Affiliates (TAMA), Ngāriki/Ngā Ariki Kaipūtahi, and Te Whānau a Kai all filed amended statements of claim between November 2011 and February 2012; all sought the return of the Mangatū CFL land.[29] In response, the Tribunal enlarged the scope of the Inquiry to include all groups now seeking the return of the Mangatū CFL land as a specific remedy. Ngāriki/Ngā Ariki Kaipūtahi and Te Whānau a Kai had previously been included within the TAMA structure, the body that was formed out of Te Pou a Haokai specifically

23. *Haronga v Waitangi Tribunal* [2010] NZCA 201, para 42
24. *Haronga v Waitangi Tribunal* [2010] NZCA 201, para 49
25. *Haronga v Waitangi Tribunal* [2012] 2 NZLR 53 (SC), para 108
26. Memorandum–directions of the chairperson, 3 June 2011, Wai 814, #2.298
27. Memorandum–directions of the chairperson, 5 July 2011, #2.309
28. Memorandum–directions of the chairperson, 12 July 2011, #2.311
29. Amended statement of claim for TAMA, 9 November 2011, #SOC 1(a); amended statement of claim for TAMA, 31 January 2012, #SOC 1(b); amended statement of claim for TAMA, 2 August 2012, #SOC 1(c); amended statement of claim for Ngāriki Kaipūtahi, 4 November 2011, #SOC 3(a); amended statement of claim for Ngāriki Kaipūtahi, 4 November 2011, #SOC 6(b); amended statement of claim for Ngāriki Kaiputahi, 31 Jan 2012, #SOC 6(c); amended statement of claim for Te Whānau a Kai, 4 November 2011, #SOC8(a); amended statement of claim for Te Whānau a Kai, 21 February 2012, #SOC8(b)

to negotiate the claims of groups closely affiliated with Te Aitanga a Māhaki.[30] At that time, the Crown had recognised TAMA's mandate to settle the claims of Te Aitanga a Māhaki, Te Whānau a Kai, Ngāriki/Ngā Ariki Kaipūtahi, Te Whānau a Wi Pere, and Te Rangiwhakataetaea–Wi Haronga–Ngāti Matepu.[31]

20 This round of remedies hearings culminated in the release of the Tribunal's *Mangatū Remedies Report* in 2014. In the report, the Tribunal made no recommendation under section 8HB that the land be returned to any of the claimants, nor any recommendation that the land be deemed not liable for return. Instead, the Tribunal dismissed all but one of the applications for a range of reasons, including the difficulty of determining fair and equitable redress for all claimants, and the lack of clarity about who represented Ngāriki/Ngā Ariki Kaipūtahi claimants.[32]

21 However, the Tribunal did not dismiss TAMA's application, opting instead to adjourn it. The Tribunal noted TAMA were 'originally mandated to negotiate on behalf of all the Māhaki cluster claimants and during negotiations strove to represent them all', although their mandate was no longer as stable as it had been when TAMA entered settlement negotiations.[33] The Tribunal considered there was a reasonable prospect of TAMA successfully re-entering negotiations with the Crown once their mandate was renewed. In adjourning TAMA's application, the Tribunal encouraged them to refresh their mandate and then resume negotiations with the Crown. If those negotiations were unsuccessful, TAMA could return to the Tribunal, 'with the attendant delays'.[34]

2014–16: Judicial review of the Mangatū Remedies Report

22 Following the release of the 2014 Mangatū Remedies Report, Mr Haronga, the Te Aitanga a Māhaki Trust (the Māhaki Trust), and Mr Rawiri David Brown (representing Ngāriki Kaipūtahi) applied for judicial review of the Tribunal's report in the High Court. Again, Justice Clifford heard the application. He upheld the applicants' arguments that the Tribunal had decided that the Mangatū lands should be returned to Māori but had neglected to make binding recommendations for that return. The High Court found that the Tribunal had incorrectly deferred to the Crown's settlement policy. It had also insufficiently considered the context in which the Tribunal's power to make binding recommendations had been inserted into the TOWA to provide Māori claimants with greater protections.[35] Accordingly, the High Court quashed the 2014 *Mangatū Remedies Report* and directed the Tribunal to reconsider all the applications for binding recommendations 'in terms of

30. Evidence of William Stirling Te Aho, #118, paras 18–21
31. Evidence of William Stirling Te Aho, #118, para 24
32. Waitangi Tribunal, *The Mangatū Remedies Report* (Wellington: Legislation Direct, 2014), pp 130–131
33. Waitangi Tribunal, *The Mangatū Remedies Report*, pp 131, 127
34. Waitangi Tribunal, *The Mangatū Remedies Report*, p 131
35. *Haronga v Waitangi Tribunal* [2015] NZHC 1115, paras 98, 109

this judgment'.[36] The Crown appealed. The Court of Appeal upheld the High Court's decision and the Tribunal was directed to reconvene the Mangatū Remedies Inquiry (the judicial review and its consequences for this Inquiry are discussed further in chapter 3, see paragraphs 30–41).[37]

2017–21: The Tribunal's reconvened Mangatū Remedies Inquiry and the release of this report

23 On 8 March 2017, the presiding officer issued memorandum–directions notifying the parties of the reconvened inquiry.[38] Soon after, Ahonuku Tom Roa was appointed to replace Ahorangi Te Wharehuia Milroy on the reconvened panel, joining presiding officer Judge Stephanie Milroy and existing members Dr Ann Parsonson and Mr Tim Castle.[39]

24 The second round of hearings was held between August 2018 and July 2019, and included extensive and highly technical economic evidence alongside tangata whenua evidence from witnesses. To assist the Tribunal's consideration of this technical material, independent expert economist, Dr Andrew Coleman, was commissioned to provide further evidence.[40] This additional evidence was heard by the Mangatū Remedies panel and the Wairarapa Remedies panel (which was considering analogous matters) in a specially convened joint hearing in July 2019.[41]

25 During these hearings, the Tribunal discussed with parties the possibility of adopting an 'iterative' process to resolve some of the technical and logistical issues likely to arise if it made binding recommendations for return of the CFL land to Māori ownership. A key issue for the claimants was establishing suitable entities as recipients of any binding Tribunal recommendation requiring the return of CFL land and compensation. In closing submissions, the claimants recognised the need to liaise and work together on preparing to receive any such recommendations. Most parties also supported the proposed iterative process, which would include indications from the Tribunal as to any intermediate decisions it might have reached in advance of a formal interim recommendation.[42] These intermediate decisions would be

36. *Haronga v Waitangi Tribunal* [2015] NZHC 1115, para 114
37. *Attorney-General v Haronga* [2017] 2 NZLR 2 (CA)
38. Memorandum–directions of the presiding officer, 8 March 2017, #2.505
39. Memorandum–directions of the chairperson, 10 April 2017, #2.510
40. Memorandum–directions releasing commissioned research, 8 May 2019, #3.14
41. This evidence was heard in a joint sitting of the Wairarapa remedies and Mangatū remedies panels. In both inquiries, the Tribunal heard similar economic evidence and the independent expert was commissioned to comment on issues relevant to both inquiries; memorandum–directions of Judge Milroy and Judge Wainwright, 6 June 2019, #2.711.
42. Closing submissions for Ngāriki Kaipūtahi, 10 December 2018, #2.681, para 158; closing submissions for Ngā Ariki Kaipūtahi, 11 December 2018, #2.684, paras 182, 250; closing submissions for Te Whānau a Kai, 11 December 2018, #2.683, paras 20.6, 21.17; closing submissions for the Crown, 12 February 2019, #2.688(b), para 305; Te Aitanga a Māhaki Trust and the Mangatū Incorporation did not agree that an iterative process prior to recommendations being made by the Tribunal was appropriate: closing submissions for the Māhaki Trust and the Mangatū

designed to help the claimants prepare to receive the benefit of any binding recommendations.

26 In Gisborne on 26 and 27 August 2019, the Tribunal held a judicial conference with all parties to progress the iterative process. The Tribunal invited parties to engage in mediation, with the aim of reaching agreement on how best to implement any binding recommendation from the Tribunal for the return of the CFL land.[43] Mediation went ahead in October with a Tribunal-appointed mediator, but it was unsuccessful.

27 Following the unsuccessful mediation, the claimant groups each undertook separate ratification processes to establish appropriate legal entities to represent their interests and receive any CFL land returned to Māori ownership. Beginning in March 2020, this process was delayed as a result of the Government's nationwide Covid-19 response.[44] The claimants undertook three separate ratification processes between August 2020 and February 2021. The Te Aitanga a Māhaki claimants ratified the Māhaki Forestry Settlement Trust to represent their interests, as well as those of the Ngāti Matepu interested party, and to receive any returned CFL land and compensation on their behalf. The Ngāriki/Ngā Ariki Kaipūtahi claimants ratified the Ngā Uri o Tamanui Trust, while the Te Whānau a Kai claimants ratified the Te Whānau a Kai Trust for the same purpose.

28 Once these ratification processes were completed, the Tribunal could proceed to make an interim recommendation under section 8HB. We do so in this report.

The Tribunal's Task in this Inquiry

29 In this Inquiry, the Tribunal is tasked with deciding whether the whole or part of the Mangatū CFL land should be returned to Māori ownership under section 8HB of the Treaty of Waitangi Act 1975. If we decide it should, we must also determine how much of the CFL land should be returned and to whom. If we decide it should not be returned, the Tribunal must recommend that all or part of the CFL land not be liable for return to Māori ownership.

30 We received four separate and competing applications from claimant groups for the return of CFL land. As already noted, the Tribunal heard their broad historical claims in the Tūranga Inquiry between 2001 and 2002, and reported on them in the 2004 Tūranga report.[45] The Tūranga people generally were described in the report as 'kin groups inextricably linked by physical proximity and interwoven whakapapa, yet each with its own independent

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Incorporation, 11 December 2018, #2.682, para 149; memorandum–directions of the panel, 3 July 2019, #2.721, paras 60–64.

43. Memorandum–directions of the presiding officer, 12 September 2019, #2.759, paras 40–41
44. Memorandum–directions of the presiding officer, 38 March 2020, #2.805, paras 53, 59; memorandum–directions of the presiding officer, 28 April 2020, #2.806, para 5
45. Other claimant groups were also heard in the Tūranga Inquiry, notably Ngāi Tāmanuhiri and Rongowhakaata.

mana born of distinct whakapapa lines, distinct resource ownership, and strong leadership'.[46] This is true of the claimant groups in this Remedies Inquiry – closely connected, yet each with their own independent identity. The claimant groups (profiled more fully in chapter 2 of this report) are:

(a) Te Aitanga a Māhaki and the Mangatū Incorporation (Wai 274, Wai 283, and Wai 1489).[47] *Te Aitanga a Māhaki* comprises hapū groups connected through their common ancestor Māhaki, including Ngāti Wāhia, Ngā Pōtiki, Te Whānau a Taupara, Te Whānau a Iwi, Ngāi Tamatea, Ngāi Tuketenui, Ngāriki, Te Whānau a Wi Pere, and Ngāti Matepu.[48] Their representative body is the Te Aitanga a Māhaki Trust (referred to as the Māhāki Trust).[49]

    Te Aitanga a Māhaki's remedies application is brought jointly with the *Mangatū Incorporation*, whose owners largely affiliate to Ngāti Wahia, Ngāriki, and Te Whānau a Taupara.[50] We note that there are also owners who affiliate to Ngāriki/Ngā Ariki Kaipūtahi, and Te Whānau a Kai. The Mangatū Incorporation is New Zealand's oldest Māori incorporation. It was established by statute in 1893 to enable the owners of the Mangatū 1 block to hold their lands collectively in legal ownership, thus protecting them from alienation. In 1961, the Crown acquired 8,522 acres of land in Mangatū 1 from the Māori owners, and it now forms part of the Mangatū State Forest.

(b) Ngāriki Kaipūtahi (Wai 499 and 874) and Ngā Ariki Kaipūtahi (Wai 507). Two Ngāriki/Ngā Ariki Kaipūtahi claimant groups participated in this Remedies Inquiry.[51] Ngāriki/Ngā Ariki Kaipūtahi are the direct descendants of rangatira Rawiri Tamanui, particularly through his son, Pera Te Uatuku. Their interests lie primarily in the Mangatū area, which they claim to have occupied continuously for over 14 generations.[52] They also have interests in the neighbouring Manukawhitikitiki, Whatatutu, Mangataikapua, and Rangatira blocks. Their interests overlap with

46. Waitangi Tribunal, *Turanga Tangata*, vol 1, p 38
47. Te Aitanga a Māhaki and the Mangatū Incorporation's remedies applications were initially presented separately, then were consolidated in a joint application. This background is discussed in chapter 2.
48. Waitangi Tribunal, *Turanga Tangata*, vol 1, p 23; closing submissions for Te Aitanga a Māhaki and the Mangatū Incorporation, #2.682, para 93
49. Affidavit of Eric John Tupai Ruru, 26 June 2017, #P1, para 24
50. Amended remedies application for Te Aitanga a Māhaki and the Mangatū Incorporation, 26 June 2017, #2.522
51. The two claimant groups adopted different formulations of the name, the Wai 499 and Wai 874 claimants give the name as Ngāriki Kaipūtahi; the Wai 507 claimants give the name as Ngā Ariki Kaipūtahi. As these two groups have been separately represented for part of this Inquiry, we have adopted the nomenclature of Ngāriki/Ngā Ariki Kaipūtahi for the purposes of this report. However, during the iterative process these two claimant groups undertook mediation and came together to form the Ngā Uri o Tamanui Trust to represent the interests of both of them. This process and the outcome are discussed in chapter 6 of this report.
52. John Robson, 'Ngāriki Kaipūtahi Mana Whenua Report', November 2000, #A22, para 2.7, app 2, p 47

those of Te Aitanga a Māhaki, but they stress that Ngāriki/Ngā Ariki Kaipūtahi are the original inhabitants and kaitiaki of Mangatū.[53] Other Ngāriki groups such as Ngāriki Pō and Ngāriki Rotoawe are distinct from Ngāriki/Ngā Ariki Kaipūtahi.

(c) Te Whānau a Kai (Wai 892): Te Whānau a Kai trace their origins to descendants of the marriages between Kaikoreaunei and the two sisters, Te Haaki and Whareana. Kaikoreaunei (Kai) was the son of Te Ranginuiaihu (Ihu), and the grandson of Māhaki. However, in their traditions Kai and his descendants did not inherit their land through Ihu and Māhaki but through Kai's wives, Te Haaki and Whareana. Through the descendants of Kai, Te Haaki, and Whareana, Te Whānau a Kai were thus linked into and came to absorb the hapū Ngāti Maru, Ngāti Hine, and Ngatī Rua.[54] Te Whānau a Kai claim customary rights in a rohe that extends from the Repongaere and Patutahi/Kaimoe blocks on the Waipāoa River, to the north west. Te Whānau a Kai also claim rights in the Tahora 2 blocks; specifically, Tahora 2C2 and 2C3.[55]

31 In addition, Te Rangiwhakataetaea–Wi Haronga–Ngāti Matepu claimants (Wai 995) were granted leave to appear as an interested party.[56] Te Rangiwhakataetaea was a rangatira in Tūranga who played an important role in the early nineteenth century conflicts known as the 'Pikai fights'.[57] His son Wi Haronga was present at the siege of Waerenga a Hika, and became involved in further land disputes following the Crown's arrival in Tūranga.[58] The named claimant for Wai 995, Anthony Tapp, gave evidence that Mangatū was one of the places where Te Rangiwhakataetaea lived.[59] Ngāti Matepu see themselves as a hapū of Te Aitanga a Māhaki. But Mr Tapp's evidence was that over time 'Rangiwhakataetaea–Ngati Matepu have become invisible'.[60]

The Tribunal's power to make binding recommendations

32 To fully understand the nature of the Tribunal's task, it is necessary to also understand the scope of the Tribunal's statutory jurisdiction to make recommendations. Since its establishment, the Tribunal has been able to inquire into, and report on, claims made by Māori that they have been, or will be, prejudiced by Crown actions or omissions breaching the principles of the Treaty of Waitangi. If the Tribunal finds that a claim is well-founded, it may then recommend that the Crown take action to compensate for or remove the

53. Evidence of Owen Lloyd, no date, #C23, para 32
54. Waitangi Tribunal, *Turanga Tangata*, vol 1, p 28
55. Waitangi Tribunal, *Turanga Tangata*, vol 1, p 30
56. Application for resumption for Te Rangiwhakataetaea–Wi Haronga–Ngāti Matepu, 12 July 2017, #2.720
57. Merata Kawharu, 'Te Mana Whenua o Te Aitanga a Māhaki', 2000, #A25, p 160
58. Opening Submissions for Te Rangiwhakataetaea–Wi Haronga–Ngāti Matepu, 5 November 2018, #2.653, para 3.4
59. Evidence of Anthony Tapp, 5 April 2012, #I9, para 36
60. Evidence of Anthony Tapp, 29 May 2018, #P27, para 27

prejudice caused by the Treaty breach. Such recommendations are ordinarily non-binding on the Crown.

33 However, when applications for remedies involve State-owned enterprise (SOE) land and CFL land, the Treaty of Waitangi Act gives the Tribunal the power to make binding recommendations. It acquired this power in the late 1980s, following a series of landmark Court of Appeal decisions in which the New Zealand Māori Council successfully challenged the Government's proposals to corporatise some of its commercial activities, including forestry. The Court held that the principles of the Treaty of Waitangi required the Crown to establish a scheme to protect Māori interests before it corporatised assets that constituted potential sources of redress for claimants.[61] In response to the Court's directions, the Crown inserted statutory safeguards into the Treaty of Waitangi Act in 1988. These were sections 8A and 8HB, which aimed to ensure that Crown land and assets would be available for return to Māori ownership following corporatisation. These provisions allow the Tribunal to make binding recommendations for the return of SOE and CFL land. Importantly, the Crown and Māori agreed to the 1988 amendments to the Act so that the Government could carry out its economic policies, in exchange for improved protections for Māori Treaty rights.

34 It is also important to note that the Tribunal has rarely exercised its power to make binding recommendations. It proposed doing so in 1997 in the Muriwhenua Lands Inquiry, but went no further after the parties chose to enter into negotiations instead.[62] A year later, the Tribunal took the step of issuing binding recommendations in the Turangi Township Remedies Inquiry, but these were never implemented as the parties to that Inquiry chose to negotiate an alternative agreement with the Crown.[63]

The basis for the Tribunal's recommendations in this Remedies Inquiry

35 The claimant groups seeking the return of the Mangatū CFL land in this Inquiry have brought applications that are broadly based and include allegations set out in their comprehensive statements of claim. However, this is not a comprehensive Remedies Inquiry. We can only recommend the return of the CFL land to compensate for or remove prejudice associated with claims that relate to the land.

36 We rely on the Tribunal's findings in the Tūranga report as a basis for our determinations relating to the Mangatū CFL land. We also have the advantage of additional, updated evidence about the impact of the Crown's actions on the claimant groups over time.[64] This additional evidence complements the

61. *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 (CA); *New Zealand Maori Council v Attorney-General* [1989] 2 NZLR 142 (CA); *Tainui Maori Trust Board v Attorney-General* [1989] 2 NZLR 513 (CA)
62. Determination of preliminary issues, 14 May 1998, Wai 45 ROI, #2.166
63. Waitangi Tribunal, *The Turangi Township Remedies Report* (Wellington: GP Publications, 1998)
64. Memorandum–directions of the presiding officer, 31 July 2017, #2.532, para 7

findings in the Tūranga report, and gives us a fuller understanding of the prejudice – its nature and extent, and who it affected – that must be either removed or compensated for by our remedies recommendations. These are the foundations upon which we base our recommendations, which are set out at the end of this report.

The Structure of this Report

37 As already stated, the Tribunal's central task in this Inquiry is to decide whether to make an interim binding recommendation, under section 8HB of the Treaty of Waitangi Act, for the return of all or part of the Mangatū CFL land to Māori ownership, or to recommend its removal from liability for return. The statutory scheme that governs the Tribunal's power to make binding recommendations (section 8HB of the TOWA and Schedule 1 of the CFAA), requires us to make a carefully sequenced series of determinations (see paragraph 6 above). The structure of this report reflects that sequence, addressing in turn the necessary determinations we must make en route to delivering our overall recommendation.

38 First, chapter 2 profiles the claimant groups in more detail and sets out their claims. In chapter 3, we discuss the statutory scheme and the approach it requires us to take when making binding recommendations under section 8HB. In particular, we examine the four statutory prerequisites – also described as a four-step legal test – that must be met before such a recommendation can be made. We also summarise how the Courts have interpreted the statutory scheme to help clarify our task, most recently in *Mercury NZ Limited and Ors v Waitangi Tribunal and Ors*. At the end of chapter 3, we present our conclusions on the appropriate approach we must take to our task.

39 In chapter 4, we determine one of the key threshold questions: do Te Aitanga a Māhaki and the Mangatū Incorporation, Ngāriki/Ngā Ariki Kaipūtahi, and Te Whānau a Kai have well-founded claims that relate to the CFL land? Once again, we have several sources of guidance as to the appropriate approach: how the higher Courts have interpreted the 'relates to' requirement, previous Tribunal jurisprudence, and the submissions of the parties – including those made after the *Mercury* decision was released in 2021. Drawing on all these sources, as well as the findings of the 2004 Tūranga report, we assess whether the claimants' well-founded claims relate to the CFL land in question.

40 We then move in chapter 5 to determine another key question: whether the action taken to compensate for or remove the prejudice caused by the Crown's Treaty breaches 'should include the return to Māori ownership of the whole or part of that [CFL] land'.[65] Again, we take account of the Courts' guidelines, the parties' submissions and evidence, previous Tribunal jurisprudence, and what the Tūranga report (and additional evidence presented in our 2012

65. Treaty of Waitangi Act 1975, s 8HB(1)(a)(ii)

and 2018 remedies hearings) revealed about the prejudice associated with the claimants' losses. Understanding the nature, extent, and effects of the prejudice the claimants have experienced and how it flowed from the Crown's Treaty breaches is central to our subsequent determination of whether that prejudice should be remedied by the return of the Mangatū CFL land.

41 Chapters 6 and 7 address consequential matters flowing from this determination. In chapter 6, we identify 'the Māori or groups of Māori' to whom the land should be returned – the last step in the four-step legal test we must apply in making binding recommendations.[66] Here we discuss the 'iterative process' through which the claimants have prepared themselves and ratified legal entities to receive section 8HB interim recommendations. Chapter 7 sets out our determination on the payment of financial compensation to the claimants (as provided for in Schedule 1 of the Crown Forest Assets Act 1989) along with the return of the CFL land. Here we consider the purpose of the Schedule 1 financial compensation and also the extensive economic evidence adduced to assist the Tribunal in awarding compensation.

42 Finally, chapter 8 summarises our key determinations and sets out our section 8HB interim recommendation in full (including terms and conditions, and the compensation to be awarded). This interim recommendation will become final and binding after 90 days, unless the claimants and the Crown agree otherwise in that period. We also offer some general recommendations for appropriate Crown redress for prejudice suffered by the claimants that we consider cannot in fact be remedied by returning the Mangatū CFL land to Māori ownership. The latter are, of course, non-binding; however, we urge the Crown to respond to them in order to fully resolve these claims.

66. This is a requirement under the Treaty of Waitangi Act 1975, section 8HB(1)(a).

CHAPTER 2

THE PARTIES AND THEIR CLAIMS IN THIS REMEDIES INQUIRY

Introduction

1 In this chapter, we introduce the claimant groups seeking binding recommendations under section 8HB of the Treaty of Waitangi Act 1975 that the Mangatū CFL land be returned to Māori ownership. The claimants are:

- Eric John Tupai Ruru (known as John Ruru) on behalf of Te Aitanga a Māhaki (Wai 274 and Wai 283), and Alan Haronga on behalf of the Proprietors of Mangatū Blocks Incorporated (Wai 1489).[1]
- Tanya Rogers (Brown) and Rawiri David Brown on behalf of Ngāriki Kaipūtahi (Wai 499 and Wai 874).[2]
- Owen Lloyd on behalf of Ngā Ariki Kaipūtahi (Wai 507).[3]
- David Hawea on behalf of Te Whānau a Kai (Wai 892).[4]

2 Anthony Tapp on behalf of Te Rangiwhakataetaea–Wi Haronga–Ngāti Matepu (Wai 995) was heard as an interested party.[5] From this point on, we refer to this group as Ngāti Matepu.

3 The Tribunal inquired into and reported on the claims of Te Aitanga a Māhaki, Ngāriki/Ngā Ariki Kaipūtahi, and Te Whānau a Kai in the Tūranga District Inquiry, and its 2004 *Turanga Tangata, Turanga Whenua: The*

1. Amended remedies application for Te Aitanga a Māhaki and the Mangatū Incorporation, 26 June 2017, #2.522
2. Amended remedies application for Ngāriki Kaipūtahi, 15 September 2017, #2.540
3. Amended remedies application for Ngā Ariki Kaipūtahi, 15 September 2017, #2.539
4. Amended remedies application for Te Whānau a Kai, 15 September 2017, #2.537
5. Application for resumption of Crown Forest Licensed Land, 12 July 2017, #2.720; the Tribunal also received applications from Adriana Edwards on behalf of various Whakatōhea hapū, seeking to participate in the reconvened Remedies Inquiry in 2017 and 2018. Their requests were filed late in the Inquiry process and the Tribunal did not grant their request for urgent research into their claim and for full participation in the Inquiry. They were granted a 'watching brief' and leave to make submissions and file questions in writing to witnesses. The Whakatōhea claimants were required to adhere to the existing timetable for the hearing programme, and did not participate in the 2018 remedies hearings: memorandum–directions of the presiding officer, 7 November 2018, #2.864, paras 87–89

Report on the Turanganui a Kiwa Claims ('the Tūranga report').[6] Some of these groups have formed new legal entities to represent their interests in settlement negotiations with the Crown, and in our remedies proceedings. Nevertheless, those now seeking binding recommendations are the same claimants who participated in the District Inquiry.

4 In this chapter, we introduce the claimant groups, their specific claims, and the remedies they seek. We also outline the Crown's opposition to the remedies sought by Te Aitanga a Māhaki and the Mangatū Incorporation, Ngāriki/Ngā Ariki Kaipūtahi, and Te Whānau a Kai. We begin by explaining why the claimants are now entitled to seek binding recommendations for the return of CFL land as a remedy for their claims which were inquired into in the Tūranga District Inquiry.

Waiata Kaikerēme: the Claimants and their Claims

5 Section 8HB(1)(a) of the TOWA provides that claimants whose Treaty of Waitangi claims have been established as well-founded can seek binding recommendations from the Tribunal for the return of CFL land.[7] To meet this requirement claims must first be the subject of an inquiry into the pleaded allegations of Crown Treaty breach and prejudice.[8] Section 6(3) of the TOWA states that if the Tribunal finds a claim is well-founded, it may 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. If the claim relates to CFL land, the Tribunal's recommendations under section 6(3) may include recommendations under section 8HB(1)(a) (we discuss this statutory scheme in more detail in chapter 3).

6 The Tribunal heard the claims of Te Aitanga a Māhaki, Ngāriki/Ngā Ariki Kaipūtahi, and Te Whānau a Kai between 2001 and 2002, and reported on them in the 2004 Tūranga report. The Tūranga report focused on a wide landscape of Treaty breach and prejudice variously caused by Crown action or inaction that the Tribunal found was specifically designed to destroy Māori autonomy in the district, and to facilitate the transfer of resources to the growing settler population.[9] The Tribunal found that many of the Crown's breaches in Tūranga – such as its pursuit of the 'cession' of land in 1868 to punish Tūranga Māori who were deemed to be in 'rebellion' – impacted the peoples of the entire district (we discuss the Crown's breaches in chapter 4).[10]

7 The Tūranga report also addressed specific grievances concerning the claimants' interests in the Mangatū lands. For instance, Ngāriki/Ngā Ariki Kaipūtahi's claim included allegations about the Native Land Court's

6. Waitangi Tribunal, *Turanga Tangata Turanga Whenua: The Report on the Turanganui a Kiwa Claims*, 2 vols (Wellington: Legislation Direct, 2004), vol 2, p 741
7. *Haronga v Waitangi Tribunal* [2012] 2 NZLR 53 (SC), para 76
8. Memorandum–directions of the presiding officer, 30 January 2018, #2.561, para 76
9. Waitangi Tribunal, *Turanga Tangata*, vol 2, p 739
10. Waitangi Tribunal, *Turanga Tangata*, vol 1, p xv-xx

determination of title for Mangatū 1 in 1881; the Tribunal found the effect of that determination and subsequent legislation allowing Te Whānau a Taupara, but not Ngāriki/Ngā Ariki Kaipūtahi, to reargue their rights in the block was that they had 'their rights in Mangatu reduced disproportionately'.[11] Another Mangatū-specific claim concerned the Crown's acquisition of 8,522 acres (3,448.7 hectares) of land in Mangatū 1 from the Mangatū Incorporation in 1961, while failing to disclose its intentions for the use of the land for production forest.[12] The Tribunal found that the Crown 'breached its obligations to act reasonably and with utmost good faith.'[13]

8 Having participated in the Tūranga District Inquiry, in which the Tribunal found that they have well-founded claims, Te Aitanga a Māhaki, Ngāriki/Ngā Ariki Kaipūtahi, and Te Whānau a Kai are eligible to seek binding recommendations. However, the majority of the Tribunal's findings in the Tūranga report were not specific to particular blocks or claimant groups. With limited exceptions, the Tribunal considered that the Crown Treaty breaches arising from well-founded claims formed a single story of extreme prejudice suffered by all Māori communities in Tūranga.[14] The groups concerned included the claimants now seeking binding recommendations from the Tribunal, but also Rongowhakaata and Ngāi Tāmanuhiri, whose claims were also heard in the District Inquiry.

9 We rely on the Tribunal's findings on the well-founded claims in the Tūranga District Inquiry, in order to determine whether the claims relate to the Mangatū CFL land and how the issues of Crown Treaty breach specifically affected Te Aitanga a Māhaki and the Mangatū Incorporation, Ngāriki/Ngā Ariki Kaipūtahi, and Te Whānau a Kai. Before turning to the Tribunal's findings in the Tūranga report, we begin by outlining those groups' claims. In the sections below, we explain how they came to seek section 8HB binding recommendations in this Remedies Inquiry following the Tūranga District Inquiry, and what remedies they are seeking.

The Māhaki Trust and the Mangatū Incorporation

10 Te Aitanga a Māhaki comprises hapū groups connected through their common ancestor Māhaki. These groups include the hapū Ngāti Wāhia, Ngā Pōtiki, Te Whānau a Taupara, Te Whānau a Iwi, Ngāi Tamatea, Ngāi Tuketenui, Ngāriki, Te Whānau a Wi Pere, and Ngāti Matepu.[15] The Tūranga report explains that Te Aitanga a Māhaki's principal settlements are 'found

11. Waitangi Tribunal, *Turanga Tangata*, vol 2, p 748
12. Cabinet originally approved the purchase of 8,646 acres for £82,137 on 15 May 1961. However, the final deed of sale was for 8,522 acres at a price of £80,958, this reflected the same price per acre as £9 10s: Waitangi Tribunal, *Turanga Tangata*, vol 2, p 724; 'Memorandum of Transfer', Crown bundle of resumption documents, 25 May 2012, #I32(a), pp 362–364
13. Waitangi Tribunal, *Turanga Tangata*, vol 2, p 748
14. Waitangi Tribunal, *Turanga Tangata*, vol 1, p 38, vol 2, pp 742–748
15. Waitangi Tribunal, *Turanga Tangata*, vol 1, p 23; closing submissions for Te Aitanga a Māhaki and the Mangatū Incorporation, 10 December 2018, #2.682, para 93

inland, up through the rich alluvial river valleys of the Waipaoa River and its tributaries and into the mountainous interior'.[16]

11 In 2014, Te Aitanga a Māhaki confirmed the Te Aitanga a Māhaki Trust as their representative body (referred to as the Māhaki Trust) in order to settle their historical claims and to seek binding recommendations from the Tribunal.[17] The Māhaki Trust was constituted for the purposes of receiving and managing fisheries settlement assets on behalf of the hapū of Te Aitanga a Māhaki.[18] In 2018, the Māhaki Trust held a re-mandating process to ensure the hapū's support for their remedies application.[19] They are now seeking remedies jointly with the Mangatū Incorporation, whose owners largely affiliate to Ngāti Wahia, Ngāriki, Te Whānau a Taupara, and Ngāriki/Ngā Ariki Kaipūtahi; however, there are also owners with Te Whānau a Kai whakapapa.[20]

12 The Mangatū Incorporation is New Zealand's oldest Māori incorporation, and was established in 1893 through the efforts of Wi Pere and his lawyer William Rees. A prominent leader in Tūranga, Wi Pere could whakapapa to Te Aitanga a Māhaki, Te Whānau a Kai, Te Whānau a Taupara, Rongowhakaata, and other groups in the district and beyond.[21] Wi Pere, then a Member of the House of Representatives, was one of the sponsors of the Mangatū No 1 Empowering Bill 1893. This legislation was intended to provide legal sanction for the owners of the Mangatū 1 block to hold the lands collectively, thus protecting them from alienation.[22] The owners were incorporated into a body corporate and elected a block committee of seven to manage the estate on their behalf. The Incorporation has largely been successful in retaining its land, losing only the land acquired by the Crown in 1961, which now forms part of the Mangatū CFL land. As of 2017, the Incorporation managed 45,638 hectares of land, including approximately 4,720 hectares of exotic forest.[23]

13 In 1992, then-chair of the Mangatū Incorporation, John Ruru, submitted two claims to the Waitangi Tribunal in the Tūranga district. His first claim (Wai 274) was brought on behalf of Te Aitanga a Māhaki and the shareholders of Proprietors of the Mangatū Blocks Incorporated and concerned the Crown's acquisition of land in Mangatū in 1961 for afforestation purposes.[24] His second claim (Wai 283) was originally a comprehensive claim about land alienation

16. Waitangi Tribunal, *Turanga Tangata*, vol 1, p 25
17. Affidavit of Eric John Tupai Ruru, 22 June 2017, #P1, para 24
18. 'Te Aitanga a Māhaki Trust: Amended Deed of Trust', evidence of Pehimana Haapu Brown, 28 May 2018, #P26(a), para 3.2(a)
19. Evidence of William Stirling Te Aho, 28 May 2018, #P18, paras 7 – 15
20. Amended remedies application for Te Aitanga a Māhaki and the Mangatū Incorporation, #2.522
21. Waitangi Tribunal, *Turanga Tangata*, vol 1, p 27
22. Waitangi Tribunal, *Turanga Tangata*, vol 2, p 493
23. Evidence of Alan Haronga, 28 May 2018, #P17, p 2
24. Statement of claim for the Mangatū Incorporation and Te Aitanga a Māhaki, 21 February 1991, Wai 274 ROI, #1.1

in the district, brought on behalf of all Tūranga iwi.[25] Before hearings for the Tūranga District Inquiry began in 2001, both Mr Ruru's claims were consolidated into a comprehensive claim on behalf of the members of Te Aitanga a Māhaki.[26] This claim includes (but is not limited to) the following allegations:

(a) 'The Crown, without lawful excuse and in gross breach of its obligations under Article 1 and Article 2 of the Treaty of Waitangi, sought actively to defeat by military force the mana and rangatiratanga of Te Aitanga a Mahaki with the object of defeating the exclusive and undisturbed possession of their land, estates, forests, fisheries, and taonga which had been solemnly guaranteed by Article 2 of the Treaty of Waitangi.'[27]

(b) 'The Crown, without lawful excuse and in gross breach of its obligations under Article 1 of the Treaty of Waitangi attacked the Waerenga a Hika Pa killing or injuring members of Te Aitanga a Mahaki.'[28]

(c) 'The Crown unlawfully, without justification and for improper purposes, exiled at least 40% of Te Aitanga a Mahaki to Wharekauri [Chatham Islands].'[29]

(d) 'The Crown and its officers undertook offensive and inappropriate action in the pursuit of the Whakarau and subsequent treatment of them in breach of the principles of the Treaty of Waitangi.'[30]

(e) 'The Crown confiscated Te Aitanga a Mahaki lands without proper inquiry as to the present and future needs of Te Aitanga a Mahaki.'[31]

(f) 'The Crown acted in breach of the principles of the Treaty of Waitangi by adopting a policy under the Deed of Cession which resulted in Te Aitanga a Mahaki losing tino rangatiratanga and customary ownership of their land.'[32]

(g) 'In establishing the Poverty Bay Commission, the Crown failed to put in place any fair and transparent procedures for determining which Turanga Maori would be debarred from ownership of their ancestral lands on the basis of their alleged 'rebel' status.'[33]

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25. Statement of claim for Te Aitanga a Māhaki, Ngāi Tāmanuhiri, and Rongowhakaata, 13 March 1992, Wai 283 ROI, #1.1
26. Second amended statement of claim for Te Aitanga a Māhaki, not dated, Wai 814 ROI, SOC #1
27. Second amended statement of claim for Te Aitanga a Māhaki, SOC #1, para 14
28. Second amended statement of claim for Te Aitanga a Māhaki, SOC #1, para 16
29. Second amended statement of claim for Te Aitanga a Māhaki, SOC #1, para 18
30. Second amended statement of claim for Te Aitanga a Māhaki, SOC #1, para 24; the Whakarau (exiles or unhomed) was the name given to the prisoners detained on Wharekauri by Te Kooti: Waitangi Tribunal, *Turanga Tangata*, vol 1, p xviii
31. Second amended statement of claim for Te Aitanga a Māhaki, SOC #1, para 28
32. Second amended statement of claim for Te Aitanga a Māhaki, SOC #1, para 29
33. Second amended statement of claim for Te Aitanga a Māhaki, SOC #1, para 35; the Poverty Bay Commission was made up of two Native Land Court Judges, and was established to carry out three functions: to punish 'rebels' by confiscating their lands and awarding the ceded lands to 'loyal' Māori; to investigate settler land claims from the 1840s; and to transform the tenure of land returned to 'loyal' Māori into Crown-derived titles: Waitangi Tribuanl, *Turanga Tangata*, vol 1, p xxii, 254

(h) 'The Crown failed to recognise tino rangatiratanga through its imposition of joint tenancy which was contrary to Maori customs regarding succession. This system exacerbated the effects of individualisation enabling further alienation of Te Aitanga a Mahaki lands.'[34]

(i) 'In breach of the principles of the Treaty of Waitangi the Crown imposed the Native Land Court process on Te Aitanga a Mahaki facilitating the permanent alienation of their ancestral lands.'[35]

(j) 'As a result of the Government's continued failure to recognise attempts by Turanga Maori to retain their land [the Tūranga trusts], and as they were now forced back into the Native Land Court process, Te Aitanga a Mahaki looked for other options.[36] With the failure of the trust scheme Te Aitanga a Mahaki supported the establishment of the East Coast Native Land & Settlement Company in 1881 – which then became the New Zealand Native Land Settlement Company ('the Company'). In participating in the Company, Te Aitanga a Mahaki could exercise some control over the processes of alienation and European settlement. However, the Company faced difficulties and the Government continued to refuse to intervene resulting in the permanent alienation of a significant amount of Te Aitanga a Mahaki land.'[37]

(k) 'In breach of its obligations and principles under the Treaty of Waitangi the Crown acquired land in the Mangatu Blocks from Te Aitanga a Mahaki for the purposes of establishing a state forest by use of legislation and acts aimed at forcing the owners to sell the land.'[38]

14 In the Tūranga report, the Tribunal found that Te Aitanga a Māhaki were among the Tūranga iwi most affected by Crown Treaty breaches related to the attack on Waerenga a Hika, the treatment of Te Kooti and the Whakarau, the deed of cession, the Poverty Bay Commission, the Native Land Court and the Crown's native land regime, and the Tūranga trusts. The Tribunal also found that Te Aitanga a Māhaki were directly affected by the Crown's breaches in the 1961 acquisition of Mangatū 1 land for afforestation purposes.[39] We discuss these issues and their impact on Te Aitanga a Māhaki further in chapter 4.

15 Following the Tūranga District Inquiry, Te Aitanga a Māhaki, Ngāriki/Ngā Ariki Kaipūtahi, and Te Whānau a Kai formed the body Te Pou a Haokai to represent them in settlement negotiations. The Crown recognised Te Pou a Haokai's deed of mandate to settle the claims of its constituent groups in August 2005. By 2007, Te Pou a Haokai had been included in the

34. Second amended statement of claim for Te Aitanga a Māhaki, SOC #1, para 47
35. Second amended statement of claim for Te Aitanga a Māhaki, SOC #1, para 55
36. The Tūranga trusts were sophisticated schemes developed by Tūranga Māori led by Wi Pere and his lawyer William Rees to escape the strictures of the Native Land Court, and to maximise benefit from their lands: Waitangi Tribunal, *Turanga Tangata*, vol 1, p xxiv
37. Second amended statement of claim for Te Aitanga a Māhaki, SOC #1, para 112
38. Second amended statement of claim for Te Aitanga a Māhaki, SOC #1, para 134
39. Waitangi Tribunal, *Turanga Tangata*, vol 2, pp 743–748

Tūranga-wide body, Tūranga Manuwhiriwhiri, which was formed to collectively negotiate settlement of all Tūranga claims.[40] The collective and the Crown signed an Agreement in Principle in August 2008 which included a provision offering the entire Mangatū CFL land to Te Pou a Haokai for purchase out of the proceeds of their settlement.[41]

16 On 31 July 2008, the Tribunal received an application for an urgent remedies hearing from Alan Haronga), the chairman of the Mangatū Incorporation, on behalf of the Proprietors of the Mangatū Blocks Incorporated. Mr Haronga's application relied on the Tribunal findings in respect of the Te Aitanga a Māhaki claim (filed by John Ruru), that the Crown breached the principles of the Treaty of Waitangi by failing to act in good faith when it acquired land from the Mangatū Incorporation for afforestation purposes in 1961.[42] The Crown opposed Mr Haronga's application on the basis that settlement negotiations had reached an advanced stage.[43]

17 Mr Haronga sought from the Tribunal a binding recommendation under section 8HB for the land lost in the 1961 sale to be returned to the Mangatū Incorporation.[44] Litigation following the Tribunal's initial refusal of Mr Haronga's application for an urgent hearing led to the Supreme Court's *Haronga* decision, and the first round of remedies hearings in 2011–12.[45] The outcome of those proceedings was the first Mangatū Remedies Report, which was ultimately quashed by the High Court in further judicial review proceedings.[46] This background is detailed in the introduction of this report, and we need not repeat it here.

18 In this reconvened stage of our Remedies Inquiry, the Māhaki Trust and the Mangatū Incorporation are now together seeking binding recommendations for the return of Mangatū CFL land on the basis that all Mr Ruru's well-founded claims (summarised above) relate to the CFL land.[47] Initially, they sought the return of the whole of the Mangatū CFL land that is within the Tūranga Inquiry District.[48] They also sought 100 per cent of the compensation that accompanies the return of CFL land, as provided for by section 36 and

40. Evidence of William Stirling Te Aho, 13 April 2012, #I18, para 26.3
41. *Haronga v Waitangi Tribunal* [2012] 2 NZLR 53 (SC), para 2
42. Statement of claim for the Mangatū Incorporation, 31 July 2008, Wai 1489 ROI, #1.1.1, para 5
43. Crown memorandum, 14 August 2008, Wai 1489, #3.1.4, para 16
44. Statement of claim for the Mangatū Incorporation, Wai 1489 ROI, #1.1.1, para 6
45. *Haronga v Waitangi Tribunal* [2012] 2 NZLR 53 (SC)
46. Waitangi Tribunal, *The Mangatū Remedies Report* (Lower Hutt: Legislation Direct, 2014); *Haronga v Waitangi Tribunal* [2015] NZHC 1115; *Attorney-General v Haronga* [2017] 2 NZLR 394 (CA)
47. Amended remedies application for Te Aitanga a Māhaki and Mangatū Incorporation, #2.522, para 5; opening submissions for Te Aitanga a Māhaki and Mangatū Incorporation, 27 August 2018, #2.615
48. Amended remedies application for Te Aitanga a Māhaki and Mangatū Incorporation, #2.522, p 4

Schedule 1 of the CFAA.[49] The Māhaki Trust and the Mangatū Incorporation also signed a memorandum of understanding dated 6 May 2014, and a deed of undertaking dated 16 June 2017 that set out how the Māhaki Trust would transfer the CFL in Mangatū 1, the 1961 lands, to the Incorporation, along with a share of the compensation. They submitted that '[t]he 1961 land is the whole reason for the journey that Mangatū Inc has been on since 2008, and jointly with Te Aitanga a Māhaki, since 2014'.[50]

19 Over the course of our Remedies Inquiry, the Māhaki Trust and Mangatū Incorporation developed their proposal for return of the land. They are still seeking the return of the whole of the Mangatū CFL land, and the eventual transfer of the 1961 land (the whole of the CFL land in the Mangatū 1 block) to the Incorporation. However, they now propose that the Māhaki Trust also receive the CFL land on behalf of Ngāriki/Ngā Ariki Kaipūtahi, and Te Whānau a Kai, both of whom they seek to represent.[51] The Māhaki Trust would retain an 85 per cent interest in the Mangatū 2 block.[52] The Māhaki Trust proposed that 'fresh trusts' be set up for Ngāriki/Ngā Ariki Kaipūtahi, and Te Whānau a Kai.[53]

20 The new Ngāriki Kaipūtahi entity would receive 15 per cent of CFL land in the Mangatū 2 block (equivalent to eight per cent of the total CFL land within the Tūranga district), along with the associated Schedule 1 compensation. The Māhaki Trust proposed that Te Whānau a Kai would not receive any land, but would be transferred 20 per cent of the available Schedule 1 compensation and 20 per cent of the forest value as further compensation.[54] The Māhaki Trust also agreed to provide Ngāti Matepu with 'a cultural centre to a value of $4 million', which they said would be covered by provisions in the

49. Opening submissions for Te Aitanga a Māhaki and Mangatū Incorporation, #2.615, para 4; closing submissions for Te Aitanga a Māhaki and the Mangatū Incorporation, #2.682, para 129
50. Evidence of William Stirling Te Aho, #P18(a)(ii)–(vi); memorandum of counsel for Te Aitanga a Māhaki Trust and the Mangatū Incorporation, 2 July 2020, #2.828, para 25
51. The full list of hapū included in the proposal described as the 'United Māhaki Mandate' is Ngāti Wāhia, Ngāpōtiki, Te Whānau a Kai, Ngāriki including Ngāriki Kaipūtahi and Ngā Uri o Tamanu, Ngāi Tuketenui, Ngāi Tamatea, Te Whānau a Iwi, and Te Whānau a Taupara: memorandum of counsel for Te Aitanga a Māhaki and the Mangatū Incorporation, 2 July 2020, #2.828, para 43; 'Power Point Presentation toward a United Māhaki Settlement', appendix to memorandum of counsel for Te Aitanga a Māhaki and the Mangatū Incorporation, 30 July 2020, #2.844(b), p 4
52. 'Power Point Presentation toward a United Māhaki Settlement', appendix to memorandum of counsel for Te Aitanga a Māhaki and the Mangatū Incorporation, 30 July 2020, #2.844(b), p 5
53. Memorandum of counsel for Te Aitanga a Māhaki and the Mangatū Incorporation, #2.828, para 42.3; We discuss the Māhaki Trust's ratification proposal in greater detail in chapter 6, see para 131
54. The claimants sought this allocation of interests whether the land was returned in undivided shares, or whether the Tribunal ordered a division of the CFL land on the ground: memorandum of counsel for Te Aitanga a Māhaki and the Mangatū Incorporation, #2.828, paras 27.1, 38; 'Power Point Presentation: Toward a United Māhaki Settlement', memorandum of counsel for Te Aitanga a Māhaki and the Mangatū Incorporation, #2.844(b), p 5

Māhaki Trust deed for the 'recognition of new hapū/marae'.[55] This proposal would mean the Mangatū Incorporation would receive all of the CFL land in Mangatū 1 and the Māhaki Trust would receive an 85 per cent interest in Mangatū 2.

21 During this Inquiry, we heard extensive evidence from Te Aitanga a Māhaki witnesses. We wish to recognise here the passing of kaumātua John Ruru, the original named claimant for Te Aitanga a Māhaki, and of Rutene Irwin, both of whom were active in the Tribunal process from the start of the Tūranga District Inquiry.[56] We would also like to acknowledge Wirangi Pera who gave evidence during this Inquiry and served as kaikarakia. He is now the chair of the Te Aitanga a Māhaki Claims Committee. Dr Peetikuia Wainui, speaking for her whānau, shared her experiences of life in Mangatū.[57] Finally, the current chair of the Mangatū committee of management, Alan Haronga, also gave evidence about the Incorporation's current operations, their hopes for the future, and the challenges they face.

Ngāriki/Ngā Ariki Kaipūtahi

22 The Ngāriki/Ngā Ariki Kaipūtahi applicants are the direct descendants of rangatira Rawiri Tamanui, through his son, Pera Te Uatuku. Rawiri Tamanui was a leader in Tūranga from the 1820s to the 1850s and fought in several conflicts during that period. His successor Pera Te Uatuku fought alongside Te Aitanga a Māhaki and Rongowhakaata at Waerenga a Hika. He was later captured and detained on Wharekauri.[58]

23 Ngāriki/Ngā Ariki Kaipūtahi's interests lie primarily in the Mangatū area, which in their oral histories they have occupied continuously for over 14 generations.[59] They also have interests in the neighbouring Manukawhitikitiki, Whatatutu, Mangataikapua, and Rangatira blocks. Their interests overlap with those of Te Aitanga a Māhaki but they stress that Ngāriki/Ngā Ariki Kaipūtahi are the original inhabitants and kaitiaki of Mangatū.[60] They also emphasise that other Ngāriki groups such as Ngāriki Pō and Ngāriki Rotoawe are distinct from Ngāriki/Ngā Ariki Kaipūtahi.[61]

24 Groups of Ngāriki/Ngā Ariki Kaipūtahi claimants originally filed three separate claims in the Tūranga District Inquiry, and each has since followed a different path – joining together at some stages and separating at others.

55. Memorandum of counsel for Te Aitanga a Māhaki and the Mangatū Incorporation, 31 July 2020, #2.844, para 5
56. Affidavit of John Ruru, #P1; evidence of Eric John Tupai Ruru, 28 May 2018, #P25; video evidence of Rutene Irwin, 22 May 2018, #P3
57. Evidence of Wirangi Pera, 28 May 2018, #P15; evidence of Dr Peetikui Bessie Wainui, 28 August 2018, #P25(b)(i)
58. Waitangi Tribunal, *Turanga Tangata*, vol 1, pp 30–31
59. John Robson, 'Ngariki Kaiputahi Mana Whenua Report', November 2000, #A22, para 2.7, app 2, p 47
60. Evidence of Owen Lloyd, #C23, not dated, paras 30–32, 40; amended statement of claim for Ngāriki Kaipūtahi, 18 April 2001, SOC #3
61. Evidence of Owen Lloyd, #C23, para 12

We set out some of this procedural history here to clarify their status in this Remedies Inquiry.

25 Each Ngāriki/Ngā Ariki Kaipūtahi claim was initially brought on behalf of a differently constituted claimant group. Tanya Rogers, the daughter of Ngāriki/Ngā Ariki Kaipūtahi leader, Edward Mokopuna Brown, brought her claim (Wai 499) on behalf of 'herself and on behalf of the members of the Ngariki Kaiputahi Tribe and on behalf of her sister the Executrix of the Mangatū shares Julie Celia O'Donnell and Maureen Colette Drummond.'[62] Owen Lloyd filed a claim (Wai 507) originally on behalf of the trustees of the Ngāriki Kaipūtahi Whānau Trust.[63] Rawiri Brown brought his claim originally on behalf of Te Iwi Ngāriki (Wai 874). He later amended the claim to be on behalf of the Ngāriki Kaipūtahi Tribal Authority.[64]

26 Prior to the beginning of the Tūranga District Inquiry hearings in 2001, Mr Lloyd and Ms Rogers together filed a joint amended statement of claim on behalf of the trustees of the Ngāriki Kaipūtahi Whānau Trust and all Ngāriki Kaipūtahi.[65] During the same interlocutory process, Mr Brown (Wai 874) filed a further amended statement of claim on behalf of a separate Ngāriki Kaipūtahi claimant group.[66] Both groups claimed that Ngāriki/Ngā Ariki Kaipūtahi were, and remain, prejudicially affected by the Crown's Treaty breaches in the district. Their statements of claim included many of the same broad allegations set out above for Te Aitanga a Māhaki and the Mangatū Incorporation.[67] The Ngā Ariki Kaipūtahi claims included (but were not limited to) the following allegations:

(a) 'On 17 November 1865, the Crown exercised powers under the Suppression of Rebellion Act 1863 to use military force at Waerenga-a-Hika, ostensibly to punish Turanga Maori for their alleged links with the Pai Marire movement.'[68]

(b) 'As a result of the conflict at Waerenga-a-Hika, Pera Te Uatuku and other Ngariki Kaiputahi became prisoners of the military under the Suppression of Rebellion Act 1863 and were imprisoned on Wharekauri (the Chatham Islands) from March 1866 to July 1868.'[69]

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62. Statement of claim, 28 March 1995, Wai 499 ROI, #1.1
63. Statement of claim for Ngāriki Kaipūtahi, 26 April 1995, Wai 507 ROI, #1.1
64. Statement of claim for Ngāriki Kaipūtahi, Wai 874 ROI, not dated, #1.1; statement of claim for Ngāriki Kaipūtahi, Wai 874 ROI, 12 May 2004, #1.1(a)
65. Amended statement of claim for Ngāriki Kaipūtahi, SOC #3
66. First amended statement of claim for Ngāriki Kaipūtahi, March 2001, SOC #6
67. Amended statement of claim for Ngāriki Kaipūtahi, SOC #3; first amended statement of claim for Ngāriki Kaipūtahi, SOC #6
68. Amended statement of claim for Ngāriki Kaipūtahi, SOC #3, para 10; first amended statement of claim for Ngāriki Kaipūtahi, SOC #6, p 2; Pai Marire was a Māori religious movement that emerged during the wars of the 1860s and was founded by Te Ua Haumene: Waitangi Tribunal, *Turanga Tangata*, vol 1, p xv, 40
69. Amended statement of claim for Ngāriki Kaipūtahi, SOC #3, para 16; first amended statement of claim for Ngāriki Kaipūtahi, SOC #6, p 2

(c) 'By imprisoning Pera Te Uatuku and other Ngariki Kaiputahi on Wharekauri, the Crown deliberately intended to prevent them from participating in matters relating to their ancestral lands, including the Crown's attempts to acquire those lands by confiscation or cession.'[70]

(d) 'In December 1868, the Crown forced a cession of land in the Turanga district, including the ancestral lands of Ngariki Kaiputahi, in circumstances that amounted to confiscation.'[71]

(e) 'As part of its Native land policy, the Crown adopted and implemented in the Turanga district a policy of forfeiture of land for rebellion . . . While no ancestral land of Ngariki Kaiputahi was permanently lost in this process, it nevertheless interfered with the customary authority that Ngariki Kaiputahi exerted over its ancestral lands.'[72]

(f) 'The Crown's Native Land policy given legislative effect through a raft of Native Land Acts and related enactments and statutory instruments, affected all Māori, including Ngariki Kaiputahi. The policy had the express and primary purposes of extinguishing Native title to Maori lands as rapidly as possible and of facilitating, again as rapidly as possible, the transfer of Maori-owned interest in land to the ownership of the Crown or of the settler population.'[73]

(g) 'In 1881, the Native Land Court heard and determined title to lands known as the Mangatu Block and determined that Ngariki Kaiputahi effectively had no customary interests in that block, which was a gross error since most of Ngariki Kaiputahi customary interests were in the area covered by that block.'[74]

(h) 'Ngariki Kaiputahi's shareholding in Mangatu was further diluted following hearings of the Native Land Court and the Maori Appellate Court between 1918 and 1922, which resulted in a redistribution of shares in the land.'[75]

(i) 'Although the Crown was aware, or should have been aware, of Ngariki Kaiputahi's grievances in respect of the Native Land Court's 1881 determination of title to the Mangatu block and the subsequent decisions of the Native/Maori Land Court and the Maori Appellate Court, it failed or refused to provide relief to the satisfaction of Ngariki Kaiputahi and has allowed the grievance to remain unresolved until today.'[76]

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70. Amended statement of claim for Ngāriki Kaipūtahi, SOC #3, para 20; first amended statement of claim for Ngāriki Kaipūtahi, SOC #6, p 2
71. Amended statement of claim for Ngāriki Kaipūtahi, SOC #3, para 31
72. Amended statement of claim for Ngāriki Kaipūtahi, SOC #3, para 30
73. Amended statement of claim for Ngāriki Kaipūtahi, SOC #3, para 24; first amended statement of claim for Ngāriki Kaipūtahi, SOC #6, p 2–3
74. Amended statement of claim for Ngāriki Kaipūtahi, SOC #3, para 38
75. Amended statement of claim for Ngāriki Kaipūtahi, SOC #3, para 44
76. Amended statement of claim for Ngāriki Kaipūtahi, SOC #3, para 45; first amended statement of claim for Ngāriki Kaipūtahi, SOC #6, p 3

(j) 'The Crown put the Maori landowners [of Mangatū 1 block] under significant pressure to accept the afforestation proposal whereas it did not apply such pressure to Pakeha owners . . . In 1960/1961, the Maori landowners agreed to negotiate a sale but it was not in reality a willing sale and the owners were not compensated for the cultural and spiritual significance of their ancestral lands.'[77]

27 In the Tūranga report, the Tribunal referred to Ngāriki/Ngā Ariki Kaipūtahi as among the Tūranga iwi found to be affected by Crown Treaty breaches related to the attack on Waerenga a Hika, the treatment of Te Kooti and the Whakarau, the deed of cession, the Poverty Bay Commission, the Native Land Court and the Crown's native land regime, and the Tūranga trusts. The Tribunal found that following the 'unsafe' determination of the Native Land Court in 1881, the entitlements of Ngāriki/Ngā Ariki Kaipūtahi were reduced disproportionately by the process of determining relative interests in the Mangatū 1 block.[78] We discuss these issues and their impact on Ngāriki/Ngā Ariki Kaipūtahi further in chapters 4 and 5.

28 At the beginning of our 2018 hearings, Mr Lloyd sought a binding recommendation for the return of all the Mangatū CFL land in the Tūranga Inquiry District to the Te Runanganui o Ngā Ariki Kaipūtahi Trust (the successor to the Ngāriki Kaipūtahi Whānau Trust), together with the accumulated rentals held in relation to that land and compensation pursuant to Schedule 1 of the CFAA.[79] Mr Brown and Ms Rogers separately sought the return of all the Mangatū CFL land to Ngāriki Kaipūtahi Tribal Authority, together with compensation under Schedule 1 of the CFAA.[80] Both applications were brought on the basis that all of Ngāriki/Ngā Ariki Kaipūtahi's well-founded claims relate to the Mangatū CFL land.[81]

29 However, during the course of our 2018 hearings, Mr Lloyd, and Mr Brown were asked to consider how the two groups could resolve their differences in order to receive remedies for the benefit of a single Ngāriki/Ngā Ariki Kaipūtahi claimant community.[82] After the conclusion of hearings, both applicant groups participated in facilitated hui in October 2019. When a mediation agreement was successfully reached at that hui, both applicant groups agreed 'to set up a new entity to go forward as a united Iwi' to be called the Ngā Uri o Tamanui Trust.[83]

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77. Amended statement of claim for Ngāriki Kaipūtahi, SOC #3, paras 58–65; first amended statement of claim for Ngāriki Kaipūtahi, SOC #6, p 3
78. Waitangi Tribunal, *Turanga Tangata*, vol 2, pp 743–748
79. Amended remedies application for Ngā Ariki Kaipūtahi, #2.539, para 1
80. Amended remedies application for Ngāriki Kaipūtahi, 15 September 2017, #2.540, para 1(a)
81. Closing submissions for Ngā Ariki Kaipūtahi, 10 December 2018, #2.684, paras 44–140; Amended remedies application Ngāriki Kaipūtahi, #2.540, para 4(b)
82. Transcript for hearing week one, 27–31 August 2018, #4.30, pp 644–647; transcript for hearing week two, 12–15 November 2018, #4.33, pp 204–212
83. Joint memorandum of counsel, 14 October 2019, #2.765, para 3

30 For clarity, we will refer to the Ngā Uri o Tamanui Trust only in chapter 6 and chapter 8 of this report as the entity established by the Ngāriki/Ngā Ariki Kaipūtahi applicants to represent their interests following their mediation agreement (and also to receive the Tribunal's section 8HB recommendations, and as necessary to pursue subsequent negotiations with the Crown). Otherwise, we use 'Ngāriki/Ngā Ariki Kaipūtahi' throughout this report when referring to the claims inquired into in the Tūranga District Inquiry and at issue in this Inquiry, including the positions taken by the two Ngāriki/Ngā Ariki Kaipūtahi groups prior to the 2019 mediation.

31 As the Ngā Uri o Tamanui Trust, the claimants made further submissions on the remedies they are seeking. They submitted that if the Tribunal is to recommend that Te Whānau a Kai receive an individual allocation, then Ngā Uri o Tamanui seek the return of 2,304 hectares (5,693.3 acres) of the CFL land, which amounts to an allocation of a 30 per cent interest, along with the associated compensation. They submitted that Te Aitanga a Māhaki should receive a 40 per cent allocation and Te Whānau a Kai a 30 per cent allocation. Ngā Uri o Tamanui also submitted that '[i]f Te Whānau a Kai are found not to be "related to" the CFL land, Ngā Uri o Tamanui seek 3455 hectares of the CFL land. This amounts to a 45%/55% division between Ngā Uri o Tamanui and Te Aitanga a Māhaki respectively'.[84]

32 During our hearings we heard important evidence from both Ngāriki Kaipūtahi and Ngā Ariki Kaipūtahi claimant groups. For the Ngā Ariki Kaipūtahi claimants (Wai 507), Owen Lloyd gave evidence on the significance of the Mangatū lands to Ngā Ariki Kaipūtahi, and on Te Runanganui o Ngā Ariki Kaipūtahi's efforts to regain some control over their traditional rohe.[85] We heard from Raiha Goldsmith about Ngā Ariki Kaipūtahi's aspirations to provide new employment and community-building opportunities for their people.[86] We also heard from Mahia Smith, Corie Brooking, and Johanna Lloyd about their efforts to revitalise Ngā Ariki Kaipūtahi through community activities such as kapa haka.[87] For the Ngāriki Kaipūtahi claimants (Wai 499 and Wai 874), we heard evidence from the Brown whānau. Rawiri Brown gave evidence on Ngāriki Kaipūtahi's customary interests in Mangatū, and Tanya Rogers (Brown) told us of her experiences living in Mangatū, and the land's importance to Ngāriki Kaipūtahi.[88]

Te Whānau a Kai

33 David Hawea brought claims on behalf of Te Whānau a Kai in the Tūranga, Te Urewera, East Coast, and North-Eastern Bay of Plenty District Inquiries

84. Memorandum of counsel for Ngāriki/Ngā Ariki Kaipūtahi, 29 June 2020, #2.824, para 33
85. Evidence of Owen Lloyd, 28 May 2018, #P20
86. Evidence of Rahia Goldsmith, 28 May 2018, #P24
87. Evidence of Mahia Smith, Corie Brooking and Johanna Lloyd, 28 May 2018, #P22
88. Evidence of Rawiri Brown, 28 May 2018, #P13; evidence of Tanya Brown, 28 May 2018, #P14

(the East Coast Inquiry was later adjourned as a result of Ngāti Porou entering settlement negotiations with the Crown).[89] With widespread claims in these four different districts, Mr Hawea told us that it has been difficult for Te Whānau a Kai to have their interests recognised. However, he has maintained throughout this Inquiry that 'it is important to us and important in terms of understanding the full Te Whānau a Kai picture, to be aware of these interests.'[90]

34 In the Tūranga District Inquiry, Mr Hawea claimed that Te Whānau a Kai were prejudicially affected by many of the same Crown breaches in the district that impacted on Te Aitanga a Māhaki and Ngāriki/Ngā Ariki Kaipūtahi, and they supported Te Aitanga a Māhaki's claims regarding the Crown's native land regime in Tūranga.[91] Te Whānau a Kai's claim included (but was not limited to) the following allegations:

(a) 'The Crown, acting illegally and without lawful excuse and in breach of its duties under the Treaty: In November 1865 the Crown attacked the Waerenga a Hika Pa killing or injuring members of Te Whanau a Kai; . . . exiled Te Whanau a Kai to Wharekauri to facilitate Crown policy to confiscate Te Whanau a Kai lands and remove opposition to that policy being carried out.'[92]

(b) 'The Crown forced Turanga Maori to enter into a deed of cession in December 1868 in exchange for protection, taking the ancestral lands of Te Whānau a Kai and purporting to extinguish customary title in the ceded lands.'[93]

(c) 'The confiscation of Patutahi meant that Te Whanau a Kai shared disproportionately in the Crown's actions in the Poverty Bay region, prejudicially depriving them of their land in a manner that was arbitrary and unfair and contrary to the principles of the Treaty of Waitangi.'[94]

(d) 'The effects of the Native Lands Acts and the Native Land Court are now well understood and Te Whanau a Kai support and adopt the general allegations . . . as set out in the second Amended Statement of Claim filed by Te Aitanga a Māhaki.'[95]

(e) 'Te Whanau a Kai endorse and support the allegations made in the Te Aitanga a Māhaki statement of claim regarding the New Zealand Native

89. Statement of claim for Te Whānau a Kai, 27 November 2000, Wai 892 ROI, #1.1; third amended statement of claim for Te Whānau a Kai, 27 January 2003, Wai 892 ROI, #1.1(a); evidence of David Hawea, 28 May 2018, #P12, para 3.4
90. Evidence of David Hawea, 20 April 2012, #I20, para 6.11
91. Second amended statement of claim for Te Whānau a Kai, 23 May 2001, SOC #8
92. Second amended statement of claim for Te Whānau a Kai, SOC #8, para 4.2
93. Second amended statement of claim for Te Whānau a Kai, SOC #8, para 5.7
94. Second amended statement of claim for Te Whānau a Kai, SOC #8, para 5.12(b)
95. Second amended statement of claim for Te Whānau a Kai, SOC #8, para 6.4

Land Settlement Company, the Carroll-Wi Pere Trust and the East Coast Native Trust Lands Act 1902.'[96]

(f) 'Two areas in Tahora belonging to Te Whanau a Kai, these being Tahora 2C2:2 and Tahora 2C3:2, were vested in the Carroll-Pere Trust following partitions of Tahora 2C2 and 2C3 in 1896. The actual vesting was conducted by the Validation Court sitting at Gisborne on 17 April 1896.'[97]

(g) 'Interests in Tahora No 2 are recorded as being included in the lands sold to repay the debt owed by the Trust to the Bank of New Zealand.[98]. . . [T]hese losses arose out of serious inadequacies and shortcomings in the Native Lands Acts and their amendments, including the inability of the Land Court to establish land management trusts and the Crown's general failure to establish a workable means of administering multiply owned lands.'[99]

35 In the Tūranga report, the Tribunal reffered to Te Whānau a Kai as among the Tūranga iwi found to be affected by Crown Treaty breaches relating to the attack on Waerenga a Hika, the treatment of Te Kooti and the Whakarau, the deed of cession, the Poverty Bay Commission, the Native Land Court and the Crown's native land regime, and the Tūranga trusts.[100] However, the Tribunal did not receive evidence in time to fully inquire into the claims concerning the Tahora 2 block, and was unable to make findings about that part of Te Whānau a Kai's claim in the Tūranga report.[101] After the completion of a research report concerning the Tahora 2C blocks, the Tribunal inquired into these issues further in the Te Urewera District Inquiry, and reported on them in 2010.[102] We discuss these issues and their impact on Te Whānau a Kai further in chapters 4 and 5.

36 In this Remedies Inquiry, Te Whānau a Kai seek that Mangatū CFL land be returned to the Te Whānau a Kai Trust, together with compensation under Schedule 1 of the CFAA, on the basis that all of their well-founded claims relate to the CFL land.[103] They also seek non-binding recommendations

96. Second amended statement of claim for Te Whānau a Kai, SOC #8, para 8.2; The East Coast Native Trust Lands Board Act 1902 vested the lands held under the trusteeship of Wi Pere and James Carroll in the new East Coast Native Trust Lands Board, from 1906 these lands were administered by the East Coast Commissioner: Waitangi Tribunal, *Turanga Tangata*, vol 2, pp 504–505
97. Second amended statement of claim for Te Whānau a Kai, SOC #8, para 8.4
98. Second amended statement of claim for Te Whānau a Kai, SOC 8, para 8.5
99. Te Whānau a Kai also stipulated at the time that further research was being conducted into alienations in the Tahora blocks and sought leave to further amend this aspect of their claim: second amended statement of claim for Te Whānau a Kai, SOC #8, paras 8.7, 8.8(c)
100. Waitangi Tribunal, *Turanga Tangata*, vol 2, pp 743–748
101. Waitangi Tribunal, *Turanga Tangata*, vol 2, pp 578–579
102. Waitangi Tribunal, *Te Urewera*, 8 vols (Wellington: Waitangi Tribunal, 2010), vol 3, pp 1003–1315; Peter Boston and Steven Oliver, 'Tahora', June 2002, Wai 894 ROI, #A22,
103. Amended remedies application for Te Whanau a Kai, #2.537, paras 4(a)–(b); Closing submissions for Te Whānau a Kai, 10 December 2018, #2.683, para 9

that the Crown should begin negotiations with Te Whānau a Kai and work towards a more comprehensive settlement that is not limited to the Tūranga Inquiry District; the settlement should also include further compensation and other forms of redress, they say.[104] In closing submissions, counsel for Te Whānau a Kai recognised that other claimant groups are also entitled to the return of some land, and submitted that Te Whānau a Kai sought 'a fair and appropriate portion of the Mangatu CFL lands'.[105] However, later in our proceedings, Te Whānau a Kai made further submissions on the allocation of remedies they were seeking. They now seek a 90 per cent interest in the CFL land, along with the associated compensation and accumulated rentals.[106]

37 As the lead claimant for Te Whānau a Kai, Mr Hawea has served as the chairperson of the Te Whānau a Kai Trust since its inception in 1996. Throughout his participation in multiple Tribunal inquiries, Mr Hawea has consistently emphasised the distinctiveness of Te Whānau a Kai's identity and gave further evidence on their interests during our 2018 hearings.[107] Te Whānau a Kai kaumātua Keith Katipa also gave evidence before the Tribunal on Te Whānau a Kai's customary interests in Mangatū through their Ngāriki whakapapa.[108] Mr Katipa has supported Mr Hawea in pursuing Te Whānau a Kai's claims and in negotiations with the Crown since the release of the Tūranga report in 2004.[109] We also heard evidence from Josephine Ihimaera-Smiler about her experience working in social services with Te Runanga o Tūranganui a Kiwa and the Māhaki Trust (where she represents Te Whānau a Kai through her role as a representative for Rongopai Marae).[110] Ms Ihimaera-Smiler was supported by Noline Terere, who told us of her experience trying to revitalise Te Whānau a Kai identity through the progression of their claim, and avenues such as kapa haka.[111]

Interested party: Te Rangiwhakataetaea–Wi Haronga–Ngāti Matepu

38 On 31 March 2017, counsel for Ngāti Matepu filed a memorandum seeking leave under section 8HB(1)(d) of the TOWA to participate in this Remedies Inquiry and to be heard on the return of Mangatū CFL land to Māori ownership.[112] On 12 July 2017, counsel further sought leave to submit an 'Application for Resumption of Crown Forest Licensed Land' in the name of Anthony Tapp for and on behalf of Ngāti Matepu.[113] Other counsel opposed this application

104. Closing submissions for Te Whānau a Kai, #2.683, para 16.7
105. Closing submissions for Te Whānau a Kai, #2.683, para 1.6
106. Memorandum of counsel for Te Whānau a Kai, 30 June 2020, #2.826, para 30(c)
107. Evidence of David Hawea, #P12, para 2.14
108. Evidence of Keith Katipa, 14 August 2018, #P44
109. Evidence of Keith Katipa, 20 April 2012, #I19, paras 1.13–1.14
110. Evidence of Josephine Ihimaera-Smiler, 16 August 2018, #P46
111. Evidence of Noline Terere, 30 November 2018, #P46(a)
112. Memorandum of counsel for Te Rangiwhakataetaea–Wi Haronga–Ngāti Matepu, 31 March 2017, #2.507
113. Application for resumption of Crown Forest Licensed Land, 12 July 2017, #2.720

from Ngāti Matepu on the basis that the claimants had not participated in the Tūranga District Inquiry, and thus had no Tribunal finding that their claim was well-founded.[114]

39 Ngawiki Lewis filed the Wai 995 claim in February 2002 on behalf of herself and the descendants of Te Rangiwhakataetaea.[115] The claim alleges that their tipuna, Wi Haronga, 'took a neutral stance during the East Coast wars' and that their lands were 'confiscated by the Crown regardless of whether they had been in active opposition, neutral or Crown supporters'.[116] However, the acting chairperson of the Waitangi Tribunal noted that the claim had been filed too late for inclusion in the Tūranga Inquiry, although it was registered nonetheless.[117]

40 Ngāti Matepu are closely connected to the larger Te Aitanga a Māhaki claimant group and were included within TAMA during the 2012 remedies hearings.[118] Anthony Tapp gave evidence in support of Te Aitanga a Māhaki's application in those proceedings, and described Ngāti Matepu as a hapū of Te Aitanga a Māhaki.[119] In this Inquiry, Mr Tapp emphasised again his affiliation to Te Aitanga a Māhaki iwi.[120]

41 In 2018, the presiding officer issued memorandum–directions recognising that the Ngāti Matepu claimants met the criteria under section 8HD(1)(d) to appear in the reconvened inquiry as an interested party, even though they did not participate in the Tūranga District Inquiry. However, the presiding officer concluded that Ngāti Matepu's claim had not been determined as well-founded by the Tribunal in the Tūranga report, and commented:

> [T]he Wai 995 claimants do not, at this stage of proceedings, need to have a well-founded claim to participate in this inquiry, and it is important to try and avoid further controversy or judicial review. Accordingly, the Wai 995 claimants may participate as per s 8HD(1)(d) and may seek to produce evidence to show that the Tribunal should identify Ngāti Matepu as 'the Maori or group of Maori to whom that land or that part of that land is to be returned': s 8HB(1)(a).[121]

42 In closing submissions, counsel for Ngāti Matepu initially argued that the Tribunal could partition a portion of the CFL land to be held separately until the Tribunal had inquired into their claim. They subsequently refined

114. Memorandum of counsel for the Māhaki Trust and the Mangatū Incorporation, 15 September 2017, #2.534; memorandum of counsel for Ngā Ariki Kaipūtahi, 15 September 2017, #2.536; memorandum of counsel for Ngāriki Kaipūtahi, 15 September 2017, #2.538
115. Statement of claim for Te Rangiwhakataetaea–Wi Haronga–Ngāti Matepu, 19 February 2002, Wai 995 ROI, #1.1
116. Statement of claim for Te Rangiwhakataetaea–Wi Haronga–Ngāti Matepu, Wai 995 ROI, #1.1, paras 2.3–2.5
117. Memorandum–directions of the Tribunal, 6 August 2002, Wai 995 ROI, #2.1
118. Supplementary third amendment to the statements of claim of TAMA, 2 August 2012, SOC #1(c)
119. Evidence of Anthony Tapp, 5 April 2012, #I9, para 28.4
120. Transcript for hearing week two, 14 November 2018, #4.33, pp 468–469
121. Memorandum–directions of the presiding officer, 30 January 2018, #2.561, para 98

this position, submitting that Ngāti Matepu were open to a broader holding structure that could include their rights as 'a specified interest'.[122] Counsel later submitted that Ngāti Matepu would accept their inclusion in a list of Te Aitanga a Māhaki recipient hapū as long as their interest was, visibly, 'front and centre on the whenua.'[123]

Waiata Karauna: the Crown's Position on the Claims and the Return of CFL Land

43 In its 2018 closing submissions, the Crown accepted in principle that 'the return of some of the licensed lands to Māori ownership could be an appropriate way to remove or compensate for the prejudice attributable to the particular well-founded claims which relate to the CFL'.[124] However, the Crown opposed the return of the whole of the Mangatū CFL land, and the amount of compensation under Schedule 1 of the CFAA sought by the claimants in this Inquiry.[125] Counsel for the Crown submitted the following:

(a) The Tribunal's recommendations must provide a complete scheme to compensate for or remove the prejudice suffered as a result of the well-founded claims that relate to the Mangatū Crown forest licensed lands located within the inquiry district;[126]
(b) The Crown accepts that the unsettled claims in this inquiry district are significant and deserve redress. However, in considering whether to make remedial recommendations under s 8HB(1)(a), the Tribunal must have regard only to the extent of the prejudice attributable to the particular well-founded claim or claims which relate to the Crown forest licensed lands;[127]

44 The Crown opposes, for the most part, the extent of remedies sought by the claimants here. In summary:

(a) Mr Hawea's claims (Wai 892) do not relate to the licensed lands;[128]
(b) Mr Ruru's claims (Wai 274, Wai 283) relate in part to the licensed lands. The scale of relief sought goes beyond the severity of the prejudice the Tribunal might find was suffered;[129]
(c) Mr Haronga's claims (Wai 1489) relate to the licensed lands. These claims have not been inquired into. To the extent they mirror parts of Mr Ruru's

122. Closing submissions for Te Rangiwhakataetaea–Wi Haronga–Ngāti Matepu, 10 December 2018, #2.680, para 26
123. Transcript for hearing week four, 20 December 2018, #4.35, p 174
124. Amended closing submissions for the Crown, 12 February 2019, #2.688(b), p 6
125. Amended closing submissions for the Crown, #2.688(b), paras 6–7
126. Amended closing submissions for the Crown, #2.688(b), para 3
127. Amended closing submissions for the Crown, #2.688(b), para 4
128. Amended closing submissions for the Crown, #2.688(b), para 7.1
129. Amended closing submissions for the Crown, #2.688(b), para 7.2

claims above . . . the Tribunal may conclude they are well-founded to the same extent it concludes that for Mr Ruru's claim. The scale of relief sought goes beyond the severity of the prejudice the Tribunal might find was suffered;[130]

(d) A number of the claims submitted by Ms Rogers (Wai 499) and Mr Brown (Wai 874) relate to the forest land. The scale of relief sought goes beyond the severity of the prejudice the Tribunal might find was suffered. The size of the group affected reinforces this point; and[131]

(e) A number of the claims submitted by Mr Lloyd (Wai 507) relate to the forest land. Again, the scale of relief sought goes beyond the severity of the prejudice the Tribunal might find was suffered. The size of the group affected reinforces this point.[132]

45 Following the High Court's decision in *Mercury NZ Ltd and Ors v Waitangi Tribunal and Ors* (this judgment is discussed further in chapters 3, 4, and 5), the Crown altered its position. It submitted that the only claim that met the legal test under section 8HB was 'the arms-length purchase by the Crown of land for forest purposes, from within the Mangatū 1 block, from the 1961 shareholders of the Mangatū Incorporation'.[133] However, the Crown argued that the return of CFL land would be an 'inappropriate remedy' for this claim and a 'recommendation to return part of the 1961 land would be to overcompensate those affected given that the price paid for the land was appropriate.'[134]

46 Crown counsel argued that the Tribunal should take a 'restorative, proportionate, and practical' approach to exercising its power to make binding recommendations.[135] In the Crown's view, this approach should include other remedies besides binding recommendations under section 8HB.[136] For instance, the Crown suggested that 'non-binding recommendations are appropriate to remove prejudice that is non-compensable in economic terms'.[137] As an example, the Crown proposed that non-binding recommendations are appropriate for the claims brought by Mr Ruru and Mr Haronga regarding the Crown's 1961 purchase of land for afforestation purposes.[138]

130. Amended closing submissions for the Crown, #2.688(b), para 7.3
131. Amended closing submissions for the Crown, #2.688(b), para 7.4
132. Amended closing submissions for the Crown, #2.688(b), para 7.5
133. Memorandum of counsel for the Crown, 31 May 2021, #2.933, para 15
134. Memorandum of counsel for the Crown, #2.933, para 15
135. Amended closing submissions for the Crown, #2.688(b), para 68
136. Amended closing submissions for the Crown, #2.688(b), para 69; memorandum of counsel for the Crown, #2.933, paras 15, 17
137. Amended closing submissions for the Crown, #2.688(b), para 298; memorandum of counsel for the Crown, #2.933, paras 15, 17
138. Amended closing submissions for the Crown, #2.688(b), paras 296–297

Tribunal Summary

47 The claimant parties in this Inquiry are seeking binding recommendations for the return of all the CFL land and Schedule 1 compensation on the basis that all their well-founded claims listed above relate to the Mangatū CFL land, and the relevant prejudice is therefore severe. In contrast, the Crown has taken a narrower view, arguing that *some* of the land could be returned to applicant groups, together with accompanying compensation to address prejudice associated with the particular claim that it says relates to the CFL land. We observe that much of the difference between the Crown's and claimants' approaches to the statutory scheme in this Inquiry arises from their different positions on the requirement under section 8HB(1) that a claim 'relates to' the CFL land. We return to these divergent positions in chapter 4.

48 The claims summarised above illustrate that Te Aitanga a Māhaki and the Mangatū Incorporation, Ngāriki/Ngā Ariki Kaipūtahi, and Te Whānau a Kai share a number of the same significant grievances which they assert relate to the CFL land. Each group also has well-founded claims which address discrete Treaty breaches. The grievances shared by the claimants, and those that are specific to a particular group, arise from the following areas of Crown Treaty breach:

- The Crown's attack on Waerenga a Hika and its treatment of Te Kooti and the Whakarau, 1865–68.
- The deed of cession (1868), and the Crown's retained lands.
- The Poverty Bay Commission, 1869–73.
- The Crown's native land regime, and the new native title.
- The Native Land Court's Mangatū title determination: Ngāriki/Ngā Ariki Kaipūtahi Mangatū claim.
- The Tūranga trusts, 1878–1955
- The Mangatū afforestation and the Crown's 1961 acquisition

49 Our determinations on the claimants' applications for the return of the Mangatū CFL land under section 8HB will focus on these issues. As explained already, to reach those overall determinations, the statutory scheme requires us to follow a sequence of steps. First, we must determine whether the well-founded claims relate to the CFL land (this feature of the scheme is discussed further in chapter 4, see paragraphs 7–36) and, if so, we must then consider the prejudice the applicants have suffered. If we conclude that the action to be taken under section 8HB should include the return of CFL land to Māori ownership, we must then proceed to determine how much CFL land is to be returned, and to whom.

50 We begin in chapter 3 by discussing the statutory scheme and explaining further our approach to reaching our overall determination via the steps just described.

WAIATA UIUINGA

Kia noho ai te korōria ki tō tātou whenua

CHAPTER 3

THE TRIBUNAL'S JURISDICTION TO MAKE BINDING RECOMMENDATIONS FOR CROWN FOREST LICENSED LAND

Introduction

1 In this chapter, we explain the statutory scheme under section 8HB that empowers the Tribunal to make binding recommendations for the return of CFL land. We then set out our approach to making the determinations the statutory scheme requires of us. In doing so, we have the benefit of judgments from the Senior Courts on how the Tribunal can lawfully exercise its powers to make binding recommendations.[1] In a number of decisions, the Courts have endorsed the Tribunal as the appropriate expert body to exercise those powers. The Courts have made it clear that once we determine that the legal test for applications for binding recommendations has been met, we have a statutory obligation to make one of the recommendations under section 8HB.

2 The Courts' interpretation of the Tribunal's task under section 8HB, and of the determinations required by the statutory scheme, supports the approach we take to the remedies applications in this Inquiry. In our view, section 8HB empowers the Tribunal to carry out the intended outcomes of the 1989 Forests Agreement. That agreement was essentially of a commercial nature, and its provisions were also intended to contribute to restoring to Māori claimants, who were prejudiced by relevant Crown Treaty breaches, the land they lost as a result.

3 We begin by outlining the statutory provisions governing binding recommendations under section 8HB. We then consider the Courts' observations concerning the purpose of the Tribunal's additional powers to make binding recommendations and their statutory context, and the consequences for this Inquiry of the judicial review of the 2014 Mangatū Remedies report. Finally, we set out our views on how the Tribunal should approach its task under section 8HB, the issues for this Inquiry, and the principles of the Treaty of Waitangi we consider applicable to their resolution.

1. *Haronga v Waitangi Tribunal* [2012] 2 NZLR 53 (SC); *Haronga v Waitangi Tribunal* [2015] NZHC 1115; Attorney-General v Haronga [2017] 2 NZLR 2 (CA); *Mercury NZ Ltd and Ors v Waitangi Tribunal and Ors* [2020] NZHC 654

The Statutory Scheme Governing Binding Recommendations under Section 8HB

4 The Tribunal's jurisdiction to inquire into claims and make findings is set out in the Treaty of Waitangi Act 1975 (TOWA). The purpose for which the Act was designed is fundamental to our jurisdiction, and is captured in the preamble:

> [T]hat a Tribunal be established to make recommendations on claims relating to the practical application of the principles of the Treaty and, for that purpose, to determine its meaning and effect and whether certain matters are inconsistent with those principles.

5 As we have already noted in chapter 2, section 6 of the Act sets out who may bring claims of Treaty breach and resulting prejudice before the Tribunal. For a claim to be considered well-founded, the Tribunal must find evidence of both breach and prejudice. Section 6(3) states:

> 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.

6 The Tribunal's obligations are not discharged in any inquiry simply by determining whether a claim is well-founded. Section 6 requires the Tribunal to consider *whether* remedial recommendations should be made; if so, it may then make a recommendation under section 6(3) as to *how* the Crown should compensate for or remove the prejudice caused by the Treaty breach. Recommendations made by the Tribunal under section 6(3) are ordinarily not binding, and they may be general or specific.[2]

7 The Tribunal's power to make binding recommendations over CFL land is set out in section 8HB(1) of the TOWA:

> (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 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,—

2. Treaty of Waitangi Act, section 6(4)

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.

8 Under section 8HC of the TOWA, the Tribunal's section 8HB recommendation is interim for a period of up to 90 days. The Tribunal's findings and interim recommendation are served on the parties to the inquiry, who may enter into negotiations to settle the claim. The parties shall inform the Tribunal within the 90 days if an alternative settlement has been reached. The Tribunal is then required to cancel or modify the interim recommendation accordingly and may, if necessary, make a final recommendation.[3] If a negotiated settlement is not reached and the 90 days have elapsed, the Tribunal's interim recommendation becomes final and binding.[4]

9 Upon the Tribunal's recommendation becoming final and binding, section 36(1) of the Crown Forest Assets Act 1989 (CFAA) becomes operative. That section states that, once an interim recommendation for the return of CFL land to Māori ownership has become final, 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.

10 A successful claimant would have part or all of the CFL land returned, together with the accumulated rentals for the CFL land in question, plus the compensation calculated in accordance with Schedule 1 of the CFAA. We discuss the methods for calculating compensation under Schedule 1 in greater detail in chapter 7.

3. Treaty of Waitangi Act 1975, section 8HC(4)–(5)
4. Treaty of Waitangi Act 1975, section 8HC(5)

The four-step legal test in section 8HB(1)

11 The four-step legal test for binding recommendations is clearly articulated in *Attorney General v Haronga*. There, the Court of Appeal states the four prerequisites for exercise of the Tribunal's power to make binding recommendations for the return of CFL land are:

(a) the claim relates to the CFL land;
(b) the claim is well-founded;
(c) the action to be taken under section 6(3) to compensate for or remove the prejudice caused by the breach should include the return to Māori ownership of the whole or part of the land; and
(d) some or all of the identified groups are appropriate for that purpose.[5]

12 In the sections below, we explain the Courts' directions on the lawful exercise of the Tribunal's powers to make binding recommendations.

The Supreme Court's decision in *Haronga*

13 As we noted in chapter 1, the Supreme Court concluded in *Haronga* that the Tribunal had erred in law by not granting Mr Haronga's application for an urgent remedies hearing. It held that 'having decided the claim on behalf of the Mangatu Incorporation was well-founded, [the Tribunal] was obliged to determine the claim in Wai 1489 for an order under section 8HB(1)(a) of the Treaty of Waitangi Act'.[6] The Court directed that, where a claim meets the statutory prerequisites and the remedy sought is CFL land, 'the inquiry must address whether the land is to be returned to Māori ownership, any terms and conditions of return, and, if applicable, to which Māori or group of Māori the land is to be returned'.[7]

14 The Supreme Court endorsed the Tribunal's expertise in making the determinations required by the scheme, and a recommendation under section 8HB. However, the Court held that 'the relief available to [the Tribunal] is a matter for judgment', and noted that the scheme provides the Tribunal with considerable flexibility in exercising what is an adjudicatory role under section 8HB.[8] The Court stated that '[i]f the Tribunal is of the view that the land should be returned, it has power under section 8HB to arrive at the outcome it thinks right.'[9] For instance, it said, the Tribunal has 'ample power to impose terms and conditions', and is not required to recommend the return of the land.[10]

15 Even if a claim is well-founded, the Court emphasised that the Tribunal may recommend under section 8HB(1)(b)(ii) that the CFL land be removed from liability to return to Māori ownership, as a part of its adjudicatory function.

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5. *Attorney-General v Haronga* [2017] 2 NZLR 394 (CA), para 60
6. *Haronga v Waitangi Tribunal* [2012] 2 NZLR 53 (SC), para 78
7. *Haronga v Waitangi Tribunal* [2012] 2 NZLR 53 (SC), para 84
8. *Haronga v Waitangi Tribunal* [2012] 2 NZLR 53 (SC), para 89
9. *Haronga v Waitangi Tribunal* [2012] 2 NZLR 53 (SC), para 107
10. *Haronga v Waitangi Tribunal* [2012] 2 NZLR 53 (SC), para 107

Conversely, the Tribunal retains a residual discretion *not* to recommend that the liability to return be removed if the land is 'subject to other claims which makes its clearance from liability premature'.[11] Thus the Tribunal has 'three options only in relation to claims for licensed Crown forest land'.[12] To summarise, if the Tribunal finds that a claim is well-founded and relates to CFL land, it *must*:

(a) return the land or part of it; or,
(b) clear the land from liability for return; or,
(c) make no recommendations if there are other claims to the land.

The background to the statutory scheme

16 The Supreme Court commented that the history of the statutory scheme under section 8HB of the TOWA was important when interpreting its language and the purpose of the scheme.[13] In particular, the Court stated that the Tribunal's power to make binding recommendations under section 8HB was the result of the 1989 Forests Agreement, 'the negotiated solution reached between the Crown and Māori . . . under which both parties gained something of value'.[14] That agreement was given effect by the CFAA. In conjunction with the Treaty of Waitangi (State Enterprises) Act 1988 (TOWSE), this legislation amended the TOWA to provide the Tribunal with the power to make binding recommendations for the return of State-owned enterprise and CFL land to Māori ownership. For readers less familiar with this important background and the Court's commentary, we summarise it below.

17 In the 1980s the Government of the day began developing a 'policy of corporatising government commercial activities'.[15] This policy coincided with the Government's growing commitment to the Treaty of Waitangi in the wake of determined Māori protest, both publicly and behind the scenes. Since the early 1980s, the Waitangi Tribunal had published reports which led to public discussion of Treaty issues. In 1985, the Labour Government extended the Tribunal's jurisdiction to investigate claims of Treaty breaches dating back to 1840. The Government committed to resolving Treaty claims by providing for some return of land and other compensation, including the management and ownership of resources such as fisheries.[16] However, as historian Claudia Orange observed, this commitment came into conflict with the Government's economic policies which were designed to restructure the New Zealand economy 'to promote efficiency and growth', by relinquishing the Crown's 'rights to the very resources' it might use for remedying Māori Treaty claims.[17]

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11. *Haronga v Waitangi Tribunal* [2012] 2 NZLR 53 (SC), para 91
12. *Haronga v Waitangi Tribunal* [2012] 2 NZLR 53 (SC), para 91
13. *Haronga v Waitangi Tribunal* [2012] 2 NZLR 53 (SC), para 57
14. *Haronga v Waitangi Tribunal* [2012] 2 NZLR 53 (SC), para 88
15. *Haronga v Waitangi Tribunal* [2012] 2 NZLR 53 (SC), para 60
16. Claudia Orange, *The Treaty of Waitangi* (Wellington: Bridget Williams Books, 2011), pp 233–239
17. Orange, *The Treaty of Waitangi*, pp 236–237

18 The State-Owned Enterprises (SOE) Bill was introduced into Parliament in September 1986 to give effect to the Government's corporatisation policy.[18] On 8 December 1986, as Parliament began the third reading of the SOE Bill, the Waitangi Tribunal commenced hearing the claims of Muriwhenua iwi. At the start of the hearing, the claimants submitted that the SOE Bill would likely prejudice their interests as they had claims to Crown lands that would pass to State-owned enterprises.[19] That same day, the Tribunal issued an interim report on the Bill, advising that:

> Without pre-judging in any way our finding as to whether or not all or part of the land in question should be returned, we consider the Claimants are likely to be prejudicially affected by the Bill. The policy proposed in the State-Owned Enterprises Bill involves a transfer of Crown Land to the Forestry Corporation, the Land Corporation and other corporations. It will then cease to be Crown land.[20]

19 The Government subsequently amended the proposed Bill by adding a provision, section 9, which stated: 'nothing in this Act shall permit the Crown to act in a manner that is inconsistent with the principles of the Treaty of Waitangi'.[21] The Bill also made provision for SOE land to be available as a remedy for claims that the Tribunal had received on or before 18 December 1986 (the date of assent for the SOE Act).[22] The Supreme Court noted in *Haronga* that, at the time, 'a number of claims which were in the course of preparation had not been lodged'.[23]

20 It was at this point that the New Zealand Māori Council and its then-Chairman, Sir Graham Latimer, began legal proceedings against the Crown. The Council sought judicial review of the deadline for claims involving SOE land. The High Court removed the case to the Court of Appeal in early 1987, and the Court of Appeal issued a landmark ruling on the matter, which came to be known as the *Lands* decision.[24] The Court held that the protections for Māori Treaty rights were unduly limited by the Act, 'in that if the claim was not lodged before 18 December 1986 the State enterprise may have on-sold the land and no machinery is then provided for its recovery'.[25] The Court confirmed the rights of Māori to seek 'an effective legal remedy by which

18. *Haronga v Waitangi Tribunal* [2012] 2 NZLR 53 (SC), para 60
19. Waitangi Tribunal, *Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim* (Wellington: GP Publications, 1988), p 5
20. Waitangi Tribunal, *Interim Report to Minister of Maori Affairs on State-Owned Enterprises Bill* (Wellington: Waitangi Tribunal, 1986), p 2
21. State Owned Enterprises Act 1986, section 9
22. The Act received that assent on 18 December 1986.
23. *Haronga v Waitangi Tribunal* [2012] 2 NZLR 53 (SC), para 61
24. *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 (CA), p 650
25. *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 (CA), p 660

grievous wrongs suffered by one of the Treaty partners in breach of the principles of the Treaty can be righted.'[26]

21 Following the *Lands* decision, the New Zealand Māori Council and the Crown negotiated an agreement that led to the passage of the TOWSE, introducing sections 8A to 8H to the TOWA. Section 27 of the TOWSE scheme provided for the Crown's resumption of land if the Tribunal recommended that land transferred to a State-owned enterprise should be returned to Māori ownership. In this situation, the Crown would be bound to resume the land by reacquiring it compulsorily and by paying compensation to any third party who may have acquired it.[27] As the Supreme Court later stated in *Haronga*, 'the purpose of the 1988 Act was accordingly to protect both existing and likely future claims submitted to the Tribunal'.[28] The Tribunal was empowered 'to recommend that land transferred to or vested in state enterprises under the 1986 Act be returned to Māori ownership'.[29]

22 In the case of Crown forest land, however, the Crown realised that the TOWSE resumption scheme presented a barrier to the sale of State forestry assets. In 1988, the Government established a Forestry Working Group to report on the most appropriate form in which State forestry assets (notably the cutting rights to timber on the land) could be sold and their sale value maximised.[30] The group highlighted that the value of the Crown's forestry assets would be greatly devalued if it did not provide for greater security of tenure than was available under the resumption scheme in the Treaty of Waitangi (State Enterprises) Act. The Forestry Working Group proposed that the Crown could sell prospective buyers a forestry right for two *Pinus radiata* rotations, or 70 years.[31]

23 This proposed solution departed from the corporatisation scheme established under the State-Owned Enterprises Act 1986, whereby land would be transferred to State-owned enterprises under memorial and could be resumed under section 27B of TOWSE. Under this alternative proposal, the Crown would retain ownership of forest land, and the cutting rights to its forestry assets could be sold as a long-term licensed forestry right.[32] The tenure of the licensee could thereby be guaranteed, and the sale price of the Crown's assets protected. But the problem that the proposal created for Māori was that forestry assets subject to a forestry license would no longer be available as redress under the section 27B resumption provision of the TOWSE.

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26. *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 (CA), p 668
27. This is only a general description of the elaborate TOWSE scheme, see *New Zealand Maori Council v Attorney-General* [1989] 2 NZLR 142 (CA), p 146.
28. *Haronga v Waitangi Tribunal* [2012] 2 NZLR 53 (SC), para 65
29. *Haronga v Waitangi Tribunal* [2012] 2 NZLR 53 (SC), para 65
30. *Haronga v Waitangi Tribunal* [2012] 2 NZLR 53 (SC), p 142
31. *Haronga v Waitangi Tribunal* [2012] 2 NZLR 53 (SC), p 149
32. 'Report of the Forestry Working Group to the Minister of Finance and the Minister for State-owned Enterprise', appendix to the evidence of Bernard Paul Quinn, 20 April 2012, #I26(b), p 5

24 Following a hui in Rotorua on 20 January 1989 to discuss the Crown's proposal, the New Zealand Māori Council brought a further application to the Court of Appeal on 3 February 1989; this has become known as the *Forests* case.[33] The Council sought a declaration that the Crown's proposal for the disposal of forestry assets was inconsistent with the judgment delivered by the Court of Appeal in the *Lands* case. The Court found that:

> The Maori Council's application was in order, as the Government's changed policy went to the very heart of the issue raised in the 1987 case, namely whether assets including forest lands could be disposed of through the new State enterprises to interests outside the State enterprises without a breach of the principles of the Treaty of Waitangi. If the development to sell forestry rights rather than the land had been signalled during the hearing of the 1987 case the main declaration granted by the Court in that case could well have been differently worded.[34]

25 Following the Court of Appeal's decision, the Crown and the Māori Council entered into negotiations, culminating in an agreement on 20 July 1989 (we refer to it as 'the 1989 Forests Agreement'). It was subsequently brought into effect by the CFAA, which introduced sections 8HA to 8HI to the TOWA.[35]

26 In the 1989 Forests Agreement, both parties agreed that, when selling forest land, the Crown could sell the existing tree crop and grant a forestry licence to the purchaser allowing them to use the land for commercial forestry for a defined period. The purchaser would pay a rental to the Crown under the forestry licence, and the purchaser's rights of use were protected. The rentals were to be held in trust by a new entity (the Crown Forestry Rental Trust) until after the Waitangi Tribunal had reported on any claims relating to CFL land. The interests of Māori who made claims relating to Crown forest land were also protected because, on inquiring into the claim, the Waitangi Tribunal could make a binding recommendation for the return of the land to Māori ownership. Financial compensation according to set parameters would also accompany the return of the land. The provision for compensation recognised that Māori would receive the land but would be unable to exercise their rights fully. The forestry licence would remain as an 'encumbrance' on the land, and the licensee would retain the right to harvest the forest growing on the land, until the licence expired.[36] The Crown could not on-sell the land on which the forest stood to other interests unless the Waitangi Tribunal recommended clearing the land from liability to be returned to Māori.

33. *New Zealand Maori Council v Attorney-General* [1989] 2 NZLR 142 (CA)
34. *New Zealand Maori Council v Attorney-General* [1989] 2 NZLR 142 (CA), p143
35. 'The Forest Agreement 20 July 1989', appendix to the evidence of Bernard Paul Quinn, 20 April 2012, #I26(a)
36. *Haronga v Waitangi Tribunal* [2012] 2 NZLR 53 (SC), para 54

27 Lists of 'principle[s] of significance' to both parties were appended to the agreement.[37] These key principles were identified by the Māori negotiators as part of a proposal tabled on 21 June 1989.[38] The principles set out by the Māori negotiators were to:

- Uphold the articles of the Treaty and the protections in current legislation.
- Minimise the alienation of property which rightfully belongs to Maori.
- Optimise the economic position of Maori.

28 The principles presented by the Crown officials were to:

> Safeguard integrity of sale by guaranteeing security of tenure to purchasers to avoid discounting and to encourage investment in the forestry industry – security of tenure must involve purchasers having guaranteed access to wood and sufficient control over forest management to assure that wood supply.
>
> Honour the principles of the Treaty of Waitangi by adequately securing the position of claimants relying on the Treaty – adequately securing the claimant's position must involve the ability to compensate for loss once the claim is successful.[39]

29 When the Waitangi Tribunal declined to grant Mr Haronga's application for an urgent remedies hearing in 2008 and 2009, he took the matter to the Supreme Court. In ruling in Mr Haronga's favour, the Court attached considerable importance to the 1989 Forests Agreement, which it said permitted 'the Crown to transfer government-owned assets including forest crop and other forest assets to private interests'.[40] In return, Māori with Treaty claims relating to CFL land would receive additional protections 'supplementing their right to have the Tribunal inquire into their claim with the opportunity to seek from the Tribunal remedial relief which would be binding on the Crown.'[41] The Supreme Court stated that '[the] legislative history of the 1989 amendments makes it clear that this jurisdiction was enacted as significant redress and as part of a bargain in which the Crown also gained something of value to it'.[42] It followed, the Court found, that the Tribunal's decision not to grant Mr Haronga's application for an urgent remedies hearing was not 'in the spirit of the legislation or its policy of providing greater security to Māori claimants in obtaining return of land to treat the loss of the opportunity [to recover the lost land] as irrelevant'.[43] Furthermore, Māori claimants who met

37. *Haronga v Waitangi Tribunal* [2012] 2 NZLR 53 (SC), para 88
38. Evidence of Bernard Paul Quinn, 20 April 2012, #126, paras 55–57
39. 'Maori proposal tabled at 21 June 1989 meeting between Crown and Māori', appendix to the evidence of Bernard Paul Quinn 20 April 2012, #126(i)
40. *Haronga v Waitangi Tribunal* [2012] 2 NZLR 53 (SC), para 76
41. *Haronga v Waitangi Tribunal* [2012] 2 NZLR 53 (SC), para 76
42. *Haronga v Waitangi Tribunal* [2012] 2 NZLR 53 (SC), para 105
43. *Haronga v Waitangi Tribunal* [2012] 2 NZLR 53 (SC), para 105

the requirements of the scheme had a right to seek binding recommendations, which is 'itself a right of real value'.[44]

The High Court's 2015 judicial review of the *Mangatū Remedies Report* (2014)

30 In compliance with the Supreme Court's direction, the Tribunal proceeded to hear remedies applications for the return of the Mangatū CFL land in 2012. As we noted in chapter 1, in its 2014 *Mangatū Remedies Report* (the 2014 report), the Tribunal dismissed the applications of the Mangatū Incorporation, Ngāriki/Ngā Ariki Kaipūtahi, and Te Whānau a Kai. It adjourned the application brought by Te Aitanga a Māhaki and Affiliates (TAMA) on the basis that any section 8HB recommendations for the return of Mangatū CFL land should be part of a comprehensive remedies inquiry. The Tribunal also considered that TAMA would need time to refresh its mandate from all the groups it claimed to represent before continuing its settlement negotiations with the Crown for return of the forest and other redress. TAMA would be able to return to the Tribunal if negotiations with the Crown proved unsuccessful.

31 In judicial review proceedings in the High Court in November 2014, Alan Haronga, the Māhaki Trust, and David Brown challenged the Tribunal's decision in the 2014 report. The Court held that the Tribunal had made the findings required by section 8HB(1), but its failure to make any recommendation under section 8HB was an error of law. The High Court said that the Tribunal had misconstrued the statutory scheme and erroneously deferred to the Crown's current Treaty settlement policy.[45] For example, the Tribunal had concluded that the redress for Te Aitanga a Māhaki, the Mangatū Incorporation, Ngāriki/Ngā Ariki Kaipūtahi, and Te Whānau a Kai's well-founded claims should include the return of Mangatū CFL land.[46] However, instead of making a recommendation under section 8HB, the Tribunal had focused on whether the transfer of the land and monetary compensation pursuant to the legislation would be 'unfair and premature' by reference to parameters set by settlement policy.[47]

32 The Court also held that the Tribunal had not sufficiently considered the context in which the Forests Agreement was reached in 1989. At that time, the Crown's current settlement policy and the Tribunal's comprehensive approach to remedies did not exist.[48] The Court said that as 'an essentially commercial bargain', the Forests Agreement was a contract 'the relevant factual nexus for, and the terms of which, remain relevant when interpreting the statutory provisions at issue'.[49] The Agreement was primarily designed to give claimants greater protection under section 8HB(1) and 'to indeed be greater,

44. *Haronga v Waitangi Tribunal* [2012] 2 NZLR 53 (SC), para 105
45. *Haronga v Waitangi Tribunal* [2015] NZHC 1115, paras 75–76, 109
46. *Haronga v Waitangi Tribunal* [2015] NZHC 1115, paras 46, 75
47. *Haronga v Waitangi Tribunal* [2015] NZHC 1115, para 83
48. *Haronga v Waitangi Tribunal* [2015] NZHC 1115, para 96
49. *Haronga v Waitangi Tribunal* [2015] NZHC 1115, para 96

that protection cannot be made subject to non-binding recommendations which the Crown may or may not accept. Nor can it be made subject to Crown settlement policy.'[50]

33 Instead, the Tribunal had approached binding recommendations as a 'remedy of last resort'.[51] Nor did the Court accept that the Tribunal would need to undertake a comprehensive remedies inquiry before making a binding recommendation.[52] The difficulty of the task did not absolve the Tribunal from the duty to perform its adjudicatory function: '[I]f a claimant invokes the Tribunal's adjudicatory jurisdiction under s 8HB then, subject to a narrow power of deferral under s 7A and the discretion under s 8HB(1)(b), a decision is required.'[53]

34 The High Court found that the Tribunal also erred in its assessment of the flexibility the legislation provided to calibrate the compensation flowing from binding recommendations.[54] The Court stated that there were two points at which the Tribunal could calibrate compensation: the amount of land to be returned, and the percentage of Schedule 1 compensation above the minimum that could accompany the return of land. Using these two methods together, the Tribunal has 'considerable flexibility in fashioning the terms and conditions of binding recommendations to achieve an appropriate apportionment'.[55] The Court pointed out that section 8HB(3) empowers the Tribunal not only to make further recommendations under section 6(3) or section 6(4), but also to take into account the transfer of land and compensation under section 8HB when doing so.[56] Accordingly, the High Court quashed the 2014 report and directed the Tribunal to reconsider all the applications for binding recommendations 'in terms of this judgment'.[57]

35 The Court's judgment makes it clear that the binding recommendations regime is not subject to any limitations or considerations arising from the Crown's settlement policy. In the view of the Court, the sequence of the statutory scheme is that once a recommendation under section 8HB for the return of land becomes final, then the award of monetary compensation under Schedule 1 of the CFAA follows automatically.

The Crown's appeal of the High Court decision, 2017

36 The Crown appealed to the Court of Appeal on the grounds that the High Court, in deciding to quash the Tribunal's 2014 report, was wrong:

50. *Haronga v Waitangi Tribunal* [2015] NZHC 1115, para 102
51. *Haronga v Waitangi Tribunal* [2015] NZHC 1115, para 98
52. *Haronga v Waitangi Tribunal* [2015] NZHC 1115, para 101
53. *Haronga v Waitangi Tribunal* [2015] NZHC 1115, paras, 100, 110
54. *Haronga v Waitangi Tribunal* [2015] NZHC 1115, para 110
55. *Haronga v Waitangi Tribunal* [2015] NZHC 1115, para 103
56. *Haronga v Waitangi Tribunal* [2015] NZHC 1115, para 116
57. *Haronga v Waitangi Tribunal* [2015] NZHC 1115, para 114

(a) to conclude that the Tribunal found all the statutory prerequisites had been met;[58] and

(b) to treat section 8HB(1) as a code which limits the Tribunal's broad discretion to make recommendations (or not) under section 6(3) where the claim is for CFL land.[59]

37 The Crown argued that the Tribunal's statements that remedies 'should include' the return of land were not intended as factual findings, but rather commentary.[60] However, even if the Tribunal had found that the four statutory prerequisites were fulfilled, the Crown considered that the Tribunal was not obliged to make a binding recommendation – it has a discretion to decline to grant the binding recommendation on the facts or to adjourn the matter where a negotiated settlement is in prospect.[61] The Crown also argued that the High Court erred in 'failing to recognise the Tribunal's obligation to have regard to relativities and equity between the claimants', and to take account of 'the potential impact of statutory compensation payments'.[62]

38 In rejecting the Crown's submissions, the Court of Appeal agreed with the High Court that the Tribunal would not have considered whether to exercise its recommendatory powers if it had not already found that the statutory prerequisites were established.[63] The Court of Appeal also considered that the statutory changes following the 1989 Forests Agreement meant that the Tribunal's 'recommendatory power assumed a more specific and prescriptive dimension for claims to Crown forest land'.[64] The Court of Appeal confirmed that, once the statutory prerequisites were met, the Tribunal was required to determine which recommendation to make: to return the land or part of it to Māori ownership (section 8HB(1)(a)), or to clear the land from liability to return (section 8HB (1)(b)). The Court also confirmed that, where there were other claims over the land, the Tribunal retained a residual discretion not to clear the land from liability to return to Māori ownership. It could not adopt a 'middle ground' by dismissing or adjourning the applications for binding recommendations.[65]

39 The Court of Appeal also held that the Tribunal should not have taken into account the Crown's settlement policies when considering the downstream effects of an interim recommendation for return of the land. The consequences of applying section 36 and Schedule 1 of the CFAA (the monetary compensation accompanying the return of CFL land) were not a relevant

58. *Attorney-General v Haronga* [2017] 2 NZLR 394 (CA), para 46
59. *Attorney-General v Haronga* [2017] 2 NZLR 394 (CA), paras 52–53
60. *Attorney-General v Haronga* [2017] 2 NZLR 394 (CA), para 46
61. *Attorney-General v Haronga* [2017] 2 NZLR 394 (CA), para 54
62. *Attorney-General v Haronga* [2017] 2 NZLR 394 (CA), para 55
63. *Attorney-General v Haronga* [2017] 2 NZLR 394 (CA), paras 50–51
64. *Attorney-General v Haronga* [2017] 2 NZLR 394 (CA), para 58
65. *Attorney-General v Haronga* [2017] 2 NZLR 394 (CA), paras 60, 65

consideration for the Tribunal when determining whether to recommend return of the land.[66]

40 The Court of Appeal confirmed that the difficulty of making the decision was not a reason for the Tribunal to avoid performing its statutory function. The Tribunal could call for further evidence if that would assist its decision-making.[67] If the Tribunal was not satisfied that the CFL land should be returned to a claimant, then it should recommend that the land be released from liability for return in respect of that claim.[68] The Court emphasised that the statutory scheme placed the onus upon the Tribunal, saying:

> The Tribunal is itself obliged to determine relativities and equity between claimants. It cannot abdicate to the parties themselves its responsibilities to resolve the merits of the competing claims; it must make a binding decision on the merits.[69]

41 Finally, the Court of Appeal found that the Tribunal's concern 'not to create a fresh set of grievances' was justified. However, it emphasised that the Tribunal – as an expert body when it came to determinations concerning the principles of the Treaty – was 'the appropriate vehicle to carry into effect the purpose of the CFAA amendments to the principal Act and the Forest Lands Agreement'.[70] Within its broader recommendatory function, the Tribunal has a role as a 'clearing house' for claims under section 8HB(1)(a). Once any claim meets the legal test, the Tribunal must decide whether and how much land should be returned.[71] Under section 8HB(1)(b), if the Tribunal decides that land should not be returned, it must *also* determine how much land should be cleared from liability for return. Thus, the Crown's appeal failed and the High Court's decision quashing the 2014 report was upheld.

The Court's decision in *Mercury NZ Ltd v Waitangi Tribunal*

42 In March 2021, the High Court issued a judgment in *Mercury NZ Limited and Ors v Waitangi Tribunal and Ors* (*Mercury*), reviewing the Tribunal's preliminary determinations issued in March 2020 in response to remedies applications in the Wairarapa ki Tararua District Inquiry.[72] The Tribunal had determined to exercise its powers under section 8A and section 8HB in relation to land sought by claimants for return to Māori ownership.

43 In reviewing the Tribunal's determinations, the High Court held that the 'relates to' prerequisite under sections 8A and 8HB requires 'the well-founded

66. *Attorney-General v Haronga* [2017] 2 NZLR 394 (CA), para 62
67. *Attorney-General v Haronga* [2017] 2 NZLR 394 (CA), para 66
68. *Attorney-General v Haronga* [2017] 2 NZLR 394 (CA), para 67
69. *Attorney-General v Haronga* [2017] 2 NZLR 394 (CA), para 70
70. *Attorney-General v Haronga* [2017] 2 NZLR 394 (CA), para 74
71. *Attorney-General v Haronga* [2017] 2 NZLR 394 (CA), para 59
72. The decision is, at the time of writing, under appeal: *Mercury NZ Ltd and Ors v Waitangi Tribunal and Ors* [2020] NZHC 654

claims to concern the land sought to be returned'. The provisions 'contemplate situations where the lands were acquired by the Crown from Māori in breach of Treaty principles'.[73] Because the purpose of the scheme is the return of specific Crown land to Māori ownership, the Court identified the guarantees under Article 2 of the Treaty to 'the right of the Tribes to "full exclusive and undisturbed possession of their lands"' and 'te tino rangatiratanga o o ratou wenua', as key to the Tribunal's task under section 8HB.[74] The Court stated:

> The provisions can be thought of as involving Māori resuming the full exclusive and undisturbed possession of the lands that are the subject matter of the claims – to use the more contemporary expression, to restore the exercise of full mana whenua. This is a significant indicator that the well-founded claim would concern that land, and the circumstances under which it is no longer in the ownership of Māori.[75]

44 Once the Tribunal had determined that a claim 'relates to' the land, the Court considered it could then 'take into account other breaches when deciding . . . whether the land "should" be returned'.[76] But the Tribunal's binding powers were not available to remedy those other breaches, or wider land-based Treaty breaches (we consider the meaning of these comments in chapter 5, paragraphs 5–11). Rather, the Court stated, '[t]he essence of the resumption jurisdiction is specific, and focuses on the Treaty breach associated with the loss of the mana whenua over the land in question, and the appropriateness of return of the land given that breach.'[77]

Summary of the Courts' directions

45 The main points we draw from the Courts' collective directions are:

(a) The history of the TOWSE and CFAA is important in understanding and interpreting the statutory scheme, which put in place what was essentially a commercial bargain between Māori and the Crown.

(b) The statutory scheme was intended to give greater protections to Māori claimants by empowering the Tribunal to make binding recommendations for the return of CFL land to Māori, together with financial compensation.

(c) Accordingly, the Tribunal should not be influenced by, or take into account considerations of quantum of compensation arising from Crown Treaty settlement policy.

73. *Mercury NZ Ltd and Ors v Waitangi Tribunal and Ors* [2020] NZHC 654, para 68
74. *Mercury NZ Ltd and Ors v Waitangi Tribunal and Ors* [2020] NZHC 654, paras 79–80
75. *Mercury NZ Ltd and Ors v Waitangi Tribunal and Ors* [2020] NZHC 654, para 80
76. *Mercury NZ Ltd and Ors v Waitangi Tribunal and Ors* [2020] NZHC 654, para 87
77. *Mercury NZ Ltd and Ors v Waitangi Tribunal and Ors* [2020] NZHC 654, para 88

(d) The Tribunal is obliged to carry out the adjudicatory function under section 8HB and must determine to make one of the three recommendations available under the scheme. The three possible recommendations are:
   - A recommendation for the return of CFL land to Māori ownership.
   - A recommendation that the land be cleared from liability to return.
   - No recommendation, but only if there are other potential claims to the land still to be inquired into.

(e) If the Tribunal determines that the land should be returned to Māori ownership, it has the power under the scheme to arrive at the outcome it thinks is right.

(f) The Tribunal can calibrate at two points the level of remedy to appropriately compensate or remove the prejudice suffered by Māori applicants as a result of Crown Treaty breaches:
   - the amount of land to be returned; and
   - the amount of compensation awarded above the statutory minimum under section 36 and Schedule 1 of the CFAA.

(g) In addition, the Tribunal has considerable flexibility to impose terms and conditions in order to arrive at a fair and just outcome.

(h) Section 8HB(3) empowers the Tribunal to make further non-binding recommendations under section 6(3) and section 6(4), and to take into account the return of CFL land under section 8HB(1)(a) and payment of Schedule 1 compensation when doing so.

(i) The Tribunal, as an expert on the principles of the Treaty of Waitangi, is the appropriate body to make these determinations.

46 We now outline some preliminary matters that affect how we approach the task of making the determinations the scheme requires. We consider:

(a) Whether parts of the 2014 Mangatū Remedies Report survive the quashing by the High Court in 2015? Or is it quashed in its entirety?

(b) If the report is quashed in its entirety, what is the correct approach to our task of making the determinations required under section 8HB?

What is the Effect of the High Court Quashing the 2014 *Mangatū Remedies Report*?

47 Following the High Court's 2015 decision to quash the 2014 Mangatū Remedies Report, parties made submissions on the consequences of this decision for these reconvened remedies proceedings. Parties debated whether the Tribunal's factual determinations set out in the 2014 report were in fact included in the quashing order and therefore had to be reconsidered. For instance, the Courts concluded that the Tribunal had determined that Te Aitanga a Māhaki, the Mangatū Incorporation, Ngāriki/Ngā Ariki Kaipūtahi, and Te Whānau a Kai had claims which related to the CFL land, were

well-founded, and that the land should be returned: did these determinations still stand?[78]

48 We set out the parties' different submissions on this question below. It is an important question. If the errors of law made by the Tribunal pervade the entire structure of the 2014 report, or broadly influence the interpretation of the statutory scheme made there, then we must determine anew whether the well-founded claims relate to the CFL land, and whether the land should be returned. After summarising the parties' submissions, we set out our conclusions.

Parties' positions

The submissions of Māhaki Trust and the Mangatū Incorporation, Ngāriki Kaipūtahi, and Te Whānau a Kai

49 The Māhaki Trust and the Mangatū Incorporation, Ngāriki Kaipūtahi (Wai 874 and Wai 499), and Te Whānau a Kai all made similar submissions, arguing that:

(a) The High Court's order did not quash the 2014 report in its entirety. Rather, the factual findings of the report survived the quashing order. The Tribunal could rely on the decision in *Waikanae Christian Holiday Park v Kapiti Coast District Council* where the High Court had earlier quashed an Environment Court decision and referred the case back to that Court for reconsideration of 'those aspects where this Court has concluded the Environment Court was in error'.[79] The Environment Court subsequently proceeded on the basis that its original decision still stood, except in relation to the errors of law as determined by the High Court. When this approach was appealed to the High Court, it held that the Environment Court had not erred in law in adopting this approach because the High Court's decision had specified that 'reconsideration need involve only those aspects' where the Environment Court was in error.[80]

(b) In regard to the Waitangi Tribunal's 2014 *Mangatū Remedies Report*, the parties argued that both the High Court and the Court of Appeal had found that the Tribunal had erred by misconstruing the statutory scheme, by taking into account an irrelevant factor (namely, the Crown's settlement policy), and by failing to make the decisions the legislation required of it. However, the parties submitted that the Courts had found no errors in the Tribunal's factual determinations and had confirmed that the statutory prerequisites had been fulfilled.[81]

78. *Haronga v Waitangi Tribunal* [2015] NZHC 1115, para 75; *Attorney-General v Haronga* [2017] 2 NZLR 394 (CA), paras 61–69
79. *Waikanae Christian Holiday Park v Kapiti Coast District Council* High Court Wellington, CIV2003–485–1764, 1774, 1805, 27 October 2004, para 9
80. *Waikanae Christian Holiday Park v Kapiti Coast District Council*, para 12
81. Closing submissions for Te Aitanga a Māhaki and the Mangatū Incorporation, 11 December 2018, #2.682, para 23

50 If we find these submissions are correct, then the Tribunal's task is simply to determine, first, how much of the CFL land is to be returned and to whom and, second, how much compensation above the minimum five per cent (calculated in accordance with section 36 and Schedule 1 of the CFAA) should be paid.

Ngā Ariki Kaipūtahi's submissions

51 Ngā Ariki Kaipūtahi (Wai 507) advanced a different view, submitting that:

(a) No specific direction was given by the Courts to reconsider only parts of the report or to undertake an assessment of limited matters. The standard approach when a matter is returned to a decision-maker is that they must decide anew the matters remitted for reconsideration. Only where specific directions for reconsideration are given by the reviewing Court may the decision-maker retain earlier parts of the decision and reconsider only those matters specified. In this case, the applications for binding recommendations are remitted in their entirety.[82]

(b) The High Court and Court of Appeal indicated that they did not have a detailed understanding of the precise history of different groups in the forest blocks. The Courts' focus was on the Mangatū Incorporation's claim as the principal litigant. Ngā Ariki Kaipūtahi did not find helpful the Courts' tentative suggestions for possible redress.[83]

(c) The High Court and Court of Appeal judgments mean that the entire approach to binding recommendations has to be reconsidered by the Tribunal, and every significant part of the 2014 report is affected. The Courts' decisions invite the Tribunal to take an approach which pays close attention to particular losses in particular blocks when considering recommendations – akin to a civil damages approach, which the Tribunal stated in the 2014 report that it would not take.[84]

52 Counsel for Ngā Ariki Kaipūtahi concluded that in order to take a safe approach, 'the Tribunal should not incorporate or adopt any parts of the earlier report'.[85] The Tribunal would still be able to use evidence from the earlier hearings, which could inform the new decision.[86]

The Crown's submissions

53 Counsel for the Crown agreed that all of the Tribunal's determinations had been quashed, submitting that:

(a) The effect of the High Court's quashing order was to set aside 'all the findings and recommendations . . . on the s 8HB applications' the Tribunal had made in its 2014 report. The Crown argued that quashing a

82. Memorandum of counsel for Ngā Ariki Kaipūtahi, 20 June 2017, #2.526, paras 3–6
83. Memorandum of counsel for Ngā Ariki Kaipūtahi, #2.526, paras 7–11
84. Memorandum of counsel for Ngā Ariki Kaipūtahi, #2.526, paras 12–14; see also Waitangi Tribunal, *The Mangatū Remedies Report* (Wellington: Legislation Direct, 2014), pp 120–121
85. Memorandum of counsel for Ngā Ariki Kaipūtahi, #2.526, para 15
86. Memorandum of counsel for Ngā Ariki Kaipūtahi, #2.526, para 16

decision is 'to establish that a decision is ultra vires [beyond the powers] and to set the decision aside. The decision is retrospectively invalidated, and deprived of legal effect since its inception'.[87]

(b) The referral back to the Tribunal of the 'applications for binding recommendations' is consistent with the High Court 'having set aside all the Tribunal's findings and recommendations on those applications.' The Crown disputed the relevance of *Waikanae Christian Holiday Park v Kapiti Coast District Council*, arguing that decision concerns the scope of 'referral back' as a remedy in relation to factual findings; it is not about the effect of quashing legal determinations. The Crown also emphasised that the Tribunal's decisions on the statutory prerequisites were not just factual findings but findings involving questions of law and Treaty principles.[88]

(c) The claimants' submissions are misconceived and 'inconsistent with the Court of Appeal's finding that the Tribunal misconstrued its statutory role and powers within s 8HB and the legal consequences of that finding.' In light of the Court of Appeal's reasoning, the Crown said it was not possible to preserve any part of the Tribunal's findings because the Tribunal's error 'was fundamental or part of the structure of the decision' and inextricable from the rest. Nor did the High Court purport to save any part of the Tribunal's findings – the errors are described in broad terms and none of the Tribunal's findings are safe.[89]

Tribunal analysis

54 We consider the submissions made by counsel for Ngā Ariki Kaipūtahi and for the Crown are compelling. The plain words of Justice Clifford in the High Court decision are:

> I therefore conclude that in the Mangatu Remedies Report, the Tribunal did err in law and misconstrued the scheme of the binding recommendation regime enacted to give effect to the Forestry Lands Agreement, and its statutory role and powers within that section. Consequentially it took account of irrelevant considerations. I therefore quash that report and direct that the Tribunal reconsider the applications for binding recommendations in terms of this judgment.[90]

55 The quashing order is in clear and unequivocal terms – the report is quashed. The Court does not specifically save any part of the report. That is consistent with the Court's finding that the Tribunal had 'misconstrued the scheme of the binding recommendation . . . and its statutory role and powers', which

87. Amended closing submissions for the Crown, 12 February 2019, #2.688(b), paras 9.2.1, 11. In these submissions, counsel for the Crown relies on the commentary of C Lewis, *Judicial Remedies in Public Law* (London: Sweet & Maxwell, 2015), p 214.
88. Amended closing submissions for the Crown, #2.688(b), paras 9.2.2, 21–24
89. Amended closing submissions for the Crown, #2.688(b), paras 9.2.3, 25–30
90. *Haronga v Waitangi Tribunal* [2015] NZHC 1115, para 114

are fundamental flaws affecting all the Tribunal's considerations in the 2014 report.[91] The Court of Appeal agreed with the High Court as to the errors of law made by the Tribunal and did not modify the High Court order. In our view, the natural consequence of the report being quashed, without saving any part of it, is that we ought now to consider the evidence and submissions afresh and in accordance with the directions and guidance given by the Courts.

56 The errors of law identified by the High Court and the Court of Appeal (which concern the Tribunal's misinterpretation of the statutory scheme) appear throughout chapter 2 of the 2014 report, which sets out the legal and conceptual framework by which the Tribunal intended to consider the applications. For example, the High Court referred to section 2.6 of the report and compared it with the Supreme Court's analysis in the *Haronga* case as an illustration of the errors in the Tribunal's approach to its task under section 8HB.[92] In our view, the errors identified by the Courts are indeed part of the structure of the decision to the extent that it is impossible to disentangle the 'good' parts from the 'bad'. We accept that the Tribunal misconstrued the scheme, and its statutory role and powers, from the beginning and these errors were carried through, in one way or another, into the conclusions the Tribunal reached on the remedies applications before it. We therefore agree with Ngā Ariki Kaipūtahi and the Crown that the quashing order invalidated the 2014 report in its entirety.

57 Even if we are wrong on that point, out of an abundance of caution we consider it prudent to reconsider the evidence and submissions anew, particularly in light of the further guidance provided by the Courts, including in the *Mercury* decision. As the Crown submitted, this does not mean that we will necessarily come to different conclusions about whether the statutory prerequisites have been fulfilled, but rather that we will reach our conclusions strictly in accordance with the statutory scheme.

What determinations must the Tribunal make under section 8HB?

58 Having concluded that the Tribunal's 2014 report is entirely quashed, in the following chapters we now proceed to make the determinations required by the statutory scheme anew. In order to determine whether the applicant groups meet the prerequisites under section 8HB, the Tribunal is required to consider:

(a) What claims relate to the CFL land?
(b) Are they well-founded?
(c) What factors are relevant under section 8HB(1) in determining whether the land should be returned to Māori ownership?

91. *Haronga v Waitangi Tribunal* [2015] NZHC 1115, para 114
92. *Haronga v Waitangi Tribunal* [2015] NZHC 1115, paras 88, 96–97; *Haronga v Waitangi Tribunal* [2012] 2 NZLR 53 (SC)

59 If the CFL land should be returned to Māori ownership, we must also consider the following questions:

(a) How should the Tribunal identify the recipient entity or entities to receive the returned CFL land and compensation?

(b) What terms and conditions are appropriate pursuant to the statutory scheme?

(c) What considerations inform our rationale for awarding Schedule 1 compensation?

(d) How much Schedule 1 compensation should be awarded to the claimants?

60 In the next section, we consider the parties' submissions on *how* the Tribunal should approach making these determinations and we set out our approach.

What Is the Correct Approach to our Task of Making the Determinations Required under Section 8HB?

61 During these proceedings, parties took conflicting positions on the way in which the Tribunal should approach its statutory obligation under section 8HB. In this section, we consider their submissions on the Tribunal's broad approach to remedies and whether that approach should be modified in light of the background and terms of the 1989 Forests Agreement and the statutory provisions. This involves considering the relationship between section 6(3) and section 8HB.

Parties' positions

62 In summary, Ngā Ariki Kaipūtahi (Wai 507), Ngāti Matepu, and the Crown submitted that the Tribunal is required to match its recommendations to the prejudice associated with well-founded claims that relate to the CFL land.[93] If we accept this interpretation, then it is open to the Tribunal to take a restorative approach to our task under section 8HB. This approach would involve considering whether the remedies available under section 8HB and section 36 of the CFAA, are appropriate or sufficient to address the prejudice suffered as a consequence of the Crown's Treaty breaches, and what other remedies might be recommended.

63 The Māhaki Trust and the Mangatū Incoporation, Ngāriki Kaipūtahi (Wai 499 and Wai 874), and Te Whānau a Kai argued that the Tribunal's recommendations under section 8HB are not to be focused on the restoration of hapū and iwi, but rather on fulfilling the commercial bargain embodied in

93. Closing submissions for Ngā Ariki Kaipūtahi, 11 December 2018, #2.684, para 90; closing submissions for Te Rangiwhakataetaea–Wi Haronga–Ngāti Matepu, 10 December 2018 #2.680, para 2; transcript for hearing week four, 19–21 December 2018, #4.35, p166

the 1989 Forests Agreement.[94] If we accept this argument, then our task is simply to confirm that the applications meet the statutory prerequisites and proceed to making a recommendation under section 8HB. These claimants also submitted that the Tribunal should award all the compensation available under Schedule 1 of the CFAA because this would represent a full return of the Crown's gain on the sale of the forest, and there was no reason why the Tribunal should award a lesser amount. Further redress and remedies to address the full range of prejudice suffered by the claimants as a result of the Crown's Treaty breaches would be a matter for negotiation and settlement with the Crown or a further remedies inquiry by the Tribunal, they argued.

Tribunal analysis and conclusions

The Tribunal's section 8HB powers to make binding recommendations are expressed through its general function under section 6(3)

64 In our view, the Tribunal exercises its adjudicatory function under section 8HB through its powers to make remedial recommendations under section 6(3), but as a discrete part of those broader powers. The language of section 8HB(1)(a)(ii) makes this plain by referring to 'the action to be taken under section 6(3) to compensate for or remove the prejudice'. This relationship between the two critical sections of the statute is even more explicitly emphasised in section 8HB(3), which provides that the Tribunal may also take into consideration the land returned and the related compensation when making any further recommendations under section 6(3). However, this does not mean that in exercising our function under section 8HB, we should not also give effect to the commercial imperatives of the 1989 Forests Agreement. Our decisions should carry out the terms of that bargain while also complying with the Tribunal's remedial principles – which we discuss in the following section.

The Tribunal's remedial principles

65 The long title of the TOWA states that our recommendations are to relate to the practical application of the principles of the Treaty. Binding recommendations under section 8HB of the TOWA extend the Tribunal's recommendatory powers. The Tribunal must exercise those powers consistently with the purpose set out in the long title of the Act. In giving this jurisdiction to the Tribunal, the parties to the Forests Agreement and Parliament must have intended this. The Courts have also endorsed the Tribunal as 'the appropriate vehicle to carry into effect the purpose of the CFAA amendments to the principal Act and the Forest Lands Agreement'.[95]

94. Closing submisions for Te Aitanga a Māhaki and the Mangatū Incorporation, #2.682, paras 5, 56–58, 126; closing submissions for Ngāriki Kaipūtahi, 10 December 2018, #2.681, paras 36, 90; closing submissions for the Crown, 12 February 2019, #2.888(b), para 3; closing submissions for Te Whānau a Kai, 11 December 2018, #2.683, para 3.4

95. *Attorney-General v Haronga* [2017] 394 NZLR 2 (CA), para 74

66 Under section 8HC, the Tribunal's section 8HB recommendation is initially of an interim nature, for 90 days. Section 8HC provides an opportunity for the Crown and Māori to engage in negotiations and settle the claim on a different basis than that recommended by the Tribunal before the 90-day period expires.[96] The Court of Appeal held that this aspect of the statute reflects the Tribunal's 'intermediate role as a potential circuit-breaker of prolonged or stalemated settlement negotiations'.[97] If the parties then agree on a settlement under section 8HC(4)(a), they must inform the Tribunal of the result and the Tribunal must amend or cancel its interim recommendation accordingly. Under sections 6(3) and 6(4), the Tribunal may also make other specific or general recommendations to the Crown regarding the settlement of well-founded claims.

67 Taken together, these features of the statutory scheme provide the Tribunal with a wide discretion in its approach to the remedies applications in this Inquiry. As part of the additional protections under section 8HB, the Tribunal is required to exercise a specific and adjudicatory function. However, the Courts have been clear that, within our adjudicatory role, we have the power to arrive at the outcome we think right, and to do what is 'fair and just'.[98] The Court of Appeal declared that we are obliged to 'determine relativities and equity between claimants', and to 'resolve the merits of the competing claims'.[99]

68 We have already explained that the Tribunal was given this additional power to make binding recommendations to ensure that Māori had access to effective and tangible redress, and to allow the Government to pursue its preferred corporatisation policy. The Tribunal's restorative approach to remedies is directed at this same purpose – compensating for or removing prejudice associated with Crown Treaty breaches. The Tribunal has long considered how this might be achieved. For example, in the 1997 *Muriwhenua Land Report* the Tribunal observed that in the context of historical claims, the language of prejudice 'would appear to embrace socio-economic consequences'.[100] More recently, the Tribunal found in the 2017 *Te Urewera* report, that 'the socio-economic problems and disparities experienced by the peoples of Te Urewera . . . were in large part prejudices caused by the Crown's breaches of the principles of the Treaty'.[101]

69 In the *Muriwhenua Land Report*, the Tribunal considered that remedies for prejudice should also have regard to the redress necessary to 'provide a reasonable economic base for the hapu and to secure livelihoods for the affected

96. Treaty of Waitangi Act 1975, section 8HC(4)–(6)
97. *Attorney-General v Haronga* [2017] 2 NZLR 394 (CA), para 72
98. *Haronga v Waitangi Tribunal* [2012] 2 NZLR 53 (SC), para 107; *Haronga v Waitangi Tribunal* [2015] NZHC 1115, para 103; *Attorney-General v Haronga* [2017] 394 NZLR 2 (CA), para 63
99. *Attorney-General v Haronga* [2017] 394 NZLR 2 (CA), para 70
100. Waitangi Tribunal, *The Muriwhenua Land Report* (Wellington: Legislation Direct, 1997), p 406
101. Waitangi Tribunal, *Te Urewera*, 8 vols (Wellington: Legislation Direct, 2017), vol 8, p 3763

people.'[102] The Tribunal went on to state that 'since the case of the claims is based upon the principles of the Treaty of Waitangi, it appears the remedy, for general wrongs affecting peoples, should also have regard to Treaty principles.'[103] In the *Turangi Township Remedies Report*, the Tribunal similarly referred to the importance of Treaty principles in making its findings on the remedies required to address the claims of Ngāti Tūrangitukua.[104] As the Tribunal explained:

> [I]n the context of whether or not the Tribunal, in any given instance, should make a binding recommendation for return of . . . land, it will be right for it to take into account the purpose, viz to compensate for or remove prejudice to Māori arising from well-founded Treaty breaches.[105]

70 In that report, the Tribunal endorsed the factors described in the *Muriwhenua Lands Report*, which inform the restorative approach, but said they 'would not all have equal weight.'[106]

71 We agree with the Tribunal's comments made in both the *Turangi Township Remedies* and *Muriwhenua Lands* reports, and consider it is appropriate that the Tribunal takes a restorative approach, guided by Treaty principles, in this Inquiry. At the same time, we must not lose sight of the commercial bargain of the 1989 Forests Agreement, and its underlying principles. Thus, we have taken a balanced approach when considering the determinations we have to make; one which is mindful of both commercial and restorative imperatives.

Treaty principles

72 As the High Court held in *Mercury*, Treaty principles relating to the tino rangatiratanga guarantee under Article 2 have specific relevance to the Tribunal's task in this Inquiry.[107] In the following paragraphs, we set out some of the Tribunal's jurisprudence on these principles from previous inquiries. For completeness, we begin by introducing the principles arising under Article 1.

73 Through Article 1, the Crown received the right to exercise kāwanatanga. Previous Tribunal reports have explained that kāwanatanga was neither an exclusive nor ultimate authority, and was not an equivalent term to the British conception of sovereignty (the term used in the English text of Article 1).[108]

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102. Waitangi Tribunal, *The Muriwhenua Land Report*, p 406
103. Waitangi Tribunal, *The Muriwhenua Land Report*, p 406
104. Waitangi Tribunal, *Turangi Township Remedies Report* (Wellington: GP Publications, 1998), p 12
105. Waitangi Tribunal, *Turangi Township Remedies Report*, p 5
106. Waitangi Tribunal, *Turangi Township Remedies Report*, p 15
107. *Mercury NZ Ltd and Ors v Waitangi Tribunal and Ors* [2020] NZHC 654, paras 79–80
108. Waitangi Tribunal, *Report of the Waitangi Tribunal on the Orakei Claim* (Wellington: Brooker and Friend Ltd, 1991), p 189; Waitangi Tribunal, *Report of the Waitangi Tribunal on the Manukau Claim* (Wellington: Waitangi Tribunal, 1989), p 66

Instead, the text of the Preamble and the discussions between rangatira and the Queen's representatives leading up to the signing of the Treaty conveyed that the Crown's kāwanatanga powers related to controlling and making laws for its own subjects, principally to protect Māori from the actions of settlers.[109]

74 The Tribunal has extensively considered the scope and meaning of Article 2. In the 1992 *Te Roroa Report*, the Tribunal found that, according to the Māori understanding of Article 2, 'te tino rangatiratanga was absolute control according to Maori custom, a different concept from the possession of lands and properties guaranteed in the English version.'[110] This entitlement included the right 'to communal title to their lands, forests, fisheries, wahi tapu and all other taonga expressly recognised and protected by the Crown.'[111] In the 2004 Tūranga report, the Tribunal stated that the kāwanatanga transferred to the Crown 'included the right to make laws for the regulation of Maori title including the transfer of that title'. However, this right to make laws 'was not unfettered'. The terms of Article 2 included the fundamental promise that Māori title would be respected, and that 'Maori control over Maori title would also be respected'.[112]

75 The Tribunal has also identified Māori autonomy as an important principle flowing from the tino rangatiratanga guarantee under Article 2. In the Tūranga report, the Tribunal found that Māori autonomy includes the rights 'of tribal communities to govern themselves as they had for centuries, to determine their own internal political, economic and social rights and objectives, and to act collectively in accordance with those determinants.'[113] Similarly, the 2007 *Te Tau Ihu o Te Waka o Maui: Report on the Northern South Island Claims* concluded that Māori autonomy included the 'the right to retain their own customary law and institutions and the right to determine their own decision makers and land entitlements'.[114]

76 Acknowledging that the Treaty agreement did not clearly lay out the relationship between Article 1 and Article 2, Tribunal reports have referred to the principle of partnership to explore how these two spheres of authority should coexist and interact, and how they should respect and give effect to Treaty rights and guarantees. In the *Lands* decision, the Court of Appeal

109. Waitangi Tribunal, *He Whakaputanga me te Tiriti/The Declaration and the Treaty: The Report on Stage 1 of the Te Paparahi o Te Raki Inquiry* (Wellington: Legislation Direct, 2014), p 523; Waitangi Tribunal, *Te Mana Whatu Ahuru: Report on Te Rohe Pōtae Claims – Pre-publication Version, Parts 1 and 11* (Wellington: Waitangi Tribunal, 2018), section 3.4.3.2.5
110. Waitangi Tribunal, *The Te Roroa Report* (Wellington: Brooker and Friend Ltd, 1992), p 26
111. Waitangi Tribunal, *The Te Roroa Report*, p 300
112. Waitangi Tribunal, *Turanga Tangata, Turanga Whenua: Report on the Turanganui a Kiwa Claims*, 2 vols (Wellington: Legislation Direct, 2004), vol 2, p 534
113. Waitangi Tribunal, *Turanga Tangata*, vol 1, p 113; Waitangi Tribunal, *Report on Central North Island Claims: He Maunga Rongo*, 4 vols (Wellington: Legislation Direct, 2008), vol 1, p 172; Waitangi Tribunal, *Te Mana Whatu Ahuru*, section 3.4.2.1.4
114. Waitangi Tribunal, *Te Tau Ihu o te Waka a Maui: Report on the Northern South Island Claims*, 3 vols (Wellington: Legislation Direct, 2007), vol 1, p 4

found that the Treaty partnership requires both the Crown and Māori 'each to act towards the other reasonably and with the utmost good faith.'[115] The Treaty partnership is also reciprocal, and involves mutual obligations. In the 2018 *Te Mana Whatu Ahuru: Report on Te Rohe Pōtae Claims*, the Tribunal found that 'the Treaty established a relationship that was subject to ongoing negotiation and dialogue, under which the Crown and Māori would work out the practical details of how kāwanatanga and tino rangatiratanga would co-exist.'[116]

77 An important Crown obligation arising from the Treaty partnership is the active protection of the Article 2 guarantees to Māori, including their right to exercise tino rangatiratanga. The Crown is obliged to exercise kāwanatanga 'subject to the reciprocal promise by the Crown to utilise that new power in a manner which fostered and protected the autonomy which the tribes had exercised from time immemorial.'[117] The principle of active protection thus relates not only to the protection of ancestral lands, but also to the provision of adequate systems to ensure the security of community title, management, and leadership. In the 1987 *Lands* case, the Court of Appeal described these obligations as 'analogous to fiduciary duties.'[118] In the Tūranga report, the Tribunal considered that fostering the autonomy of Māori communities 'is the single most important building block upon which to re-establish positive relations between the Crown and Māori.'[119] The Tribunal concluded that 'it was incumbent on the Crown positively to foster Maori autonomy in Turanga, not conspire to defeat it.'[120]

78 An important requirement for this partnership is that each party respects the remit of the other's sphere of authority. The Crown has a responsibility to actively protect Māori autonomy, and accordingly it cannot unilaterally exercise its kāwanatanga in ways that contravene or undermine Article 2 guarantees.[121] In the 2008 *Report on Central North Island Claims: He Maunga Rongo*, the Tribunal considered that if the Crown was to uphold the guarantee of Māori control over land and other taonga, 'then it had to obtain their consent through partnership and dialogue, leading to a negotiated agreement.'[122] On the part of Māori, the partnership requires that they act reasonably towards the Crown, and participate in any negotiations in good faith.

115. *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 (CA), p 642
116. Waitangi Tribunal, *Te Mana Whatu Ahuru*, p 134
117. Waitangi Tribunal, *Turanga Tangata*, vol 2, p 738
118. *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641, p 642
119. Waitangi Tribunal, *Turanga Tangata*, vol 2, p 739
120. Waitangi Tribunal, *Turanga Tangata*, vol 1, p 113
121. Waitangi Tribunal, *Te Tau Ihu o te Waka a Maui*, vol 1, p 4; Waitangi Tribunal *Report on Central North Island Claims: He Maunga Rongo*, 4 vols (Wellington, Legislation Direct, 2008), vol 1, p 172; Waitangi Tribunal, *Te Kāhui Maunga: The National Park District Inquiry Report*, 3 vols (Wellington: Legislation Direct, 2013), vol 1, p 16; Waitangi Tribunal, *Ahu Moana: The Aquaculture and Marine Farming Report* (Wellington: Legislation Direct, 2002), p 64; Waitangi Tribunal, *Te Mana Whatu Ahuru*, section 3.4.5.1
122. Waitangi Tribunal, *Report on Central North Island Claims*, vol 2, p 423

79 In *Te Mana Whatu Ahuru*, the Tribunal highlighted the importance of tikanga to the exercise of tino rangatiratanga, which underpinned Māori land tenure and their social, cultural, and political organisation. The Tribunal concluded that the Crown was 'obliged to respect Māori tikanga as a system of law, policy and practice'.[123] The Tribunal observed in the 2010 *Tauranga Moana Report* that 'the exercise of tino rangatiratanga over taonga within modern New Zealand's legal framework now requires either ownership or, where this is not possible, significant management rights recognised and provided for in statute'.[124]

80 We are also guided by the principle of equity, which guarantees that Māori would be treated fairly and equitably. This principle arises from Article 3, which guaranteed Māori the same rights as British subjects – or, in today's terms, as other New Zealanders. In the Tūranga report, the Tribunal found that 'it was not enough that the Crown would govern in accordance with the rule of law. It was implicit in the language and the spirit of the Treaty that government in New Zealand would be just and fair to all.'[125] In *Te Urewera*, the Tribunal considered that the principle of equity is not just concerned with equal treatment for all citizens, but requires the Crown to make decisions based on the recognition that the needs of Māori may be different. That is, the Crown must provide services equitably (fairly) to Maori; they must meet the needs of hapū and iwi, rather than just New Zealanders in general, if prejudice is to be avoided.[126]

81 The Treaty agreement recognised that the colonisation of New Zealand was to be for the mutual benefit of both Māori and the settlers, so that Māori could retain sufficient land and resources to enable them to participate fully in the benefits of settlement.[127] In *Te Kāhui Maunga*, the Tribunal noted that both Māori and settlers saw 'the Treaty as a means to develop and prosper in the new, integrated nation state'.[128] The Tribunal considered that a further 'right of development', arises from the Treaty principles of partnership, mutual benefit and equity. This Treaty right promised Māori 'a "fair go" along with Pākehā'; that they would have an equal opportunity to develop their property and profit from the resources they retained.[129]

82 Finally, we are guided also by the principle of redress. As the Tribunal stated in *Mohaka ki Ahuriri*: 'Where the Crown has acted in breach of the principles of the Treaty, and Māori have suffered prejudice as a result . . . the Crown has

123. Waitangi Tribunal, *Te Mana Whatu Ahuru*, section 3.4.2.2
124. Waitangi Tribunal, *Tauranga Moana, 1886–2006: Report on the Post-Raupatu Claims*, 2 vols (Wellington: Legislation Direct, 2010), vol 2, p 507
125. Waitangi Tribunal, *Turanga Tangata*, vol 2, p 737
126. Waitangi Tribunal, *Te Urewera*, vol 8, pp 3776–3777
127. Waitangi Tribunal, *The Radio Spectrum Management and Development Final Report* (Wellington: GP Publications, 1999), p 52; Waitangi Tribunal, *Te Tau Ihu o te Waka a Maui*, vol 1, p 5
128. Waitangi Tribunal, *Te Kāhui Maunga*, vol 1, pp 16–17
129. Waitangi Tribunal, *Te Kāhui Maunga*, vol 1, p 18

a clear duty to put matters to right.'[130] Likewise, in the *Te Tau Ihu o Te Waka a Maui* report, the Tribunal found that 'where Maori have been disadvantaged, the principle of equity – in conjunction with the principles of active protection and redress – requires active measures . . . to restore the balance.'[131] To satisfy the principle of redress, the Crown must act to restore the mana and status of Māori, and must provide financial or other redress commensurate with the prejudice suffered.[132]

83 Accordingly, we consider the following Treaty principles to be particularly relevant to this Inquiry:

(a) the principle of autonomy;
(b) the principle of partnership;
(c) the principle of active protection;
(d) the principle of equity;
(e) the principle of mutual benefit; and,
(f) the principle of redress.

Conclusion

84 Throughout this chapter we have set out a number of important considerations relevant to the determinations required under section 8HB of the TOWA. In order to make the decisions required under the statute we have regard to the statutory provisions themselves and their history, the Courts' directions, and the principles of the Treaty. In the next chapter, we begin by determining whether the claimants in this Inquiry have well-founded claims that relate to the Mangatū CFL land.

130. Waitangi Tribunal, *The Mohaka ki Ahuriri Report* (Wellington: Legislation Direct, 2004), vol 1, p 29
131. Waitangi Tribunal, *Te Tau Ihu o te Waka a Maui*, vol 1, p 5
132. Waitangi Tribunal, *The Tarawera Forest Report* (Wellington: Legislation Direct, 2003), p 29

WAIATA MŌ TE WHENUA TE TAKE

Kua tūtaki te mahi tohu rāua ko te pono

CHAPTER 4

DO THE WELL-FOUNDED CLAIMS RELATE TO THE CFL LAND?

Introduction

1 In this chapter, we determine whether Te Aitanga a Māhaki and the Mangatū Incorporation, Ngāriki/Ngā Ariki Kaipūtahi, and Te Whānau a Kai have well-founded claims that relate to the CFL land. As we stated in chapter 3, a clear determination of that kind is required before we can consider whether the CFL land should be returned to Māori ownership.

2 Our first step is to decide our approach to making this determination. As we set out in chapter 2, the claimant groups are seeking binding recommendations for the return of the whole of the Mangatū CFL land as redress for their well-founded claims. The claims concern Crown Treaty breaches that specifically concern the Mangatū CFL lands. However, the claims brought by Te Aitanga a Māhaki and the Mangatū Incorporation, Ngāriki/Ngā Ariki Kaipūtahi, and Te Whānau a Kai also allege a wide range of Treaty breaches that occurred elsewhere in Tūranga, or concern lands in the district including, but not limited to, the CFL land.

3 In the 2004 *Turanga Tangata Turanga Whenua: The Report on the Tūranganui a Kiwa Claims* (the Tūranga report), the Tribunal reported on specific claims brought by Te Aitanga a Māhaki and the Mangatū Incorporation, Ngāriki/Ngā Ariki Kaipūtahi, and Te Whānau a Kai. The Tribunal's findings also covered all the major historical grievances shared by Tūranga iwi and hapū, including those of the claimant groups.[1] We found the report's findings on the claimants' shared experiences of Crown Treaty breach helpful in order to understand the cumulative impacts of Crown actions and policies on the claimants following the invasion of Tūranga by Crown forces in 1865.

4 In their December 2018 closing submissions, claimant parties argued that the Tribunal should take a broad and liberal approach to determining whether

1. Waitangi Tribunal, *Turanga Tangata, Turanga Whenua: The Report on the Turanganui a Kiwa Claims*, 2 vols (Wellington: Legislation Direct, 2004), vol 2, p 741

a claim 'relates to' the CFL land.[2] However, the Crown's position was that a direct and specific relationship was required between claims and the land.[3] Following the High Court's 2021 judgment in *Mercury NZ Limited and Ors v Waitangi Tribunal and Ors* (*Mercury*), parties refined their position on the 'relates to' requirement: claimants emphasised that their claims directly concern their losses in the Mangatū CFL lands, and their customary interests in those lands. The Crown meanwhile argued that the only claims that could relate to the CFL land were claims specifically concerning the alienation of Mangatū land to the Crown.

5 In determining the correct approach to the 'relates to' requirement we have several sources of guidance. We summarise them below. They include our interpretation of the statute itself, and what the High Court has said in the *Mercury* decision about what it means for well-founded claims to 'relate to' the specific land whose return is sought. We also draw on previous Tribunal jurisprudence about the 'relates to' requirement. We are also assisted by the parties' submissions on how the Tribunal should go about determining whether claims relate to the CFL land – both the closing submissions they made in 2018, and their further submissions after the *Mercury* decision was released in March of this year. We set out our approach when determining whether or not the claimants have well-founded claims that relate to the CFL land.

6 In the remainder of the chapter, we apply that approach to assess the claims before us. First, we reprise the findings of Treaty breach the Tribunal made in the Tūranga report, and consider whether and how those findings apply to each claimant group before us. Secondly, we determine whether each group has well-founded claims which do indeed meet the 'relates to' CFL land requirement.

How Should the Tribunal Determine that a Claim 'Relates to' the Mangatū CFL Land?

The High Court's decision in *Mercury* on the 'relates to' requirement

7 In the Wairarapa ki Tararua Remedies Inquiry, the Tribunal issued 'Determinations of the Tribunal Preliminary to Interim Recommendations' on 24 March 2020, setting out its decision to exercise its powers under section 8A and 8HB of TOWA.[4] This determination was reviewed by the High Court in *Mercury*. The Court's judgment addressed the very issue that is the

2. Closing submissions of Ngāriki Kaipūtahi, 11 December 2018, #2.681, para 27; closing submissions for Te Aitanga a Māhaki and the Mangatū Incorporation, 10 December 2018, #2.682, para 33; closing submissions for Te Whānau a Kai, 11 December 2018, #2.683, paras 10.3, 10.11–10.18; Transcript for hearing week four, 19–21 December 2018, #4.35, p 229; closing submissions for Te Rangiwhakataetaea–Wi Haronga–Ngāti Matepu, 10 December 2018, #2.680, para 17
3. Transcript for hearing week four, #4.35, p 293
4. Determinations of the Tribunal Preliminary to Interim Recommendations, 24 March 2020, Wai 863 ROI #2.835

subject of this chapter: what is the correct approach for the Tribunal to the 'relates to' requirement under section 8A or 8HB of the TOWA. The Court also considered the Tribunal's determination that SOE land in Pouākani, and CFL land in the Ngāumu Forest should be returned to the ownership of Ngāti Kahungunu ki Wairapapa Tāmaki nui-a-Rua.

8 The High Court found that the Tribunal had erred in law by determining that Ngāti Kahungunu's wider land-based claims related to SOE land in Pouākani in the southern Waikato, and CFL land in Ngāumu Forest, for the purposes of enabling their return under section 8A and section 8HB.[5] The High Court decided that section 8A and 8HB of the TOWA 'require the well-founded claims to concern the land sought to be returned, and that [these sections] contemplate situations where the lands were acquired by the Crown from Māori in breach of Treaty principles'.[6] On the interpretation of the statutory language, the Court stated:

> On its natural reading the requirement that the claims "relates to" the land means that claims *concern* that land [emphasis in original]. Moreover, the fact that the enactment directs the "return" of the land would suggest that the claim concerning the land would be about the circumstances under which the land left the possession of Māori, thus providing the justification for the land to be returned.[7]

9 The High Court in *Mercury* determined that the purpose of the Tribunal's powers to make binding recommendations for the return of land to Māori ownership is to effect the restoration of Māori tino rangatiratanga or mana whenua over specific lands, through the return of those lands. It considered that the return of land to Māori ownership was connected to these Treaty rights under Article 2 of the Treaty. Accordingly, claims that relate to SOE land or CFL land would most naturally refer to Crown Treaty breaches of the tino rangatiratanga guarantee under Article 2 of the Treaty.[8] The High Court explained:

> The provisions can be thought of as involving Māori resuming the full exclusive and undisturbed possession of the lands that are the subject matter of the claims – to use the more contemporary expression, to restore the exercise of full mana whenua. This is a significant indicator that the well-founded claim would concern that land, and the circumstances under which it is no longer in the ownership of Māori. That is that the land was acquired by the Crown in a manner which breached the principles in Article 2 of the Treaty.[9]

5. *Mercury NZ Ltd and Ors v Waitangi Tribunal and Ors* [2020] NZHC 654, para 52; Determinations of the Tribunal Preliminary to Interim Recommendations, Wai 863 ROI, #2.835, paras 120–123
6. *Mercury NZ Ltd and Ors v Waitangi Tribunal and Ors* [2020] NZHC 654, para 68
7. *Mercury NZ Ltd and Ors v Waitangi Tribunal and Ors* [2020] NZHC 654, para 70
8. *Mercury NZ Ltd and Ors v Waitangi Tribunal and Ors* [2020] NZHC 654, para 79
9. *Mercury NZ Ltd and Ors v Waitangi Tribunal and Ors* [2020] NZHC 654, para 80

It also held:

> The purposive approach suggests that the jurisdiction exists in relation to lands that are no longer in Māori ownership because of a breach of the Treaty, and which should be returned to Māori to allow the guaranteed right of rangatiratanga or mana whenua over that land.[10]

10 However, the High Court stipulated that 'the Tribunal cannot order that land that has never been owned by Māori should be transferred to Māori under the resumption powers'.[11] In relation to the Wairarapa Remedies Tribunal's preliminary determinations, the High Court accordingly concluded that Ngāti Kahungunu did not have mana whenua over the Pouākani lands, and that 'the lack of mana whenua is a very important consideration when the exercise of the power is considered'.[12] The Court noted the Wairarapa Tribunal's conclusions that it was not granting mana whenua to Wairarapa Māori, and that it needed to apply practical considerations, 'exercising judgement in a tikanga-compromised world'.[13] The High Court endorsed the Tribunal as the appropriate body to identify the relevant tikanga principles in its inquiry.[14] However, it concluded that the Tribunal had reached its proposed decision on the return of land without regard to the tikanga relating to that land – something it does not have the discretion to do.[15]

What has the Tribunal said in previous inquiries?

11 The Tribunal has rarely considered the meaning of the 'relates to' clause of section 8HB(1) in any depth. In the 1997 *Muriwhenua Land Report*, the Tribunal recognised the possible relevance of customary interests to what it described as the 'nexus' consideration. In that Inquiry, 'nexus' was the term Crown counsel used to describe the necessary connection between the claim and the land over which binding recommendations were sought. The Tribunal observed:

> The question is whether the land about which binding recommendations may be made is part of the territory affected by the policies and practices complained of. 'Relates to' must have regard to the tribe, the tribal area, and the type of claims that may be brought under the legislation.[16]

10. *Mercury NZ Ltd and Ors v Waitangi Tribunal and Ors* [2020] NZHC 654, para 80
11. *Mercury NZ Ltd and Ors v Waitangi Tribunal and Ors* [2020] NZHC 654, para 82
12. *Mercury NZ Ltd and Ors v Waitangi Tribunal and Ors* [2020] NZHC 654, para 89
13. *Mercury NZ Ltd and Ors v Waitangi Tribunal and Ors* [2020] NZHC 654, para 107; Determinations of the Tribunal Preliminary to Interim Recommendations, Wai 863 ROI, #2.835, para 261
14. *Mercury NZ Ltd and Ors v Waitangi Tribunal and Ors* [2020] NZHC 654, paras 108–109
15. *Mercury NZ Ltd and Ors v Waitangi Tribunal and Ors* [2020] NZHC 654, paras 108–109
16. Waitangi Tribunal, *Muriwhenua Land Report* (Wellington: GP Publications, 1997), p 407

12 The Tribunal considered that the submissions from the parties during the initial hearings into the Muriwhenua land claims had not fully addressed the issue. In 1998, the Tribunal convened a further hearing for parties to make submissions on binding recommendations, and, subsequently issued a Determination of Preliminary Issues.[17] In it, the Tribunal stated that it would 'proceed on the basis that binding recommendations may be made, according to the proper exercise of a discretion to compensate generally for *tribal land losses*' (emphasis added).[18] In appendices attached to the determination, the Tribunal stated that 'a claim could "relate" either directly or indirectly to memorialised or licensed land.'[19] The Tribunal came to these conclusions after considering the meaning different Courts had ascribed to the words 'relating to' and the importance of the statutory context in which the words were used.[20] The Tribunal noted the statements of the President of the Court of Appeal, Lord Cooke (as he later became), that provisions giving effect to the principles of the Treaty of Waitangi should be given 'a broad, unquibbling and practical interpretation.'[21]

13 In 1998, the Tribunal also considered its binding powers under section 8A of the Act in *The Turangi Township Remedies Report*.[22] It commented that 'the provisions are clearly intended to be remedial. If it had been intended that they should be applicable only if they relate directly to some but not all such land, we would expect the statute to have said so.'[23]

14 In this Inquiry, the Crown submitted that the circumstances of the Tūrangi Township Remedies Inquiry are significantly different to those of the present Mangatū remedies applications. In the former inquiry, Ngāti Tūrangitukua's claim concerned the land taken under the Public Works Act 1928 and the Turangi Township Act 1964. The Tribunal found that the memorialised land was the very same as that which had been taken, and the breaches 'related not just to *particular* sites but to the *whole* of the land compulsorily taken by the Crown (emphasis in original).'[24] In this Inquiry, the Crown has submitted that 'in this district inquiry the forest land at issue is located in just two

17. Determination of Preliminary Issues, 14 May 1998, Wai 45 ROI, #2.166
18. Determination of Preliminary Issues, Wai 45 ROI, #2.166, app A, p 14
19. Determination of Preliminary Issues, Wai 45 ROI, #2.166, app A, p 4
20. Cited in: Determination of Preliminary Issues, Wai 45 ROI, #2.166, app A, p 4; *Picture Perfect Ltd v Camera House Ltd* [1996] 1 NZLR 310 (HC), p 319; Lord McNaghten in *Commissioners of Inland Revenue v Maple and Co (Paris) Ltd* [1908] AC 22, cited by Goddard CJ in *Medic Corporation Ltd v Barrett* [1992] 3 ERNZ 523, p 531
21. Waitangi Tribunal, Determination of Preliminary Issues, Wai 45 ROI, #2.166, app A, p 4, referring to *Tainui Maori Trust Board v Attorney-General* [1989] 2 NZLR 513 (CA), pp 518–519; *Ngai Tahu Maori Trust Board v Director-General of Conservation* [1995] 3 NZLR 553 (CA), p 558
22. The language of section 8A(2) differs slightly from section 8HB(1) in that it requires that a claim 'relates in whole or in part to land or an interest in land': Treaty of Waitangi Act 1975, section 8(2).
23. Waitangi Tribunal, *The Turangi Township Remedies Report* (Wellington: GP Publications, 1998), p 18
24. Waitangi Tribunal, *The Turangi Township Remedies Report*, p 21

blocks – Mangatū 1 and 2'.[25] It argues that 'only some of the unsettled claims relate to that land', and the Tūrangi Township precedent would only apply if the Mangatū block had several pockets of CFL land on it, and the claim brought before the Tribunal concerned the Crown's acquisition of the entire block.[26]

15 In our view, the implications of this argument for the claimants in this Inquiry are profound. In this district, for example, the operation of the Crown's native land regime had a dramatic impact on the land holdings of claimants who, by whakapapa, have interests in a number of areas throughout Tūranga. The Crown's native land legislation affected all land blocks in the Tūranga district – Mangatū included. The Crown seems to be submitting that a breach which affected the whole district cannot 'relate to' a particular block of land, because it is not a breach specific to that block. On this basis, only a claim of a Treaty breach pleaded in respect of the title, tenure, and alienation of the Mangatū CFL land 'relates to' that land for the purposes of section 8HB. A claim that alleges breaches in respect of other blocks could not relate to the CFL land, even though the prejudice suffered by claimant communities as a result of those breaches has also contributed to their loss of tino rangatiratanga and mana whenua in the Mangatū CFL land. We address these submissions in the sections below.

Parties' positions on the 'relates to' requirement

16 In their 2018 closing submissions, claimant parties argued that the Tribunal should take a broad and liberal approach to the requirement that claims 'relate to' CFL land.[27] Counsel for Te Whānau a Kai submitted that the statutory language was 'quite general' and if a 'limited interpretation had been intended, Parliament [would] have used more limited or restrictive wording'.[28] Their submissions highlighted the severity of the prejudice the Tribunal had found arising from the Crown's district-wide Treaty breaches in Tūranga, and contended that it would thus be inappropriate to restrict the tangible remedies available as redress for these claims.[29] At that time, all claimants considered that Te Whānau a Kai's claim met the threshold required by the

25. Closing submissions for the Crown, 12 February 2019, #2.688(b), para 96
26. Closing submissions for the Crown, #2.688(b), para 96; transcript for hearing week four, #4.35, pp 341–342
27. Closing submissions for Ngāriki Kaipūtahi, #2.681, para 27; closing submissions for Te Aitanga a Māhaki and the Mangatū Incorporation, #2.682, para 33; closing submissions for Te Whānau a Kai, #2.683, paras 10.3, 10.11–10.18; transcript for hearing week four, #4.35, p 229; closing submissions for Te Rangiwhakataetaea–Wi Haronga–Ngāti Matepu, #2.680, para 17
28. Closing submissions for Te Whānau a Kai, #2.683, para 10.11
29. Closing submissions for Ngāriki Kaipūtahi, #2.681, para 27; closing submissions for Te Aitanga a Māhaki and the Mangatū Incorporation, #2.682, para 38; closing submissions for Ngā Ariki Kaipūtahi, #2.684, paras 58, 60, 67; transcript for hearing week four, #4.35, p 170

statutory scheme, even though their claim did not specify their interests in the Mangatū blocks during the Tūranga District Inquiry.[30]

17 The Crown's position at closing submissions was that the statute requires a direct relationship between a claim and the CFL land subject to section 8HB applications.[31] Counsel for the Crown argued that the scheme requires the Tribunal to distinguish between, first, claims alleging Treaty breach; second, the related prejudice; and third, the claimants who suffered the prejudice. In the Crown's view, 'the test requires a relationship between the subject-matter of the claim and the land' – not between the claimants and the land.[32] Therefore, the Crown argued, Te Aitanga a Māhaki and the Mangatū Incorporation, and Ngāriki/Ngā Ariki Kaipūtahi have claims that meet the 'relates to' threshold; but Te Whānau a Kai's claim does not meet this threshold.[33]

18 Following the High Court's decision in *Mercury*, claimant parties and the Crown rather refined their positions. Counsel for the Māhaki Trust and the Mangatū Incorporation submitted:

(a) The *Mercury* decision would not have significant implications for this Inquiry because the 'factual situation in relation to the Pouākani land is most unusual and completely distinguishable from Māhaki's claims.'[34] The circumstances referred to in the Court's decision could be distinguished from those in this Inquiry because, as counsel contended, 'it is beyond dispute that Māhaki and Mangatū Inc have claims that relate directly to the Mangatū CFL land.'[35]

(b) The Treaty breaches that directly relate to the CFL land in Mangatū 1 include 'the Native Land Court conversion of tenure, the Crown's failure to provide collective hapū title, and the forced sale of the 1961 land.'[36] The Treaty breaches that directly relate to the CFL land in Mangatū 2 include 'the Native Land Court conversion of tenure and the Crown's failure to provide collective hapū title, which resulted in the loss of the land as individualised interests were purchased by a private purchaser.'[37]

(c) Their position on Te Whānau a Kai's claim is now that 'Te Whānau a Kai do not have a Crown forest claim, as they do not have mana whenua in the Mangatū CFL land and nor did they extend a claim over the land.'[38]

30. Transcript for hearing week four, #4.35, pp 46, 114–115, 219; closing submissions for Te Whānau a Kai, #2.683, para 11.12
31. Transcript for hearing week four, 20 December 2018, #4.35, p 293
32. Closing submissions for the Crown, #2.688(b), para 94
33. Closing submissions for the Crown, #2.688(b), para 134
34. Memorandum of counsel for the Māhaki Trust and Mangatū Incorporation, 17 May 2021, #2.929, paras 16–18
35. Memorandum of counsel for the Māhaki Trust and Mangatū Incorporation, #2.929, para 19
36. Memorandum of counsel for the Māhaki Trust and Mangatū Incorporation, #2.929, para 21.1
37. Memorandum of counsel for the Māhaki Trust and Mangatū Incorporation, #2.929, para 21.2
38. Memorandum of counsel for the Māhaki Trust and Mangatū Incorporation, #2.929, para 20.2

19 Following the *Mercury* decision, counsel for Ngāriki/Ngā Ariki Kaipūtahi submitted:

(a) That claims under section 8HB 'must relate directly to the Mangatū CFL land. An indirect relationship does not meet that test.'[39]

(b) Ngāriki/Ngā Ariki Kaipūtahi's claim relates to the CFL land because 'claimants were prejudiced through an unsafe Native Land Court process, which resulted in loss of control of the claimants' core rohe, their turangawaewae. Just as surely as if the Crown had taken the whenua by way of raupatu.'[40]

(c) 'The claims of Te Whānau a Kai do not have a direct relationship, and therefore cannot form the basis for a recommendation awarding whenua.'[41]

20 Counsel for Te Whānau a Kai submitted:

(a) The *Mercury* decision would profoundly affect the issues in this Inquiry. Counsel argued that as a consequence of the Court's decision, the Tribunal's powers to make recommendations under section 8HB 'must necessarily involve a return of land that was previously in the ownership of the claimant group in a manner that restores the group's mana whenua over the resumable land'.[42]

(b) Tikanga would form 'a key part of the Tribunal's consideration when exercising its powers of resumption'. Furthermore, they noted that Te Whānau a Kai claimants had adduced evidence of their customary ownership of the CFL land.[43]

(c) The Tribunal could also find that Te Whānau a Kai's claims relate to the CFL land because their interests are represented by Te Aitanga a Māhaki's claims, which directly address the Mangatū CFL lands. Counsel pointed to the second amended statement of claim filed by Te Aitanga a Māhaki in 2001, which named Te Whānau a Kai amongst the predominant hapū of Te Aitanga a Māhaki. They submitted that Te Whānau a Kai did not dispense with this claim when they filed a further specific statement of claim in 2001.[44]

21 Interested party Ngāti Matepu did not make further submissions on the effect of the *Mercury* decision. However, counsel submitted that their earlier closing submissions remained relevant. There, counsel for Ngāti Matepu contended that the language of 'return to Maori ownership' in section 8HB (1)(a) empowers the Tribunal to order the return of CFL land as a tangible remedy for the loss of land resulting from the Crown's breaches.[45] They argued that

39. Memorandum of counsel for Ngā Uri o Tamanui, 17 May 2021, #2.928, para 52
40. Memorandum of counsel for Ngā Uri o Tamanui, 15 June 2021, #2.937, para 9
41. Memorandum of counsel for Ngā Uri o Tamanui, #2.928, 18 May 2021, paras 52, 58
42. Memorandum of counsel for Te Whānau a Kai, #2.930, 18 May 2021, para 9
43. Memorandum of counsel for Te Whānau a Kai, #2.930, para 9
44. Memorandum of counsel for Te Whānau a Kai, #2.938, 15 June 2021, paras 7–9
45. Closing submissions for Te Rangiwhakataetaea–Wi Haronga–Ngāti Matepu, #2.680; transcript for hearing week four, #4.35, pp 166–168

a narrow interpretation of the statute could mean that CFL land would be ineligible for remedy if the actual titles had not been the subject of a Crown Treaty breach.[46] This eventuality would be against the kaupapa of the Act. Fundamentally, counsel submitted, 'the intent, meaning and spirit of the Act is about the Treaty relationship, which is about people, as opposed to "things" (including processes)'.[47]

22 The Crown's position following the *Mercury* decision was:

(a) 'The High Court decision makes clear that eligible claims for any s 8HB recommendations are the subset of claims that concern the prejudice arising from the Crown acquisition of the particular land from Māori.'[48] In other words, only where the Tribunal has identified a connection between the Crown's acquisition of a particular piece of land in breach of the Treaty, and the resulting prejudice, can it then go on to consider making 8HB recommendations for the return of that land.

(b) As a result, in the present circumstances, 'the only qualifying acquisition is the arms-length purchase by the Crown of land for forest purposes, from within the Mangatū 1 block, from the 1961 shareholders of the Mangatū Incorporation'.[49]

(c) The return of CFL land was no longer an available remedy for Ngāriki/Ngā Ariki Kaipūtahi's claim concerning the 1881 Native Land Court Mangatū title determination because that claim does not address the Crown's 'acquisition' of the land.[50] Nor is it an available remedy for 'the circumstances in which the lands in the Mangatū 2 block were sold by Ngāi Tamatea', as these lands were alienated through private purchase and then subsequently acquired by the Crown.[51]

Tribunal analysis

23 It now falls to us to state what we think 'relates to' means. We have carefully considered the statutory history and language, and the findings of the Tribunal when exercising its jurisdiction. We also have the benefit of the Court's further guidance.

24 In our view, a claim meets the 'relates to' statutory threshold if it demonstrates the following three elements:

(a) The claim concerns the CFL land in some way.

(b) The claimant has a relationship to the CFL land (for example, through the exercise of tino rangatiratanga, mana whenua, or some other ancestral connection or interest).

46. Transcript for hearing week four, #4.35, p 170
47. Closing submissions for Te Rangiwhakataetaea–Wi Haronga–Ngāti Matepu, #2.680, para 17
48. Memorandum of counsel for the Crown, 31 May 2021, #2.933, paras 12, 13
49. Memorandum of counsel for the Crown, #2.933, paras 14–15
50. Memorandum of counsel for the Crown, #2.933, paras 14–15
51. Memorandum of counsel for the Crown, #2.933, para 16

(c) The prejudice suffered by the claimant as a result of the Treaty breach has led to the claimant's relationship with the CFL land being destroyed or damaged.[52]

25 These three elements are derived from what has been said by the Courts and the Tribunal when interpreting the statute. These elements are necessarily of a general nature, given that the Court's consideration of the 'relates to' provision is relatively recent. As the High Court observed in *Mercury*, it has taken a generation for the Courts to consider the meaning of this aspect of the statutory scheme'.[53] There, the Court was dealing with a set of unique circumstances. The broad claims in the Wairarapa District Inquiry concerned, among other things, specific Crown acquisitions from Māori of land in the Wairarapa in breach of Treaty principles. The land the claimants in that Inquiry sought to be returned was in Pouākani in the southern Waikato, and the Ngāumu Forest. In respect of the Pouākani lands, the Court noted that they lay within the traditional rohe of Ngāti Raukawa and Ngāti Tūwharetoa and were given to Wairarapa Māori as redress for the loss of their title to Lake Wairarapa and Lake Ōnoke.[54] The Crown later compulsorily acquired land in Pouākani for the development of a hydro-electric power scheme.[55] In their submissions, counsel for the Māhaki Trust and the Mangatū Incorporation told us that the factual circumstances arising from the claims in this Inquiry are substantially different to those regarding the Pouākani lands.[56] We agree. The land sought for return by the claimants before us is in their own district, and the claims of Treaty breach occurred in this district. Similarly, the Tribunal in the Muriwhenua and Tūrangi Township Inquiries were each considering a particular set of claims.

26 We now have the task of applying the three elements identified above to the claimants and their claims before us. The specific circumstances raise some additional issues that are unique to this Inquiry, and were addressed in parties' submissions; these too must also be part of our consideration. They are:

(a) Is the scheme restricted to claims concerning land directly acquired by the Crown?

(b) What is the nature of the customary interests and mana whenua in Mangatū?

(c) Do the claimants in this Inquiry have a relationship with the Mangatū CFL land?

27 We turn to consider them now.

52. *Mercury NZ Ltd and Ors v Waitangi Tribunal and Ors* [2020] NZHC 654, para 80
53. *Mercury NZ Ltd and Ors v Waitangi Tribunal and Ors* [2020] NZHC 654, para 5
54. *Mercury NZ Ltd and Ors v Waitangi Tribunal and Ors* [2020] NZHC 654, para 6(a)
55. *Mercury NZ Ltd and Ors v Waitangi Tribunal and Ors* [2020] NZHC 654, para 7
56. Memorandum of counsel for the Māhaki Trust and Mangatū Incorporation, #2.929, paras 16–18

Is the scheme restricted to claims concerning land directly acquired by the Crown?

28 As we have noted, the Crown altered its position on the 'relates to' threshold after the *Mercury* decision. The Crown identified passages in the decision to support its submission that the Tribunal may only recommend the return of CFL land to Māori ownership as a remedy for claims where 'the land in question was acquired by the Crown from Māori in breach of Treaty principles'.[57] Counsel for Ngāriki/Ngā Ariki Kaipūtahi claimants argued that this narrow interpretation would make the return of land unavailable as a remedy for other forms of land losses. In particular, they pointed to the 'unsafe Native Land Court process, which resulted in loss of control of the claimants' core rohe . . . [j]ust as surely as if the Crown had taken the whenua by way of raupatu'.[58]

29 We understand the Crown's position to mean that only claims involving land confiscations or the Crown acquiring fee simple title over the subject land, in breach of Treaty principles, could be said to relate to the CFL land. Ngāriki/Ngā Ariki Kaipūtahi argued that qualifying Crown breaches of the tino rangatiratanga guarantee under Article 2 might also include the seizure by the Crown of control over the nature of title and tenure, or available mechanisms for the governance and management of land. In addition, we note that the Crown effectively waived its right of pre-emption in 1862, and made direct provision for private purchase of Māori land (see paragraph 122 below).[59] In the case of the CFL land in the Mangatū 2 block, the Crown's native land regime facilitated the land being acquired by private purchasers in the latter part of the nineteenth century. It was then subsequently acquired by the Crown.

30 We agree with the claimants that the Crown's interpretation would significantly narrow the scope of the Tribunal's powers to recommend the return of CFL land to Māori ownership. We do not think that this was Parliament's intention. As the Supreme Court found in *Haronga*, the statutory history of the amendments to the TOWA that introduced the Tribunal's power to make binding recommendations 'make it clear that this jurisdiction was enacted as significant redress and as part of a bargain in which the Crown also gained something of value'.[60]

31 We consider that the Crown's narrow interpretation regarding the requirement that claims concern 'the Crown acquisition of particular lands' is

57. Memorandum of counsel for the Crown, #2.933, para 13; *Mercury NZ Ltd and Ors v Waitangi Tribunal and Ors* [2020] NZHC 654, paras 68, 70, 77, 81, 86.
58. Memorandum of counsel for Ngā Uri o Tamanui, #2.937, para 9
59. The Crown waived its right of pre-emption in the Native Land Act 1862. Richard Boast writes that pre-emption was 'solidly provided for in New Zealand' under the Constitution Act 1852, and the Native Land Ordinance of 1846, 'then by what must be seen as an exceptionally radical step, it was in effect repealed in 1862': Richard Boast, *The Native Land Court: A Historical Study, Cases, and Commentary*, 3 vols (Wellington: Brookers Ltd, 2013), vol 2, pp 46–47
60. *Haronga v Waitangi Tribunal* [2012] 2 NZLR 53 (SC), para 105

inconsistent with the Court's wider observations.[61] The High Court's commentary on this requirement in *Mercury* is set out above (see paragraphs 7–10), and it is not necessary to repeat it in full here. The Court identified the key Treaty principle arising from the tino rangatiratanga guarantee under Article 2 of the Treaty – namely, from the English text, 'the right of the Tribes to "full exclusive and undisturbed possession of their lands" unless they freely agree to alienate them to the Crown', in accordance with their acceptance of the Crown's exclusive right of pre-emption.[62] In circumstances where the Crown's breach of the Treaty has enabled a third party to acquire the land from Māori, the scheme makes provision for the return of that land to Māori once it has come back into the Crown's possession. That was the whole purpose of the statutory resumption provisions with which the Court was dealing in *Mercury*. In our view, the terms and principles of the 1989 Forests Agreement similarly reinforce the purpose of returning Crown land such as Mangatū 2 to Māori ownership: it is to restore the rights guaranteed under Article 2, and to allow 'mana whenua over that land to be resumed'.[63]

32 Furthermore, it is well-established that the Treaty rights flowing from the guarantee of tino rangatiratanga encompass more than just land ownership in either customary title or Crown freehold title (see our discussion of Treaty principles in chapter 3, paragraphs 72–83). The Treaty also guaranteed that Māori would exercise autonomy and control over the way their land and other resources were managed and governed in the future. It required that the transformation from Māori customary title to new titles of a nature suitable to enable iwi and hapū to engage in the modern economy occurred with the consent of Māori and with sufficient safeguards. It is clear that Māori sought such collective titles, and sought to decide those titles themselves, as provided for by the Article 2 guarantee of tino rangatiratanga.

33 In this Inquiry, our jurisdiction under section 8HB is to be exercised on the basis of the Tribunal's findings of Crown Treaty breach and prejudice in the Tūranga District Inquiry on the claims now before us. Claims were pleaded on behalf of many tribal groups – including not only Te Aitanga a Māhaki, Te Whānau a Kai, and Ngāriki/Ngā Ariki Kaiputahi, but also Rongowhakaata and Ngāi Tāmanuhiri – and dealt with many overlapping issues. In the District Inquiry, the Tribunal was 'continually struck by the way in which the many Turanga claims form part of a single cohesive story', so that the impacts of the Crown's breaches on each hapū or iwi rippled out across the whole district because of their shared relationships and overlapping interests.[64] In particular, the Tribunal identified a close causal connection between the forceful imposition of the Crown's authority over Māori land (and other

61. Memorandum of counsel for the Crown, #2.933, para 12
62. *Mercury NZ Ltd and Ors v Waitangi Tribunal and Ors* [2020] NZHC 654, para 79
63. *Mercury NZ Ltd and Ors v Waitangi Tribunal and Ors* [2020] NZHC 654, para 80
64. This explains why the Tribunal in the 2004 report couches its analysis and findings in terms of Tūranga Māori rather than specifically referring to one group or another: Waitangi Tribunal, *Turanga Tangata*, vol 1, p 38.

resources) and the ensuing widespread land alienation and impoverishment that followed from which all Tūranga Māori suffered. In Tūranga, the Crown's breaches of Article 2 and the loss of Māori autonomy and tino rangatiratanga lay at the root of the loss of community lands.[65]

34 As we discuss further in the sections below, Māori land in Tūranga moved out of customary ownership and into Crown-administered titles by means of successive Crown actions and processes that breached Article 2. These included the 1868 deed of cession, the work of the Poverty Bay Commission, and the introduction to Tūranga of the Crown's native land laws in 1873. Māori communities were excluded from decision-making over their lands by these processes. Individual owners were left vulnerable to the Crown's purchasing, and also the Crown's policy governing private purchases. The CFL lands in the Mangatū 2 block illustrate the prejudicial effect the Crown's native land titling and transfer regime could have on Māori; it was acquired piecemeal by private purchase through 106 purchase deeds over 10 years.[66] The Crown's position is that such lands are excluded from return because they were not directly acquired by the Crown, notwithstanding the Crown's prior Treaty breaches which resulted in their alienation from Māori ownership in the first place.

35 In our view, the Crown's argument misconstrues the purpose of both the statutory scheme and the 1989 Forests Agreement. Lands like Mangatū 2 are no longer in Māori ownership because of Crown Treaty breaches. These lands are now in Crown ownership and are under a Crown forestry license sold under the CFAA. It is precisely such lands that were contemplated by this agreement's commercial provisions and remedial principles. The principles underlying the 1989 Forests Agreement include, as we have explained in chapter 3 (see paragraphs 27–28), minimising 'the alienation of property which rightfully belongs to Maori', and 'adequately securing the claimants' position [which] must involve the ability to compensate for loss once the claim is successful'.[67] In *Haronga*, the Supreme Court described the 1989 Forests Agreement as 'the negotiated solution reached between the Crown and Māori . . . under which both parties gained something of value'.[68] If we were to accept the Crown's submission about which claims meet the 'relates to' requirement, the additional protections given to Māori as part of the 1989 Forests Agreement would be substantially devalued.

36 Accordingly, we do not agree that our determinations on claims relating to the CFL land must be restricted to those claims concerning Crown acquisition of title to the Mangatū CFL lands. We can also consider claims where the Crown has, by one means or another, diminished the Māori owners' tino

65. Waitangi Tribunal, *Turanga Tangata*, vol 2, p 739
66. Waitangi Tribunal, *Turanga Tangata*, vol 2, p 482
67. 'Maori Proposal Tabled at 21 June 1989 Meeting between Crown and Māori', evidence of Bernard Paul Quinn, 20 April 2012, #126(i), p 5
68. *Haronga v Waitangi Tribunal* [2012] 2 NZLR 53 (SC), para 88

rangatiratanga or customary interests over the land. Importantly, though, we do consider there must be a clear relationship between the claims, the claimants, and the subject land. In the next section, we consider in greater detail the tikanga of customary ownership for the claimants in this Inquiry.

What is the nature of the customary interests and mana whenua in Mangatū?

37 Following the Court's decision in *Mercury*, each claimant group in this Remedies Inquiry argued that the Tribunal must carefully consider which group or groups hold 'mana whenua' in the Mangatū CFL lands, for the purposes of its section 8HB recommendations.[69] The Māhaki Trust submitted that 'it is consistent with the tikanga of mana whenua, whaunaungatanga, and manaakitanga for the land to be returned to Māhaki'.[70] Ngāriki/Ngā Ariki Kaipūtahi and Te Whānau a Kai argued that they too hold mana whenua in Mangatū, and that the Tribunal should therefore determine that their claims relate to the CFL land.[71] In light of the claimants' descriptions of their overlapping mana whenua interests, we consider we must set out our own view on the meaning of 'mana whenua', and its application in this Inquiry.

38 As the Court observed, the phrase 'mana whenua' is a relatively recent expression commonly used in reference to an authority held over land or other territory. However, the various ways and contexts in which 'mana' and 'whenua' can be linked means this phrase has a number of usages with nuanced meanings.[72] In Tā Hirini Moko Mead's influential text, *Tikanga Māori*, he describes mana whenua and mana moana as 'political ideas which are used especially in laying claim to resources'.[73] In October 1835, He Wakaputanga o te Rangatiratanga o Nu Tireni (The Declaration of Independence) made an early written reference to mana and land: 'Ko te kingitanga ko te mana i te whenua'.[74] Although various translations have been made, the phrase has been generally understood to refer to the sovereign authority which flowed from the land and was exercised by rangatira.[75] The association between mana and whenua has also been said to derive from the Kīngitanga move-

69. Memorandum of counsel for Ngā Uri o Tamanui, #2.928, para 59; memorandum of counsel for the Māhaki Trust and the Mangatū Incorporation, #2.929, para 24; memorandum of counsel for Te Whānau a Kai #2.930, para 9
70. Memorandum of counsel for the Māhaki Trust and the Mangatū Incorporation, #2.929, para 24
71. Memorandum of counsel for Ngā Uri o Tamanui, #2.928, para 61; memorandum of counsel for Te Whānau a Kai #2.938, para 5(b)
72. Paul Meredith, Richard Benton, and Alex Frame, *Te Mātāpunenga: A Compendium of References to the Concepts and Institutions of Māori Customary Law* (Wellington: Victoria University Press, 2013), p178
73. Hirini Moko-Mead, *Tikanga Māori: Living by Māori Values* (Wellington: Huia Publishers, 2003), p7
74. Meredith, Benton, Alex Frame, *Te Mātāpunenga*, p181
75. Waitangi Tribunal, *He Whakaputanga me te Tiriti: The Declaration and the Treaty* (Legislation Direct, 2014), p180

ment, founded in 1858, because the first Māori King, Pōtatau Te Wherowhero, was appointed to extend his mana as protection over the people and the land in Māori possession.[76]

39 Richard Benton, Alex Frame, and Paul Meredith observe in *Te Mātāpunenga* that 'if the application of mana to whenua was a recent invention of the late 1850s/early 1860s, it did not take long for the concept to be employed by those asserting title to land'.[77] However, while mana whenua is used to claim ownership of land, it was also used to convey the political control and governance exercised by tribal groups.[78] Some nineteenth-century commentators expressed the view that, in some circumstances, mana whenua could be shared between groups.[79] Others claimed that mana whenua could not be shared.[80] In more recent times, the phrase is sometimes used as a synonym for tangata whenua.[81]

40 Mana whenua is also used in recent legislation, such as the Resource Management Act 1991, to refer to 'customary authority exercised by an iwi or hapu in an identified area'.[82] Benton, Frame, and Meredith note that mana whenua has been associated with Treaty of Waitangi settlement processes, whereby mandates are established by legal entities to represent populations within a specified area.[83] In the 2001 *Rekohu: A Report on Moriori and Ngati Mutunga Claims in the Chatham Islands*, the Tribunal remarked on contemporary statutory use of 'mana whenua':

> The term 'mana whenua' appears to have come from a nineteenth-century endeavour to conceptualise Maori authority in terms of the English legal concepts of imperium and dominium. It links mana or authority with ownership of the whenua (soil). But the linking of mana with land does not fit comfortably with Maori concepts . . . [O]ur main concern is with the use of the words 'mana whenua' to imply that only one group can speak for all in a given area when in fact there are several distinct communities of interest, or to assume that one group has a priority of interest in all topics for consideration.[84]

41 In the Tūranga report, the Tribunal also cautioned against confining group rights to land blocks defined much later by colonial agents:

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76. Meredith, Benton, Alex Frame, *Te Mātāpunenga*, p 184
77. Meredith, Benton, Alex Frame, *Te Mātāpunenga*, pp 186
78. Meredith, Benton, Alex Frame, *Te Mātāpunenga*, pp 193
79. See Tamihana Te Rauparaha's comments: Meredith, Benton, Alex Frame, *Te Mātāpunenga*, p 187
80. See Ropata Wahawaha's comments: Meredith, Benton, Alex Frame, *Te Mātāpunenga*, p 202
81. Meredith, Benton, Alex Frame, *Te Mātāpunenga*, p 202
82. See Resource Management Act 1991, section 2
83. Meredith, Benton, Alex Frame, *Te Mātāpunenga*, p 199
84. Waitangi Tribunal, *Rekohu: A Report on Moriori and Ngati Mutunga Claims in the Chatham Islands* (Wellington: Legislation Direct, 2001), pp 28–29.

> A difficulty occurs today when people, both Maori and Pakeha, try to translate this customary network of rights and connections into an environment of 'straight line' boundaries. Resource rights were complex, convoluted, and overlapping . . . What we now term a 'block' could, therefore involve a range of resource centres, each encompassing different levels of rights of a number of communities.[85]

42 The Tribunal distinguished between ownership under English law, and 'the control and management of group's rohe . . . through the distribution of the finely differentiated rights of access to resources'.[86] The rohe of different kin groups in Tūranga 'fanned out from the bay, starting at or near the Waipaoa flood plain, which was highly prized for its alluvial soil, and ran up river valleys and watersheds until they reached the hinterland ranges'. The Tribunal observed that for inland iwi and hapū, 'corridors of access were kept open to the sea through related kin groups'. Similarly, 'reciprocal rights extended for coastal groups to have access to resources in the richly wooded interior'.[87]

43 The Tribunal observed that 'the idea of a permanent, individual, separate, and freely exercisable right to resources, without obligation or even reference to the kin group, was completely un-Maori'.[88] The control and management of resources in land 'was essentially a community affair'.[89] Kin groups would exercise kaitiakitanga over land through their rangatira, who 'were often able to command considerable authority, directing the actions of multiple hapu or across iwi lines'.[90] However, tikanga also required that rangatira consult with the community on important issues. The Tribunal observed that the leadership of rangatira 'functioned as part of the kin group – leadership was the kin group's very embodiment, each being tied to the other through a kind of reciprocal contract of kinship many generations deep'. Whakapapa functioned 'as a grid or network of possible relationships within and between hapū'. Closely related groups might break apart at times, but 'principles of whanaungatanga and manaakitanga, rather than those of difference and separation, could prevail'.[91]

44 When the claimants in this Inquiry referred to mana whenua, we understood it to mean their customary relationships with land; these relationships could include ownership but were also connected to their history and identity as communities. During our hearings, Te Aitanga a Māhaki kaumātua Wirangi Pera gave evidence that before the Native Land Court's individualisation of titles, individuals could occupy lands through the rights of ahi kā and noho

85. Waitangi Tribunal, *Turanga Tangata*, vol 1, p 18.
86. Waitangi Tribunal, *Turanga Tangata*, vol 1, p 16
87. Waitangi Tribunal, *Turanga Tangata*, vol 1, p 18
88. Waitangi Tribunal, *Turanga Tangata*, vol 1, p 19
89. Waitangi Tribunal, *Turanga Tangata*, vol 1, pp 16
90. Waitangi Tribunal, *Turanga Tangata*, vol 1, p 15
91. Waitangi Tribunal, *Turanga Tangata*, vol 1, p 15.

whenua. He told us, 'ko te rangatira nāna te mana o te whenua tīpuna nā mātou tēnei rohe.'[92] Rangatira exercised mana over land through the distribution and allocation of rights in land.[93] They were responsible to the tribal groups under their mana, and the reciprocal responsibilities of manaakitanga and whanaungatanga allowed for these interwoven interests and customary rights to be managed. In the Tūranga report, the Tribunal observed that 'a leader like [Wi] Pere could call on wide-ranging whakapapa connections embodying the mana of all whom they represented.'[94]

45 During the 2001 Tūranga hearings, expert witness Merata Kawharu described mana whenua 'as the single most important principle underpinning the status and identity of Te Aitanga a Mahaki'.[95] Te Aitanga a Māhaki kaumātua and leader John Ruru spoke of the significance of Maungahaumi within the Mangatū 1 block, as a key marker of their mana whenua rights:

> The maunga rises to 1312 metres, and marks our continuous relationship with the surrounding rohe (area), an area in which we came to hold customary rights. The name Maungahaumi comes from the overland expedition of Paoa when he reached thick inland bush coming across a hill on the west of the Mangatu River shaped like a canoe hull which he named "Maungahaumi", haumi being the hull.[96]

46 Maungahaumia is also a significant marker of Ngāriki/Ngā Ariki Kaipūtahi's rohe, although their relationship to the maunga is explained differently.[97] Ngāriki/Ngā Ariki Kaipūtahi kaumātua gave evidence during the Tūranga Inquiry that they 'call the mountain, Maungahaumia – mountain of fernroot – because it provides an abundant source of fernroot as a food for the people'.[98] In Mr Lloyd's evidence, he told us that 'this land is fundamental to who we are as Nga Ariki Kaiputahi. We call it Ukaipo – mother's milk'.[99] It is clear that closely related groups hold different stories about their identity and mana within their areas of interest.

47 The co-existence of different kin groups with shared whakapapa was common. In the Tūranga report, the Tribunal described Te Aitanga a Māhaki's customary history in Mangatū this way:

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92. 'It was the chiefs who had authority over the land. And so, when you had that kind of tenure you had . . . [those ancestors saying that they belong to us]': transcript for hearing week 1, 27–31 August 2018, #4.30, p 69
93. Waitangi Tribunal, *Turanga Tangata*, vol 1, p 18.
94. Waitangi Tribunal, *Turanga Tangata*, vol 1, p 15
95. Merata Kawharu, 'Te Mana Whenua o Te Aitanga a Māhaki', 2000, #A25, p 190.
96. Evidence of Eric John Tupai Ruru, no date #A55, para 8
97. Te Aitanga a Māhaki and Ngāriki/Ngā Ariki Kaipūtahi have different spellings and stories for the maunga Maungahuamia or Maungahaumi, but they refer to the same location.
98. Evidence of Owen Lloyd, no date, #C23, paras 14–16
99. Evidence of Owen Lloyd, 20 April 2012, #I21, p 1.14

> Te Aitanga a Mahaki hold that a group called Ngariki (sometimes written Nga Ariki) were the original inhabitants of the Mangatu area and elsewhere. While this group was defeated in battle a number of times, it also intermarried with Ngati Wahia, creating close connections between the two. It may be fair to say that Wahia's rights in the Mangatu area are to a certain extent dependent on these marriages into more ancient bloodlines.[100]

48 The whanaungatanga between the different groups with interests in Mangatū was demonstrated by the approach Tūranga leader Wi Pere took when establishing the first governance group for the Mangatū 1 block. In 1881, he brought together the first group of 12 trustees representing the mana whenua, including the rangatira Pera Te Uatuku of Ngāriki/Ngā Ariki Kaipūtahi and Peka Kerekere of Te Whānau a Kai, on behalf of the 179 owners (we discuss the fate of this trust further at paragraph 134–141).[101] These trustees would act as a governing body for the Mangatū 1 block. Throughout our remedies hearings, we heard evidence from claimant witnesses about Wi Pere's vision for the management and governance of Mangatū 1. Alan Haronga, the chair of the Mangatū Incorporation, gave evidence that the 12 trustees 'represented the mana whenua interests of Wāhia, Ngāriki and Taupara eventually'.[102] Intermarriage between these groups meant that 'many of the Mangatu pā, marae and urupā have more than one hapū association depending on the time period and perspective'.[103] Mr Haronga agreed that the 12-trustee model reflected the interconnected and interdependent nature of the customary owners of Mangatū.[104] Kaumātua Rutene Irwin – whose great-grandfather was Hori Puru, one of the 12 trustees – told us that many tribal groups were contained within the Ngāti Wāhia, Ngāriki, and Te Whānau a Taupara interests considered by the Native Land Court. In his own words, 'He maha ngā iwi i reira'.[105] He noted that it was common for Mangatū people to have more than one whakapapa connection to the land.[106]

49 In our view, customary ownership of Mangatū is better understood as an overlapping community of kinship groups connected by whakapapa and reciprocal responsibilities. John Ruru told us of the 'strong desire by the old people . . . to try to keep all of the hapū involved with Mangatū lands'.[107] In cross-examination by counsel for Ngā Ariki Kaipūtahi, Mr Ruru explained

100. Waitangi Tribunal, *Turanga Tangata*, vol 1, p 25
101. Waitangi Tribunal, *Turanga Tangata*, vol 2, p 677; Tony Walzl, 'Te Whanau a Kai: Manawhenua Interests in & Tenurial Review of the Mangatu Block', 28 May 2018, #P9, p 96
102. Transcript for remedies hearing, 18–22 June 2012, #4.28, p 103.
103. Evidence of Alan Haronga, 5 April 2012, #117, para 10
104. Transcript for remedies hearing, #4.28, p 103.
105. 'there are many tribes within that particular name that you mention': Transcript for remedies hearing, 18–22 June 2012, #4.28(a), p 42
106. Transcript for remedies hearing, #4.28, p 37
107. Transcript for hearing week one, 27–31 August 2018, #4.30, p 123

that the old people did not see such strong distinctions between the different groups:

> I remember as a kid on the marae with them, there didn't appear to be any disconnection between them at all, and as I said in my statement of claim, my grandmother, she was a Kerekere from Te Whānau a Kai. My father was born in the old wharenui at Pākōwhai. And my father's brothers were born there, and that's where my grandfather met up with his wife my kuia. So, from a personal point of view I found it difficult to try and sort of comprehend how am I going to separate myself to be over here with Whānau a Taupara, to be over there with Whānau a Kai. Far as I was concerned, well they were interwoven with one another.[108]

50 The tikanga of collective responsibility and action remains important today. During our hearings, kaumātua from Te Aitanga a Māhaki, Ngāriki/Ngā Ariki Kaipūtahi, and Te Whānua a Kai all spoke about the possibility of the groups working together in the future, and the benefits that could bring for all.[109] In making determinations on whether claims relate to the land, we have regard to this claimant evidence, and also the principled actions of Wi Pere and the Mangatū owners in 1881 when they sought to ensure the various kin groups with customary rights in Mangatū were represented in the governance of their land. As they did then, we recognise now the gulf between Māori customary understandings of tino rangatiratanga in respect of their land, and the western concept of fee simple ownership. In our view, customary interests and mana whenua are reliant on the principles of whanaungatanga and manaakitanga governing the reciprocal obligations between groups, and the responsibilities of rangatira to act for the benefit of the collective.

51 Having considered the nature of the customary interests and mana whenua exercised by Te Aitanga a Māhaki, Ngāriki/Ngā Ariki Kaipūtahi, and Te Whānua a Kai in the Mangatū area, we now turn to the question of whether these groups have a relationship to the Mangatū CFL lands for the purposes of the statute.

Do the claimants in this Inquiry have a relationship to the Mangatū CFL land?

52 The customary interests of Te Aitanga a Māhaki hapū Ngāti Wāhia, Ngāriki, and Te Whānau a Taupara in the Mangatū 1 block, as well the distinctive rights held by Ngāriki/Ngā Ariki Kaipūtahi, are well-established; we do not consider it necessary to revisit them here.[110] As for the Mangatū 2 block, it

108. Transcript for hearing week one, #4.30, p 106
109. See the evidence of John Ruru, Wirangi Pera, and Owen Lloyd: transcript for hearing week one, #4.30, pp 60–61, 104–105, pp 622–623; see evidence of David Hawea: transcript for hearing week two, 12–15 November 2018, #4.33, pp 312–313
110. Waitangi Tribunal, *Turanga Tangata*, vol 1, pp 23–27, vol 2, p 695

was awarded to Ngāi Tamatea during the 1881 Native Land Court title determination.[111] A hapū of Te Aitanga a Māhaki, Ngāi Tamatea claim descent back from Tamateaiti, the son of Kahunoke. Kahunoke was the brother of Nonoikura, who married Ranginuiaihu, a son of Māhaki.[112] In the Tūranga report, the Tribunal stated that the deeds of Tamateaiti's son, Tutepuaki and then Mutunga, 'helped to secure rights over an area of land in the north-east of the Tūranga hearing district'.[113] Anthony Tapp (who appeared as an interested party) told us that, in addition to those groups, Ngāti Matepu occupied and had interests in Mangatū.[114] Mr Tapp's evidence was not challenged. We consider it supports his assertion concerning Ngāti Matepu's interests in Mangatū.

53 Te Whānau a Kai also claim to be customary owners in the Mangatū CFL lands.[115] As we noted above, this assertion is now resisted by the other claimant groups. Although they contend that Te Whānau a Kai do not hold mana whenua in Mangatū as Te Whānau a Kai, we consider that they have a sufficient relationship to the CFL land for the reasons we now set out.[116] Since the beginning of the Tūranga Inquiry, Te Whānau a Kai kaumātua have given evidence concerning their Ngāriki whakapapa connections, which they argue form the basis of their rights in Mangatū. David Hawea, the named claimant for Te Whānau a Kai, gave evidence that their rights in land can be traced through the marriage of Kaikoreaunei, the eponymous ancestor, to two sisters, Te Haaki and Whareana.[117] Kaikoreaunei's name means 'I am Kai with nothing' (Kaikore meaning without food, or landless).[118] During the 2012 and 2018 remedies hearings, Mr Hawea explained that their rights in land instead came from Te Haaki and Whareana who 'had descent from the original inhabitants and ariki of the Tūranga area'.[119]

54 According to Te Whānau a Kai, Kaikoreaunei's descendants came to occupy the areas where Te Haaki and Whareana held rights through their Ngāriki whakapapa. In the Tūranga report, the Tribunal observed that, through these connections, Te Whānau a Kai 'were linked into, and came to absorb within

111. Waitangi Tribunal, *Turanga Tangata*, vol 2, p 660
112. Waitangi Tribunal, *Turanga Tangata*, vol 1, pp 24–25
113. Waitangi Tribunal, *Turanga Tangata*, vol 1, p 25
114. Evidence of Anthony Tapp, 28 May 2018, #P27, paras 18–23
115. Amended statement of claim for relief for Te Whānau a Kai, 21 February 2012, #SOC 8(b)
116. Memorandum of counsel for Ngā Uri o Tamanui, #2.928, para 58; memorandum of counsel for the Māhaki Trust and the Mangatū Incorporation, #2.929, para 20.2
117. Evidence of David Hawea, no date, #A56, paras 10–11; evidence of Garry Clapperton, no date, #C11, paras 53–59; evidence of David Hawea, 28 May 2018, #P12, paras 2.5–2.10; evidence of Keith Katipa, 20 April 2012, #I19, paras 3.5–4.7
118. Waitangi Tribunal, *Turanga Tangata*, vol 1, p 28
119. Evidence of David Hawea, #P12, para 2.6; The connections between Ngāti Hine and Ngāti Maru, and Te Whānau a Kai are described in greater detail in Rongowhakaata Halbert's customary history *Horouta: The History of the Horouta Canoe, Gisborne and East Coast* (Auckland: Reed, 1999).

them, the hapu Ngati Maru, Ngati Hine, and Ngati Rua.'[120] Te Whānau a Kai kaumātua Keith Katipa gave evidence that Te Whānau a Kai trace their descent through Te Haaki and Whareana to Tui, the apical ancestor to these three hapū.[121] Mr Katipa explained that Ngāti Maru are named for the tipuna Marutaiaroa who descends from Arikinui, an apical Ngāriki tipuna.[122] His evidence was that Ngāti Maru have maintained close links with the Mangatū area through intermarriage with Ngāti Hine.[123]

55 During our 2018 remedies hearings, historian Tony Walzl produced further research concerning Te Whānau a Kai's interests in Mangatū. Mr Walzl's report included a detailed consideration of the evidence presented during the 1881 Native Land Court hearings for Mangatū 1, and other nearby blocks. His considered view was that Wi Pere's statements during the 1881 hearings were evidence of Te Whānau a Kai occupation of the Mangatū lands through their Ngāriki whakapapa. Mr Walzl highlighted the whakapapa provided by Wi Pere, which traced lines of descent from Kai through Te Ihooterangi to Wi Pere on one side, and through Te Ihooterangi and Rangiwhakataetaea to Wi Haronga on the other. During the 1881 hearing, Wi Pere observed that 'all grandchildren of Ihooterangi were Ngariki'.[124] Wi Pere then described Te Whānau a Kai's customary rights in Mangatū in these apparently contradictory terms: 'Whanauakai [*sic*] have no claim on this land. My ancestors from Kai down have always lived on this land.'[125] Mr Walzl interpreted this statement as a recognition 'that Kai's descendants lived on the land through the Ngariki lineage of his two wives.'[126]

56 Mr Walzl argued that, taken together, Wi Pere's evidence illustrated that 'descent from Whareana through Te Ihooterangi linked one part of Te Whanau a Kai to Mangatū through Ngāriki ancestry under which the block is partly claimed'. He also noted another line of descent from Te Haaki 'who have a whakapapa that joins with Wahia and is often reinforced by marriages back into Te Whanau a Kai and other Ngariki descent lines over successive generations'.[127] During cross-examination by counsel for the Māhaki Trust and Mangatū Incorporation, Mr Walzl recognised that Te Whānau a Kai's interests through Whareana and Te Haaki did not mean that they have a claim to the block specifically as Te Whānau a Kai. He argued that Wi Pere sought to manage the different Ngāriki interests and 'he didn't want to open it

120. Waitangi Tribunal, *Turanga Tangata*, vol 1, p 28
121. Evidence of Keith Katipa, 20 April 2012, #119, para 4.1
122. Evidence of Keith Katipa, #119, paras 4.2–4.4; Wi Pere identified Arikinui as an apical tipuna for Ngāriki during the 1881 Mangatū 1 hearings: *Mangatu 1* (1881) 7 Gisborne MB, p 172
123. Evidence of Keith Katipa, #119, para 4.1–4.4
124. *Mangatu 1* (1881) 7 Gisborne MB, pp 192–193
125. *Mangatu 1* (1881) 7 Gisborne MB, p 185; Walzl, 'Te Whanau a Kai', #P9, p 81
126. Walzl, 'Te Whanau a Kai', #P9, p 81
127. Walzl, 'Te Whanau a Kai', #P9, p 82

up as a claim for all Te Whānau a Kai because all Te Whānau a Kai don't have that connection.'[128]

57 Mr Walzl highlighted further connections between Te Whānau a Kai tīpuna and Ngāriki descent lines that were described in the whakapapa and occupation evidence presented during the Native Land Court's 1917 'relative interests' proceedings (the process for the determination of relative interests is discussed further at paragraph 147–151). In the lists created for Ngāriki owners, Mr Walzl identified 16 of the owners whose recorded whakapapa included Te Whānau a Kai descent lines. A further 63 owners who affiliated to both Ngāriki and Ngāti Wāhia claimed descent through Tuarauoterangi, who married Te Whānau a Kai tipuna Te Paiko (the granddaughter of Whareana's son Te Hauoterangi). He contended that all Ngāti Wāhia owners share descent with Te Whānau a Kai tipuna Te Haaki through Wahia's marriage to her daughter Kiterangi.[129] We note that many of these owners also gave evidence of their tīpuna's occupation of the Mangatū block.

58 In our view, some of the connections identified by Mr Walzl are likely more significant than others. For instance, Te Whānau a Kai's shared lines of descent with Ngāti Wāhia through the marriage of Wāhia and Kiterangi do not diminish Ngāti Wāhia's clear customary interests in Mangatū 1. It appears that the connection between the Ngāti Wāhia lines of descent and Te Whānau a Kai tīpuna was not acknowledged in the whakapapa presented during the Native Land Court proceedings. Conversely, the whakapapa presented for ten Ngāriki owners recorded their descent to Te Haaki and Whareana in 1917 as the source of their rights in Mangatū.[130] These claims provide a clearer example of owners identifying Te Whānau a Kai tīpuna as the basis for their rights in Mangatū.

59 There is also other evidence of occupation by Te Whānau a Kai people who were included in the list of customary owners Wi Pere submitted to the Court in 1881. The Te Whānau a Kai owners include the whānau of Peka Kerekere, who was named as one of the original 12 trustees exercising governance over the land.[131] Peka Kerekere's son, Te Miini Kerekere, later told the Native Land Court that prior to 1840, their tipuna Hemara had lived on the block at Te Hua and Te Apiti, and was buried at Pikauroa.[132] Mr Hawea, the named claimant and Te Whānau a Kai leader, is a direct descendant of Peka and Te Miini Kerekere.[133]

60 Another example is Himiona Katipa, who gave evidence during the 1881 and 1917 Native Land Court hearings. The Court noted that his whānau group had good occupation and they were awarded 8000 acres.[134] We heard

128. Transcript for hearing week two, #4.33, p 418
129. Walzl, 'Te Whanau a Kai', #P9, p 195
130. Walzl, 'Te Whanau a Kai', #P9, pp 162–163, 169
131. Walzl, 'Te Whanau a Kai', #P9, pp 100–101
132. Walzl, 'Te Whanau a Kai', #P9, p 132
133. Evidence of David Hawea, 20 April 2012, #120, para 1.5
134. Walzl, 'Te Whanau a Kai', #P9, p 145

evidence from Keith Katipa, a direct descendant of Himiona Katipa, of their family's other connections to Mangatū through Himiona Katipa's marriage to Mangere Peneha, whose mother was Heni Haua of 'Te Whānau a Kai with Ngariki rights in Mangatū.'[135] In 1917, the Native Land Court found that Heni Haua's wider whānau grouping had occupied Mangatū and had Ngāriki and Ngāti Wāhia ancestry.[136]

61 Ultimately, there are limitations to the conclusions we can draw from this evidence. For one thing, minute book evidence requires some caution as it is often prone to omissions and vulnerable to the vagaries of translation.[137] We are also aware of the sensitivity that these issues demand, demonstrated by the claimants' caution in speaking about the interests of their whanaunga during our hearings. In such circumstances, we do not consider it appropriate, nor is it our role, to simplify the complex nature of these groups' interests in order to reach a tidier conclusion. However, the evidence presented in our Inquiry demonstrates to our satisfaction that the customary owners of Mangatū included people who were Te Whānau a Kai, and who occupied Mangatū through their Ngāriki connections.

62 We do not wish to overstate the extent of Te Whānau a Kai's interests. The evidence they adduced emphasised the key importance of their other lands to the south and west of Mangatū.[138] However, we are satisfied that Crown Treaty breaches affecting Māori ownership of the Mangatū CFL lands would also have prejudiced Te Whānau a Kai. We therefore consider their claims eligible for consideration under section 8HB too, along with Te Aitanga a Māhaki and Ngāriki/Ngā Ariki Kaipūtahi. In the next section we turn to the claims themselves, and determine whether they relate to the CFL land.

Do the Claimants' Well-Founded Claims Relate to the CFL Land? – Tribunal Discussion

63 In this section, we discuss the well-founded claims of Te Aitanga a Māhaki and the Mangatū Incorporation, Ngāriki/Ngā Ariki Kaipūtahi, and Te Whānau a Kai, and determine which alleged Crown Treaty breaches relate to the Mangatū CFL land. As we set out in chapter 2, the claimants are seeking binding recommendations for the return of all the CFL land (along with Schedule 1 compensation) on the basis that all their well-founded claims relate to the Mangatū CFL land. The claims address the following areas of Crown Treaty breach:

- The Crown's attack on Waerenga a Hika and its treatment of Te Kooti and the Whakarau, 1865–68.

135. Evidence of Keith Katipa, #119, para 2.9
136. *Mangatu Relative Interests* (1917) 43 Gisborne MB, p 203
137. Waitangi Tribunal, *Turanga Tangata*, vol 2, p 666
138. Tui Gilling, 'Te Whanau a Kai: The Manawhenua and Alienation of Te Whānau a Kai Lands, 1869–1910', April 2001, #A36, p 2

- The deed of cession (1868) and the Crown's retained lands.
- The Poverty Bay Commission, 1869–73.
- The Crown's native land regime and the new native title.
- The Native Land Court's Mangatū title determination: Ngāriki/Ngā Ariki Kaipūtahi's claim.
- The Tūranga trusts, 1878–1955.
- The Mangatū afforestation and the Crown's 1961 acquisition.

64 In our view, it is necessary at this point to retrace some of the history covered in the Tūranga report – not only to determine whether the claims do indeed relate to the Mangatū CFL land, but also to assist readers unfamiliar with the claimants' significant claims. We begin by outlining the Tribunal's general findings on the Crown's Treaty breaches, before summarising its findings on specific breaches. In making a determination on whether the claims relate to the CFL land, we will consider the impact the Crown's breaches had on the customary owners of the CFL land. As we established in the previous section, the customary owners include the Te Aitanga a Māhaki, Ngāriki/Ngā Ariki Kaipūtahi, and Te Whānau a Kai claimants. Our discussion of the related prejudice will follow in chapter 5.

The Tribunal's general findings in Tūranga

65 In the concluding chapter of the Tūranga report, the Tribunal emphasised 'the importance in the Treaty of three important ideals. They are: the rule of law, just and fair government, and the protection of Māori autonomy.'[139] These ideals were drawn from the preamble and the Articles of the Treaty of Waitangi, and were implicit in its language and spirit. The Tribunal explained that 'the ideals (and the failure of the Crown to live up to them) were at or near the surface of Maori–Pakeha relations throughout the nineteenth and early twentieth centuries in Turanga.'[140] We record these observations again to emphasise the Crown's determination to impose its authority and destroy Māori autonomy in Tūranga, and the deep roots of its destructive land laws and policies in the district.

66 In respect of the rule of law, the Tribunal noted that the Queen had promised in 1840 'a settled form of Civil Government'. However, the powers of government were subject to two key constraints: first, the promises made to Māori in Articles 2 and 3 of the Treaty, and second, the rules of the constitution the Crown brought from Great Britain and introduced through Article 1 of the Treaty. The Crown is the embodiment of executive government and is subject to the law, 'and has no power to act outside it.'[141] In the Tūranga report, however, the Tribunal highlighted the Crown's willingness, time

139. Waitangi Tribunal, *Turanga Tangata*, vol 2, pp735–739
140. Waitangi Tribunal, *Turanga Tangata*, vol 2, pp735
141. Waitangi Tribunal, *Turanga Tangata*, vol 2, p736

and again, to disregard its own law when it was 'politically expedient' to do so. This willingness was evident particularly in the Crown's acts at and subsequent to Waerenga a Hika and Ngātapa, and the unlawful confiscation through the Poverty Bay Commission of the property rights of hundreds of Tūranga Māori (see paragraph 78 for our summary of the Tribunal's findings concerning the siege of Ngātapa; see paragraph 106 for our findings on the confiscation of property rights through the Poverty Bay Commission).[142]

67 The Tribunal also stated that it was 'implicit in the language and the spirit of the Treaty that government in New Zealand would be just and fair to all'. There should have been no room for laws or policies calculated to defeat Māori interests in order to favour those of settlers. Yet the Crown devised policies and laws that 'led to the destruction of Maori society and the extinguishment of Maori title in Turanga'. These 'more insidious forms of Treaty breach' included Crown policies such as the operation of the Poverty Bay Commission and the native land regime which led to wholesale alienation of Māori land with lasting impacts on the lives of Tūranga Māori.[143]

68 The third constraint on the Crown was its Treaty obligation to use the power of kāwanatanga contained in Article 1 to deliver on its promise to exercise its new power in a manner 'which fostered and protected the autonomy which the tribes had exercised from time immemorial'.[144] Tūranga Māori protected their tino rangatiratanga and autonomy until 1865, but by then the Crown had come to fear that continued Māori autonomy would compromise both the process of settlement and the Crown's own authority. Examples of its laws and policies designed to destroy that autonomy are numerous in Tūranga, and include the Crown's military actions, its introduction of 'detribalised titles', and its refusal to make provision in the law for Māori communities to retain, manage, and protect their lands.[145]

69 We turn now to examine the specific Treaty breaches identified by the Tribunal in the Tūranga report, in order to determine whether the well-founded claims of Te Aitanga a Māhaki, Ngāriki/Ngā Ariki Kaipūtahi, and Te Whānau a Kai relate to the Mangatū CFL land. We begin with one of the worst examples of the Crown disregarding its promise to use its new kāwanatanga power to foster and protect Māori autonomy, when it provoked the eruption of hostilities at Waerenga a Hika in 1865. The Crown's attack on Waerenga a Hika has been described as the 'hinge of fate' that began the transformation of Tūranga, replacing Māori autonomy with Crown control and leading to the extinguishment of native title over the vast majority of the district by the early 1870s.[146]

142. Waitangi Tribunal, *Turanga Tangata*, vol 2, pp 735–736
143. Waitangi Tribunal, *Turanga Tangata* vol 2, pp 737–738
144. Waitangi Tribunal, *Turanga Tangata* vol 2, pp 738–739
145. Waitangi Tribunal, *Turanga Tangata* vol 2, p 739
146. Waitangi Tribunal, *Turanga Tangata*, vol 1, p 42

The Crown's attack on Waerenga a Hika and its treatment of Te Kooti and the Whakarau, 1865–68

70 Until 1865, Māori had successfully protected their political autonomy and their lands in Tūranga. Tribal communities had retained the ability to govern themselves as they had for centuries; to determine their own internal political, economic, and social rights and objectives; and to act collectively in accordance with those determinants. In the years after 22 Tūranga leaders signed the Treaty, their communities sought contact with the Crown on matters of commerce.[147] Tūranga Māori also established their own centralised rūnanga that would allow them to continue to assert their autonomy.[148] Very little land was sold during this period. The only land purchased by the Crown was the 57-acre 'Government paddock' at Makaraka, which cost a record price of £85 in 1857.[149]

71 Yet the Crown failed to apply section 71 of the Constitution Act 1852, which provided that native districts 'could be set apart by proclamation and that within those districts Maori law and institutions could be preserved'.[150] The Tribunal considered that the Crown 'lost a very great opportunity to work with the leadership there when it failed to apply section 71'.[151] Instead, the Tribunal found that 'the settlers, and Government officials, looked forward to a time when colonial law would operate in Turanga in the context of a strong British presence'.[152] Donald McLean, then the Chief Land Purchase Commissioner, considered that establishing Crown authority in Tūranga would require control of land. Visiting Tūranga in 1851, he wrote that 'misunderstanding will continually arise in this Bay, until the native title is fairly extinguished to such lands as may be required for grazing or other European purposes'.[153] Like the Crown, the Tribunal found that Tūranga Māori 'saw a strong connection between Crown purchase and Crown authority'. From the outset, the Tribunal commented, Tūranga Māori were 'determined to maintain their own law and to protect their land'.[154]

72 Against this background, the Crown's invasion of Tūranga and attack on the defensive pā at Waerenga a Hika was the consequence of several factors that converged in Tūranga in 1865. Armed conflict between the Crown forces and Māori in Taranaki, Waikato, and Tauranga had raised tensions across the North Island. The Pai Mārire faith emerged in this environment under the prophetic leadership of Te Ua Haumēne and spread across the North Island. In March 1865, a party of Pai Mārire followers led by Kereopa Te Rau and

147. Waitangi Tribunal, *Turanga Tangata*, vol 1, pp 39–40
148. Waitangi Tribunal, *Turanga Tangata*, vol 1, p 50
149. Waitangi Tribunal, *Turanga Tangata*, vol 1, p 48
150. Waitangi Tribunal, *Turanga Tangata*, vol 1, pp 59, 121
151. Waitangi Tribunal, *Turanga Tangata*, vol 1, p 59
152. Waitangi Tribunal, *Turanga Tangata*, vol 1, p 48
153. McLean to Colonial Secretary, 20 February 1851, BPP, vol 9, p 2; Bruce Stirling, 'Rongowhakaata and the Crown, 1840–1873', January 2001, #A23, p 58
154. Waitangi Tribunal, *Turanga Tangata*, vol 1, p 58

Patara Raukatauri arrived on the East Coast following the murder of the missionary Carl Sylvius Völkner in Ōpōtiki. News of the murder and the presence of the Pai Mārire emissaries immediately heightened tensions between the Māori and settler communities in Tūranga. These tensions were further exacerbated as fighting broke out amongst Ngāti Porou further up the coast. Donald McLean's success in directing colonial and Ngāti Porou kāwanatanga forces against the Pai Mārire in Ngāti Porou territory as the agent for the Government on the East Coast, led him to turn south towards Tūranga.[155]

73 While the majority of Tūranga Māori had converted to the new Pai Mārire faith, they were not in rebellion against the Crown.[156] When McLean arrived with his forces in Tūranga on 9 November 1865, he presented Māori with terms of surrender that required them to reject Pai Mārire, take an oath of allegiance, and relinquish all arms.[157] The Tribunal found that McLean, refused to engage with Tūranga Māori 'except on terms of complete capitulation to the Crown and, perhaps more importantly, to at least 380 armed Ngati Porou.'[158] As a result, negotiations failed and from 17 to 22 November 1865, Crown and kāwanatanga forces besieged Waerenga a Hika pā. At the time of the assault, 300 of the 800 people inside the pā were women and children.[159] By the sixth day, over 70 of the inhabitants had been killed in the siege and more arrested. When 400 men, women, and children in the pā surrendered, the Crown took 113 men prisoner, eventually transporting them to Wharekauri (Chatham Islands).[160] Anaru Matete led another party of several hundred people 'out the back of the pa, and they escaped into the hills.'[161]

74 The Crown's assertion of military power at Waerenga a Hika was intended to crush Māori autonomy in the district, and to allow the settlement of Tūranga to proceed in accordance with the Crown's own priorities.[162] The Tribunal found that the Crown had acted lawlessly and had fundamentally breached the Treaty of Waitangi by attacking Tūranga Māori, who were not in fact in rebellion at Waerenga a Hika. They were defending their Treaty-guaranteed tino rangatiratanga and exercising their right of self-defence under English constitutional law, and protecting their families.[163] The Crown's actions at Waerenga a Hika represent a failure to meet the responsibilities of a Treaty partner, and also breached the principle of active protection, the Tribunal concluded.[164]

155. Waitangi Tribunal, *Turanga Tangata*, vol 1, pp 104–107
156. Waitangi Tribunal, *Turanga Tangata*, vol 1, p 119
157. Waitangi Tribunal, *Turanga Tangata*, vol 1, p 108
158. Waitangi Tribunal, *Turanga Tangata*, vol 1, p 119
159. Waitangi Tribunal, *Turanga Tangata*, vol 1, p 112
160. In total, 123 prisoners from Tūranga were detained on Wharekauri: Waitangi Tribunal, *Turanga Tangata*, vol 1, p xvii.
161. Waitangi Tribunal, *Turanga Tangata*, vol 1, p 93
162. Waitangi Tribunal, *Turanga Tangata*, vol 1, p 114
163. Waitangi Tribunal, *Turanga Tangata*, vol 1, pp 120–121
164. Waitangi Tribunal, *Turanga Tangata*, vol 1, pp 113–114

75 Following the assault on Waerenga a Hika, the Crown used the pretext of a threat to the security of the colony to deport prisoners far away to Wharekauri. Those who were detained there had committed no crimes and were not charged or brought to trial; the Tribunal therefore found that this punishment was unlawful.[165] Te Kooti gave the group of prisoners detained with him on Wharekauri the name 'Whakarau' (literally 'the exiles', 'the banished ones', or 'the unhomed').[166] They were removed from Tūranga to create conditions in which the Crown could push through the confiscation of Māori land and resolve the issue of Māori autonomy in Tūranga in accordance with its own wishes.[167]

76 The first group of detainees, who arrived on Wharekauri on 14 March 1866, consisted of 39 male detainees and their families (10 women and 19 children). Later arrivals included Te Kooti Rikirangi of Rongowhakaata, arrested on suspicion of spying, who would emerge on Wharekauri as a spiritual leader for the Whakarau and found Te Haahi Ringatū (the Ringatū church).[168] With the arrival of Te Kooti's group in June, and more prisoners' wives and children, the number of detainees increased to 203.[169] Two further groups of detainees from Hawke's Bay, numbering 100 people in all, arrived some months after Te Kooti's group in 1866. A report suggested that approximately 49 women and 38 children had by then joined the detainees by November 1867 (though the Tribunal found that these figures are unreliable).[170] The Tribunal considered that the total number on Wharekauri was around 300.[171]

77 In the Tūranga report, the Tribunal considered Te Kooti and the Whakarau were justified in escaping Wharekauri on the schooner, the *Rifleman*, in July 1868. After over two years of detention in harsh conditions, during which Te Kooti had twice sought a fair trial, there seemed little hope that they would be released.[172] Within a month of the Whakarau's return to Tūranga, they were pursued by multiple expeditions of colonial militia and government forces. The Tribunal found that the Crown acted unlawfully and in breach of the Treaty in pursuing and harassing the Whakarau after their escape, and as they tried to make their way inland.[173] With few options and suffering an intense sense of grievance (directed at both settlers and his own whanaunga,

165. Waitangi Tribunal, *Turanga Tangata*, vol 1, p 193
166. Te Kooti recorded in his diary his communications from God. The Spirit of God 'raised him up, telling him that he had been sent to make known the name of God "to his people who are dwelling in captivity in this land" ("ki tona iwi e noho whakarau nei i tenei whenua")': Waitangi Tribunal, *Turanga Tangata*, vol 1, pp xviii, 170, 185–186.
167. Waitangi Tribunal, *Turanga Tangata*, vol 1, p 193
168. Waitangi Tribunal, *Turanga Tangata*, vol 1, p 174. For a discussion of Te Kooti's prophetic leadership, see pp 214–215.
169. Waitangi Tribunal, *Turanga Tangata*, vol 1, p 174
170. Waitangi Tribunal, *Turanga Tangata*, vol 1, pp 174–175
171. Waitangi Tribunal, *Turanga Tangata*, vol 1, p xvii,
172. Waitangi Tribunal, *Turanga Tangata*, vol 1, p 194
173. Waitangi Tribunal, *Turanga Tangata*, vol 2, p 743

whom he felt had not assisted the Whakarau), Te Kooti determined to strike back against communities in Tūranga, targeting Patutahi, Matawhero, and Oweta. Patutahi was a Te Whānau a Kai kāinga where three men were killed, and Te Kooti took men, women, and children captive there.[174] At Matawhero, between 29 and 34 settlers were killed, including women and children. Another 20 to 40 Māori were killed following their capture by Te Kooti.[175] The Tribunal found these acts to be completely unjustifiable, whatever provocation Te Kooti and the Whakarau had been subjected to.[176]

78 In response to the Whakarau attacks and the casualties inflicted, the Crown mobilised colonial and kāwanatanga forces to besiege the mountain-top pā of Ngātapa, where Te Kooti and the Whakarau had taken refuge, accompanied by their Māori prisoners.[177] The siege lasted several days, and early on 5 January 1869 the Whakarau escaped down the unguarded northern face of the pā.[178] Many were killed in the pursuit that ensued; of those caught, many more were executed without trial.[179] The Tribunal found that between 150 and 194 men of the Whakarau, their allies, or their captives were killed by Crown forces. This number includes between 86 and 98 executions; 11 or 12 women and children may also have been killed during the fighting.[180] The Tribunal concluded that it was very likely that among those killed and executed were many of the innocent prisoners Te Kooti had seized and taken inland with him, including Te Whānau a Kai people captured at their kāinga at Patutahi as the Whakarau moved towards Matawhero.[181] The Tribunal found that the Crown's failure to discriminate between the innocent captives of the Whakarau and those who had participated in the Tūranga murders was a breach of the Treaty principle of active protection. Furthermore, the executions themselves were probably in breach of the rules of war then in force in the British Empire. The Tribunal stated:

> To the extent that these executions were effected without civil or military trials, they were unlawful, indeed criminal, acts. It follows that they breached, in the most fundamental way, the principles of the Treaty. 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.[182]

174. Waitangi Tribunal, *Turanga Tangata*, vol 1, pp 203–204
175. Waitangi Tribunal, *Turanga Tangata*, vol 1, pp 204–205
176. Waitangi Tribunal, *Turanga Tangata*, vol 1, p 215
177. Waitangi Tribunal, *Turanga Tangata*, vol 1, p 224
178. Waitangi Tribunal, *Turanga Tangata*, vol 1, p 226
179. Waitangi Tribunal, *Turanga Tangata*, vol 1, p 242
180. The Tribunal found that these figures represent the minimum range of summary executions: Waitangi Tribunal, *Turanga Tangata*, vol 1, pp 244–245.
181. Waitangi Tribunal, *Turanga Tangata*, vol 1, pp 203–204, 242–244
182. Waitangi Tribunal, *Turanga Tangata*, vol 1, p 247

Do the well-founded claims regarding Waerenga a Hika and the Crown's treatment of Te Kooti and the Whakarau relate to the Mangatū CFL land?

79 During the 2018 remedies hearings, Crown witness Michael Macky contended that the Crown's assault on Waerenga a Hika and the treatment of the Whakarau did not directly affect the Mangatū lands, because there was no fighting on those blocks and the Crown did not seek to punish the Mangatū owners for fighting at Waerenga a Hika.[183] However, this is too narrow a view of the severe impact of the Crown's actions. We heard from claimants that the loss of life and prolonged absence of the prisoners subsequently held by the Crown resulted in district-wide upheaval.[184]

80 In our view, it is unreasonable to expect that Māori communities would act to defend only specific blocks of land, especially as the boundaries and individual owners of those blocks had yet to be determined by the Native Land Court. Waerenga a Hika was a defensive pā where Tūranga Māori from across the district had gathered for protection from the Crown's invading forces and to defend their interests.[185] Rutene Irwin gave telling evidence during the 2001 Tūranga hearings, saying that nearly all his family were involved in the fighting at Waerenga a Hika because they 'supported the retention of our whenua, the mana whenua, the mana tangata, and they were imprisoned for fighting for their rights, and some of them died for it'.[186] The Crown took advantage of an opportunity to break the autonomy of Tūranga Māori it deemed to be troublesome and the resulting prejudice was felt across the district, including at Mangatū.

81 Moreover, we cannot agree that the customary owners of Mangatū lands were not punished for fighting at Waerenga a Hika.[187] McLean had written one day before the attack that 'the tribe that more particularly requires to be chastised is the Aitanga Mahaki residing at Waerengahika'.[188] The Tribunal considered that a large proportion of the Whakarau were Te Aitanga a Māhaki; 154 of the 207 Tūranga Māori held on Wharekauri by November 1867 were reported as being Te Aitanga a Māhaki. This number included 40 Te Aitanga a Māhaki women and 30 children.[189] It also seems very likely that Te Whānau a Kai were amongst the casualties 'because they were likely to have supported their

183. Evidence of Michael Macky, #P30, 30 July 2018, paras 14, 29
184. Waitangi Tribunal, *Turanga Tangata*, vol 1, p 124; closing submissions for Ngā Ariki Kaipūtahi, #2.684, para 57
185. Waitangi Tribunal, *Turanga Tangata*, vol 1, pp 113–114
186. Taken from: Waitangi Tribunal, *Turanga Tangata*, vol 1, p 98
187. Waitangi Tribunal, *Turanga Tangata*, vol 1, pp 123–124
188. McLean to Fraser, 15 November 1865, *Appendix to the Journal of the House of Representatives*, 1865, A-6, p 3; Vincent O'Malley, 'An Entangled Web: Te Aitanga-a-Mahaki Land and Politics, 1840–1873, and their Aftermath', 2000, #A10, p 151; Waitangi Tribunal, *Turanga Tangata*, vol 1, p 124
189. This number included 40 Te Aitanga a Māhaki women and 30 children: Waitangi Tribunal, *Turanga Tangata*, *Turanga Whenua*, vol 1, pp 174–175; Brian Murton, 'Te Aitanga a Mahaki, 1860–1960: The Economic and Social Experience of a People', 2001, #A26, p 70.

Mahaki relatives.'[190] Keith Katipa gave evidence that a significant portion of the Te Whānau a Kai people detained on Wharekauri were from the hapū Ngāti Torohina, including Pehimana Taihuka. He also told us of his tipuna Himiona Katipa, who was killed by Te Kooti's followers after Matawhero.[191] Ngāriki/Ngā Ariki Kaipūtahi rangatira Pera Te Uatuku was also present at the pā and, with two of his close relatives, was amongst the first batch of prisoners detained and exiled to Wharekauri.[192] In response to questioning from counsel for Te Aitanga a Māhaki, Mr Macky conceded that the Crown's breaches at Waerenga a Hika would have had catastrophic economic and social impacts on the wider communities that exercised customary rights in Mangatū.[193]

82 The pursuit and destruction of the Whakarau after they escaped back to the mainland caused significant cumulative prejudice to people of Te Aitanga a Māhaki, Ngāriki/Ngā Ariki Kaipūtahi, and Te Whānau a Kai. Within just three years following Waerenga a Hika, a large proportion of their men had been killed while a large number of women and children at Ngātapa, perhaps 200, had been taken prisoner by colonial and kāwanatanga forces.[194] The lives of these iwi had been disrupted, and their communities shattered. Their ability to exercise customary rights over land and resources, including at Mangatū, was significantly reduced. As Professor Brian Murton noted:, 'Some of the people who had lived on Mangatū were taken to the Chathams, and when they returned many moved back to other kainga before returning to their original homes in the upper valleys.'[195] Food was scarce during these chaotic years and 'agriculture had come to a virtual standstill'.[196] Even those Māori who were not detained on Wharekauri or suffered the attacks would have been shaken by the brutality of the Crown's military response, and concerned at what this might presage for the Crown's control of the district in future. Māori communities feared for their lives and land, and these fears overshadowed the relations between the Crown and Te Aitanga a Māhaki, Ngāriki/Ngā Ariki Kaipūtahi, and Te Whānau a Kai for the foreseeable future.

83 Counsel for Ngā Ariki Kaipūtahi gave the example of Pera Te Uatuku, who, as we have said, was among the first batch of prisoners to be detained on Wharekauri with his Ngā Ariki Kaipūtahi relatives and was exiled from his lands between 1865 and 1873. After the detainees' escape in 1868, Pera Te Uatuku 'formed part of the Whakarau, fighting at Ngātapa and elsewhere, until he was captured again by Government forces in March 1870'.[197] He

190. Waitangi Tribunal, *Turanga Tangata*, vol 1, p 124
191. Evidence of Keith Katipa, #119, paras 2.3–2.5
192. Waitangi Tribunal, *Turanga Tangata*, vol 1, p 124
193. Transcript for hearing week two, #4.33, p 522
194. Waitangi Tribunal, *Turanga Tangata*, vol 1, pp 242–2434
195. Professor Murton gave evidence for Te Aitanga a Māhaki in the Tūranga Inquiry: Murton 'Te Aitanga a Mahaki, 1860–1960', #A26, p 77.
196. Murton, 'Te Aitanga a Mahaki, 1860–1960', #A26, p 78
197. Closing submissions for Ngā Ariki Kaipūtahi, #2.684, paras 50–55

was tried under the Disturbed Districts Act of 1869 and sentenced to death, though he was not executed but imprisoned and released in 1873.[198] Counsel argued that '[t]he exile and imprisonment of Ngā Ariki Kaipūtahi people, including the key rangatira of the time, undoubtedly put great pressure on the ability of Ngā Ariki Kaipūtahi to exercise kaitiakitanga and assert their rights in the Mangatū lands.'[199] The long-term impact of these events on the hapū's ability to argue for their rights before the Native Land Court was furthermore recognised by the Crown's witness, Michael Macky, who said in evidence:

> the 71 Deaths at Waerenga a Hika, and the prolonged absence of the more than 200 prisoners on the Chathams, put great pressure on communities exercising customary rights in Tūranga. Some of this burden would have been felt by hapū exercising rights at Mangatū 1 and 2.
>
> . . . . .
>
> The death and dislocation arising from the wars of the 1860s is likely to have affected the balance of power among Tūranga iwi and hapū, and influenced who had the ability to exert control over applications to the Native Land Court.[200]

84 This was certainly true for Pera Te Uatuku. Counsel for Ngā Ariki Kaipūtahi submitted that 'Pera Te Uatuku lives at Mangatū, it is his tūrangawaewae, it is his whenua, it is his people and [his detention on] the Chathams, is when he was taken away from his land and placed there.'[201] John Robson, who produced a report on Ngāriki Kaipūtahi mana whenua during the Tūranga Inquiry, noted that: 'By the date of the Manukawhitikitiki and Whatatutu [Court] hearings, Pera had been released from prison only two years previously.'[202] At these hearings (as with the Native Land Court title determination for the Mangatū lands in 1881) the other claimants included Wi Pere, who had also given evidence against Pera at his trial in Wellington in 1870. Counsel for Ngā Ariki Kaipūtahi noted that 'incredibly Wi Pere sits with Pera Te Uatuku and those two work out what is required for the land even in the face of that intense impact of colonisation.'[203] Robson considered that Pera Te Uatuku's reticence during the Native Land Court proceedings was understandable in this context, and '[i]f he adopted too aggressive an approach in the face of his past accusers, he ran the risk of being declared ineligible to be recognised as an owner.'[204]

85 The case of Pera Te Uatuku is just one example of how the Crown's Treaty breaches at Waerenga a Hika and against the Whakarau undermined the tino rangatiratanga of the customary owners of the Mangatū CFL land, as well as

198. John Robson, 'Ngariki Kaiputahi: Mana Whenua Report', 2000, #A22, para 5.10
199. Closing submissions for Ngā Ariki Kaipūtahi, #2.684, para 57
200. Evidence of Michael Macky, #P30, paras 19, 23
201. Transcript for hearing week four, #4.35, p 431
202. Robson, 'Ngariki Kaiputahi', #A22, para 5.11(c)
203. Transcript for hearing week four, #4.35, pp 431–432
204. Robson, 'Ngariki Kaiputahi', #A22, para 5.11(c)

the owners of Māori land throughout the district. These policies were specifically designed to undermine the control that Te Aitanga a Māhaki, Ngāriki/Ngā Ariki Kaipūtahi, and Te Whānau a Kai had over their lands.

86 In the aftermath of these events, the Crown was for the first time in a position to impose its own control over Tūranga lands and to secure large tracts of land for settlement. It could now take further steps to capitalise on the severe blow it had dealt to Tūranga Māori and to their ability to resist the Crown's realisation of its goals. The Crown's attacks on Waerenga a Hika and the Whakarau created the circumstances for the widespread transfer of land and resources from Māori to the settler population over the next 35 years, including the Mangatū 2 block. Because of these watershed events, we consider that Te Aitanga a Māhaki, Ngāriki/Ngā Ariki Kaipūtahi, and Te Whānau a Kai's claims concerning Waerenga a Hika and the Whakarau do indeed relate to the Mangatū CFL lands.

87 In the following section, we discuss the next phase of the Crown's efforts to assert its authority in Tūranga.

The deed of cession (1868) and the Crown retained lands

88 The Crown's first step following the military victories at Waerenga a Hika and Ngātapa was to establish a new colonial authority in place of Tūranga Māori tino rangatiratanga. McLean moved to impose Crown control by confiscating the lands of those Māori deemed 'rebels'. Edward Stafford, the Premier at the time, had signalled privately to McLean that the Government was 'absolutely determined [to] punish all future outbreaks by taking sufficient lands to pay for the cost of putting them down, and for establishing military settlements to maintain the Queen's authority'.[205]

89 However, the Tribunal found that the confiscation policy 'was put on hold while the Auckland and Hawke's Bay provincial governments vied to secure the right to develop Tūranga lands'.[206] At the same time, the New Zealand Government was facing criticism from the Imperial Government for its policy of land confiscation, and took up the British suggestion of acquiring land by an 'imposed' cession.[207] Under the East Coast Land Titles Investigation Act 1866, the Crown sought to empower the Native Land Court to sit in Tūranga to identify claimants on the basis of whether or not they had been engaged in 'rebellion', and certify grants of land to 'loyal' Māori'. Captain Reginald Biggs, who had fought at Waerenga a Hika, was appointed to represent the Crown and to investigate the interests of 'rebel' and 'friendly' Māori.[208] Biggs' approach was 'to pressure Turanga Maori into agreeing to substantial voluntary cession of land by way of reparations to the Crown'.[209]

205. Stafford to McLean, 3 November 1865; O'Malley, 'An Entangled Web', #A10, p 172
206. Waitangi Tribunal, *Turanga Tangata*, vol 1, p 167
207. Waitangi Tribunal, *Turanga Tangata*, vol 1, p 126
208. Waitangi Tribunal, *Turanga Tangata*, vol 1, p 126
209. Waitangi Tribunal, *Turanga Tangata*, vol 1, p xvii

Through the Court, 'rebel' lands would be immediately deemed Crown land, and the Governor might set aside land for settlement.[210] However, an error in the statutory language meant that the Court never sat under the Act.[211] The mistake in the 1866 Act was corrected a year later.[212]

90 The Tribunal found that Biggs' approach to confiscation aroused 'extensive Māori opposition'.[213] Tūranga Māori boycotted the 1867 sitting of the Native Land Court 'on the ground that they had no confidence in the court, sitting under the 'confiscatory East Coast legislation'.[214] Following a further Court sitting on 9 March 1868, Tūranga Māori sent a number of petitions to the Governor, requesting that no land be confiscated, and citing Sir George Grey's promise that 'this side of this island will be spared in consideration of the strenuous endeavours of the Maori chiefs to put down evil'.[215] Anthony Tapp, the named claimant for Ngāti Matepu, gave evidence about the petitions that were brought by Wi Haronga and others in 1867 and 1868. Wi Haronga appealed to the Governor in 1868, writing that 'the blood having long ago dried, during the last two years, and the proclamation for taking the land did not come at that time. Then what is the sin committed this year that these thoughts should be brought to bear now?'[216]

91 The Crown made a third legislative attempt to punish 'rebel' Māori and acquire land in Tūranga under the East Coast Act 1868. However, by the time the East Coast Act was passed, Te Kooti and the Whakarau had escaped their detention on Wharekauri. Their return, Biggs observed in a letter to McLean, brought 'a return of heightened tensions in the district'.[217] After two years without success, the Tribunal noted that by 1868 Biggs was prepared to accept a cession of just 10,000 to 15,000 acres. But before he could finally reach an agreement, he was killed in Te Kooti's November 1868 assault on the settlers at Matawhero. The Tribunal observed that 'it was only after Te Kooti's attacks on the Turanga communities that the Crown managed to secure a substantial cession of land from Turanga Māori'.[218] Following Te Kooti's attacks on Patutahi, Matawhero, and Oweta, and the killings there in November 1868, the Crown increasingly pressured Māori to agree to the cession, and

210. Waitangi Tribunal, *Turanga Tangata*, vol 1, p 36
211. Section 2 of the Act mistakenly excluded those who had engaged in 'rebellion' from the definition of 'rebels': Waitangi Tribunal, *Turanga Tangata*, vol 1, p 149.
212. The East Coast Land Titles Investigation Amendment Act, 1867
213. Waitangi Tribunal, *Turanga Tangata*, vol 1, p 145
214. Waitangi Tribunal, *Turanga Tangata*, vol 1, p xvii
215. Waitangi Tribunal, *Turanga Tangata*, vol 1, p 155; 'Petitions from East Coast Native Relative to their Lands', *Appendix to the Journal of the House of Representatives*, 1868, A-16, pp 3–6
216. 'Wiremu Haronga and 250 others, petition, 8 July 1867', evidence of Anthony Tapp, 29 May 2018, #P27(a), app D, p [21]
217. Waitangi Tribunal, *Turanga Tangata*, vol 1, p 155; Biggs to McLean, 28 September 1868, document bank, #A10(a), vol 2, p 908
218. Waitangi Tribunal, *Turanga Tangata*, vol 1, p 127

threatened to remove its military protection. This would have left the area and its people open to attack from either Te Kooti or Ngāti Porou.[219]

92 Beginning on 18 December 1868, a deed of cession was signed in which 279 Tūranga Māori of Te Aitanga a Māhaki, Rongowhakaata, and Ngāi Tahupo (Ngāi Tāmanuhiri) declared themselves loyal to the Crown and acknowledged that some of their people had participated in 'rebellion . . . murders and burnings'.[220] The signatories included rangatira Wi Pere and Wi Haronga, as well as other customary owners in Mangatū deemed to be 'loyal'.[221] The Tribunal pointed out that these were hardly all the adult Māori landowners in the district. Two hundred more were part of the Whakarau, and another 300 had recently been captured by Te Kooti and taken to his base inland.[222] The area included in the deed of cession was approximately 1.195 million acres; essentially the entire Tūranga district, including the Mangatū CFL lands.[223] The deed of cession was published in the *New Zealand Gazette* on 13 February 1869, and Governor Bowen deemed that 'Native title to and over' the lands the *Gazette* described was extinguished from 18 December 1868.[224]

93 The Tribunal found that during this time of turmoil Tūranga Māori, 'who had seen a number of their chiefs killed 'had every reason to fear Te Kooti'.[225] The people of Tūranga, both Pākehā and Māori, had borne the brunt of Whakarau grievances against the Crown, and 'many may have feared that his desire to strike those that he thought had wronged him had yet to be requited'. They also had reason to fear the Ngāti Porou kāwanatanga forces still in Tūranga. The Tribunal observed that, Ngāti Porou leader, '[Ropata] Wahawaha had threatened them with raupatu'.[226] In this environment of fear and panic, the Crown's threat to remove its protection if they did not agree to the cession of their lands, left resident Māori with no choice but to capitulate to the Government's demands for land.[227]

94 In these circumstances, the deed of cession was signed under duress and in breach of the principles of the Treaty, and was ineffective in extinguishing Māori title.[228] The Tribunal found that by threatening 'to abdicate a primary obligation of kawanatanga – that of keeping the Queen's peace' – in order to obtain land by cession, the Crown exclusively pursued its own interests and breached the Treaty principle of active protection.[229]

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219. Waitangi Tribunal, *Turanga Tangata*, vol 1, pp 253–254
220. Henry H Turton, 'Deed No 490', document bank, #A10(a), vol 4, pp 2321–2326
221. Henry H Turton, 'Deed No 490', document bank, #A10(a), vol 4, pp 2321–2326
222. Waitangi Tribunal, *Turanga Tangata*, vol 1, p 269
223. Waitangi Tribunal, *Turanga Tangata*, vol 1, p xx
224. Waitangi Tribunal, *Turanga Tangata*, vol 1, pp 270, 339
225. Waitangi Tribunal, *Turanga Tangata*, vol 1, p 267
226. Waitangi Tribunal, *Turanga Tangata*, vol 1, p 267
227. Waitangi Tribunal, *Turanga Tangata*, vol 1, pp 267–268
228. Waitangi Tribunal, *Turanga Tangata*, vol 2, p 744
229. Waitangi Tribunal, *Turanga Tangata*, vol 1, pp 267–268

95 The Crown intended to keep a proportion of the land acquired through the deed of cession for military settlement but return the balance to 'loyal' Māori.[230] Commissioners were appointed to hear the claims of these 'loyal' individuals. However, the Crown and Māori struggled to agree on which land the Crown would retain. The disagreement continued until the first hearings of the Poverty Bay Commission (as it was known) in June 1869. There, the surveyor acting as agent for Te Aitanga a Māhaki and Rongowhakaata, William Graham, reported that the iwi had struck an agreement with the Crown providing for it to retain the Te Muhunga, Te Arai, and Patutahi blocks. However, Māori and the Crown had fundamentally different understandings of what was agreed to.[231]

96 The Tribunal concluded that Māori had agreed (albeit under duress) to cede three 5,000-acre blocks on the flats and including a small area of hill country. The Tribunal found that the original purpose for the retained lands was to be both for military settlement and as compensation for kāwanatanga forces that had fought with the Crown.[232] This suggested that the retained land would be in three blocks 'of equal size and quality', with access to 'the three strategic access ways onto the Poverty Bay flats from the interior'.[233] It seems, however, that the Crown decided to take not just the 15,000 acres comprising the three blocks, but also a much larger ill-defined area of hill country. As a result, the Tribunal found that '[n]o agreement was . . . reached on 29 June 1869, or at any later date'.[234]

97 The Tribunal found that the fact Crown officials sought to cover up these irregularities over the following years represented a further breach of their obligation to act in good faith.[235] Ultimately, the Crown retained 56,161 acres, much greater than the area to which the Māori signatories had agreed.[236] Te Aitanga a Māhaki have interests in the Te Muhunga block which made up 5,395 acres of the amount taken.[237] Rongowhakaata and Te Whānau a Kai have traditional interests in the Patutahi and Te Arai blocks that made up 50,746 acres and the bulk of the confiscated lands.[238] We return to these losses and discuss the prejudice suffered by Te Aitanga a Māhaki and Te Whānau a Kai in chapter 5.

98 The Tribunal concluded that the Crown's actions were in bad faith. There were two distinct breaches under Article 2 of the Treaty.[239] First, those who signed were not able to agree to the cession on behalf of those who did not

230. Waitangi Tribunal, *Turanga Tangata*, vol 1, p 254
231. Waitangi Tribunal, *Turanga Tangata*, vol 1, pp 254, 277
232. Waitangi Tribunal, *Turanga Tangata*, vol 1, p 304
233. Waitangi Tribunal, *Turanga Tangata*, vol 1, p 305
234. Waitangi Tribunal, *Turanga Tangata*, vol 1, p 322
235. Waitangi Tribunal, *Turanga Tangata*, vol 1, p 325
236. Waitangi Tribunal, *Turanga Tangata*, vol 1, p 328
237. Waitangi Tribunal, *Turanga Tangata*, vol 1, p 331
238. Gilling, 'Te Whānau a Ka', #A36, p 17; Waitangi Tribunal, *Turanga Tangata*, vol 1, p xxi
239. Waitangi Tribunal, *Turanga Tangata*, vol 1, p 271

sign – including the customary owners of Mangatū who were detained on Wharekauri. The Tribunal found that '[w]hat is important is that the signatories did not even pretend to extinguish the rights of non-signatories.'[240] In the Tūranga Inquiry, the Crown accepted that 'to the extent that the deed of cession purported to extinguish the customary title of non-signatories, then it was ineffective.'[241] Second, to the extent that the deed confiscated non-rebel interests, the Tribunal concluded 'it was in breach of the article 2 guarantee of exclusive and undisturbed possession by those Maori of their lands.'[242] Third, there was the additional confiscation by the Crown of the land retained in excess of the area which Māori understood to have been agreed in the negotiations before the Commission. The Tribunal concluded that 'the Crown breached the principles of the Treaty in retaining to itself an area of land between 35,000 and 40,000 acres larger than that which Maori consented (albeit under duress) to give up'.[243]

Do the well-founded claims regarding the 1868 deed of cession relate to the Mangatū CFL land?

99 Even for those iwi whose lands were returned by the Crown in 1873 (see our discussion at paragraphs 110–111), the intent and effect of the cession 'signified an acceptance of the need to formalise a relationship with the Crown which would, after Matawhero, be on the Crown's terms'.[244] The deed enabled the Crown to take control of Tūranga lands which Te Aitanga a Māhaki, Ngāriki/Ngā Ariki Kaipūtahi, and Te Whānau a Kai (along with other Tūranga iwi) had so determinedly protected from alienation.

100 Despite the flaws of the deed, which was ineffective as a contract, it opened the way for the Crown to impose processes through the Poverty Bay Commission and the Native Land Court to transform customary title, governed by tikanga and rangatiratanga, into Crown-derived titles.[245] The Tribunal described the effect of the deed as 'the doorway through which the machinery of the civil empire would enter Turanga'.[246] The imposition of the cession, under duress, was a further step in the assertion of the Crown's authority in Tūranga at the expense of iwi and hapū tikanga, and rangatiratanga.

101 The Mangatū lands themselves were subject to the deed of cession, but were returned to the Māori owners in 1873 with other Tūranga land. Title was issued by the Native Land Court eight years later. During this period, the customary owners from Te Aitanga a Māhaki, Ngāriki/Ngā Ariki Kaipūtahi, and Te Whānau a Kai, including the surviving Whakarau, would have suffered

240. Waitangi Tribunal, *Turanga Tangata*, vol 1, p 271
241. Waitangi Tribunal, *Turanga Tangata*, vol 1, p 271
242. Waitangi Tribunal, *Turanga Tangata*, vol 1, p 271
243. Waitangi Tribunal, *Turanga Tangata*, vol 2, p 744
244. Waitangi Tribunal, *Turanga Tangata*, vol 1, p 340
245. Native title was formally extinguished by an order in counsel published in the *New Zealand Gazette* on 13 February 1869: Waitangi Tribunal, *Turanga Tangata*, vol 1, p 339.
246. Waitangi Tribunal, *Turanga Tangata*, vol 1, p 338

acute uncertainty as to their rights and tenure in the Mangatū lands. Once the ceded land was returned, the owners of Mangatū had no alternative but to engage in the processes the Crown then imposed in order to ensure their title to their lands was recognised.

102 The deed of cession was part of the Crown's ongoing efforts to overthrow Māori autonomy and rangatiratanga. We therefore consider that the Crown's abdication of its responsibilities to protect Māori interests, and the duress it exerted on Māori to agree to the cession of their lands, are Treaty breaches that relate to the Mangatū CFL lands. The ultimate consequences of the cession would include the creation of circumstances for the alienation of land blocks such as Mangatū 2 after they passed through the Native Land Court.

The Poverty Bay Commission, 1869–73

103 The Poverty Bay Commission was the Crown's first titling body in Tūranga. During its two sittings in 1869 and then in 1873, the Commission's first task (after recording which lands the Crown would retain out of the lands ceded by 'loyal' Tūranga Māori) was to preside over a process of title adjudication to identify the 'loyal' customary owners of the ceded lands. Those Māori who had fought to defend their tino rangatiratanga and their mana whenua were to be excluded from titles having been labelled as 'rebels'.[247] In this way, the Commission created the precedent for Crown titles in Tūranga, and 'was the harbinger of its successor the Native Land Court'.[248]

104 The Tribunal's view was that Māori claimants before the Commission feared that the Crown might take more land if the ownership lists they prepared out of Court were too short, but were also anxious about including 'rebels' on the lists. Consequently, they may have excluded 'rebel' kin themselves and included some 'loyal' non-owners on their lists of owners. The Tribunal concluded:

> What is clear . . . is that the process overall could not be said by any stretch of the imagination to have been fair or transparent. Once a list of owners had been prepared by the claimants and submitted, it was accepted [by the Commission] as a matter of course. We cannot accept that this was an appropriate treatment for alleged 'rebels'.[249]

105 Most of the Commission's work was completed in 1869 in 33 days of hearings. Historian Kathryn Rose, who gave evidence for Te Aitanga a Māhaki during the Tūranga hearings, stated that out of the 101,000 acres that were

247. The Tribunal found that those who had been sent to Wharekauri were almost completely excluded from titles to land awarded by the Poverty Bay Commission: Waitangi Tribunal, *Turanga Tangata*, vol 1, p 365.
248. Waitangi Tribunal, *Turanga Tangata*, vol 1, p 393
249. Waitangi Tribunal, *Turanga Tangata*, vol 1, p 366

returned to Māori during this hearing, approximately half were awarded to Te Aitanga a Māhaki.[250] A smaller number of blocks were passed through the Native Land Court (sitting under the East Coast Act 1868 in 1870) and the Commission in its second sitting in 1873.[251] The Commission and the Native Land Court awarded a total of 138,278 acres to Tūranga Māori.[252] Crown grants would subsequently be issued to those found to be owners.

106 In the Tūranga report, the Tribunal considered that the Commission could not lawfully confiscate the land rights of those who had not signed the deed of cession and who the Crown deemed 'rebels'. As we have noted, the signatories did not pretend to extinguish the rights of non-signatories; it was the Commission which confiscated their rights.[253] But the Commission had been created by royal prerogative, and the Crown had no prerogative of confiscation. Only Parliament could authorise the Crown to take land from citizens.[254] The Tribunal found that the Crown acted unlawfully and in breach of its kāwanatanga obligations in empowering the Commission to usurp the role of the ordinary Courts by identifying 'rebels' and confiscating their lands without due process. Further, it was a breach of its obligation of active protection of Māori rights under Articles 2 and 3 of the Treaty, which entitled Māori to the rights of British citizens, including rights to a fair and proper trial.[255]

107 The Poverty Bay Commission was also charged with issuing new titles to those who it found to have rights in the ceded land. The new titles were issued as Crown grants. Because neither the deed of cession, nor any legislation, made special provision for title to be issued to multiple Māori grantees or owners as tenants in common, titles were issued to Māori in the form of joint tenancies by default. The Tribunal considered that these titles imported principles from English common law that were ultimately prejudicial to Māori interests including those of Te Aitanga a Māhaki and Te Whānau a Kai (we discuss this prejudice further in chapter 5 and consider the impact joint tenancies had on the ability of communities to retain their land, and resist alienation in the district, see paragraphs 106–113). For instance, all interests were deemed equal so that the joint tenancies penalised those who were entitled by tikanga to greater rights. Furthermore, individual interests could not be inherited by descendants; instead, when a joint tenant died, their interests reverted to the pool of surviving tenants. The Tribunal found:

250. Kathryn Rose, 'Te Aitanga-a-Mahaki: Land and Autonomy, 1873–1890', 1999, #A17, p 32
251. The East Coast Act 1868 gave the Native Land Court explicit confiscatory powers. The Native Land Court sat in December 1870, however objections were raised as to the Court's jurisdiction to hear claims to Tūranga land which had been ceded in 1868. The Crown reintroduced the Poverty Bay Commission in 1873 as a solution: Waitangi Tribunal, *Turanga Tangata*, vol 1, pp 126–127, 347–349.
252. Waitangi Tribunal, *Turanga Tangata*, vol 1, p 340
253. Waitangi Tribunal, *Turanga Tangata*, vol 1, p 271
254. Waitangi Tribunal, *Turanga Tangata*, vol 1, pp 358–359
255. Waitangi Tribunal, *Turanga Tangata*, vol 1, p 360

> The transformation of title effected by the commission produced a form of tenure that made retention of the old relationships with the land impossible while at the same time preventing owners from taking any advantage of the new mercantile economy except by the alienation of land.[256]

108 These conditions caused substantial anxiety for Tūranga Māori, who were concerned that their interests would be reduced by the form of title issued in the wake of Commission awards. The Tribunal considered that the Crown was responsible for fixing its mistake and the resulting problems caused by the legal presumptions imposed upon Māori title.[257] The Crown's failure to resolve quickly the problems inherent in the joint tenancy tenure was a breach of the Treaty principle of active protection, the Tribunal found.[258]

109 Instead of Māori receiving the security of tenure and the land promised, the effect of the Poverty Bay Commission was to open the way for title adjudication by Crown processes, and for individualised titles that were not subject to Māori community control and management – and were thus far more vulnerable to alienation to the Crown and private purchasers. The Tribunal found that the Crown's failure to ensure that the form of title awarded following investigation by the Poverty Bay Commission was not prejudicial to Māori interests was a breach of the principles of the Treaty.[259] Furthermore, the Crown failed to keep its promise to 'loyal' Māori that they would be compensated for their land interests retained by the Crown. During the Tūranga Inquiry, the Crown conceded that this constituted a breach of the Treaty obligation to act in good faith. The signatories of the 1868 deed, including some customary owners of the Mangatū lands, also lost lands within the areas retained by the Crown. In exchange they were to receive 'pieces of land of the Hauhau of equal value . . . in place of the lands so taken'.[260]

110 By 1873, Māori protests at the Commission's work were such that the Government was anxious to wind it up and leave the Native Land Court to determine Māori title to remaining Tūranga lands.[261] Wi Pere sought to avoid the consequences of extended title determinations and of individualisation in the Native Land Court by proposing to the Commission that remaining tribal lands be returned to 12 trustees, with the authority to administer them on behalf of Te Aitanga a Māhaki, Ngāi Tahupo (Ngāi Tamanuhiri), and Rongowhakaata. However, this proposal was not accepted.[262] A much larger part of the ceded land had not passed through the Commission, and Pere's

256. Waitangi Tribunal, *Turanga Tangata*, vol 1, pp 393
257. Waitangi Tribunal, *Turanga Tangata*, vol 1, pp 379, 386–387
258. Waitangi Tribunal, *Turanga Tangata*, vol 1, p 387
259. Waitangi Tribunal, *Turanga Tangata*, vol 2, p 745
260. Waitangi Tribunal, *Turanga Tangata*, vol 1, p 368
261. The Commission only heard evidence in three cases during the second sitting in 1873: the Waikohu block (22,000 acres), Waihau (13,800 acres), and Awapuni: Waitangi Tribunal, *Turanga Tangata*, vol 1, p 349.
262. Waitangi Tribunal, *Turanga Tangata*, vol 1, pp 391–392

proposal would have avoided the time and resources that would instead be spent on divisive Native Land Court processes. The Tribunal found that 'the commission could have recommended such a course to the Government if it so chose. It did not.'[263] The failure to provide for tribal ownership breached the Treaty principles of active protection and autonomy. The Tribunal found:

> Not only would [Wi Pere's] proposal have allowed for Turanga-wide corporate administration of the Maori land asset, but it would have avoided the time, resources, and divisiveness of block-by-block inquiry and adjudication by the commission and, later, the Native Land Court.[264]

111 Instead, the Poverty Bay Land Titles Act 1874 was introduced to regularise the status of the titles issued by the Commission, in the wake of Crown concerns over the legality of the deed of cession and Commission's powers to issue valid titles.[265] It provided that further claims within the returned land could be investigated by the Native Land Court. The second schedule to the Act provided that the returned land would be subdivided into tribal blocks. This had been proposed by Crown agent Samuel Locke, who estimated the area to be awarded to each iwi: 400,000 acres to Te Aitanga a Māhaki, 51,600 acres to Ngāitahupo (Ngāi Tāmanuhiri), 5,000 acres to Rongowhakaata, and 185,000 acres to sections of Rongowhakaata and Ngāti Kahungunu.[266] However, there was no provision to protect these boundaries in the Act, nor was the Native Land Court required to adhere to the division of the remaining lands on a tribal basis.[267] Instead, the Native Land Court 'simply investigated blocks, hapu by hapu, in the orthodox way of the court, and issued individualised Native Land Court titles to the remaining one million acres of ceded lands'.[268]

112 The Tribunal considered that the deed of cession and the work of the Commission 'signalled the final accession of Turanga Māori to the newly imposed absolute authority of the Crown'.[269] The Commission was the Crown's 'primary instrument of punishment for the events of Waerenga a Hika and Matawhero'.[270] However, many of the Māori who had resisted Crown aggression between 1865 and 1869 were dead, meaning the punitive effect of the Crown's actions fell upon their descendants and on those Māori in the district who had not used force to resist the Crown's incursion.[271] The

263. Waitangi Tribunal, *Turanga Tangata*, vol 1, vol 1, p 391
264. Waitangi Tribunal, *Turanga Tangata*, vol 1, p 391
265. This legislation meant that the ceded land over which native title had purportedly been extinguished by the deed of cession was to be treated as if native title still existed: Waitangi Tribunal, *Turanga Tangata*, vol 1, p 341.
266. Waitangi Tribunal, *Turanga Tangata*, vol 1, p 392
267. Rose, 'Te Aitanga-a-Mahaki Land and Autonomy', #A17, p 31
268. Waitangi Tribunal, *Turanga Tangata*, vol 1, p 392
269. Waitangi Tribunal, *Turanga Tangata*, vol 1, p xxii
270. Waitangi Tribunal, *Turanga Tangata*, vol 1, p 350
271. Waitangi Tribunal, *Turanga Tangata*, vol 1, pp xxii-xxiii

Tribunal found that the children of alleged rebels and their descendants were affected equally harshly. 'Those descendants', the Tribunal stated, 'still have no land in Turanga.'[272]

Do the well-founded claims regarding the Poverty Bay Commission relate to the Mangatū CFL land?

113 The importance of the Poverty Bay Commission's work 'cannot be overstated'.[273] It began the process of the individualisation of title that would ultimately undermine the control Te Aitanga a Māhaki, Te Whānau a Kai, and Ngāriki/Ngā Ariki Kaipūtahi had over their lands and resources, including the Mangatū lands. This work would be continued under the Native Land Court. However, this was clearly not an inevitability in 1873. During the Commission's final hearing, Wi Pere spoke on behalf of all Te Aitanga a Māhaki, Rongowhakaata, and Ngāi Tāmanuhiri seeking the return of one million acres of ceded land to tribal leadership.[274] At that point, the Crown had an opportunity to track a different course to the block by block investigations of the Native land Court, and instead give to Tūranga Māori an opportunity to exercise their tino rangatiratanga over their lands including at Mangatū. It failed to do so. The Tribunal observed that 'the opportunity to adopt a tribal approach to the management of the remaining lands was lost and never regained'.[275]

114 Although the Mangatū CFL lands were included in the lands returned in 1873, they would be consigned to investigation by the Native Land Court in 1881, only eight years after the final hearing of the Poverty Bay Commission.[276] The alienation of Mangatū 2 to private purchasers would follow, as would the vesting of Mangatū 1 in trustees by the mid-1890s, and in the early twentieth century, in the East Coast Commissioner (we discuss this later at paragraph 125). The connection between the work of the Poverty Bay Commission and loss of customary ownership over the Mangatū lands establishes to our satisfaction that these Crown Treaty breaches relate to the CFL land.

The arrival of the Native Land Court, 1874

115 In the wake of the work of the Poverty Bay Commission, which awarded prime Tūranga flat land partly to the Crown and partly to 'loyal' Tūranga Māori, the Native Land Court became the next Crown titling body. The Court began the process of transforming customary tenure over remaining Māori lands in 1874, and approximately 1 million acres of the land ceded in the 1868 deed of cession, including Mangatū, would pass through it.[277] Following the

272. Waitangi Tribunal, *Turanga Tangata*, vol 1, p 367
273. Waitangi Tribunal, *Turanga Tangata*, vol 1, p 393
274. Waitangi Tribunal, *Turanga Tangata*, vol 1, pp 391–392
275. Waitangi Tribunal, *Turanga Tangata*, vol 1, pp 391–392
276. Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, vol 2, p 660
277. Following the Poverty Bay Commission's final sitting, the first sitting of the Native Land Court in Tūranga was in 1874.

Crown's refusal to return the ceded land on a tribal basis, the arrival of the Native Land Court in Tūranga would 'normalise the Crown-Maori relationships on the basis of the Crown's newly acquired ascendancy'.[278]

116 The work of the Native Land Court, and the Crown's native land regime, involved the individualisation of title, which enabled alienation of Māori land in Tūranga 'on a completely unprecedented scale'.[279] It is notable that this happened despite the sustained and innovative attempts by Te Aitanga a Māhaki and Tūranga Māori generally to slow land loss and retain community control of ancestral lands, which we outline below. Within 35 years, three-quarters of the district had been purchased: one-half by settlers, and one-quarter by the Crown. The Court continued the process set in motion by the events at Waerenga a Hika, turning Tūranga 'from an almost entirely Maori district to one in which they were a minority both demographically and economically'.[280]

The Crown's native land regime and the new native title

117 The Tribunal made several key findings on the work of the Native Land Court, and the subsequent process and volume of alienation of land throughout Tūranga. It found that:

(a) Although Maori were very interested in the official ratification of their customary titles, most did not wish to hand over the power to award such titles to a colonial court. They wished to adjudicate their own title questions. The Native Land Court therefore expropriated from Maori, without their consent, the right to make their own title decisions. This breached the tino rangatiratanga guarantee in the Treaty.

(b) The native land legislation removed community land management rights and individualised the alienation process against the generally expressed wishes of Maori both nationally and in Turanga. This breached both the title and tino rangatiratanga guarantees in the Treaty.

(c) The system of title and transfer provided for in the Native Lands Acts from 1873 on was complex, inefficient, and contradictory.

(d) The refusal to support community land management combined with the individualisation of undivided interests meant that land alienation was the only means by which Maori could access the benefits of the colonial economy. But the complexities and inconsistencies of the individualised sale process provided under the Native Lands Acts, and the fact that titles remained in customary tenure, caused prices to be significantly discounted. Cumulatively, these factors caused Maori to sell more land as individuals than they would have sold as communities, and at far lower overall prices.

278. Waitangi Tribunal, *Turanga Tangata*, vol 1, p 397
279. Waitangi Tribunal, *Turanga Tangata*, vol 2, p 395
280. Waitangi Tribunal, *Turanga Tangata*, vol 1, p xxiii

The system was designed to produce this effect. It therefore breached both the title and rangatiratanga guarantees in article 2 of the Treaty.

(e) Maori quickly lost control of the pace and volume of alienation, but the Crown took no effective steps to prevent Maori landlessness even though it had been warned by Maori, officials, and politicians that this would be the result of the system in place. While it cannot be definitively concluded that the Crown designed the system *to produce Maori landlessness*, it can certainly be said that the Crown was aware of the risks and remained recklessly indifferent to them throughout the crucial 35-year period from 1874. This breached the Crown's fiduciary and active protection obligations. [Emphasis added.][281]

118 The Tribunal found that the title adjudication and land transfer system embodied in the Native Land Act 1873 and implemented through the Native Land Court was the subject of sustained protest by Māori over the next 30 years and well into the twentieth century. Under the 1873 Act, the names of all those whom the Court found to be owners of a block of land were recorded on a memorial of ownership. This list of owners did not, however, constitute a legal title to the land. Individual Māori did not receive awards of individual allotments, but rather 'a share in a wider hapu estate'.[282] The land itself technically remained customary land, outside the pale of English law, but with one fundamental exception: the Act made no provision for legal community ownership and management of Māori land. Instead, the Tribunal found, 'the intention and effect of the memorial of ownership was to create individually tradable interests in land where none had existed in Maori custom'.[283]

119 In the Tūranga report, the Tribunal expressed general propositions regarding the alienation of Māori land:

(a) Land selling, in and of itself, was not necessarily damaging to Maori communities. In fact, sales, if controlled, could benefit communities in the new economy.

(b) Communities, if left to themselves, might have been expected to make strategic sales to meet a range of requirements: providing cash flow (given that were few alternatives to producing this from their land) and injecting funds for development.

(c) Having said that, 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.

(d) If, on the facts, land sales occurred at a level that undermined community existence or well-being then this cannot have been the result of rational

281. Waitangi Tribunal, *Turanga Tangata*, vol 2, pp 745–746
282. Waitangi Tribunal, *Turanga Tangata*, vol 1, p 441
283. Waitangi Tribunal, *Turanga Tangata*, vol 2, p 443

community choice. The explanation for divestment on this scale must lie elsewhere.[284]

120 The Tribunal found that in the absence of alternative options for managing customary land, and despite Māori interest in engaging with the colonial economy, Māori involvement was limited to the alienation of individual shares in newly defined blocks. The interests of Te Aitanga a Māhaki, Ngāriki/Ngā Ariki Kaipūtahi, and Te Whānau a Kai in land could be recognised only for the purposes of sale or lease: they could not be mortgaged.[285] It followed that 'modern management systems could not be grafted onto this form of title'.[286] The Tribunal found that 'a system which constrained choice and removed community decision making in this way was unquestionably designed to force sales'.[287]

121 The inefficiencies of the Native Land Court process, the inadequate nature of the titles granted by the Court, and the consequent vulnerability of Māori landowners to the operations of Crown and private purchasers caused many owners to fall into debt.[288] Māori who sought to be included in titles issued by the Court were often required to attend Court sittings far from their homes. Professor Murton noted that 'the almost continuous sessions of the land court at Gisborne and Makaraka had enormous potential to disrupt agriculture'.[289] In addition, the costs of transforming title were high: between 5 and 20 per cent of the price of the land was required for surveys (which might well have to be paid for on credit; that is, at an additional cost), and more for Court fees.[290] One effect of increasing debt was that Māori were often in need of quick cash flow, which in turn encouraged further sales of land interests.[291] The Tribunal found that ordinary Māori owners experienced an 'unbearable statutory pressure to sell' which breached the Treaty principle of active protection and the Crown's fiduciary obligation to Māori.[292]

122 Having waived its right of pre-emption in 1862, the Crown set the conditions for private purchasing of Māori land under the Native Lands Act 1873. Under section 87 of the 1873 Act, purchases were void until affirmed first by a trust commissioner and then by a judge. This affirmation process was often concluded long after payments had been made. The uncertainty and risk created for private purchasers led them to pay a fraction of the price that

284. Waitangi Tribunal, *Turanga Tangata*, vol 2, pp 510–511
285. The Mangatū 1 block, however, was protected from alienation, first by an unusual award to a small number of trustee-owners made by the land court (1881), and later by its own Act of Parliament (1893).
286. Waitangi Tribunal, *Turanga Tangata*, vol 2, p 527
287. Waitangi Tribunal, *Turanga Tangata*, vol 2, p 527
288. Murton, 'Te Aitanga a Mahaki, 1860–1960', #A26, p 645
289. Waitangi Tribunal, *Turanga Tangata*, vol 1, p 100
290. Waitangi Tribunal, *Turanga Tangata*, vol 2, pp 518–519
291. Waitangi Tribunal, *Turanga Tangata*, vol 2, p 516
292. Waitangi Tribunal, *Turanga Tangata*, vol 2, p 536

they would for a Crown-granted title.[293] By contrast, the Crown's purchasing was unaffected by section 87. However, the Crown itself discounted the prices it paid Māori because of the long wait before piecemeal purchases were transformed into separate titles by a partition order of the Court. But at the same time, the Crown protected its own interests as a purchaser: section 42 of the Immigration and Public Works Act Amendment Act 1871 and section 3 of the Government Native Land Purchases Act 1877 gave the Crown the power to exclude private purchasers from acquiring interests in a block in which the Crown was negotiating a lease or purchase. The Tribunal observed, 'put bluntly, the Crown could, by proclamation in the *Gazette*, give itself a monopoly whenever it wished to.'[294]

123 Further uncertainty was created by the constant changes in the Crown rules and policies governing the partition of purchased land. Section 65 of the 1873 Act provided some protection to landowners by allowing the Native Land Court to subdivide the land between sellers and non-sellers only if a majority of the owners consented. However, this safeguard was removed within four years. Section 6 of the Native Land Amendment Act 1877 allowed the Crown to apply to the Court to cut out its proportionate share where it had purchased undivided interests. The Native Land Act 1873 Amendment Act 1878 allowed any owner to apply to the Court to determine the value of their interest, in order to partition out an equivalent portion of land. The 1880s saw the Crown's regime for partition become confused as policy was changed under the Native Land Administration Act of 1886, only for that change to be reversed in 1888. The Validation Court was established in 1893 in order to perfect partitions, among other things. Then one year later, under section 17 of the Native Land Court Act 1894, any person 'interested in the land' could begin partition proceedings in the Native Land Court.[295] The Tribunal concluded that in the twenty years after the introduction of the Crown's native land regime in Tūranga, 'the subdivisional rules U-turned three times'.[296] Despite the various attempts to change the rules, 'years of uncoordinated sales of undivided interests rapidly produced a patchwork of small blocks as buyers (whether the Crown or settlers) went to the court to have their interests defined and partitioned out'. The resulting problem of dwindling blocks and landholdings would continue into the twentieth century.[297]

124 Because of the low prices and high costs, land sales did not provide Māori with the opportunity to develop their other lands, or to make alternative investment. Instead, the proceeds from selling individual interests were often insufficient for anything other than consumption purposes.[298] For this reason, Professor Murton observed, 'Basically, through the 1870s and 1880s, both the

293. Waitangi Tribunal, *Turanga Tangata*, vol 2, p 519
294. Waitangi Tribunal, *Turanga Tangata*, vol 2, p 474
295. Waitangi Tribunal, *Turanga Tangata*, vol 2, p 458
296. Waitangi Tribunal, *Turanga Tangata*, vol 2, p 459
297. Waitangi Tribunal, *Turanga Tangata*, vol 2, p 458
298. Waitangi Tribunal, *Turanga Tangata*, vol 2, pp 515–516

Crown and private individuals of all sorts were trying not only to relieve Te Aitanga-a-Mahaki of their land, but also of any money they received for it'.[299] These features of the scheme breached the Treaty principles of active protection and equity.

125 This process of individualisation and fragmentation of interests through partition occurred in Mangatū 2 – a block awarded to individuals of Ngāi Tamatea, a hapū of Te Aitanga a Māhaki. The block was subdivided into 16 blocks of different acreages in 1888, and private purchaser F J Tiffen acquired most of Mangatū 2 through 106 purchase deeds over 10 years.[300] Only one small block of 60 acres remained in Māori ownership.[301] In her research report, Jacqueline Haapu described the alienation of Mangatū 2:

> The Native Land Act allowed Maori to subdivide and partition their lands. This process made Maori susceptible to the persuasion of European speculators as they became divorced from the protection of communal ownership. Once interests were individualised, settlers would slowly buy the shares in the land. If they could not acquire all the interests a partition was made. The result of this system was that Maori who did not sell became owners of landlocked and uneconomical blocks and eventually sold their land to the purchaser. This is exemplified by the purchase of Mangatu 2C, 2D, 2J, 2M, and 2P.[302]

126 At the beginning of the twentieth century Te Aitanga a Māhaki, Ngāriki/Ngā Ariki Kaipūtahi, and Te Whānau a Kai faced a new Crown institution – Maori Land Boards. These boards were created to manage the leasing of Māori land, and from 1908 became responsible for the supervision of land sales. The boards acted as compulsory agents for the owners in all alienations.[303] One out of the three members of a board was required to be Māori, although this requirement was abolished in 1913.[304] They could lease land for up to 50 years, which ensured ongoing income for owners and the payment of their rates, but also meant administration costs were deducted from income before the owners received it. This arrangement was entirely the consequence of the Crown's native land regime, which prevented Māori landowners from managing and developing their land. Generally, individual owners received little for leasing their land, and the long lease terms meant that owners would

299. Murton, 'Te Aitanga a Mahaki, 1860–1960', #A26, p 645
300. Waitangi Tribunal, *Turanga Tangata*, vol 2, p 482
301. Jacqueline Haapu, 'Te Ripoata o Mangatu: The Mangatu Report', 2000, #A27, pp 37, 48–49, 75–76
302. Haapu, 'Te Ripoata o Mangatu: The Mangatu Report', #A27, p 48
303. This change in the land board's role was a result of the Maori Land Laws Amendment Act 1908. A further change would result from the Native Lands Act 1909, where all existing restrictions on the alienation of Māori freehold land were invalidated and a new set of statutory restrictions were imposed. The Tribunal described how the boards became responsible for ensuring 'that the instrument of alienation had been properly executed, that it was not contrary to good faith and equity, that the owners would not be rendered landless as a result of the sale, that payment was adequate and had been paid': Waitangi Tribunal, *Turanga Tangata*, vol 2, pp 497–498.
304. Waitangi Tribunal, *Turanga Tangata*, vol 2, p 497

have no access or control over their lands for nearly two generations. The Tribunal found that, by 1907, the Tairawhiti Maori Land Board was responsible for leasing a 'very high proportion' of remaining Te Aitanga a Māhaki lands, overwhelmingly to Pākehā farmers.[305]

127 Between 1900 and 1910, Te Aitanga a Māhaki also established 48 incorporations after the Crown made legal provision for Māori incorporations for the first time in the Native Land Court Act 1894 (following the specific Mangatū Incorporation statute in 1893, see paragraph 136 below).[306] The Tribunal found that most of the blocks involved were not being utilised at the time and 'the owners saw incorporations as the best way of securing economic benefit from their lands'.[307] Despite now having legal support to borrow money, the Tribunal found that the incorporations still struggled to access finance within the legal regime established under the Act. Loans had to be processed and administered through the land board, and many small incorporations found this process difficult. The Tribunal pointed to the Waihirere Incorporation, which was successful because 'it administered a comparatively large block and it had leaders with experience on the committee'.[308] The vast majority of the other smaller incorporations were unable to negotiate the legislative requirements and were subject to either sale or lease through the land board.[309]

128 One further function of the Native Land Court under the Crown's native land regime would have dramatic long-term effects on the ability of Māori owners to use and retain their land: the Court was responsible for determining succession to Māori land. The system of equal succession by children to the individual shares of both their parents was established in the 1865 *Papakura* case and implemented in the Native Land Court in every successive generation. Over time, this led to an accelerating fractionation of shares as the number of owners in any one block, or its partitions, multiplied.[310] The Tribunal found that equal succession was inconsistent with tikanga Māori and the fractionation of undivided interests within titles, compounded by the increase in the Māori population during the twentieth century, meant that 'the great majority of Turanga Maori owned tiny, uneconomic shares in scattered blocks'.[311] For owners of shares in blocks that were so small they could produce no return at all, there seemed little point in retaining them.[312] We discuss the

305. Waitangi Tribunal, *Turanga Tangata*, vol 2, pp 497–499
306. Waitangi Tribunal, *Turanga Tangata*, vol 2, pp 502–503
307. Waitangi Tribunal, *Turanga Tangata*, vol 2, p 503
308. Waitangi Tribunal, *Turanga Tangata*, vol 2, pp 504; Kathryn Rose, 'Te Aitanga-a-Māhaki Land: Alienation and Efforts at Development, 1890–1970', #A18, p 370
309. Waitangi Tribunal, *Turanga Tangata*, vol 2, p 504
310. The *Papakura* case established the principle that all children were to inherit equally the shares of both their parents: Waitangi Tribunal, *Turanga Tangata*, vol 2, pp 499–500.
311. Waitangi Tribunal, *Turanga Tangata*, vol 2, p 509
312. Waitangi Tribunal, *Turanga Tangata*, vol 2, p 517

prejudice associated with fractionation of the claimants' remaining land holdings further in chapter 5 (see paragraphs 130–131).

129 In summary, the Tribunal found that the Crown's native land laws and land alienation system breached both the spirit and intent of the Treaty's title guarantee:

> It is clear that the 1873 Act and subsequent Native Lands Acts were expropriatory at two levels. First, rights traditionally vested in the community to decide matters of title were taken away and given to the Native Land Court. Secondly, community title, including crucially the right to control alienation, was extinguished. No compensation was paid for these takings. All of that certainly was raupatu in breach of both the property and control guarantees in article 2.[313]

130 The individualisation of Māori titles breached the express guarantee of tino rangatiratanga – that is, the autonomy, authority, and control promised over whenua, kāinga, and taonga kātoa – in Article 2 of the Treaty's Māori text. The Tribunal found that Article 2 contained two crucial guarantees:

> The first was that Maori title would be respected. This was most explicitly stated in the English text promise to protect Maori in the 'exclusive and undisturbed possession of their lands'. The second was that Maori control over Maori title would also be respected. This is best encapsulated in the Maori text promise of 'te tino rangatiratanga o ratou whenua'. There can be no question but that both promises were absolutely fundamental to the Treaty bargain.[314]

131 Those promises were made to 'chiefs, hapu, and all the people'. But the hapū were excluded by the new native land regime from decisions about alienation, as were the rangatira, the hapū leaders. The Tribunal found that '[i]n this way, the [1873] Act confiscated rights formerly vested in tikanga Maori. It effectively removed from these two levels, the right to participate in the most important decisions the community collectively and its members individually would ever make'[315] By the time the Crown provided a legal mechanism for Māori landowners to incorporate in 1894, the bulk of Tūranga land had already been sold.[316] The Tribunal found that the Crown's native land regime was designed to ensure this outcome.[317]

132 The loss of control over land sales and alienations meant that much of Te Aitanga a Māhaki, Ngāriki/Ngā Ariki Kaipūtahi, and Te Whānau a Kai's tribal estate had passed from their hands by 1900. The claimants' tīpuna were required to engage in a new economy and political order even as they

313. Waitangi Tribunal, *Turanga Tangata*, vol 2, p 536
314. Waitangi Tribunal, *Turanga Tangata*, vol 2, p 534
315. Waitangi Tribunal, *Turanga Tangata*, vol 2, p 446
316. Waitangi Tribunal, *Turanga Tangata*, vol 2, p 532
317. Waitangi Tribunal, *Turanga Tangata*, vol 2, p 529

were being 'kept from access to power, by governments and the legislation, designed to assimilate Maori into mainstream Pakeha society'.[318] The removal of community-based decision-making structures and Māori access to alternative capital investment was devastating to economic initiative and social development. In the Tūranga report, the Tribunal considered that the Crown was aware of the risk of Māori landlessness but failed to act to protect Māori.[319] The Tribunal considered that these effects were hardly an accident; they were inherent in the 'structure and objectives of the native land system'.[320] The purpose of the Crown's native land regime was 'to ensure that the bulk of the Maori land band passed out of Maori ownership'.[321] We discuss the claimants' losses and the socio-economic consequences that resulted from these breaches in more detail in chapter 5.

Do the well-founded claims regarding the Crown's native land regime and new native title relate to the Mangatū CFL land?

133 In our view, Te Aitanga a Māhaki, Ngāriki/Ngā Ariki Kaipūtahi, and Te Whānau a Kai's claims regarding the operation of the Native Land Court clearly relate to the Mangatū CFL land. The many Crown breaches of its responsibility to protect Māori autonomy and the tino rangatiratanga guarantee under Article 2, through the introduction of its native land regime, prejudiced all iwi and hapū in Tūranga, including the customary owners of Mangatū. The loss of Mangatū 2 through private purchase is a typical example of how the Crown-designed process worked to undermine the control of Māori communities over their land.

134 Mangatū 1 was saved from a similar fate to Mangatū 2 by the foresight of Wi Pere. Remarkably, Wi Pere persuaded the Native Land Court to adopt an unorthodox measure and issue a certificate of title to a small group of 12 owners on the understanding that these owners would enter into a voluntary arrangement to manage and hold the land on trust for the larger list of 179 owners.[322] Wi Pere's intention was that the trustees would protect the land from individualisation and the pressure to sell: the block was made inalienable except by 21-year leases.[323] This arrangement was intended as a response to the problems Māori communities faced as a result of Crown policies and legislation affecting their land. It reflected a vision of community

318. Murton, 'Te Aitanga a Mahaki, 1860–1960', #A26, p 654
319. Waitangi Tribunal, *Turanga Tangata*, vol 2, pp 531–532
320. Waitangi Tribunal, *Turanga Tangata*, vol 2, p 537
321. Waitangi Tribunal, *Turanga Tangata*, vol 2, p 526
322. On 29 April 1881 Wi Pere handed into the Court a deed conveying Mangatū 1 to 12 trustees, which had been signed by 86 owners; 20 owners had not signed. The Court advised him that the 12 trustees should execute another deed of trust after the issue of a certificate of title declaring that they held the land for 'the whole of the tribe'. The Court also required that a full list of all the owners in the block be entered into the Court's records for future reference, and the next day Pere submitted a list of 179 owners to the Court: *Mangatu 1* (1881) 7 Gisborne MB, pp 257–262; 'Mangatu Blocks Document Project', vol 2, #131(b), pp 85–90).
323. Waitangi Tribunal, *Turanga Tangata*, vol 2, p 677

management in Mangatū that allowed for a range of overlapping interests. However, despite Wi Pere's success in retaining a level of community control in Mangatū 1, the owners' position remained precarious.

135 In its 1881 *Pouawa* decision (issued one month prior to the opening of the Native Land Court hearings for Mangatū 1), the Supreme Court held that there was no provision in the native land legislation for the Pouawa block to be vested in trust.[324] As a result of this decision, the Court did not accept the trust deed presented by Wi Pere, and found that the 12 trustees in Mangatū would have to be relied upon to adhere 'to the moral if not legal obligation of their trusteeship'.[325] After issuing the title to the trustees, the Native Land Court Judges Heale and O'Brien warned that if the inalienability clauses on the Mangatū titles were removed, 'the estate would then absolutely belong to the 12'.[326]

136 By 1893 Wi Pere, then a member of the House of Representatives, adopted the idea of incorporating the Mangatū 1 owners in order to retain community management of the land. He successfully oversaw the passage of the Mangatu No 1 Empowering Bill 1893, a private member's bill, that declared the 179 individual owners and their successors to be the owners of the Mangatū 1 block and incorporated them as a body corporate. Unlike memorial ownership interests in land, individual shares in the incorporation could not be sold.[327] The owners would elect a management committee of seven to administer the land.[328] It appears that the initial committee members were chosen with great care to reflect the hapū affiliations of the customary owners, and to maintain relationships among the people of Mangatū.

137 The Incorporation's early years were beset by problems in raising finance. As a Māori entity, the management committee was unable to borrow money from the Public Trustee to fund the survey or development of their lands, despite owning a valuable asset. In 1894, the Incorporation vested 80,222 acres of Mangatū 1 in three trustees, including Wi Pere, Henry Jackson (the receiver for the Carroll Pere Trust, see paragraphs 160–161), and the Hawke's Bay Commissioner for Crown Lands. From 1900, Mangatū 3 and Mangatū 4 were also vested in the same trustees, and all three blocks were managed as one entity. This arrangement allowed the Trust to borrow money through the

324. The *Pouawa* decision led to the collapse of an arrangement with settlers from Belfast who waited three months in Tūranga, intending to settle the Pouawa block, but left after it became clear they could not be given secure title to it: Waitangi Tribunal, *Turanga Tangata*, vol 2, pp 488, 567.
325. Waitangi Tribunal, *Turanga Tangata*, vol 2, pp 493; Murton explained that 'the court ruled that it could not legally accept the trust deed, because it could not create any trust estate or recognise the deed tendered, except as a voluntary arrangement under which the great body of owners consented to the land being vested in the 12 persons so named': Murton, 'Te Aitanga a Mahaki, 1860–1960', #A26, p 152
326. Waitangi Tribunal, *Turanga Tangata*, vol 2, pp 493
327. Waitangi Tribunal, *Turanga Tangata*, vol 2, pp 494
328. Waitangi Tribunal, *Turanga Tangata*, vol 2, p 678

Commissioner for Crown Lands. They could also lease the land for periods of 21 years with a right of renewal, binding the owners to 42-year agreements.[329]

138 The Incorporation's committee of management was to be retained and would be responsible for the day-to-day administration of the lands. The trustees were also to secure the consent of the committee of management for all mortgages and transactions above £250.[330] However, it is unclear whether the owners were involved in decisions about leasing. Henry Jackson, the Trust's secretary, kept no records of its transactions until 1908, and a total of 47,276 acres had been leased by that time. The same year, Himiona Katipa presented a petition on behalf of the owners to the Stout-Ngata Commission (a royal commission that inquired into Māori lands and tenure), objecting to the administration of the trustees and the heavy mortgages being placed on the land. Murton observes that the Commission did not consider that the problem warranted specific attention and 'so the trust drifted on until Wi Pere's death in 1915'.[331] By 1917, 59,845 acres of Mangatū 1 were leased to settlers, rather than being lived on and worked by the owners themselves.[332] Jacqueline Haapu gave evidence during the Tūranga Inquiry that 'in essence the owners had lost the right to utilise portions of traditional land for substantial numbers of years'.[333]

139 Following the death of Wi Pere in 1915, the powers of the two remaining trustees were suspended and transferred to the East Coast Commissioner. Parliament authorised a commission of inquiry into the Trust. The Commission recommended that new trustees be appointed, and a new committee elected for each block under new legislation.[334] In our view, the Crown had an opportunity at that time, to provide the owners of Mangatū 1 with a level of control over their lands. Murton considered that the situation was retrievable, and that 'if new trustees had been appointed to replace Wi Pere and Jackson, much closer control might have been retained by Te Aitanga-a-Mahaki'.[335] However, the Crown chose not to follow the Commission's recommendations; it removed the administration of the Mangatū lands from the trustees and placed the land under the control of the East Coast Commissioner until 1947. Mortgages and loans would now be handled without input from the owners' committee of management. The Tribunal found that 'even when the trust lands became directly administered by the Native department (1921 to 1934), Turanga Māori were not involved in the management of their lands)'.[336] The East Coast Commissioner's agent in Gisborne, John Harvey,

329. Waitangi Tribunal, *Turanga Tangata*, vol 2, p 493; Haapu, 'Te Ripoata o Mangatu', #A27, p 125
330. Murton, 'Te Aitanga a Mahaki, 1860–1960', #A26, p 159
331. Murton, 'Te Aitanga a Mahaki, 1860–1960', #A26, p 164
332. Murton, 'Te Aitanga a Mahaki, 1860–1960', #A26, pp 160–161. Jacqueline Haapu provides the larger figures of 62,128 acres leased by 1912: Haapu, 'Te Ripoata o Mangatu', #A27, p 128.
333. Haapu, 'Te Ripoata o Mangatu', #A27, p 125
334. Waitangi Tribunal, *Turanga Tangata*, vol 2, p 507
335. Murton, 'Te Aitanga a Mahaki, 1860–1960', #A26, p 174
336. Waitangi Tribunal, *Turanga Tangata*, vol 1, p 184

also suggested in 1921, that the owners be consulted prior to any leases being undertaken. The Tribunal found that 'in practice this did not happen'.[337]

140 During this period, the Te Aitanga a Māhaki, Ngāriki/Ngā Ariki Kaipūtahi, and Te Whānau a Kai owners and shareholders in the Mangatū Incorporation, were unable to exercise their rights under Article 2 of the Treaty. Rather than assisting Māori to retain community control of their lands and to develop them on behalf of their iwi, hapū and whānau, the legislation and policies of the Crown were intended to transfer the control and management away from Māori to the Crown or settlers.

141 This story demonstrates the extraordinary lengths Wi Pere was required to go to escape the dysfunction of the Crown's native land regime. Sadly, he was only partially successful, and the owners could not escape the consequences of the imperfect titles they were awarded under the regime. Having overcome one barrier to community land control and retention by establishing the Mangatū Incorporation through legislation, Wi Pere and the Māori owners then encountered another in borrowing money to develop their land. Unable to borrow from the private sector, they were dependent on the Crown to provide access to finance. That in turn led to the circumstances where the land was vested in the East Coast Commissioner for nearly two generations. That said Mangatū 1 was eventually returned to the owners' control, having escaped the prolonged piecemeal purchasing that occurred in Mangatū 2. We will return to the East Coast Commissioner, and the Mangatū owners' efforts to exercise control over their lands, in subsequent sections. Our conclusion is that the history of the Mangatū 1 and 2 blocks clearly show that the claims made in relation to the Crown's native land regime 'relate to' the Mangatū CFL land.

142 We now turn to the original determination of title in Mangatū 1, and how the individualisation of interests impacted the Ngāriki/Ngā Ariki Kaipūtahi owners.

The Native Land Court's Mangatū title determination: Ngāriki/Ngā Ariki Kaipūtahi claim, a case study of the impacts of the Crown's titling system

143 Ngāriki/Ngā Ariki Kaipūtahi's claim regarding the reduction of their interests in Mangatū 1 provides a case study in how the individualised titles created by the Crown's native land regime impacted Māori communities and their relationship to the land, even where land was retained. We begin with the background to the titling of the Mangatū 1 block.

144 The Mangatū parent block was originally 160,680 acres.[338] The block was ultimately partitioned into six sections to provide for awards to the parties claiming different parts of the block, and to pay for survey costs.[339] Following an 1881 Native Land Court hearing into the Mangatū 1 block (that is, the

337. Waitangi Tribunal, *Turanga Tangata*, vol 2, p 566
338. Haapu, 'Te Ripoata o Mangatu: The Mangatu Report', #A27, p 12
339. Haapu, 'Te Ripoata o Mangatu: The Mangatu Report', #A27, pp 659–660

largest part of the block, at 146,000 acres), the land was awarded to Wi Pere and Wi Haronga – the claimants representing a group comprising both Ngāti Wāhia and Ngāriki.[340] Pera Te Uatuku (the Ngāriki/Ngā Ariki Kaipūtahi rangatira who was the son of Rawiri Tamanui) was an important witness in Wi Pere's case, and also represented Ngāriki; the Tribunal noted that the Pera Te Uatuku and Wi Pere operated as co-claimants.[341] Another five counterclaims had been lodged with the Native Land Court, including Wi Mahuika's case on behalf of Te Whānau a Taupara seeking their inclusion with Ngāti Wāhia.[342]

145 Over a 12-day hearing, the Native Land Court heard complex evidence regarding customary interests in Mangatū. A primary area of dispute was the status of Ngāriki interests in the block. The Tribunal considered that the Court failed to resolve the conflicting evidence presented by the various parties and treated 'all Ngariki as a single, homogeneous group, when evidence was given that clearly indicated that this was not the case'.[343] The Court further found that Ngāriki had been 'completely broken as a tribe'.[344] However, Wi Pere did not maximise his interests by denying Pera Te Uatuku and his immediate kin 'any place on the block'. The Tribunal considered this was 'a powerful indication that the court had got its tikanga all wrong'.[345] This error particularly affected Ngāriki/Ngā Ariki Kaipūtahi, who maintained that they had not lost their ancestral rights in Mangatū.[346] The Tribunal found that the Court's decision was 'unsafe'.[347]

146 Because of Wi Pere's success in persuading the Court to issue a certificate of title for Mangatū 1 to the 12 trustees, and eventually in securing the statutory incorporation of the owners in 1893, the Court's 1881 determination had little immediate effect on the ability of Ngāriki/Ngā Ariki Kaipūtahi to exercise their customary rights. They were included in the 179 owners, and Ngāriki/Ngā Ariki Kaipūtahi rangatira Pera Te Uatuku was given a prominent leadership role at the head of the list of the 12 trustee-owners (and later in the Mangatū committee of management).[348] However, Wi Pere's success in shielding the Mangatū owners from the individualisation of interests under the Crown's native land regime would only be temporary.

340. The largest portion of the Mangatū block (146,000 acres) was divided after the hearing into Māngatu 1 (100,000 acres), Mangatū 4 (6,000 acres), and Mangatū 5 and 6 (20,000 acres each). The Tūranga Tribunal explained that the hearing of this area is typically referred to as being for the Mangatū 1 block. The Mangatū 2 block (11,000 acres) was uncontested and went before the court separately, as was also the case with the smaller Mangatū 3 block: Waitangi Tribunal, *Turanga Tangata*, vol 2, p 664.
341. Waitangi Tribunal, *Turanga Tangata*, vol 2, p 664.
342. Waitangi Tribunal, *Turanga Tangata*, vol 2, pp 664–665
343. Waitangi Tribunal, *Turanga Tangata*, vol 2, p 693; Haapu, 'Te Ripoata o Mangatu', #A27, p 34
344. *Mangatu 1* (1881) 7 Gisborne, p 201 (Waitangi Tribunal, *Turanga Tangata*, vol 2, p 674)
345. Waitangi Tribunal, *Turanga Tangata*, vol 2, pp 677–678
346. Waitangi Tribunal, *Turanga Tangata*, vol 2, pp 671–672
347. Waitangi Tribunal, *Turanga Tangata*, vol 2, p 678
348. Waitangi Tribunal, *Turanga Tangata*, vol 2, pp 677–678

147 The creation of the Mangatū Incorporation in 1893 did not protect the Māori owners from the Crown's policy of individualisation and the determination of relative interests in land. Section 9 of the Mangatu No 1 Empowering Act 1893 provided for the owners' relative shares to be determined by consent, or by the Native Land Court in the case of a dispute 'as if the said land were subject to the ordinary jurisdiction of that Court'.[349] Following Wi Pere's death in 1915, questions arose within the community of Mangatū owners over the ownership of the land.[350] The next year, a committee of owners began a process of dividing the 179 individuals recorded in 1881 into four groups to apportion individual relative interests.[351] Disagreements plagued this process and created lasting divisions within the community of owners.[352] Unable to reach agreement, the committee decided to wait for a session of the Native Land Court to finalise the apportionments.

148 By 1916, when the Court held its first preliminary hearing on Mangatū 1 interests, the Crown's policy of determining relative interests in Māori land was well-established.[353] The Rules and Regulations of the Native Land Court under the Native Land Court Act 1894 (gazetted in 1895) stated that it was the duty of the Court 'on every investigation of title or partition, and on determining any succession to ascertain or define the relative interests in the land of owners or successors'.[354] In the absence of agreement among the owners, this policy was applied to the Mangatū 1 owners.

149 The Court process involved contentious litigation over the customary interests in land. Arguments arose over how the owners' right under tikanga should be quantified and defined against the rights of others. Murton observed that the process of determining relative interests exemplified the replacement of

349. Section 45 of the Native Land Act 1873 provided: 'at the same sitting of the Court and if the majority in number of the claimants shall so desire it, the inquiry shall be extended in order to ascertain in such instances the amount of the proportionate undivided share that each such owner of such land is entitled to according to Native usage and custom'.
350. Bernadette Arapere, 'Ngariki Kaiputahi Research Report', 2000, #A21, p 30
351. Waitangi Tribunal, *Turanga Tangata*, vol 2, pp 679–680
352. Murton, 'Te Aitanga a Mahaki, 1860–1960', #A26, p 204
353. The Crown's relative interests policy dated from the Native Land Act 1873, which provided that a majority of awardees could request that the Court ascertain 'the amount of proportionate of the proportionate undivided share that each owner is entitled under native usage and custom'. The Land Court Act 1886, gave the Native Land Court further powers to determine relative interests when making any order. Under the Native Land Amendment Act (No 2) 1878, any owner or interested party could request that the Court determine their share of a block of Māori land. The Intestate Native Succession Act 1875 made it mandatory for the Court to determine proportionate share when determining successors to a deceased owner, and the Native Land Court Act 1886 Amendment Act (No 2) 1888 required the Court to determine relative interests in land 'whether such procedure is applied for or not': Native Land Act 1873, section 45; Native Land Act Amendment Act (No 2) 1878, section 11; Intestate Native Succession Act 1876, section 3; Native Land Court Act 1886, section 42; Native Land Court Act 1886 Amendment Act 1888
354. Rules and Regulations of the Native Land Court, 7 March 1895, *New Zealand Gazette*, 1895, no 18, pp 442; Waitangi Tribunal, *He Maunga Rongo: Report on Central North Island Claims*, 4 vols (Wellington: Legislation Direct, 2008), vol 2, p 726

a common property regime, where 'ultimate control over land was vested in whanau and hapu leadership', with a private property regime.[355] As a result, it 'became a matter of principle to have the shares of an ancestor increased, and disagreements over whakapapa, the mana of ancestors, their ability to occupy and protect the land, and their placing of rahui, led to increasing rifts within hapu' (we discuss the prejudice associated with this process in chapter 5, see paragraphs 56–60).[356]

150 From 1916, Ngāriki/Ngā Ariki Kaipūtahi increasingly lost control of their core ancestral lands, as their attempts to reargue the 1881 case failed. From the first relative interest hearing in 1917, the legacy of the 1881 judgment was apparent as individuals stressed Ngāti Wahia connections over Ngāriki connections, or were placed on the aroha list.[357] The Tribunal found clear evidence 'that identification as Ngariki was discouraged by the 1881 decision and that the wider Ngariki group, including Ngariki Kaiputahi suffered a loss of mana as a result'.[358] In a further development which would impact on Ngāriki/Ngā Ariki Kaipūtahi, the Native Land Court was asked in 1916 by William Pitt, an advocate of Te Whānau a Taupara, to consider whether members of that hapū should be included on the title of the Mangatū 1 block.[359] The Native Land Court did not accept his application, but Te Whānau a Taupara petitioned Parliament for an inquiry into the ownership of the Mangatū 1 block.[360] Here, they were successful and in 1917 Parliament intervened. Section 6 of the Native Land Amendment and Native Land Claims Adjustment Act 1917 empowered the Native Land Court to reopen the question of Te Whānau a Taupara interests in Mangatū 1 and Mangatū 4 blocks. According to the Supreme Court, the 1917 amendment gave Te Whānau a Taupara a blank slate upon which to argue their interests in the block.[361]

151 In 1918, the Native Land Court drew up a new list of Te Whānau a Taupara individuals who might be added to the title of the Mangatū 1 block. The re-introduction of Te Whānau a Taupara meant that the argument between them and Ngāti Wahia that had dominated the 1881 hearing was essentially relitigated.[362] The Tribunal found that there was little indication of coopera-

355. Murton, 'Te Aitanga a Mahaki, 1860–1960', #A26, pp 222–223
356. Murton, 'Te Aitanga a Mahaki, 1860–1960', p 204
357. The Ngāriki list of owners decreased from 64 individuals to 47, the aroha list increased from nine to 20: Waitangi Tribunal, *Turanga Tangata*, vol 2, p 681.
358. The Court issued its decision on 11 May 1917. In the final allocation the Ngāti Wahia groups were to receive 57,000 shares, the Ngāriki groups were awarded 15,000 shares, the Wi Pere whānau was awarded 15,000 shares, and the Wi Haronga whānau was awarded 11,000 shares: Waitangi Tribunal, *Turanga Tangata*, vol 2, pp 682–683.
359. Te Whānau a Taupara had previously been awarded a 6,000-acre portion of the original Mangatū block which became Mangatū 4: Waitangi Tribunal, *Turanga Tangata*, vol 2, p 680.
360. Haapu, 'Te Ripoata o Mangatu', #A27, p 132; 'petition of Karaitiana Ruru and 30 others', no 213 (2016), *Appendix to the Journal of the House of Representatives*, 1917, I-3, p 11
361. *In Re Mangatu Nos 1 & 4 Blocks* [1922] NZLR 158 (SC), p 166; document bank, #A21(c), pp [115]–[118]
362. Waitangi Tribunal, *Turanga Tangata*, vol 2, p 686

tion between parties during this period, as 'relationships between the groups appear to have deteriorated further'.[363] This time, the Native Land Court held that Te Whānau a Taupara were 'entitled to a large award', and they received 40,000 shares.[364] In contrast, the Ngāriki group's entitlement was reduced; they received only 8,000 shares.[365] The Tribunal found there was a breach of the Treaty in that the Crown, when it intervened, failed to give Ngāriki/Ngā Ariki Kaipūtahi the same opportunity to reargue their case as Te Whānau a Taupara.[366]

152 The Crown's native land regime removed control of Māori land from hapū and their rangatira in breach of Article 2 of the Treaty, imposing a system of adjudication of titles which failed to recognise tikanga or to give effect to tino rangatiratanga. The Native Land Court's longstanding preoccupation with defining relative interests (in accordance with its legislation) could, and in this case did, create increasingly acrimonious and lasting disputes among large groups of owners and their uri. For Ngāriki/Ngā Ariki Kaipūtahi, and the other hapū involved in the Mangatū 1 title disputes, this outcome exemplifies the corrosive consequences on customary rights and relationships of the Crown's system for determining title.

Do Ngāriki/Ngā Ariki Kaipūtahi's well-founded claims regarding the Native Land Court's Mangatū title determination relate to the Mangatū CFL land?

153 Ngāriki/Ngā Ariki Kaipūtahi's claim concerning the 1881 Mangatū title determination and the Crown's subsequent legislative intervention clearly relates to the Mangatū lands. Ultimately for Ngāriki/Ngā Ariki Kaipūtahi, this lengthy process perpetuated the myth that they had lost their occupation sites in Mangatū by conquest. They suffered a reduction in their interests in Mangatū, and the ongoing Court hearings and appeals 'pitted hapu against hapu and whanau against whanau, leaving a legacy of bitterness in its wake'.[367] We will address the prejudice suffered by Ngāriki/Ngā Ariki Kaipūtahi as a result of the Crown's breaches in more detail in chapter 5.

The Tūranga trusts, 1878–1955

154 In Tūranga, the introduction of the Crown's processes for the determination of title through the Poverty Bay Commission and then the Native Land Court led to a remarkable but ill-fated attempt by Tūranga Māori to sidestep the

363. Waitangi Tribunal, *Turanga Tangata*, vol 2, p 685
364. *Mangatu 1 & 4* (1921) 46 Gisborne MB 144 (46 TRW 144); Grant Young, 'Mangatu: The Customary Interests of Ngariki Kaiputahi in the Mangatu Block and the Proceedings of the Native Land Court', February 2018, #P4, pp 45, 46
365. This figure was unchanged after almost all parties appealed the Court's decision to the Native Appellate Court, which in its 1922 judgment reiterated the judgment of 1881 and its finding that 'Ngariki . . . were a conquered and subordinate people'; Waitangi Tribunal, *Turanga Tangata*, vol 2, p 689; *Mangatu 1 & 4* (1922) 21 Native Appellate Court MB 1 (21 TRW 1), p 51.
366. Waitangi Tribunal, *Turanga Tangata*, vol 2, pp 747–748
367. Waitangi Tribunal, *Turanga Tangata*, vol 2, p 692

new legal regime. The Tūranga trusts were the first initiative Wi Pere and his lawyer William L Rees (a prominent radical liberal who became a member of the House of Representatives) took to promote community structures that facilitated the development of Māori land by Māori – something the Crown's native land regime did not provide for. In some ways, the trusts can be distinguished from Wi Pere's efforts to protect the Mangatū lands from alienation. However, although the story of the trusts begins differently from the story of Mangatū, the Crown's failure to provide for effective community management and development of Māori land saw the Mangatū lands drawn into the trusts at different points, leading to both permanent and temporary alienations of Māori land.

155 In the late 1870s, communities throughout the East Coast were attracted to the prospective benefits of having their lands managed by trustees, and schemes that 'offered a role for local leadership and an alternative to the fragmentation of their assets in individual dealings'.[368] As a result, Tūranga Māori vested over 70,000 acres of their land in various trusts.[369] This marked the start of a prolonged attempt by Rees and Pere to make a success of what the Tūranga report called 'Native Land Act avoidance schemes'.[370] These schemes were a direct result of the Crown having excluded rangatira and hapū from collective control of their land in the new legal regime, in breach of Article 2 of the Treaty. Over the decades that followed, the Crown's initial failure to support the trusts, and its later failure to provide an adequate remedy for the trusts' financial difficulties, led to Tūranga hapū and iwi losing tens of thousands of acres of land. Those affected included Te Aitanga a Māhaki, Ngāriki/Ngā Ariki Kaipūtahi and Te Whānau a Kai.

156 The first attempt to establish community trust structures in 1878, via the Rees–Pere trusts, was frustrated by the failures of the land title and transfer system set up for Māori land under the Native Land Act 1873. The trusts were set up with the intention of empowering local Māori communities. Community leaders were appointed as trustees to decide on development and close settlement of their lands; they might choose to retain some land while selling other parts to pay for local infrastructure such as roads, bridges, and schools. But a major problem was that settlers had already acquired much of the best Tūranga land after the Poverty Bay Commission had awarded the land titles to individual Māori through Crown grants. The costs for Māori of getting it back proved crippling.[371]

157 Additionally, Pere and Rees suffered legal and political setbacks. The 1881 *Pouawa* decision, referred to above, undermined confidence in the Rees-Pere trusts, and also restricted their ability to hold land on trust, other than via Crown grant. As a consequence, the ineffective Rees–Pere trusts soon

368. Waitangi Tribunal, *Turanga Tangata*, vol 2, p 583
369. Waitangi Tribunal, *Turanga Tangata*, vol 2, p 539
370. Waitangi Tribunal, *Turanga Tangata*, vol 2, p 523
371. Waitangi Tribunal, *Turanga Tangata*, vol 2, pp 486–487, 542

collapsed under the debts they had accumulated by reacquiring land on the fertile Tūranga flats.[372] The Tribunal found that the Crown's failure to provide adequate systems for Māori community title and management, and to prevent piecemeal erosion of community land interests, breached both the tino rangatiratanga guarantee in Article 2 and the principle of active protection.[373]

158 The Rees-Pere trusts were succeeded by the New Zealand Native Land Settlement Company, a Māori-Pākehā joint stock company that combined Pākehā investors' capital with land contributed by Māori. The company was to have a share capital of half a million pounds. Its headquarters were in Auckland, and its directors included many well-known Auckland businessmen. Most of the Rees-Pere trusts' lands were transferred directly to the company, along with the trusts' debts.[374] The company also acquired many more lands, some by direct purchase. For instance, in 1883 Wi Pere and the Mangatū owners vested the 40,000-acre Mangatū 5 and 6 blocks in the company in order to pay for the survey and court costs associated with partitioning and determining title for the whole of Mangatū.[375]

159 Kathryn Rose estimated that, by 1883, the New Zealand Native Land Settlement Company held 115,000 acres of Te Aitanga a Māhaki land (not all in the inquiry district).[376] Like its predecessor, the company struggled and, following the depression of the late 1880s, it failed.[377] In 1891, a mortgagee sale was announced to pay off the company's debt to the Bank of New Zealand, which resulted in the loss of 36,300 acres of land Māori had earlier invested in the company, with consequential shareholder losses of £86,000.[378] The Tribunal found that the company's failure was due in large part to bad business decisions or poor economic conditions for which the Crown 'cannot be held responsible'.[379] However, Tūranga Māori would not have been exposed to this kind of risk but for the Crown's prior Treaty breaches, notably the large

372. Waitangi Tribunal, *Turanga Tangata*, vol 2, p 542
373. Waitangi Tribunal, *Turanga Tangata*, vol 2, p 746
374. Waitangi Tribunal, *Turanga Tangata*, vol 2, pp 542–543
375. Mangatū 5 and 6 blocks were originally intended by Wi Pere to be sold to the Crown to pay the costs of surveying the whole of Mangatū. However, this arrangement fell through when the Crown wanted a different portion of Mangatū and Pere refused to change his original offer. The Mangatū owners thus turned to the New Zealand Native Land Settlement Company as a means of recouping the costs of the survey and court fees: Haapu, 'Te Ripoata o Mangatu', #A27, pp 81, 84–87.
376. The Tribunal observed that there are no complete records of the lands held by the company, but it found that the following Te Aitanga a Māhaki lands were vested in the company: Mangatū 5 and 6 (40,000 acres), Whataupoko (11,990 acres), Okahuatiu 1 (26,427 acres), Makauri (acreage unknown), Matawhero 1 (acreage unknown), Matawhero B (656 acres), Okahuatiu 2 (20,000 acres), Tangihanga (7,000 acres), Pukepapa A (1,200 acres), Motu 1 (2,000 acres), and the Karaka block. The Ngakoroa block and Mangatū 1 were added to the company by 1886, though the Mangatū 1 block was made inalienable except by lease: Waitangi Tribunal, *Turanga Tangata*, vol 2, p 580; Rose, 'Te Aitanga-a-Mahaki', #A17, p 417.
377. Waitangi Tribunal, *Turanga Tangata*, vol 2, pp 543–545, 556
378. Waitangi Tribunal, *Turanga Tangata*, vol 2, p 545
379. Waitangi Tribunal, *Turanga Tangata*, vol 2, p 746

land losses resulting from the operation of the Poverty Bay Commission and the Crown's native land regime. Furthermore, the Tribunal found:

> The communities who supported Rees and Pere did so not just because they saw an economic future, but because the schemes were rooted in their own political and cultural landscape. . . . The failure of the Native land regime to create conditions for Maori economic development led Pere and Rees into unsustainable initial ventures, and then to experiment on a much larger scale in the [New Zealand Native Land Settlement] company. The scale of economic reckoning in the depression of the 1880s was correspondingly greater.[380]

160 Following the mortgagee sales, the company's remaining lands (approximately 64,000 acres) were transferred in 1892 to a new trust formed by Sir James Carroll and Wi Pere.[381] Eight Te Aitanga a Māhaki blocks, including Mangatū 5 and 6 blocks, were included in the Carroll Pere Trust as principal security blocks.[382] Further blocks were vested in the Trust between 1894 and 1897, through the operation of the newly established Validation Court.[383] Te Whānau a Kai's land in the Tahora 2C blocks was vested in the Carroll Pere Trust through the Court in 1896. These blocks would become security for the remaining debt on Trust lands, enabling the debt to be spread over more blocks. Eventually, nearly 100,000 acres of Tūranga land were vested in the Carroll Pere Trust.[384]

161 From the beginning, the Carroll Pere Trust was heavily burdened with costs, exacerbating the debt of £58,000 it had inherited from the New Zealand Native Land Settlement Company.[385] During the 1890s, the Trust's debt doubled and, by 1902, it had risen to £156,383.[386] The Tribunal found that the Trust suffered from 'the complex, inefficient, and contradictory system of individual transfer which destabilised the trust's titles': the result was a 'tenurial mess'.[387] Furthermore, the Trust encountered 'exceptionally high legal costs

380. Waitangi Tribunal, *Turanga Tangata*, vol 2, p 583
381. Michael Macky, 'Trust Company Management by Wi Pere and William Rees', 2002, #F11, p 189
382. These blocks were Whataupoko G (1,520 acres), Motu (2,000 acres), Okahuatiu 2 (15,190 acres), Mangatū 5 and 6 (40,150 acres), Whataupoko 5 (125 acres), Matawhero 5 (34 acres), and Matawhero 1 (185 acres): Waitangi Tribunal, *Turanga Tangata*, vol 2, p 581.
383. These were blocks with incomplete titles originating in transactions conducted between Māori landowners and the Company in the 1880s: Waitangi Tribunal, *Turanga Tangata*, vol 2, p 558; Michael Macky, 'Trust Company Management', #F11, pp 179–180. The Validation Court was established under the Native Land (Validation of Titles) Act 1893 to perfect defective titles resulting from transactions which had not complied with the formal requirements of the native land legislation at the time. The uncompleted transactions fell into certain 'problem' categories which are set out in the Tūranga report: Waitangi Tribunal, *Turanga Tangata*, vol 2, pp 463–464.
384. Waitangi Tribunal, *Turanga Tangata*, vol 2, p 546
385. Macky, 'Trust Company Management', #F11, p 179
386. Macky, 'Trust Company Management', #F11, p 224
387. Waitangi Tribunal, *Turanga Tangata*, vol 2, p 568

attributable to the unprecedented level of litigation over trust lands.'[388] The Tribunal found 'the system that allowed these things to happen was established and operated in breach of te tino rangatiratanga guarantee and the Crown's obligation of active protection of community titles.'[389]

162 From 1896, Parliament became increasingly concerned about the Trust lands' growing debt.[390] However, while there was considerable awareness of the problem at a government level, no action was taken until 1901 when the Bank of New Zealand, which held the mortgage to cover the Trust's debts, threatened foreclosure. The bank sought government intervention, and in August 1902, the East Coast Native Trust Lands Bill was passed. It vested all the Carroll Pere Trust land in a new entity, the East Coast Native Lands Trust Board.[391] While the Tribunal acknowledged the Crown's intervention at that time was welcome, it also found that the failure to intervene earlier 'resulted in an escalation of the trust debt and ultimately in further loss of land.'[392] The Crown's omission represented a failure to discharge its Treaty obligation of active protection.

163 The Trust lands were managed by a board of three Pākehā businessmen, whose job was to prevent a further mortgagee sale and clear the debt. The Board sold considerable portions of land in 1904 and 1905, which enabled it to pay off the debt to the Bank.[393] In 1906, the remaining estate was transferred to the control of the East Coast Commissioner (the East Coast Native Lands Trust Board and the East Coast Commissioner are referred to collectively as the East Coast Trust).[394] The Commissioner, who administered 185,000 acres across the East Coast, was empowered to borrow externally to develop the Trust land, and to operate the Trust as a single unit so that profitable blocks could support the less profitable blocks.[395] However, the Commissioner was also responsible for managing the remaining debt equitably, so that blocks should only have been encumbered with their share of the debt.

164 In 1908, the Validation Court proposed that blocks be termed either 'creditor' blocks, which were owed money by the Commissioner, or 'debtor' blocks, which owed money.[396] For instance, Mangatū 5 and 6 were found by auditors to owe £16,519 to the Commissioner.[397] However, the Tribunal found that Thomas Coleman Junior, the then East Coast Commissioner, mistakenly

388. Waitangi Tribunal, *Turanga Tangata*, vol 2, p 492
389. Waitangi Tribunal, *Turanga Tangata*, vol 2, p 568
390. Waitangi Tribunal, *Turanga Tangata*, vol 2, p 547
391. This land amounted to 244,985 acres, including 98,299 acres in the inquiry district: Waitangi Tribunal, *Turanga Tangata*, vol 2, pp 547–548.
392. Waitangi Tribunal, *Turanga Tangata*, vol 2, p 568
393. The Board was appointed early in 1903. Its members were John McFarlane, who became chairman, John Harding, a businessman, and Walter Shrimpton, a local farmer active on local bodies in Hawke's Bay: Waitangi Tribunal, *Turanga Tangata*, vol 2, p 548.
394. Rose, 'Te Aitanga-a-Mahaki', #A18, p 182
395. Waitangi Tribunal, *Turanga Tangata*, vol 2, pp 547, 570
396. Waitangi Tribunal, *Turanga Tangata*, vol 2, p 565
397. Haapu, 'Te Ripoata o Mangatu', #A27, p 97

interpreted the Validation Court's directions to mean that he should charge compound interest on the debt; it was not until in 1922 that it was accepted an error had been made.[398] As a result, the repayment of the debt was delayed and both the East Coast Native Trust Lands Board and the East Coast Commissioner sold land without consulting the Māori owners during this period.[399] These sales included Mangatū 5 and Mangatū 6 blocks, which were gradually alienated to pay off general debts inherited from the failure of the Tūranga trusts.[400]

165 In the end, the number of blocks the Commissioner had in the estate – the legacy of the whole Tūranga trust project – allowed him access to credit and commercial clout. With advantages that Pere and Rees were denied, he was able finally to 'return . . . some lands, well-farmed and prospering, to the great-grandchildren of those old people who had hoped that Pere and Rees might secure them a role in the new regional economy'.[401] The returns were also sufficient for the beneficial trust owners, guided by the tikanga of their tīpuna, to make some recompense to the descendants of those whose lands were sold to repay the Bank of New Zealand debt in 1891, allowing the remaining lands to survive. The Tribunal made the important observation that tikanga still guided all the trust owners many years later to acknowledge the contribution of their whanaunga to the survival of some original trusts' lands involved in their joint enterprise, commenting:

> It seems to us to underline the owners' recognition of the collective enterprise they had entered on together in the latter part of the nineteenth century. Nothing could have been further from the individual decision-making enshrined in the 1873 Native land legislation which their tupuna had sought to escape.[402]

166 While the East Coast Native Trust Lands Act was clearly a rescue package, the Tribunal found that, once it was clear that the East Coast Trust would be a long-term institution, 'the Crown should have required the board, and later the commissioner who superseded it, to include Maori in the development of policy for the administration of their lands'.[403] This further omission represented another failure by the Crown to discharge its Treaty obligation of active protection.[404]

167 Te Aitanga a Māhaki and Ngāriki/Ngā Ariki Kaipūtahi had a great deal at stake in the trusts' ultimate fates. Te Aitanga a Māhaki lost around 100,000 acres through the Rees-Pere trusts, the Native Land Settlement Company, the

398. Waitangi Tribunal, *Turanga Tangata*, vol 2, p 565; Macky, 'Trust Company Management', #F11, pp 296, 298
399. Waitangi Tribunal, *Turanga Tangata*, vol 2, p 565
400. Waitangi Tribunal, *Turanga Tangata*, vol 2, p 581
401. Waitangi Tribunal, *Turanga Tangata*, vol 2, p 585
402. Waitangi Tribunal, *Turanga Tangata*, vol 2, p 585
403. Waitangi Tribunal, *Turanga Tangata*, vol 1, p xxvi
404. Waitangi Tribunal, *Turanga Tangata*, vol 2, p 567

Carroll Pere Trust and the East Coast Native Trust Lands Board (these losses are discussed in further detail in chapter 5, see paragraphs 134–145). From 1902, the Tribunal found that a total of 73,592 acres of land in the inquiry district had been sold by the East Coast Trust Board and the East Coast Commissioner.[405]

168 Te Whānau a Kai were hit particularly hard by the loss of land in the Tahora 2C2 section 2 and 2C3 section 2 blocks during the period when they were administered by the East Coast Commissioner, in circumstances which (in the *Te Urewera Report*) the Tribunal found 'entirely inappropriate.'[406] In particular, the Tribunal observed that there had been no talk of selling Tahora lands until Thomas Coleman Junior took over as Commissioner from his father in 1920. Following his appointment, Coleman made two large sales in Tahora 2C3 to clients of his law firm in 1920 and 1921 (we discuss these sales further in chapter 5, see paragraphs 140–141).[407] Despite the protests of the Trust's own solicitor, James Nolan, who called for Coleman's immediate suspension, the Native Department did not act to prevent the sale. The failure to investigate these serious allegations, and the failure to prevent sales until their propriety was clear and the wishes of the owners were known, was a breach of the Treaty principle of active protection.[408]

169 The Tūranga trusts were an impressive regional venture, based on a vision for the acquisition and development of Māori land that transcended the aims of the native land legislation. They attracted Māori landowners from throughout Tūranga and the East Coast who sought to retain Māori land and to protect active tribal involvement in regional development. To achieve their aims, Pere and Rees sought recognition of their trusts from the Courts and from Parliament, which they failed to receive. They also had to reckon with the far-reaching impacts of the depression of the late 1880s, which would prove fatal to many New Zealand companies. In the wake of Waerenga a Hika, Ngātapa, the work of the Poverty Bay Commission, and the Native Land Court, Tūranga hapū and iwi were poorly placed to survive such an impact. Throughout this sad story, the Crown committed multiple Treaty breaches, including failing to:

- support Rees and Pere's efforts over a number of years to build alternative structures for Tūranga Māori community control, management, and development of their lands, leading to an incremental increase in their debt;

405. Waitangi Tribunal, *Turanga Tangata*, vol 2, pp 549, 580–581
406. Waitangi Tribunal, *Te Urewera*, 8 vols (Wellington: Legislation Direct, 2017), vol 3, p 1452
407. Coleman embarked on the second sale despite the serious allegations against him in the wake of the first sale, and despite a warning from the Native Department. He had not completed the sale when he resigned as commissioner, but his successor completed the negotiations, about which there is virtually no evidence. Coleman's successor saw no alternative given that the purchasers were threatening legal action: Waitangi Tribunal, *Te Urewera*, vol 3, p 1438.
408. Waitangi Tribunal, *Te Urewera*, vol 3, p 1452

- intervene before 1902 to avoid the debt crisis which would lead to the loss of more Māori land; and
- ensure that the East Coast Native Trust Lands Board and the East Coast Commissioner acted in accordance with the Treaty, particularly by failing to require the Board and Commissioner to consult with Māori owners prior to the sale of land and by excluding them from decision-making over a long period.

Do the well-founded claims regarding the Tūranga trusts relate to the Mangatū CFL land?

170 In light of the prejudicial consequences of the Crown's failures to support Tūranga Māori initiatives to preserve Māori community control and management of their lands during this period, and the impact this had on the customary owners of Mangatū 1, we consider that a number of the well-founded claims of Te Aitanga a Māhaki and the Mangatū Incorporation, Ngāriki/Ngā Ariki Kaipūtahi, and Te Whānau a Kai concerning the Tūranga trusts relate to the Mangatū CFL lands.

171 As we have discussed (see paragraph 139), the Crown had an opportunity to empower the owners of Mangatū 1 to manage and develop their lands effectively following Wi Pere's death. However, following reports of chaotic conditions and drifting debt, the East Coast Commissioner was appointed as the new administrator by order in council dated 12 November 1917. The Mangatū 1 block was not one of the East Coast Trust blocks. However, this distinction became blurred as the same general management policies that applied to the East Coast Trust lands were also applied in Mangatū 1.[409]

172 During this period too, the Māori owners were unable to actively manage their land.[410] In the Tūranga report, the Tribunal observed that, had the Crown provided the owners with mechanisms for the management and development of their lands, this temporary alienation would probably not have been necessary. Some owners unsuccessfully petitioned for the return of Mangatū 1 to their control in 1937. In 1941, Wi Haronga and others petitioned Parliament to have Mangatū 1, 3, and 4 blocks incorporated and returned to Māori control.[411] However, this did not happen until the passage of the Maori Purposes Act 1947, when the owners of these three blocks were incorporated as The Proprietors of the Mangatu Nos 1, 3, and 4 Blocks (Incorporated). In his evidence, Professor Murton suggested that the 'dominance' of the East Coast Commissioner over the Mangatū committee of management hindered the development of corporate and management skills within the iwi. He pointed to the deterioration of the Incorporation's properties, and high operating costs in the period immediately following the land's return in 1947.[412]

409. Murton, 'Te Aitanga a Māhaki, 1860–1960', #A26, p 174
410. Rose, 'Te Aitanga-a-Māhaki', #A18, pp 367, 401
411. Haapu, 'Te Ripoata o Mangatu', #A27, pp 14, 147
412. Murton, 'Te Aitanga a Māhaki, 1860–1960', #A26, p 221

173 We add that the Mangatū 5 and Mangatū 6 blocks lie outside of what is now the CFL land, but they were closely tied to the history of Mangatū 1. Mangatū 5 and 6 had been set aside in 1881 to pay for the survey of the larger Mangatū block. The Native Land Court awarded the blocks to two small groups of six owners headed by Wi Pere and including Te Whānau a Kai rangatira Peka Kerekere and Te Hira Te Uatuku of Ngāriki/Ngā Ariki Kaipūtahi.[413] It appears that these leaders were to act on behalf of the larger list of owners of Mangatū 1.[414] When the ownership of the two blocks was finally decided in September 1970, the Māori Land Court found that the beneficial owners were the same as the owners of Mangatū 1.[415] In our view, the decision to sell this large area of approximately 40,000 acres to the New Zealand Land Settlement Company represents a significant sacrifice by the customary owners of Mangatū 1 in order to protect their interests in the larger block, and avoid incurring debt on their asset.

174 After the Mangatū 5 and 6 blocks became principal security blocks for the Carroll Pere Trust, the owners of Mangatū 1 sought their return to Māori ownership. The Trust had struggled to develop the land during the 1890s because of complexities in the Native Land Court titles that did not allow for mortgaging of Māori land.[416] The 1899 deed of trust, which vested the Mangatū 3 and 4 blocks in the three trustees of Mangatū 1, also contained provisions for the owners to reacquire Mangatū 5 and 6. In February of that year, Rees sought an 'empowering decree' from the Validation Court to 'try and redeem No 5 & 6 which have gone from them.'[417] He explained that the owners of the blocks were the same people as the owners of Mangatū 1, and they wished to retain the block as a whole. However, their request was withdrawn after the Court considered it did not have jurisdiction over the application.[418]

175 If Rees had been successful in reacquiring Mangatū 5 and 6, this land might have been able to be developed as part of the larger incorporated estate of the Mangatū 1, 3, and 4 blocks. As it happened, large portions of the blocks remained undeveloped and unoccupied in 1902, when they came under the control of the East Coast Trust. Following the Validation Court's 1908 decision, the Commissioner decided that it was necessary to sell unproductive land in Mangatū 5 and 6 to adjust the Trust's accounts.[419] Between 1913 and 1919, a number of sales were made to private purchasers, and the remainder of the block was purchased by the Crown in 1930 (we return to these alienations in chapter 5, see paragraph 138). Professor Murton found no evidence that the Commissioner had attempted to consult with the beneficial owners

413. Waitangi Tribunal, *Turanga Tangata*, vol 2, p 677
414. *Mangatu 1* (1881) 7 Gisborne MB, pp 216–217
415. Macky, 'Trust Company Management', #F11, p 344
416. Macky, 'Trust Company Management', #F11, p 344
417. Rose, 'Te Aitanga-a-Māhaki', #A18, p 158
418. Rose, 'Te Aitanga-a-Māhaki', #A18, p 158
419. Murton, 'Te Aitanga a Māhaki, 1860–1960', #A26, p 268

of the land about these sales. There was also no consultation with the committee of management for Mangatū Incorporation, who could be considered to represent the owners of Mangatū 5 and 6.[420]

176 When the East Coast Trust was finally dissolved, the Mangaotane Station was the only land from the 40,150 acres in Mangatū 5 and Mangatū 6 that had not been sold.[421] Mangaotane had been purchased in two stages by William Douglas Lysnar in 1914 and 1919, and included 13,608 acres in Mangatū 5 and Mangatū 6. However, Lysnar defaulted on his mortgage and the land was repurchased by the Commissioner in 1931.[422] It remained vested with the Commissioner until the passage of the Maori Purposes Act 1951. Under this legislation, the Mangaotane Trust was created to receive the returned land as compensation for the losses suffered by the original owners of Mangatū 5 and 6. However, by the time that the Mangaotane Station was returned to the owners of Mangatū 1 in September 1974, it had acquired significant debts and was substantially affected by erosion.[423]

177 In our view, the Crown had multiple opportunities to support the Mangatū owners to take a more substantial role in the management and development of their lands. In 1893, with the establishment of the Mangatū Incorporation through statute, and again in 1894 in the Native Land Court Act, the Crown failed to empower the Māori landowners to raise finance to develop their lands. Had the Crown provided for a robust community management arrangement at this early stage of the Mangatū 1 blocks story, then the further loss of control that followed could have been avoided. However, as we have seen, in order to raise funds for development, the land came under the control of trustees. Following the death of Wi Pere in 1915, the Crown lost a further opportunity to involve the owners in the management of their lands.

178 The cumulative effect on the Mangatū owners of the Crown's failure to support the management and development by Māori of their own lands was great. They were excluded from decision-making in respect of their Mangatū 1 lands for a generation, losing the opportunity to manage or develop their own economic base. Over time, the loss of control caused much concern to the owners, who petitioned for the land to be returned from the East Coast Commissioner. The return of the Mangaotane Station many years later provided little solace, as they had to accept the loss of the rest of their Mangatū 5 and 6 lands. In light of these significant consequences for the customary owners of Mangatū 1, 5 ,and 6 blocks, we consider it would be wholly artificial to determine that the Crown's Treaty breaches in respect of the

420. Murton, 'Te Aitanga a Māhaki, 1860–1960', #A26, p 268
421. Haapu, 'Te Ripoata o Mangatu', #A27, p 82; Rose, 'Te Aitanga-a-Mahaki', #A18, p 173
422. Haapu, 'Te Ripoata o Mangatu', #A27, p 82; Rose, 'Te Aitanga-a-Mahaki', #A18, p 325
423. Macky, 'Trust Company Management', #F11, p 344; Murton, 'Te Aitanga a Māhaki, 1860–1960', #A26, pp 270–272

Tūranga trusts (listed at paragraph 169) do not relate to the CFL land. Overall, the Crown's failure to support the initiatives of Tūranga Māori to retain and develop their lands caused the Mangatū owners significant prejudice, which we consider further in chapter 5.

The Mangatū afforestation and the Crown's 1961 acquisition

179 Only a decade after the return of the Mangatū 1 block to Māori control, Crown officials began considering the need to acquire land in the upper Waipāoa catchment for afforestation purposes.[424] Responding to the severe erosion and river aggradation caused by the deforestation of the early twentieth century, the Government entered negotiations with the Mangatū Incorporation's committee of management in 1959. The circumstances in which the Māori owners ultimately agreed to the sale in 1961 is the subject of the claim by Te Aitanga a Māhaki and the Mangatū Incorporation.[425] Today, the Mangatū Incorporation is in a strong financial position and conducts diverse commercial forestry and agricultural operations on the lands it has retained and amalgamated.[426] Its shareholders and many members of its committee of management are direct descendants of the original owners of Mangatū 1. The chair of the Incorporation, Alan Haronga, gave evidence that 'Mangatū Incorporation has the historical legacy as the legal vehicle that was established in 1893 to protect and maintain ownership, control and mana whenua of Mangatu No 1 Block on behalf of the hapū placed on the title.'[427]

180 We now turn to the events that led to the Crown seeking to acquire land in Mangatū 1 for afforestation purposes, resulting in a 1961 purchase of Māori land. Between the 1890s and 1920, much of the land acquired by settlers in Tūranga was cleared of indigenous forest so that it could be brought into pastoral production. The large-scale clearances led to rapid erosion and contributed to river aggradation in the Waipāoa River catchment. The severe flooding of the 1930s and 1940s was a direct consequence of deforestation, and significantly damaged the flat lands in Tūranga.[428] The Soil Conservation and Rivers Control Council was formed in 1941. Out of this national body, the Poverty Bay Catchment Board was established in 1944 and began developing a scheme to provide flood protection for the lower Waipāoa catchment area.[429]

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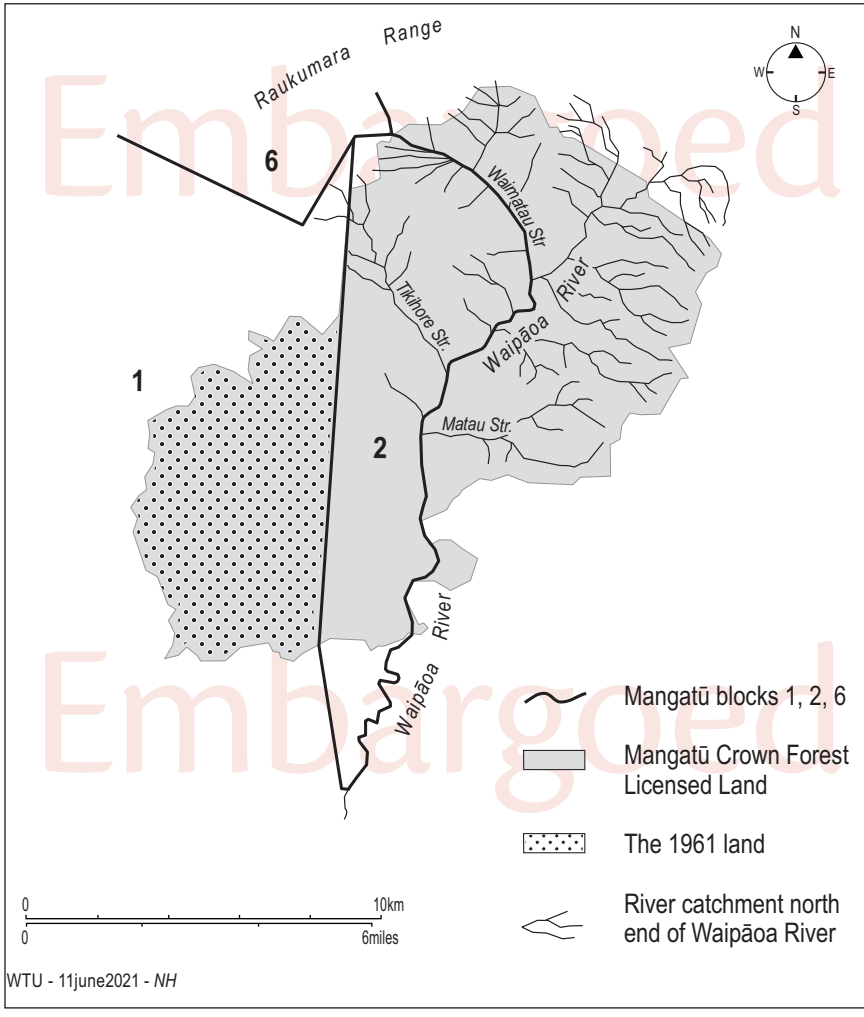
424. Waitangi Tribunal, *Turanga Tangata*, vol 1, pp 70–709
425. We note the Ngāriki/Ngā Ariki Kaipūtahi claimants also addressed this issue in their pleadings during the Tūranga District Inquiry: amended statement of claim, #S0C 3, pp 15–17.
426. Evidence of Alan Haronga, 28 May 2018, #P17
427. Evidence of Alan Haronga, 11 April 2012, #117, para 84.3
428. Waitangi Tribunal, *Turanga Tangata*, vol 2, pp 699–700
429. These flood control measures included a series of earthworks and stopbanking designed to restrain and redirect the Waipāoa River over the final 45 kilometres of its passage to the sea. Construction for these measures took years to complete and was not completed until the late 1960s: Waitangi Tribunal, *Turanga Tangata*, vol 2, pp 701–702.



The Waipāoa river catchment and the Mangatū Crown forest licensed land

181 In 1955, the Soil Conservation and Rivers Control Council appointed a panel of soil conservation experts to evaluate the Waipāoa catchment. They found that the most significant erosion problems were caused in the crushed argillite and bentonite zones. They recommended that a 14,000-acre area of crushed argillite be retired from farming and afforested with a protective exotic forest on 7,000 acres (2,832.8 hectares) and a productive forest on 6,000 acres (2,428.1 hectares).[430] Half of this land was owned by the Mangatū

430. Waitangi Tribunal, *Turanga Tangata*, vol 2, pp 697–698; 'A M Moore to the Conservator of Forests', 10 July 1956, Crown document bank, March 2002, #F33, vol 1, p 217

Incorporation. The expert panel recommended that this land remain in Māori ownership and the Crown reach an agreement with the Māori owners, under which they would retain title to the land and the Crown would finance the afforestation under section 64 of the Forests Act 1949. The Minister of Forests would thereby become the agent of the owners and carry out the reforestation work.[431]

182 The Mangatū owners and the Incorporation's committee of management were also aware of the erosion problem and recognised the need for action to prevent further damage. The Incorporation had previously leased land at Te Weraroa to the Catchment Board in 1948 for 'experimental purposes' related to erosion control.[432] Throughout 1955 and 1956, the committee of management had also been in talks with the Catchment Board about pursuing further larger-scale afforestation in the Te Hua and Tarndale Stations.[433] As the expert panel expected, however, the Māori owners did not wish to sell their ancestral land, and they sought alternative arrangements with the Crown.

183 When formal negotiations began in October 1959, officials informed the owners that the Crown's preference was voluntary acquisition, but compulsory acquisition was also raised as an alternative.[434] At this and subsequent meetings with Crown officials, the owners stated repeatedly that they did not wish to sell their land; they also consistently argued for a land exchange.[435] The Tribunal found that the options available at that time included the Crown using the section 64 provision of the Forests Act 1949 (whereby the Minister of Forests, as agent of the owners, would carry out the reforestation work); the owners leasing the land to the Crown; the owners afforesting the land themselves; or the owners forming a partnership with the Crown and becoming shareholders.[436] However, the Crown did not seriously consider any of these options when they were put forward by the owners.

184 Throughout the negotiations, the Crown failed to disclose to the Māori owners its intentions for a commercially productive forest on at least part of the 1961 land.[437] Instead, Crown officials firmly maintained that because the forest would not be productive, and the cost to establish it so great, the only

431. Waitangi Tribunal, *Turanga Tangata*, vol 2, pp 698, 716
432. Waitangi Tribunal, *Turanga Tangata*, vol 2, p 702. In this case, 'experimental purposes' meant efforts to test the effectiveness of different types of erosion control in the area.
433. Ashley Gould, 'Afforestation at Mangatu', 2002, #F1, p 50
434. Waitangi Tribunal, *Turanga Tangata*, vol 2, p 713
435. Waitangi Tribunal, *Turanga Tangata*, vol 2, p 729
436. Waitangi Tribunal, *Turanga Tangata*, vol 2, p 730. The Mangatū owners also expressed some scepticism about this option. At an important meeting in June 1956 with the district forest ranger A M Moore, owners expressed concern that, under that arrangement, afforestation would lead to a loss in production, that there would be a delay in deriving revenue from the afforestation, and that the scheme would impose costs on the owners: 'A M Moore to the Conservator of Forests', 26 June 1956, Crown document bank, #F33, vol 1, p 217.
437. Waitangi Tribunal, *Turanga Tangata*, vol 2, pp 730–731

possible arrangement was either voluntary sale or compulsory acquisition.[438] However, as early as 1956, the expert panel recommended that 43 per cent of the forest planted could be commercial.[439] According to the Tūranga report, in 1958, the Forest Service 'was now basing its planning on ratios as high as 75 per cent production forest in the Waipaoa catchment area, alongside a much smaller planned protection forest'.[440]

185 The Tribunal considered that the profitability of the forest was 'absolutely crucial to the owners' attitude and the whole question of sale'.[441] When they eventually agreed to the sale in 1961, one of the key factors behind the owners' decision was that they had been led to believe their lands would no longer be profitable if they retained them. The Tribunal described the 21 October 1960 annual general meeting, where the owners agreed to proceed to negotiations over the purchase price, as critical. At the meeting '[a] crucial question was put to the commissioner of [Crown] lands, who was present with other Crown officials, as to whether the Crown would consider a partnership with the owners retaining the land, the Crown doing the planting, and the profits being shared'.[442] The Commissioner of Crown Lands reiterated that the Government was unlikely to enter into a partnership because of the high costs of establishing the forest, and because any profit 'would be very small and a long time in coming'.[443] Further negotiations, based on the land valuations produced by 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 of management executed the deed of sale in October 1961.[444]

186 Questions remain about how certain the Crown was at the time of the 1960 negotiations that a large area of the forest would become commercially productive. Indeed, Crown witness Michael Macky gave evidence during our 2018 hearings that the Government remained uncertain about how much of the forest would be suitable for harvesting long after the Crown had

438. Waitangi Tribunal, *Turanga Tangata*, vol 2, p 713. The possibility of compulsory acquisition was given serious consideration by both the Mangatū committee of management and Crown officials after the owners passed a resolution to not sell their lands at the February 1960 annual general meeting. It seems also that the owners were prepared to accept compulsory acquisition over an agreed sale, so that they would not themselves have to make the decision to sell. The secretary of the Mangatū management committee informed the Commissioner of Crown Lands five days after that meeting that 'if the Government decided it was in the national interest that the land be compulsory acquired for re-afforestation and did so, it appeared to me that this action would be accepted provided satisfactory compensation was arranged in the Maori Land Court': Secretary, Mangatu Incorporated, to Commissioner of Crown Lands, 25 February 1960 (Waitangi Tribunal, *Turanga Tangata*, vol 2, pp 715–716).
439. Waitangi Tribunal, *Turanga Tangata*, vol 2, p 731
440. Waitangi Tribunal, *Turanga Tangata*, vol 2, p 732
441. Waitangi Tribunal, *Turanga Tangata*, vol 2, p 732
442. Waitangi Tribunal, *Turanga Tangata*, vol 2, p 721
443. Commissioner of Crown Lands, minutes of Mangatū Incorporated annual general meeting, 21 October 1960 (Waitangi Tribunal, *Turanga Tangata*, vol 2, p 721)
444. Waitangi Tribunal, *Turanga Tangata*, vol 2, pp 719–721, 724; Gould, 'Afforestation at Mangatu', #F1, pp 180–181

acquired the land. For example, the Forest Service's Deputy Director-General of Forests, A P Thomson, wrote as late as 1970 that 'it is not yet possible to assess what proportion of the forest planted will yield produce of commercial value'.[445] However, the fact remains that the Crown continued to develop plans for a commercial forest in Mangatū without sharing this information with the Mangatū owners. The Tribunal concluded that: 'At best, officials withheld information which was highly material to the owners' consideration of their options. At worst, they were lied to'.[446] It found that 'the Crown failed to act reasonably and with the utmost good faith when it acquired the Mangatū forest lands from the Māori owners'.[447] Accordingly, the Crown, through its officials, breached the principle of partnership.

187 The Tribunal was also critical of the Crown's failure to inquire seriously into any alternatives to sale, finding that '[t]he owners sold because the Crown offered them no other option'.[448] The Tribunal noted seven occasions when the owners had argued for a land exchange.[449] However, the Commissioner for Crown Lands, F W Brown, informed the owners that the Crown did not have the resources for such an exchange, and that the funds from the sale should be held in trust so that other land could be acquired.[450] Crown historian Ashley Gould, gave evidence that 'Ministers and Officials echoed his [Brown's] advice on a number of occasions.'[451]

188 It does not appear as if Crown officials ever seriously considered any of these alternatives to sale. In 1960, Director of Forestry, Alexander Entrican took the position that any lease would have to be in perpetuity, but the evidence does not provide any convincing explanation for this view. If rent was paid during the first crop, Entrican observed, it would be based on the deteriorating productive capacity of the land and 'would not therefore be very remunerative to the owners'.[452] Due to the cost of the afforestation, a lease 'would also require special compensation clauses to deter attempts to force land resumption by the owners'.[453] Entrican considered that a similar outcome would arise if the land was administered under section 64 (see paragraph 181 above). He stated that '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'.[454]

445. A P Thomson, 'Who Pays for Joint Use Forests', *New Zealand Journal of Forestry*, vol 15, no 2, 1970, p 217 (evidence of Michael Macky, #P30, para 144)
446. Waitangi Tribunal, *Turanga Tangata*, vol 2, p 733
447. Waitangi Tribunal, *Turanga Tangata*, vol 2, p 733
448. Waitangi Tribunal, *Turanga Tangata*, vol 2, p 733
449. Waitangi Tribunal, *Turanga Tangata*, vol 2, p 729
450. Crown document bank, #F33, vol 1, p 304
451. Ashley Gould, 'Afforestation at Mangatu', #F1, p 36
452. 'Director of Forestry to Director-General of Lands', 8 April 1960, Crown document bank, #F33, vol 3, p 1065; Waitangi Tribunal, *Turanga Tangata*, vol 2, p 717
453. Waitangi Tribunal, *Turanga Tangata*, vol 2, p 717
454. 'Director of Forestry to Director-General of Lands', 8 April 1960, Crown document bank, #F33, vol 3, p 1065; Waitangi Tribunal, *Turanga Tangata*, vol 2, p 717

189 Indeed, the Crown took on the costs of afforestation and the liability associated with preventing further aggradation. In 1959, officials estimated that afforestation would cost £1.1 million.[455] However, it appears that the actual cost of the afforestation has never been established.[456] For instance, a 1988 economic review of the Waipāoa flood control scheme, prepared by Barry Harris for the Commission for the Environment, did not include an assessment of the cost or benefits of soil conservation and afforestation in the upper catchment.[457] Forestry expert, Dr McEwen, gave evidence that while the actual cost of the afforestation remained unclear, it was almost certainly a much greater investment than the amount the Crown received for the sale of cutting rights to the forest – estimated at roughly $23 million in 1992.[458]

190 Yet, even if the Crown did not recoup its investment in purely financial terms, the primary purpose of the scheme was never commercial, but erosion control and flood mitigation. In his report, Harris found that the major financial benefit from wider flood control initiatives (including the afforestation in the upper catchment), was the increased returns from intensifying land use on the flood plains. He provided examples including the establishment of Watties Canneries in the district in 1977 and the later development of a wide variety of intensive cropping, horticulture, and viticulture activities in the Gisborne flats. Furthermore, he emphasised the importance of the considerable social and environmental values created by flood mitigation efforts, which were not included in his cost benefit analysis.[459] Harris concluded:

> If the primary objective is land conservation, it is inappropriate to apply a productive return criteria as the overriding factor in deciding if afforestation is in the national good. A possible viewpoint is that if a forestry operation can at least break even financially in these areas, then the conservation values must result in a positive net benefit to society.[460]

191 Crown officials repeatedly told the Māori owners that the forest would be protective, rather than productive. On that basis, Entrican's concern for the interest of his department in having to meet the cost of the afforestation required for erosion and flood control purposes seems misplaced. If in the

455. Waitangi Tribunal, *Turanga Tangata*, vol 2, p 712
456. Transcript for hearing week three, 27–28 November 2018, #4.34, p 104
457. The author of the review, Barry Harris, found that the cost of other flood mitigation activity by 1984 was $33 million (as valued in 1987); Barry Harris, 'Economic Review of the Waipaoa Flood Control Scheme', 1988, document bank, #M4(h), pp 19, 26
458. Transcript for hearing week three, #4.34, p 104; the Crown's witness, Michael Marren, a registered forestry consultant, estimated the net value of the 1990 and 1992 sales by the Crown of forestry rights to the Mangatū lands was $23,805,341. We note that this figure may not represent a proportionate estimate of the value of the forest. The 1992 licence was sold along with other areas of licensed land which made up a larger forest, and likely increased the sale value of the Mangatū CFL land: evidence of Michael Marren, 30 July 2018, #P32, p 19
459. Harris, 'Economic Review of the Waipaoa Flood Control Scheme', #M4(h), pp 37–45
460. Harris, 'Economic Review of the Waipaoa Flood Control Scheme', #M4(h), pp 6–7

negotiations with the owners, and in the development of Crown policy, more attention had been given to the wider conservation values and net benefits to society, then our view is that the Crown should have diligently explored options other than the Crown's acquisition of the land. Such an approach would have been Treaty-compliant and would have aligned with the known wishes of the Māori owners. The Tribunal found that the owners had limited opportunity to discuss the afforestation with Crown officials and '[t]his was particularly so once the Department of Forests took a more prominent role.'[461] Ashley Gould also expressed concern that he had found no evidence of the Crown's exploration of other options 'particularly in terms of the leasing and joint venture type arrangements.'[462]

192 Had the Crown more seriously engaged with the owners' requests for an alternative to sale, we consider that there was an opportunity to have reached an acceptable arrangement whereby the owners would have been able to retain their land. In the Tūranga report, the Tribunal recognised that Crown policy for the afforestation of Māori land was not developed by the time of the Mangatū negotiations. However, the Tribunal found that 'the tools clearly already existed to allow the Crown to develop forests with the owners as agent and owner'.[463] Though there was no clear policy or statutory provision for longer-term leases, the Mangatū situation and the interactions between the Crown and the owners should have prompted the Crown to develop an appropriate lease at that time.

193 Of particular interest to us here is the growing interest within the Forest Service and Department of Maori Affairs, from 1962, in encouraging Māori to afforest their lands, especially in areas close to prospective markets.[464] Following consultation with landowners, the Rotorua Maori Affairs district officer suggested in November 1962 that although Māori did not wish to sell their land (as was clear from meetings of owners the official had attended), they would favourably consider, say, 99-year leases. A Bill to that effect was introduced that month. It was followed by an amendment to section 235(1) of the Maori Affairs Act 1953, allowing Māori freehold land to be leased for longer than 50 years where the land was to be used by the lessee exclusively or primarily for afforestation purposes.[465] The Board of Maori Affairs could also appoint the Minister of Forests as its agent to manage forests.[466]

461. Waitangi Tribunal, *Turanga Tangata*, vol 2, p 731
462. Transcript from Crown hearing, 27–30 May 2002, #4.18, p 59
463. Waitangi Tribunal, *Turanga Tangata*, vol 2, p 730. Dr Andrew McEwen also gave evidence for the Crown that formal approval for the development of profit-sharing arrangements, such as the Grainger Leases, did not begin until early 1965. He explained that these leases required that the Crown and the Māori landowners each receive an 'equitable share of income': 'PowerPoint Presentation', evidence of Dr Andrew McEwen, 23 November 2018, #L6(c), pp 9–16; transcript to hearing week three, #4.34, pp 75–85.
464. Waitangi Tribunal, *The Tarawera Forest Report* (Wellington: Legislation Direct, 2003), p 48; evidence of Andrew McEwen, 31 May 2012, #I33, para 29.1
465. Waitangi Tribunal, *The Tarawera Forest Report*, p 48
466. Maori Affairs Amendment Act 1962, section 30

194 The circumstances in Mangatū were certainly different to those in Rotorua and the Bay of Plenty during the 1960s. During the 2018 remedies hearings, Dr McEwen gave evidence that the forest at Mangatū would not have access to the same cheap logging or transport. He also considered that, because Mangatū had difficult topography and higher operating and transportation costs, the available stumpage value would have been less; therefore, the owners would not be able to receive as high a royalty as that paid to other Māori landowners in leasehold or profit-sharing arrangements.[467] However, despite these factors, the Government did in fact pursue large-scale planting on the East Coast over the following decades, especially following Cyclone Bola in 1988. John Ruru gave evidence during the Tūranga District Inquiry that, since 1960, 'in excess of 144,000 hectares of Radiata pine forest has been established on the East Coast, 30,000 hectares of that under the Mangatu and East Coast Project'.[468]

195 Had this extensive planting been anticipated during the negotiations for Mangatū, then the Forest Service might have been more open to leasing the land.[469] We note Mr Ruru's evidence that the Crown acquired further land in the area for afforestation in July 1983, agreeing to a lease of 9,760 acres (3,950 hectares) in the adjacent Waipāoa Station for a term of 66 years.[470] The circumstances on the ground were comparable to the 1961 land in Mangatū 1, and Mr Ruru described this land as 'European freehold land situated on the eastern border of the Critical Headwaters boundary'.[471] It is not clear why a similar arrangement was not possible for the owners of the adjacent Mangatū 1 block, 22 years earlier. Furthermore, it is surprising that officials were not looking further ahead when they considered leases in 1960, given the length of the forestry cycle contemplated at the time.

196 As the Mangatū Incorporation was founded for the purpose of retaining Māori land in Māori ownership, such a lease would have spared the owners the hurt they endured from being pressured into the sale. As it happened, the Crown's failure to give serious consideration to the available alternatives to sale and compulsory acquisition led to the owners becoming separated from their ancestral land, against their wishes. Accordingly, the Crown breached Article 2 of the Treaty which guaranteed tino rangatiratanga to Māori.

Do the well-founded claims regarding the Mangatū afforestation and 1961 sale claim impact the Mangatū CFL land?

197 The claims of Te Aitanga a Mahaki and the Mangatū Incorporation regarding the Crown's acquisition of land in Mangatū 1 for afforestation clearly

467. 'PowerPoint presentation', evidence of Andrew McEwen, 23 November 2018, #L6(c), pp 9–16; transcript to hearing week three, #4.34, pp 75–85
468. Evidence of Eric John Tupai Ruru, not dated, #B14, p 10
469. 'Director of Forestry to Director-General of Lands', 8 April 1960, Crown document bank, #F33, vol 3, p 1065; Waitangi Tribunal, *Turanga Tangata*, vol 2, p 717
470. Evidence of Eric John Tupai Ruru, #B14, p 6
471. Evidence of Eric John Tupai Ruru, #B14, p 6

relate to the CFL land.[472] It was through the breaches set out above that the Crown acquired the CFL land. For the Incorporation – including Te Aitanga a Māhaki, Ngāriki/Ngā Ariki Kaipūtahi, and Te Whanau a Kai people with interests in Mangatū – the loss of this land so soon after it had been returned from the East Coast Commissioner remains a source of significant grievance. We will address in more detail the resulting prejudice suffered by Te Aitanga a Māhaki and the Mangatū Incorporation, and Ngāriki/Ngā Ariki Kaipūtahi in chapter 5.

Summary of the Well-founded Claims that Relate to the CFL Land

198 As we have shown throughout this chapter, the claims of Te Aitanga a Māhaki and the Mangatū Incorporation, Ngāriki/Ngā Ariki Kaipūtahi, and Te Whānau a Kai attest to the Crown's relentless imposition of its authority, and its overthrow of hapū and iwi rangatiratanga and autonomy. Its actions have had critical long-term consequences for Te Aitanga a Māhaki, Ngāriki/Ngā Ariki Kaipūtahi, and Te Whānau a Kai, and for their ownership, control, development, and management of the Mangatū CFL land. Beginning with the Crown's first military incursion into the district and leading step by deliberate step to the imposition of its system of government, the Crown's aim was to gain control of the land and resources across the district, including in the claimants' Mangatū lands.

199 In combination, the deed of cession and the work of the Poverty Bay Commission consolidated the Crown's authority over land in Tūranga and enabled the introduction of individualised titles for Māori land.[473] The deed of cession represented an assertion of Crown control through an instrument that was signed under duress, was flawed legally and in Treaty terms, and yet in effect confiscated the land of those deemed 'rebels' – that is, those who had fought to defend their tino rangatiratanga, their families, and their lands. What land was returned to those the Commission found to be 'loyal' owners came by way of Crown grant, rather than being held under the authority of whānau, hapū, and iwi. After the Poverty Bay Commission had done its work, Māori were consigned to the Native Land Court, which completed the process of replacing Māori customary governance and land tenure with individualised titles.

200 The individualisation, fractionation, and fragmentation of land were salient features of the Crown's system of land title and transfer that led to the loss of much of the claimants' remaining estate in the district: the piecemeal sale of the Mangatū 2 block is a classic example of how the system worked

472. Ngāriki/Ngā Ariki Kaipūtahi's claim also addressses the Crown's acquisition of land in Mangatū 1 for afforestation: amended statement of claim for Ngariki Kaiputahi, 18 April 2001, #SOC 3, paras 57–70

473. Waitangi Tribunal, *Turanga Tangata*, vol 1, p 324

against the retention of land by the Māori owners. A further consequence of this system and its disruption of community ownership was the fracturing of relationships among Māori landowners, as happened in relation to the Mangatū 1 block.

201 The trust projects that Pere and Rees initiated as attempts to retain and develop Māori land in Māori hands failed – partly as a result of prevailing economic circumstances and poor business decisions, but mainly because they were unable to overcome the limitations of the legal and tenurial system they were operating under. The Crown also failed to assist them through legal infrastructure for the trusts until it was too late. When the Crown finally appointed the East Coast Native Lands Board and then the East Coast Commissioner to deal with the debts incurred by these trust projects, even more of the Mangatū owners' land was lost – either permanently, such as the Mangatū 5 and 6 blocks, or for lengthy periods, such as Mangatū 1 between 1917 and 1947. Then, only 14 years later, the Crown acquired land in Mangatū 1 for afforestation purposes, against the wishes of the owners.

202 As a result of these breaches and the turbulent history of Crown-Māori relationships in Tūranga, the Mangatū CFL land is no longer in Māori ownership and has since become encumbered with a Crown forestry licence. We have discussed how the claims all concern the CFL land in some way. We found that the claimants all have a relationship to the CFL land through mana whenua and the exercise of tino rangatiratanga. We also found that the prejudice suffered by Te Aitanga a Māhaki and the Mangatū Incorporation, Ngāriki/Ngā Ariki Kaipūtahi, and Te Whānau a Kai as a result of the Crown's Treaty breaches has led the claimants' relationship with the CFL land to be destroyed or damaged.

203 Our findings on the well-founded claims that relate to the CFL land are set out below. The affected claimant groups are identified in each heading. We consider that all the claims listed below are well-founded claims and demonstrate the three elements required by section 8HB (set out in paragraph 24 above). They all relate to the CFL land.

Te Aitanga a Māhaki, Ngāriki/Ngā Ariki Kaipūtahi, and Te Whānau a Kai, on the basis of the following Treaty breaches, all have well-founded claims which relate to the Mangatū CFL land

The Crown's attack on Waerenga a Hika and its treatment of Te Kooti and the Whakarau, 1865–68

(a) The Crown acted unlawfully and fundamentally breached the principles of the Treaty of Waitangi by attacking the pā at Waerenga a Hika, where many Te Aitanga a Māhaki, as well as Ngāriki/Ngā Ariki Kaipūtahi, and Te Whānau a Kai had taken refuge, including women and children. They were defending their Treaty-guaranteed tribal autonomy and exercising their right of self-defence under English constitutional law.

(b) The Crown's deportation of the Whakarau to Wharekauri, along with their families, and their detention there in harsh conditions for over two

years without trial, was unlawful. The disruption caused by the exile of a large proportion of the male population compounded the impact of the Crown's Treaty breaches at Waerenga a Hika on the autonomy of Te Aitanga a Māhaki, Ngāriki/Ngā Ariki Kaipūtahi, and Te Whānau a Kai. It also inhibited these groups' ability to exercise customary rights and tino rangatiratanga over their land and resources, including at Mangatū.

(c) The Crown acted unlawfully and in breach of the Treaty in pursuing and harassing Te Kooti and the Whakarau after their return to the East Coast, as they attempted to find sanctuary in the central North Island. Te Kooti's resort to violence by attacking the Tūranga settlements must be seen in this context, although the killing of both Māori and Pākehā in these attacks cannot be justified. The execution without civil or military trial of those taken prisoner by Crown forces at Te Kooti's pā at Ngātapa, and the pursuit and killing of those who had escaped the pā, was illegal and breached the guarantees in Article 3 of the Treaty. Innocent Māori prisoners of Te Kooti were likely to be among those executed. The lawlessness of the Crown's actions in these years would have severely impacted even those Māori in Tūranga who were not detained on Wharekauri or did not suffer the attacks, including those with customary interests in Mangatū.

(d) In the wake of Ngātapa, the Crown took steps to capitalise on the severe blow it had dealt to the autonomy of Te Aitanga a Māhaki, Ngāriki/Ngā Ariki Kaipūtahi, and Te Whānau a Kai and their ability to resist the Crown's realisation of its goals. The effect of the defeat at Waerenga a Hika and the Crown's treatment of the Whakarau shattered these groups' autonomy and their control over their affairs and lands, including those at Mangatū. From this time onwards Tūranga ceased to be a Māori district as Pākehā settlement transformed the area, and the Crown consolidated its authority in the district.

The deed of cession (1868) and the Crown-retained lands

(a) The 1868 deed of cession was signed by Tūranga Māori under duress. Following Te Kooti's attacks on Patutahi, Matawhero, and Oweta, and the killings of Māori and settlers there in November 1868, the Crown threatened to remove its protection from the district. It did so during a time of considerable turmoil, fear, and panic in Māori and Pākehā communities, and gave Māori no choice but to agree to the cession of 1.195 million acres (including the Mangatū lands). Its actions breached the primary obligation of kāwanatanga and the Treaty principle of active protection.

(b) The legally flawed deed of cession was ineffective in extinguishing the rights of the many Te Aitanga a Māhaki, Ngāriki/Ngā Ariki Kaipūtahi, and Te Whānau a Kai people, including those customary owners of Mangatū who were detained on Wharekauri. They were deemed to be 'rebels' and did not sign the deed. Despite this, the imposition of the

cession was a major step in the assertion of the Crown's authority in Tūranga at the expense of iwi and hapū tikanga, and rangatiratanga. These actions breached Article 2 of the Treaty.

The Poverty Bay Commission, 1869–73

(a) Instead of receiving the land and security of tenure promised to 'loyal' Māori by the Crown, the work of the Poverty Bay Commission effectively opened the way for the replacement of customary ownership and interests with land title adjudication by Crown designed processes. The joint tenancies created by the Commission began the process of the individualisation of interests in land in Tūranga. The Crown's failure to ensure that the form of title awarded, following investigation by the Poverty Bay Commission, was not prejudicial to Māori interests was a breach of the principles of the Treaty.[474]

(b) The Crown's further failure to provide for legal tribal ownership when the Poverty Bay Commission 'returned' the larger part of the land in 1873 to Te Aitanga a Māhaki, Ngāriki/Ngā Ariki Kaipūtahi, and Te Whānau a Kai (as well as other Tūranga groups) breached the tino rangatiratanga guarantee under Article 2, and the Treaty principles of active protection and autonomy.[475] This gave the Mangatū owners no alternative but to engage in the Crown's native land regime, including the Crown-designed Court processes, in order to ensure their title to their lands was recognised.

The Crown's native land regime and the new native title

(a) The Crown's introduction of the native land regime and its operation in Tūranga without the consent of Te Aitanga a Māhaki, Ngāriki/Ngā Ariki Kaipūtahi, and Te Whānau a Kai expropriated their community rights to make their own title decisions – including in respect of their Mangatū lands. The Crown's native land legislation also removed community land management rights and individualised the alienation process against the strongly expressed wishes of Tūranga Maori, and breached both the title and tino rangatiratanga guarantees in the Treaty. The Mangatū 2 block was progressively acquired by private purchasers as a result of these Crown policies.

(b) The complex and inefficient native land title and transfer system imposed by the Crown was deliberately inimical to the collective control of land by Te Aitanga a Māhaki, Ngāriki/Ngā Ariki Kaipūtahi, and Te Whānau a Kai landowners, including those of the Mangatū lands. This breached the tino rangatiratanga guarantee under Article 2 of the Treaty, and the Crown's obligation of active protection of Māori title. It was also a breach of Article 3 in that titles given to settlers allowed them

474. Waitangi Tribunal, *Turanga Tangata*, vol 2, p 745
475. Poverty Bay Lands Titles Act, 1874

to borrow and develop their land, whereas the flawed titles awarded to Māori provided only for alienation. Even the Mangatū 1 owners faced difficulties, despite the remarkable provision they were able to achieve for their incorporation. Soon after the Mangatū Incorporation was established in 1893, the owners were forced to vest Mangatū 1, 3, and 4 blocks in three trustees in order to access funds to develop their lands. The owners faced successive barriers to developing the block, so that the only option open to them was to lease large areas of land to settlers for two generations. The owners were effectively prevented from exercising tino rangatiratanga over their lands.

(c) Tūranga Māori landowners, including the tīpuna of those with claims that relate to the Mangatū CFL lands, were subjected to unbearable systemic pressure to sell that was inconsistent with the Crown's fiduciary obligation to Māori and the Treaty principle of active protection. The loss of Mangatū 2, which settlers purchased from Ngāi Tamatea individual owners over a period of 10 years, is a classic example of how the system worked to constrain the choices of Māori landowners and to force sales.

The Tūranga trusts, 1878–1955

(a) The Tūranga trusts were first set up by Wi Pere and William Rees in the late 1870s to maintain control of Māori land in the hands of the Māori owners. The Rees–Pere trusts and the later Carroll Pere Trust struggled against legislative and legal barriers created by the Crown's native land regime and policies, and were ultimately unsuccessful. The Crown's failure to provide support and legal infrastructure for Māori community management, and to prevent the erosion of Māori community land interests, breached the tino rangatiratanga guarantee under Article 2, and the Treaty principle of active protection.

(b) These breaches affected the Mangatū lands when they became swept up in the sad story of the Tūranga trusts. The Mangatū 1 owners lost control of their lands for many years when they were under the administration of the East Coast Commissioner, despite Wi Pere and William Rees's success in establishing the Mangatū Incorporation. The Mangatū 5 and 6 blocks, which had the same owners as Mangatū 1, were also permanently alienated by the East Coast Commissioner, despite Rees's efforts to secure their return to Māori ownership.

(c) The Crown's inefficient and contradictory system of individual title transfer destabilised the Carroll Pere Trust titles, including those of the Mangatū 5 and 6 blocks. It exposed the Trust to exceptionally high legal costs and unprecedented levels of litigation. This breached the tino rangatiratanga guarantee under Article 2 and the principle of active protection.

(d) The Crown's failure to intervene prior to 1902 in the rising debts incurred by the Carroll Pere Trust, when it was aware much earlier of the nature

of the problem and of the consequences of its own title system, represented a breach of the principle of active protection. The debts incurred over this period would lead to the alienation of further lands under the East Coast Trust, including the Mangatū 5 and 6 blocks.

(e) The Crown intervened in 1902 to establish the East Coast Native Trust Lands Board, and then the East Coast Commissioner in 1906 to manage the remaining trust lands. Once it became evident that the East Coast Trust was not going to be a short-term solution, the Crown did not ensure that Te Aitanga a Māhaki, Ngāriki/Ngā Ariki Kaipūtahi, and Te Whānau a Kai were included in the development of policy for the administration of their land. This was in breach of the Treaty principle of active protection.[476] The Mangatū owners suffered the loss of Mangatū 5 and 6 which were sold during this period. They were also prevented from exercising their tino rangatiratanga with respect to their lands in Mangatū 1 until 1947.

Te Aitanga a Māhaki, the Mangatū Incorporation, and Ngāriki/Ngā Ariki Kaipūtahi, on the basis of the following Crown Treaty breaches, all have a well-founded claim which relates to Mangatū CFL land

The Mangatū afforestation and the Crown's 1961 acquisition

(a) The Crown's failure to act reasonably and with the utmost good faith during negotiations for the acquisition of approximately 8,500 acres in Mangatū 1 in 1961 for afforestation purposes breached the principle of partnership. This affected all the owners, including members of Te Aitanga a Māhaki hapū Ngāti Wāhia, Ngāriki, and Te Whānau a Taupara, and Ngāriki/Ngā Ariki Kaipūtahi. Members of Te Whānau a Kai who had interests in Mangatū 1 were also affected.

(b) The Crown's failure to give serious consideration to the available alternatives to sale or compulsory acquisition led to the separation of the Mangatū owners from their ancestral land, and breached the tino rangatiratanga guarantee under Article 2 of the Treaty.

Ngāriki/Ngā Ariki Kaipūtahi, on the basis of the following Crown Treaty breaches, have a well-founded claim which relates to Mangatū CFL land

The Native Land Court's Mangatū title determination

(a) The Crown's failure to recognise the flaws in the 1881 Native Land Court decision, and to ensure that Ngāriki/Ngā Ariki Kaipūtahi were able to reargue their interests in the Mangatū 1 block in the Native Land Court when legislation was introduced to allow Te Whānau a Taupara to do so in 1917, breached the principles of the Treaty of Waitangi.

(b) The Crown's imposition of the native land regime that removed control of Māori land from hapū and their rangatira, and imposed a system

476. Waitangi Tribunal, *Turanga Tangata*, vol 2, p 567

of adjudication of titles which failed to recognise tikanga or give effect to tino rangatiratanga breached Article 2 of the Treaty. This created increasingly acrimonious and lasting disputes in relation to the Mangatū 1 block among Te Aitanga a Māhaki, Ngāriki/Ngā Ariki Kaipūtahi, and their uri.

E tipu ake te pono i te whenua, e titiro iho te tika i te rangi

CHAPTER 5

SHOULD THE MANGATŪ CFL LAND BE RETURNED TO MĀORI?

Introduction

1 In chapter 4, we recorded our determination that Te Aitanga a Māhaki and the Mangatū Incorporation, Ngāriki/Ngā Ariki Kaipūtahi and Te Whānau a Kai all have claims that relate to the CFL land and are well-founded. In this chapter, we determine whether the remedies required to address the prejudice arising from these claims should include the return of land to Māori ownership. Section 8HB(1)(a)(ii) states that the Tribunal may, in relation to a well-founded claim, find:

> [T]hat 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 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.

2 Section 8HB(1)(b)(ii) states that the Tribunal may, alternatively in relation to a well-founded claim, find '[T]hat 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)'.

3 Importantly, the Tribunal is limited to these two options (except when the land is 'subject to other claims which makes its clearance from liability premature'[1]). The Tribunal performs an adjudicatory function in making its determinations. As we set out in chapter 3, Parliament viewed the Tribunal as the appropriate body to address claims that meet the statutory prerequisites by recommending either that the CFL land be returned to Māori ownership (under section 8HB(1)(a)(ii)) or that the land be removed from liability for return (under section 8HB)(b)(ii)).

4 In this chapter, we begin by setting out the Court's judgment in *Mercury NZ Ltd and Ors v Waitangi Tribunal and Ors* (*Mercury*) with reference to this

1. *Haronga v Waitangi Tribunal* [2012] 2 NZLR 53 (SC), para 91

aspect of our determination. We then consider the parties' submissions on whether the land should be returned, and discuss the Tribunal's restorative approach to redress. The restorative approach is well-established in Tribunal jurisprudence and provides the basis for our determination on the return of CFL land. We then move on to determine the central question of whether the redress 'should include' the return of CFL land to any or all of the claimant groups. In order to make this determination, we consider the prejudice associated with the well-founded claims that relate to the CFL land. First, we outline the prejudice associated with the losses of Te Aitanga a Māhaki and the Mangatū Incorporation, Ngāriki/Ngā Ariki Kaipūtahi, and Te Whānau a Kai in the Mangatū lands specifically. We then consider the prejudice they experienced as a result of related Crown Treaty breaches, and the socio-economic impact these losses have had on the customary owners of the Mangatū CFL lands. Throughout, we rely on the Tribunal's findings in the Tūranga report regarding the prejudice the claimants suffered because of Crown Treaty breaches, and also on further evidence heard during our 2012 and 2018 remedies hearings.

The High Court's Decision in *Mercury* on the Return of CFL Land

5 As we have discussed, in the *Mercury* judgment the High Court described the purpose of the Tribunal's power to make a binding recommendation under section 8HB for the return of land to Māori ownership as restoring a claimant's rights under Article 2 of the Treaty.[2] This is 'a specific and particular exercise involving claims concerning specific lands'.[3] Yet the Court considered that 'further aspects of the remedial jurisdiction should not be interpreted narrowly' and, in particular, stated that 'it would be permissible for the Tribunal to take into account other breaches when deciding at the further stage of the determination whether the land "should" be returned'.[4]

6 In *Mercury*, the High Court made findings in relation to the specific circumstances arising out of Ngāti Kahungunu's claims, and the Tribunal's approach in the Wairarapa Remedies Inquiry. The High Court said, at paragraph 87 of the judgment, that the Tribunal had reason to look at 'a series of closely interlinked Treaty breaches' when considering whether the Pouākani SOE land should be returned.[5] The 'other breaches' included Crown actions in the Ngāti Kahungunu rohe, including the Crown's acquisition of title over Lake Wairarapa and its surrounds, the Crown's failure to provide the owners with alternative lands, and then the Crown's further breach of its obligations by

2. *Mercury NZ Ltd and Ors v Waitangi Tribunal and Ors* [2020] NZHC 654, para 80
3. *Mercury NZ Ltd and Ors v Waitangi Tribunal and Ors* [2020] NZHC 654, para 71
4. *Mercury NZ Ltd and Ors v Waitangi Tribunal and Ors* [2020] NZHC 654, para 87
5. *Mercury NZ Ltd and Ors v Waitangi Tribunal and Ors* [2020] NZHC 654, para 87

providing the owners with 'largely valueless and inaccessible lands in the central North Island instead'. These lands were at Pouākani in the southern Waikato. The Crown then breached its obligations by developing, without the consent of the landowners, some of the Pouākani lands for a hydro power station.[6] The remedies applications before the Wairarapa Tribunal sought, under section 8A of the TOWA, the return of the Pouākani SOE land taken for the power station, which would include the power station itself. The Tribunal found that the prejudice from the Crown's compulsory acquisition of the land was on its own insufficient to justify the return of the SOE land. However, the Tribunal took into account Ngāti Kahungunu's wider claims in order to make a determination that the SOE land should be returned as redress for all those claims.[7]

7 The High Court described the wider breaches outlined above as 'interrelated' with the Crown's subsequent compulsory acquisition of the Pouākani SOE lands, and held that it would be appropriate for the Tribunal to consider them when exercising its jurisdiction under section 8A(2)(a)(ii).[8] However, the High Court stipulated that the Tribunal could not use its section 8A or 8HB powers to 'provide the remedy for those other breaches, or the wider land-based Treaty breaches suffered by Ngāti Kahungunu'.[9] As we discussed in chapter 4 (see paragraph 8), the High Court found that the Tribunal had erred in law when it looked to Crown Treaty breaches that relate to lands other than the Pouākani SOE land and the Ngāumu CFL land, as the basis for the return of those lands to Māori ownership. The Court commented that 'a striking feature of the Tribunal's approach is that it does not require there to be any well-founded claims about the land sought to be returned at all'.[10] It is on this basis that the High Court in *Mercury* found that the Wairarapa Tribunal had erred.

8 The circumstances in our Inquiry are different. The Mangatū CFL land is within the rohe of Te Aitanga a Māhaki, Ngāriki/Ngā Ariki Kaipūtahi, and Te Whānau a Kai. We have made a finding that the land sought for return in the Mangatū CFL land was the subject of the Crown's wider Treaty breaches that undermined the tino rangatiratanga of the Mangatū owners, including Te Aitanga a Māhaki, Ngāriki/Ngā Ariki Kaipūtahi, and Te Whānau a Kai, leading to the loss of their lands. These different circumstances give rise to the question, for this Tribunal, as to how we might reconcile the High Court's statements with the fact-specific situation in this Inquiry.

9 We consider that there are two possible interpretations of the Court's findings regarding the prejudice the Tribunal should take into account for the purpose

6. *Mercury NZ Ltd and Ors v Waitangi Tribunal and Ors* [2020] NZHC 654, para 87
7. Determinations of the Tribunal Preliminary to Interim recommendations, 24 March 2020, Wai 863, #2.835, paras 215, 278–279
8. *Mercury NZ Ltd and Ors v Waitangi Tribunal and Ors* [2020] NZHC 654, para 87
9. *Mercury NZ Ltd and Ors v Waitangi Tribunal and Ors* [2020] NZHC 654, para 88
10. *Mercury NZ Ltd and Ors v Waitangi Tribunal and Ors* [2020] NZHC 654, para 88

of determining whether or not to recommend the return of the land. The first interpretation focuses on the *Mangatū CFL land*. The Tribunal would accordingly be restricted in its considerations of prejudice to the specific losses in the Mangatū CFL lands. Taking this approach, we would not be able to take account of the prejudice associated with the 'interrelated' Treaty breaches even where that prejudice was suffered by the same claimants and served to compound the specific prejudice associated with the loss of the CFL land. This approach would involve, in our view, an artificial distinction between the CFL land lost, the claimants who have mana whenua within their rohe, and the historical context in which the claimants suffered land loss as a result of Crown Treaty breaches in Tūranga.

10 The second interpretation is that the Tribunal should consider the prejudice suffered by the *customary owners* of the Mangatū CFL land, including the prejudice associated with the Crown's wider Treaty breaches that are related to the loss of the CFL lands. In adopting this approach, the Tribunal could take into account prejudice arising from Crown acts and policies that undermined the mana whenua and tino rangatiratanga of the claimant communities in both the Mangatū CFL land, and in other lands within their rohe on which they also depended. In our view, this interpretation has a broader application in circumstances where the claimants hold mana whenua in the land sought for return, and their rights in that land were impacted by multiple Treaty breaches. It allows the Tribunal to consider the prejudice associated with the loss of the Mangatū lands within the context of the wider experiences of Crown Treaty breaches of the Māori people and communities – experiences which relate to their interests in the CFL land, but occurred outside of the boundaries of the block. We consider that this interpretation is entirely consistent with the High Court's statements at paragraph 87 of the *Mercury* judgment which emphasise that 'the further aspects of the remedial jurisdiction should not be interpreted narrowly'.[11]

11 On this basis, we now proceed to make the determination on whether the CFL land should be returned. First, we set out the parties' positions, and outline our restorative approach to remedies. Secondly, we consider the prejudice associated with the claimants' specific losses in relation to the Mangatū CFL land. Finally, we turn to consider the wider context of the Crown's related Treaty breaches, in order to gain a more complete understanding of the prejudice suffered by the claimants for the purposes of determining whether the CFL land should be returned to them.

Should the Mangatū CFL Land be Returned?

The parties' positions

12 The parties disagreed as to how, and whether, the Tribunal should consider the prejudice associated with the well-founded claims that relate to the

11. *Mercury NZ Ltd and Ors v Waitangi Tribunal and Ors* [2020] NZHC 654, para 87

CFL land for the purposes of this determination. For instance, the Māhaki Trust and the Mangatū Incorporation argued that the seriousness or extent of prejudice generally had limited relevance, and the more important factors were the Crown's obligations following the 1989 Forests Agreement. In contrast, the Crown argued that the statutory scheme required the Tribunal to match the *prejudice* associated with the well-founded claims with the *remedies* included in its recommendation. The parties' respective arguments are detailed below.

Māhaki Trust and the Mangatū Incorporation's submissions

13 The Māhaki Trust and the Mangatū Incorporation submitted:

(a) Against the backdrop of the Tribunal's findings on the Crown's breaches in the Tūranga Report, the Crown is bound to uphold its obligations under or arising out of the 1989 Forests Agreement. The Tribunal is not required to quantify prejudice caused by the Crown's breaches for the purposes of allocating proportionate land and compensation. It is 'a bespoke statutory scheme in relation to which none of the restorative approach literature has any relevance, and it would be flying in the face of the Courts' directions to say otherwise.'[12]

(b) If the Tribunal wished to 'recommit to the findings it has made already about prejudice, then the prejudice from the well-founded claims is significant and warrants the return to Māori of Mangatū 1 and Mangatū 2.'[13]

(c) The scheme is calibrated not on Te Aitanga a Māhaki's losses but on the Crown's gain.[14] Counsel argued that 'the key here is the making of resumptive orders that reflect fairly the nature, in a proportionate sense, of the interests of each group in the land and in the related compensation.'[15]

Ngāriki / Ngā Ariki Kaipūtahi's submissions

14 Ngā Ariki Kaipūtahi (Wai 507) submitted:

(a) The Tribunal ought to consider if the block of land available for return has associations with a claimant group, so that the remedy is suited to removing prejudice suffered by that group. For Ngā Ariki Kaipūtahi, this is particularly true, given that the Mangatū CFL land is their core rohe and their specific well-founded claim relates directly to those lands.[16]

(b) Ngā Ariki Kaipūtahi were severely affected by the imposition of the Native Land Court over their customary rohe. Although land in the Mangatū 1 block was retained, the 1881 title determination diminished

12. Transcript for hearing week four, 19–21 December 2018, #4.35, p 61
13. Closing submissions for Te Aitanga a Māhaki and the Mangatū Incorporation, 11 December 2018, #2.682, para 3.3
14. Closing submissions for Te Aitanga a Māhaki and the Mangatū Incorporation, #2.682, para 53
15. Closing submissions for Te Aitanga a Māhaki and the Mangatū Incorporation, #2.682, para 82
16. Closing submissions for Ngā Ariki Kaipūtahi, 11 December 2018, #2.684, para 142

Ngā Ariki Kaipūtahi's interest in that land.[17] The loss of mana following the 1881 Native Land Court title determination translated to real economic prejudice extending to the reduced land interests eventually awarded in 1922.[18]

(c) It is difficult to fully quantify the prejudice suffered by Ngā Ariki Kaipūtahi for the purpose of the statutory scheme. However, their losses exceed many times over the 45 per cent of the CFL land, along with the associated $57.6 million, that they seek through this resumptive process.[19]

15 Counsel for Ngāriki Kaipūtahi (Wai 499 and Wai 874) submitted further that:

(a) 'In the interests of equity, and to make Ngāriki Kaipūtahi whole again, this Tribunal must order that the Mangatu CFL land be resumed. For Ngāriki Kaipūtahi, this land must include Mangatu 1.'[20]

(b) 'This Tribunal must take care not to pick a winner at the expense of others who are more deserving of redress because of the extreme prejudice resulting from Crown conduct.'[21]

(c) 'Ngāriki Kaipūtahi considers that all of the CFL whenua should be returned to Māori.'[22]

Te Whānau a Kai's submissions

16 Te Whānau a Kai submitted:

(a) The Tribunal should consider a number of relevant factors to determine what is necessary to compensate for or to remove the prejudice. These include the relative seriousness of the breaches involved and the amount of land lost by the claimant group. Te Whānau a Kai 'suffered from confiscation, being subject to warfare and the most heinous of breaches (including murder, unlawful execution and transportation) and say that these factors put their prejudice at the more serious end of the scale'.[23]

(b) The loss of land is a particular grievance for Te Whānau a Kai. The loss of the Patutahi block left them without any flat land in Tūranga.[24] The prejudice they suffered includes the overall loss of cultural identity and loss of recognition as an iwi. The extent of prejudice Te Whānau a Kai suffered 'is such that it can only be remedied by the return of land'.[25]

17. Closing submissions for Ngā Ariki Kaipūtahi, #2.684, para 108
18. Closing submissions for Ngā Ariki Kaipūtahi, #2.684, para 123
19. Closing submissions for Ngā Ariki Kaipūtahi, #2.684, para 95
20. Closing submissions for Ngāriki Kaipūtahi, 10 December 2018, #2.681, para 51
21. Closing submissions for Ngāriki Kaipūtahi, #2.681, para 69
22. Closing submissions for Ngāriki Kaipūtahi, #2.681, para 96
23. Closing submissions for Te Whānau a Kai, 11 December 2018, #2.683, para 12.10
24. Closing submissions for Te Whānau a Kai, #2.683, paras 12.27–12.28
25. Closing submissions for Te Whānau a Kai, #2.683, paras 12.36, 12.40

Te Rangiwhakataetaea–Wi Haronga–Ngāti Matepu's submissions

17 Interested party Ngāti Matepu submitted:

(a) By its nature, the return of land is restorative: '[i]t ensures that the party who holds the land is not unjustly enriched by its continuing to hold it, and the party who ought to hold it, is restored.'[26]

(b) The Crown 'is holding land that it ought not to be holding. In the language of equity it can be said that if this continues to be the case, it is being unjustly enriched, whilst this interest and other applicants go without.'[27]

The Crown's submissions

18 In 2018 closing submissions, the Crown submitted:

(a) It accepts 'in principle the return of some of the licensed lands to Māori ownership could be an appropriate way to remove or compensate the prejudice attributable to the particular well-founded claims which relate to the CFL lands.'[28]

(b) 'While a recommendation for return of forest land should not be a remedy of last resort, neither should it necessarily be a remedy of first resort . . . Matters that are relevant to the exercise of this discretion include the nature of the Treaty breach and level of prejudice, whether there are other suitable or appropriate forms of redress aside from the return of the land in question, and, ultimately what the Tribunal considers is the best way to address that prejudice, in a manner proportionate to the breach and taking a restorative approach to remedies.'[29]

19 Following the High Court's judgment in *Mercury*, the Crown altered its position and submitted that the return of the Mangatū CFL land is an inappropriate remedy, on the basis that the only claim that met the legal test concerned the Crown's 1961 acquisition of land in Mangatū 1.[30] The Crown submitted that 'to return part of the 1961 land would be to overcompensate those affected given that the price paid for the land was appropriate.'[31] However, in the previous chapter we determined that a wide range of the well-founded claims of Te Aitanga a Māhaki and the Mangatū Incorporation, Ngāriki/Ngā Ariki Kaipūtahi, and Te Whānau a Kai do relate to the CFL lands, and therefore qualify for consideration.

26. Closing submissions for Te Rangiwhakataetaea–Wi Haronga–Ngāti Matepu, 10 December 2018, #2.680, para 21
27. Closing submissions for Te Rangiwhakataetaea–Wi Haronga–Ngāti Matepu, #2.680, para 27
28. Amended closing submissions for the Crown, 12 February 2019, #2.688(b), para 141
29. Closing submissions for the Crown, #2.688(b), para 142
30. Memorandum of counsel for the Crown, 31 May 2021, #2.933, para 15
31. Memorandum of counsel for the Crown, #2.933, para 15

The Tribunal's restorative approach to remedies

20 We agree with the Crown's submission that the Tribunal should consider both 'the Treaty breach and level of prejudice', and should also contemplate 'the best way to address that prejudice, in a manner proportionate to the breach and taking a restorative approach to remedies'.[32] That the Tribunal has broad scope to take a restorative approach is confirmed by the language of the statutory scheme itself (especially section 8HB, which we discuss in chapter 3, see paragraph 7). We have regard to the fact that the High Court also confirmed in *Mercury* that the purpose of the Tribunal's powers under section 8HB is to allow for the restoration of Māori tino rangatiratanga and mana whenua with respect to specific lands.[33] The Court described the return of CFL land under section 8HB as 'a restitution remedy' or a 'remedy by way of specific performance – specifically performing the Crown's obligation to return land that it has acquired inconsistently with the principles of the Treaty'.[34] In these comments, the Court characterised the return of CFL land to Māori ownership as an equitable remedy, and as such it is consistent and compatible with the restorative approach – which we turn to now.

21 As the Crown observed in closing submissions, the Tribunal has developed, over many previous inquiries, a body of jurisprudence setting out the principles applicable to the exercise of its general remedial function under section 6(3) of the TOWA. The Tribunal's restorative approach to remedies is specifically designed 'to make recommendations . . . to compensate for or remove the prejudice suffered as a result of Crown actions'.[35] This approach, which is specific to the Tribunal's jurisdiction, can be distinguished from other international approaches concerning restorative justice, or reconciliatory justice, although it may share features in common with them.[36]

22 The Tribunal's restorative approach is directed at providing effective remedies that are fair and, for those Māori communities prejudiced by Crown Treaty breaches, will go towards restoring the Treaty relationship between the Crown and Māori. In its 1985 report on the Manukau claim, the Tribunal set out its approach to recommendations under section 6 of the TOWA, determining that its jurisdiction was to 'give to the Treaty the fullest effect practicable'.[37] In its 1987 *Report on the Orakei Claim*, the Tribunal found that it should 're-establish in modern context an objective in the Treaty appropriate to the case – in this case, surely, the duty on the Crown to ensure the retention of

32. Closing submissions for the Crown, #2.688(b), para 142
33. *Mercury NZ Ltd and Ors v Waitangi Tribunal and Ors* [2020] NZHC 654, para 80
34. *Mercury NZ Ltd and Ors v Waitangi Tribunal and Ors* [2020] NZHC 654, para 86
35. Closing submissions for the Crown, #2.688(b), para 51
36. Economist, Dr John Yeabsley, gave evidence for the Crown on the reconciliatory justice approach. Drawing on international literature he provided a definition of reconciliatory justice as 'an effort to "reframe conflict and grievance so that parties are no longer preoccupied with that which divides them"': Evidence of Dr John Yeabsley, 30 July 2018, #P36, para 39
37. Waitangi Tribunal, *The Manukau Report* (Wellington: Government Printer, 1985), p 64

a proper tribal endowment'.[38] The Tribunal also emphasised the importance of restoring to Māori the autonomy and tino rangatiratanga guaranteed in Article 2 of the Treaty:

> Any policy of tribal restoration must in our view be directed to assuring the tribe's continued presence on the land, the recovery of its status in the district and the recognition of its preferred forms of tribal authority.[39]

23 In our view, the Tribunal's restorative approach to remedies requires a focus on the political, cultural and economic restoration of hapū and iwi who suffered prejudice from Crown Treaty breaches, rather than on a civil damages-based approach. In part this is because, as the Tribunal found in the 1996 *Taranaki Report*, in certain situations the prejudice caused by historical breaches of the Treaty might be so great that fully compensating the losses might not be possible.[40] The Tribunal explained that 'prejudice to claimants cannot be assessed simply by quantifying the land expropriations; but quantification is, none the less, a relevant consideration'.[41] Similarly, in the 1997 *Muriwhenua Land Report*, the Tribunal described the thrust of its remedial jurisdiction as 'to compensate for past wrongs and remove the prejudice, by assuring a better arrangement for the hapu in the future'.[42] However, the Tribunal added a rider that a specific claim concerning recent losses might justify a different approach, more akin to a damages award for particular recent prejudice.[43]

24 While the restorative approach is focused on future welfare, in our judgement, the extent of what was lost is directly relevant to prejudice and the remedy required – especially in regard to land losses. In the 1997 *Muriwhenua Land Report*, the Tribunal observed that the language of prejudice in section 6 of the Treaty of Waitangi Act 1975 meant that broad social and economic consequences were necessary considerations within its remedial jurisdiction.[44] Important factors reflected in the Tribunal's approach to relief in the Muriwhenua report were:

- the seriousness of the case – the extent of property loss and the extent of consideration given to hapu interests;
- the impact of that loss, having regard to the numbers affected and the lands remaining;

38. Waitangi Tribunal, *The Waitangi Tribunal's Report on the Orakei Claim* (Wellington: Booker and Friend Ltd, 1987), p 263
39. Waitangi Tribunal, *The Waitangi Tribunal's Report on the Orakei Claim*, p 263
40. Waitangi Tribunal, *The Taranaki Report: Kaupapa Tuatahi* (Wellington: Legislation Direct, 1996), p 15
41. Waitangi Tribunal, *The Taranaki Report*, p 13
42. Waitangi Tribunal, *The Muriwhenua Land Report* (Wellington: GP Publications, 1997), p 406
43. Waitangi Tribunal, *The Muriwhenua Land Report*, p 405
44. Waitangi Tribunal, *The Muriwhenua Land Report*, p 405

- the socio-economic consequences;
- the effect on the status and standing of the people;
- the benefits returned from European settlement;
- the lands necessary to provide a reasonable economic base for the hapu and to secure livelihoods for the affected people; and
- the impact of reparation on the rest of the community (so that local and national economic constraints are also relevant).[45]

25 In 1998, the Tribunal released its Determination of Preliminary Issues, which addressed issues raised in the Muriwhenua Lands Inquiry about how the Tribunal should approach its jurisdiction to make binding recommendations under section 8A and 8HB.[46] The Tribunal again emphasised:

> Restoration, defined as the provision of an economic base to support future development opportunities, is not . . . a return to a hypothetical, past position. It is linked to the past nonetheless. It is axiomatic that had lands been adequately reserved for tribes as was required there would be a base for those tribes today, and it is reasonable to assume from the experience of the Maori Land Court with Maori Land Trusts and Incorporations, that some infrastructure would now surround them.[47]

26 In the 1998 *Turangi Township Remedies Report*, the Tribunal relied on the factors in the Muriwhenua Tribunal's approach to relief, 'although not all [would] have equal weight'.[48] In that Inquiry, the Tribunal focused on the diminished rangatiratanga of Ngāti Tūrangitukua and the erosion of trust between the Crown and the claimants. The Tribunal concluded that to:

> redress the prejudice suffered by the hapu it is essential that some land be restored to the hapu for the benefit of its members as a necessary step towards restoring, to some degree, the rangatiratanga of Ngati Turangitukua in their ancestral homeland. This and other measures will be required to assist the hapu to regain their turangawaewae, their standing, as the tangata whenua of their Turangi rohe, and to have their mana appropriately recognised in the wider community.[49]

27 In that Remedies Inquiry, the return of land was viewed not solely as an economic remedy, but part of the redress required to restore the claimants' rights under Article 2 of the Treaty. In *The Mohaka ki Ahuriri Report*, the Tribunal also found that the guarantee of tino rangatiratanga in Article 2 of

45. Waitangi Tribunal, *The Muriwhenua Land Report*, p 406
46. Determination of Preliminary Issues, 14 May 1998, Wai 45 ROI, #2.166
47. Determination of Preliminary Issues, Wai 45 ROI, #2.166, app E, pp 6 – 7
48. Waitangi Tribunal, *The Turangi Township Remedies Report* (Wellington: GP Publications, 1998), p 15
49. Waitangi Tribunal, *The Turangi Township Remedies Report*, p 15

the Treaty, 'provided for more than mere possession of those properties and included full chiefly control and management'.[50] It also found further that for Māori, the relationship with the land has a cultural and spiritual dimension; it is both a tūrangawaewae and a foundation of political autonomy. As the Tribunal described in the *Te Tau Ihu o Te Waka a Maui Report*, a tribal land base is essential to maintaining whanaungatanga and manaakitanga within communities:

> There has to be a turangawaewae for people to return to, there have to be customary resources to sustain whanaunga and to manaaki guests, and there has to be capacity to pass these taonga to mokopuna.[51]

28 Furthermore, the ability to exercise rangatiratanga over land and other taonga is key to the restoration of tribal mana. In its *Report on the Te Reo Maori Claim*, the Tribunal accepted that 'the article 2 phrase in the Māori version of the Treaty, namely "o ratou taonga katoa", covers both tangible and intangible things and can be best translated by the expression "all their valued customs and possessions"'.[52] Restorative redress that takes into account these issues requires careful consideration of the specific circumstances of each Treaty claim. In the 2008 *He Maunga Rongo: Report on Central North Island Claims*, the Tribunal observed:

> [r]edress should be based upon a restorative approach, with its purpose being, in article 2 claims to restore iwi or hapu rangatiratanga over their property. In some circumstances restoration of tribal mana may require some other remedy. In others, the passing of legislation to recognise rangatiratanga, the return of land and some other form of redress may be sufficient to achieve this result.[53]

29 We are assisted by these expressions of the restorative approach in the Tribunal's jurisprudence. Throughout our 2018 remedies hearings, we were reminded by the claimants of the importance of land as a crucial element of redress for iwi and hapū prejudice involving land loss: 'i riro whenua atu, me hoki whenua mai'.[54] Their evidence and submissions emphasised that land has a cultural and spiritual importance to Māori over and above its economic

50. Waitangi Tribunal, *The Mohaka ki Ahuriri Report* (Wellington: Legislation Direct, 2004), p 24
51. Waitangi Tribunal, *Te Tau Ihu o te Waka a Maui: Report on the Northern South Island Claims*, 3 vols (Wellington: Legislation Direct, 2007), vol 3, p 1207
52. This finding was made in reference to the evidence of Professor Hirini Moko Meade, Waitangi Tribunal, *Report on the Te Reo Maori Claim* (Wellington: Brookers, 1993), p 20.
53. Waitangi Tribunal, *He Maunga Rongo: Report on Central North Island Claims* (Wellington: Legislation Direct, 2008), p 1248
54. 'As land was taken, so land should be given back': This whakatauki is attributed to the second Māori King, Tūkāroto Pōtatau Matutaera Te Wherowhero: closing submissions for Te Aitanga a Māhaki and the Mangatū Incorporation, #2.862, para 89.1; memorandum of counsel for Te Rangiwhakataetaea–Wi Haronga–Ngāti Matepu, 6 March 2020, #2.801, para 9.

value. It may be possible to restore a sufficient economic base for iwi or hapū with a tribal endowment that does not include the return of land, but comprises other forms of capital. However, as part of a restorative approach, addressing the loss of mana whenua will, in most cases, also require the return of some part of the claimants' lands so that their cultural and spiritual connection with them may be restored. In addition, the control and management of tribal lands is an important part of the claimants' tino rangatiratanga guaranteed under Article 2 of the Treaty.

30 There are also circumstances where the return of CFL land would *not* be an appropriate remedy for well-founded Treaty claims. This may occur if the prejudice suffered by claimants is not proportionate to the remedy, or if there is a compelling reason based in tikanga for the land to remain as CFL land. In such cases, the Tribunal may consider it more appropriate to remove the CFL land from liability to return, but make other non-binding recommendations under section 6(3) of the TOWA. Alternatively, the CFL land could itself now represent such a significant burden or liability for the Māori owners that it would not remedy the prejudice associated with their claims. We heard detailed evidence concerning current and future forestry and environmental management issues associated with the Mangatū CFL land, which we discuss in chapter 6 in relation to the recipients of the Tribunal's section 8HB recommendations.

31 In applying the restorative approach in this Inquiry, we must now determine whether the return of the Mangatū CFL land is an appropriate remedy for the prejudice suffered by the claimant communities of Te Aitanga a Māhaki and the Mangatū Incorporation, Ngāriki/Ngā Ariki Kaipūtahi and Te Whānau a Kai. In order to make this determination, we discuss in the next section the prejudice suffered by those with customary interests in Mangatū. We then return to those factors the Tribunal identified in the *Muriwhenua Lands Report*, and consider the remedy required to compensate for or remove the relevant prejudice.

What prejudice have the customary owners of the Mangatū CFL lands suffered – Tribunal analysis

32 As we found in chapter 4, the circumstances in which the Mangatū CFL lands were alienated and eventually acquired by the Crown resulted from a cascade of related Crown Treaty breaches in Tūranga. We outlined the Tribunal's findings in the Tūranga report on the Crown's policies and laws that were specifically designed to destroy Māori autonomy in breach of Article 2 of the Treaty.[55] We now return to this history to consider further the prejudice Te Aitanga a Māhaki and the Mangatū Incorporation, Ngāriki/Ngā Ariki Kaipūtahi, and Te Whānau a Kai suffered as a consequence of the Crown's Treaty breaches in order to reach a determination on the return of the Mangatū CFL land.

55. Waitangi Tribunal, *Turanga Tangata, Turanga Whenua: The Report on the Turanganui a Kiwa Claims*, 2 vols (Wellington: Legislation Direct, 2004), vol 2, p 739

33 The prejudice the claimants suffered from the Crown's Treaty breaches began with the Crown's assault on Māori autonomy at Waerenga a Hika in 1865, and continued through the deliberate steps taken by the Crown to consolidate its authority over Māori and their land through the deed of cession and the Poverty Bay Commission. As we discussed in chapter 4, the Crown feared that the autonomy of Tūranga Māori would compromise its own authority and the settlement of the district. In invading the district, the Crown asserted its control over Tūranga land and resources that rightfully belonged to Tūranga Maori.[56]

34 The Crown consolidated its authority through 'the wrongful and unfair procurement under duress of Maori "consent" to the cession of over one million acres of Maori land'.[57] Through the Poverty Bay Commission it retained 56,161 acres of fertile Tūranga land (see chapter 4, paragraph 97) where Te Aitanga a Māhaki and Te Whānau a Kai have interests, and returned blocks of land with individualised titles to 'loyal' Māori, totalling 138,278 acres (see chapter 4, paragraphs 105–111).[58] Following the return of the larger part of the ceded land in 1873, the Native Land Court arrived in Tūranga and, over the years that followed, completed the replacement of customary rights with individualised titles. The Crown's control over the district was thus normalised and completed.[59]

35 The Crown's native land regime removed community control over the title and transfer process, and left the claimants vulnerable to the dual efforts of Crown and private purchasers. The majority of the claimants' rohe was purchased over the first 35 years of the Court's operation in Tūranga, including the purchase of the Mangatū 2 block (see chapter 4, paragraph 125). In an effort to maintain Māori control of their land, Wi Pere and William Rees pursued innovative initiatives to retain and develop Māori land on the East Coast, initially establishing trusts for the owners of various blocks. However, their efforts were largely defeated by the Crown's restrictive legal and policy settings under which they were operating. Even the Mangatū 1 block, whose owners were separately incorporated under their own Act, would eventually be swept up in the Crown's East Coast Native Trust. The detriment the Mangatū owners suffered included the loss of their lands in Mangatū 5 and 6, which were sold by the East Coast Commissioner (see chapter 4, paragraphs 173–176). Shortly after the East Coast Trust was wound up in 1947, the Mangatū owners suffered the further loss of land in Mangatū 1 – acquired by the Crown for afforestation purposes.

36 In the sections below, we examine the prejudice suffered by customary owners of Mangatū as a result of the Crown's Treaty breaches. We begin with the Crown's overthrow of Māori autonomy by force in 1865, and the wider

56. Waitangi Tribunal, *Turanga Tangata*, vol 2, p 739
57. Waitangi Tribunal, *Turanga Tangata*, vol 2, p 737
58. Waitangi Tribunal, *Turanga Tangata*, vol 1, pp xxi-xxii, 340
59. Waitangi Tribunal, *Turanga Tangata*, vol 2, p 397

impacts this had on Te Aitanga a Māhaki, Ngāriki/Ngā Ariki Kaipūtahi, and Te Whānau a Kai as customary owners of Mangatū. We consider the prejudice each group subsequently suffered from their specific losses in the Mangatū lands. We then put these losses in the context of crucial and closely related Crown Treaty breaches: its imposition on the claimants of the deed of cession, the operation of the Poverty Bay Commission and then the Native Land Court, and the Crown's failure to support the Tūranga trusts. These breaches resulted in much wider losses of the claimants' land which compounded the prejudice suffered by the customary owners of the Mangatū lands. At the end of this section, we discuss the socio-economic prejudice they suffered as a result of these breaches, before making a determination on the return of the CFL land to Māori ownership.

Prejudice associated with the Crown's overthrow of Te Aitanga a Māhaki, Ngāriki/Ngā Ariki Kaipūtahi, and Te Whānau a Kai autonomy

37 Prior to Waerenga a Hika, Tūranga was an autonomous Māori district and Te Aitanga a Māhaki, Ngāriki/Ngā Ariki Kaipūtahi, and Te Whānau a Kai benefited from a robust economic base. In the Tūranga report, the Tribunal observed that Tūranga Māori increased the production of wheat, maize, pork, and other products during the 1840s as part of their enthusiastic engagement with the colonial economy. They competed with settler producers in these markets 'with the advantages of extensive lands, large labour pools, and several schooners of their own, operated in accordance with tribal strategies.'[60] As we discussed in chapter 4, rangatira exercised political authority through rūnanga which administered community affairs; and almost all of Tūranga remained Māori land.[61]

38 The lives lost at Waerenga a Hika pā, and during the Crown's assault on Te Kooti's position at Ngātapa in 1869, significantly reduced the capacity of Tūranga Māori (including Te Aitanga a Māhaki, Ngāriki/Ngā Ariki Kaipūtahi and Te Whānau a Kai) to resist and manage the Crown's incursion into the district. They lost many leaders at a time when strong leadership was sorely needed to respond to further assertions of Crown authority.[62] Professor Brian Murton's evidence highlighted that those detained on Wharekauri, along with the families who joined them, together made up 40 per cent of the total Te Aitanga a Māhaki population (the Whakarau are discussed further in chapter 4, see paragraph 81).[63]

39 The women and children who travelled to Wharekauri were not 'in detention' but certainly shared the hardships with their men.[64] Throughout their time on Wharekauri ill health was widespread. During our 2018 hearings, we

60. Waitangi Tribunal, *Turanga Tangata*, vol 1, p 49
61. Waitangi Tribunal, *Turanga Tangata*, vol 1, pp 40, 49–50
62. Waitangi Tribunal, *Turanga Tangata*, vol 2, p 512
63. Brain Murton, 'Te Aitanga a Mahaki, 1860–1960: The Economic and Social Experience of a People', 2001, #A26, p 116
64. Murton, 'Te Aitanga a Māhaki, 1860–1960', #A26, p 70

heard further evidence from Rutene Irwin, a Te Aitanga a Māhaki kaumātua, about the arrival of the Whakarau on Wharekauri:

> Te taenga atu ki reira ki Wharekauri ka haria anō rātou ki tētahi kāinga i reira, engari kāore hoki he whare i reira. Kāore he marae, kāori he whare, heoi anō ka noho rātou i roto i tētahi whenua i reira, anā, i te taha o te repo, he harakeke he raupō . . . Tētahi mea hoki i a rātou i reira, kāore i hoatungia he kai mā rātou.
>
> When they arrived in the Chatham Islands they were taken to a camp there, but there were no buildings there. They lived in that part of the countryside, beside a swamp, with flax and raupō growing nearby . . . Another aspect of their camp, they were not fed.[65]

40 The Tribunal found that the captives detained on Wharekauri, 'were removed there not because their continued presence in Turanga posed a threat to the security of the colony but because the Crown wanted to push through the confiscation of Turanga land so as to solve the "Native question" in the district once and for all'.[66] As the decades following the 1860s would demonstrate, the hostilities seriously compromised the ability of Te Aitanga a Māhaki, Ngāriki/Ngā Ariki Kaipūtahi, and Te Whānau a Kai to effectively protect and retain their land and resources.

41 The removal of such a significant proportion of the population to a remote island, hundreds of kilometres from home, had a substantial impact on the claimants' economic and agricultural production.[67] The depressive effect was made worse by the fact that many did not survive the hostilities after they returned to Tūranga. Others were imprisoned or exiled again. For example, Pera Te Uatuku was prevented from returning to his lands for many years (see chapter 4, paragraphs 83–85). Before the hostilities, many Te Aitanga a Māhaki hapū had been dispersed along the tributary rivers of the Waipāoa River valley and they had access to a rich resource base. By the 1870s, people were living in a smaller number of locations, their territory was diminished, and fewer resources were available to them.[68] These rapid changes in community organisation and structure in Tūranga had both social and psychological consequences as iwi were increasingly dislocated and divided.[69]

42 The bloodshed in Tūranga, and the despair of those detained on Wharekauri, would draw the Whakarau together as a religious community under the spiritual leadership of Te Kooti. His message that God would deliver them from the bondage of an oppressive state was a powerful one of hope for the Whakarau (see chapter 4, paragraph 75).[70] However, the legacy of the

65. Evidence of Rutene Irwin, 22 May 2018, #P3(a), pp 7–8
66. Waitangi Tribunal, *Turanga Tangata*, vol 1, p 193
67. Murton, 'Te Aitanga a Māhaki, 1860–1960', #A26, p 70
68. Murton, 'Te Aitanga a Māhaki, 1860–1960', #A26, pp 70–71
69. Murton, 'Te Aitanga a Māhaki, 1860–1960', #A26, p 78
70. Waitangi Tribunal, *Turanga Tangata*, vol 1, pp 185–186, 215

Crown's treatment of the Whakarau would be devastating for the settlers at Matawhero, and Te Kooti's own relations, whom he blamed for not supporting him. The Tribunal stated:

> The result of the Crown's actions [at Waerenga a Hika] was not peace and order but, ultimately, retribution and death. The angry despair that the Crown's actions produced was to be tragically revisited on those who had played a part in creating it.[71]

43 The horrors of Matawhero, Patutahi, and Oweta in turn drove the Crown to pursue Te Kooti to Ngātapa where a minimum range of 150 and 194 people were killed in the fighting (see chapter 4, paragraph 78). After taking the pā, Crown forces executed between 86 and 98 members of the Whakarau, their allies, and their innocent captives. The Tribunal found that 11 or 12 women and children were also killed.[72] The conflicts created an environment of distrust and fear between the settler population and the Whakarau and their descendants. In the Tūranga report, the Tribunal noted the Crown's official silence relating to the events at, and after, Ngātapa.[73] The Crown's failure to hold to account those responsible, and to acknowledge the shameful events over a long period, negatively impacted race relations in the district over many decades. Professor Murton stated that among Te Aitanga a Māhaki, 'distrust of government motivations can be traced to this time'.[74] During our 2018 hearings, Te Aitanga a Māhaki kaumātua gave telling evidence before us that there remains 'much misunderstanding, and to some extent ignorance, about the impacts of the Crown actions on Te Aitanga a Māhaki people and our environment'.[75]

44 In our view, the prejudice arising from the Crown's overthrow of Māori autonomy at Waerenga a Hika, and its treatment of the Whakarau and their captives, impacted all of Te Aitanga a Māhaki, Ngāriki/Ngā Ariki Kaipūtahi, and Te Whānau a Kai. Following these events, the Crown was able to enter Tūranga and exercise its authority over the claimants' land for the first time. By threatening to remove its protection from the district, the Crown was able to enforce the cession of over a million acres of Māori land. It then moved into the district, with the intention to establish military settlements on the ceded lands it had retained.[76] The Crown then introduced the legal institutions that would impose Crown titles on Māori land, including the Poverty Bay Commission and its successor the Native Land Court.[77]

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71. Waitangi Tribunal, *Turanga Tangata*, vol 1, p 123
72. Waitangi Tribunal, *Turanga Tangata*, vol 1, pp 244, 246
73. Waitangi Tribunal, *Turanga Tangata*, vol 1, p 247
74. Murton, 'Te Aitanga a Māhaki, 1860–1960', #A26, p 79
75. Evidence of Wirangi Pera, 28 May 2018, #P15, para 19
76. Waitangi Tribunal, *Turanga Tangata*, vol 1, p 339
77. Waitangi Tribunal, *Turanga Tangata*, vol 1, p 42

45 In the following sections, we set out the consequences of these events for Te Aitanga a Māhaki, Ngāriki/Ngā Ariki Kaipūtahi, and Te Whānau a Kai. We begin with their specific losses in Mangatū. We then consider the wider experience of the Mangatū owners in the years after 1865, and how the prejudice they suffered as a result was compounded by concurrent Crown Treaty breaches committed throughout the district with devastating socio-economic consequences for the claimant communities. This prejudice continues to the present day.

Prejudice associated with the loss of the Mangatū lands

46 In this section, we consider the prejudice associated with the losses of Te Aitanga a Māhāki and the Mangatū Incorporation, Ngāriki/Ngā Ariki Kaipūtahi, and Te Whānau a Kai in Mangatū. As a result of the Crown's Treaty breaches, the Mangatū CFL land is no longer in Māori ownership, and the prejudice suffered by the claimants includes the loss of mana whenua, and the cultural, spiritual, and economic consequences of that loss. We begin in the Mangatū 2 block, which was acquired from the Ngāi Tamatea owners by private purchasers who exploited the flaws of the Crown's native land regime to obtain large tracts of Māori land. We then consider the particular prejudice Ngāriki/Ngā Ariki Kaipūtahi suffered as a result of the reduced interests they were awarded in Mangatū 1 through the Crown-designed Native Land Court process. We outline the impact that the vesting of the Mangatū 1 block in successive trustees from 1899 until 1947 had on all its customary owners, before considering the prejudice associated with the Crown's acquisition of land in Mangatū 1 for afforestation purposes in 1961.

The loss of Mangatū 2, 1881–1900

47 As we discussed in chapter 4, the story of Mangatū 2 clearly illustrates how the Crown's native land regime and the title and transfer systems it imposed on Māori landowners placed them under significant pressure to sell. Te Aitanga a Māhaki leader John Ruru explained how the impacts of subdivision and high survey costs were felt in Mangatū 2:

> the legal process that . . . was there at the time made it difficult for the owners of those lands to be able to make a living on each of their small sections on Mangatū 2, forcing them to the point of having to find some way of earning money to pay their bills, so they sold the land.[78]

48 The 11,491-acre Mangatū 2 block was awarded to Ngāi Tamatea in 1881 by the Native Land Court during the same proceedings as the title investigation for the larger Mangatū 1 block (we discuss this case in chapter 4, see paragraphs 134, 144–146). Following the Court's title investigation, a number

78. Transcript for hearing week one, 27–31 August 2018, #4.30, p 97

of applications were made for the subdivision of the block between 1881 and 1883. Disputes over the boundary between Mangatū 1 and Mangatū 2 plagued this process, and it was not until 19 September 1888 that the block was partitioned into 16 subdivisions.[79] The Mangatū 2 owners agreed to have equal shares in the block. Jacqueline Haapu observed that this meant purchasers would not have to wait for the Court to define relative interests. The owners also agreed that no restrictions on alienation would be placed on the block, citing their other lands. Many of the Mangatū 2 owners also had interests in Mangatū 1, which was to be protected from alienation.[80]

49 In our view, the owners' apparent acceptance of the sale of some interests in their land is not evidence that they intended the entire block to pass from Māori ownership. Rather, the piecemeal purchase of the Mangatū 2 block is an example of the pressure to sell created by the Crown's native land regime (see chapter 4, paragraphs 118–125 for our discussion of the regime). It is also a case where determined purchasers acquired the entire block by deliberately manipulating the Crown's land transfer system that gave Māori communities faulty titles and insufficient power to protect themselves, and disadvantaged owners who did not want to sell.[81] In the Tūranga report, the Tribunal found:

> The law both restrained the options available to Maori and reduced the benefits that they could receive when those limited options were taken. When these factors were combined with the circumvention of community decision making, it was beyond argument that Maori sold land as individuals that which they would never have sold as communities. The Crown designed the system to produce this effect.[82]

50 The story of Mangatū 2 is a classic example of how this system worked to produce such outcomes. The pressure placed on the owners to sell by high Court costs and the process of subdivision began when Mangatū 2 was charged with a survey lien of £532.[83] A 1,935-acre subdivision in Mangatū 2A was set aside for the payment of survey and Court-related costs. Paora Haupa and his solicitor William Rees had arranged to sell the block to settler Henry John

79. Jacqueline Haapu, 'Te Ripoata o Mangatu: The Mangatu Report', 2000, #A27, p 53
80. Haapu, 'Te Ripoata o Mangatu' #A27, pp 53–54
81. In the Tūranga report, the Tribunal pointed out that section 48 of the Native Land Act 1873 restricted alienations to short term leases unless all owners wanted to sell, or a majority applied for a partition under section 65. The Tribunal found that 'these rules were routinely breached in the way private purchasers bought up land. Usually individual undivided shares were progressively bought up until either all shares had been purchased or sufficient had been purchased to justify partition in accordance with the requirements of section 65 or later amendments . . . Ordinarily this made for a slow process, but acquisition of enough shares was usually achieved over a period of months or sometimes years': Waitangi Tribunal, *Turanga Tangata*, vol 2, pp 460–461
82. Waitangi Tribunal, *Turanga Tangata*, vol 2, p 534
83. Haapu, 'Te Ripoata o Mangatu', #A27, p 55

Stubbs to meet these costs. The sale was opposed by other owners, including Pirihi Tutekohe and Hepeta Kuare, who protested against the high costs charged against the land.[84] The Native Land Court hearings to validate the subdivision and sale in September 1888 were also contested. Hetekia Te Kani and Tiopira Tawhiao stated that not all owners were present to submit their views on the subdivision. However, the Native Land Court issued a grant to a list of four owners for the purposes of sale for survey costs. Tiopia Korehe, who had unsuccessfully sought inclusion in this list of owners, petitioned the Court asking for a rehearing. A rehearing was ordered, but never eventuated. Jacqueline Haapu gave evidence that this sale 'was validated despite strong opposition and the dispossession of the rightful owners'.[85] At the time, Tiopia Korehe stated:

> We appealed to the court but were informed that we would not be admitted unless the others agreed, but through our objections to this land of ours being taken to pay for survey of the whole, our names were struck out and because the law stating that each parcel of land shall be held by not more than 20 people. Our right has been ignored and our portion given to 4 persons, although the court knew our right was good.[86]

51 Settler Frederick Tiffen subsequently purchased most of the remaining Māori land in Mangatū 2 through acquiring interests from individual owners in multiple transactions and by further subdivisions. In Mangatū 2C, Tiffen purchased the shares of 11 of the 16 owners between August 1891 and September 1892. In May 1893, the Native Land Court ordered a partition of the block and awarded Tiffen 789 acres in Mangatū 2C1; the owners who had not sold their shares retained 263 acres and were charged £16 for the survey. Seventeen days later, William Douglas Lysnar requested a further subdivision of Mangatū 2C2 on behalf of Tiffen, who had purchased the shares of Karaitiana Patutahi and two minors, Ngauru Manuka and Turuhira Toi. Tiffen was awarded a further 68 acres in Mangatū 2C2A that was surveyed as a 'parallel straight line between 2C1 and 2C2'.[87] A group of five settlers purchased the residual 195 acres in Mangatū 2C2B later that year.[88] This series of progressive purchases of individual interests left the owners with increasingly small and uneconomic blocks, and the successive Court and survey costs increased the pressure on them to sell.

84. Haapu, 'Te Ripoata o Mangatu' #A27, p 55
85. Haapu, 'Te Ripoata o Mangatu' #A27, p 59
86. Haapu, 'Te Ripoata o Mangatu' #A27, p 58; section 12 the Native Land Court Act 1886 Amendment Act 1888 provided that if an order is made declaring the land to be owned by more than twenty owners the Court shall direct that the land be 'forthwith partitioned under the said Act so that each parcel thereof shall be owned by not more than twenty Natives.'
87. Haapu, 'Te Ripoata o Mangatu' #A27, pp 62–63
88. Haapu, 'Te Ripoata o Mangatu' #A27, p 63

52 Similar purchasing tactics left the owners of Mangatū 2D without access to their lands. Tiffen purchased the shares of 10 out of the block's 12 owners in May 1893, and he purchased the remainder of the block a year later in June 1894.[89] In Mangatū 2H, Tiffen purchased the shares of all 12 owners before a partition order could be made.[90] In Mangatū 2J he acquired the interests of 10 of the 18 owners in March 1892. When the block was partitioned the next year Tiffen was awarded a 570-acre subdivision out of the 780-acre block. The non-sellers protested that they did not own any land adjoining the 'very narrow strip' of 228 acres that they were awarded. Their objection was defeated, and in 1899 Tiffen completed the purchase of the entire block.[91]

53 By 1900, all of Mangatū 2, excepting a small Mangatū 20 subdivision, had been purchased by settlers – in the main by Frederick Tiffen. This outcome was the clear result of the Crown's imposition of a land title and management regime, which failed to support community land management and resulted in the individualisation of interests, against the wishes of Tūranga Māori. The inefficient and complex system of title and transfer provided Māori landowners with little protection against the unrelenting activities of purchasers such as Tiffen, who progressively acquired the interests of individual owners. The owners who at first resisted selling their interests came under increasing pressure as the land was further subdivided, and their interests became less useful or valuable on the market. The increasing partitions diminished the choices available to them, compounding the pressure to sell. The prejudice resulting from this loss severely disadvantaged the Ngāi Tamatea hapū of Te Aitanga a Māhaki, diminishing their tino rangatiratanga over the land and leaving them with practically no land in the Mangatū 2 block. We also consider that they suffered economic prejudice as a result of the costs of, and length of time taken, to obtain title which in turn led to loss of the land at depressed prices.

Ngāriki/Ngā Ariki Kaipūtahi's losses in Mangatū 1, 1881–1922

54 Like the Ngāi Tamatea owners of Mangatū 2, the Ngāriki/Ngā Ariki Kaipūtahi owners in Mangatū 1 were also prejudiced by the Crown's native land regime. As we set out in chapter 4, the Tribunal found in the Tūranga report that the Native Land Court's 1881 title determination of Mangatū 1 was 'unsafe' and inaccurately characterised Ngāriki/Ngā Ariki Kaipūtahi as a conquered people.[92] In the years that followed, Wi Pere's success at securing the title for a group of 12 trustees, including Ngāriki/Ngā Ariki Kaipūtahi rangatira Pera Te Uatuku, shielded them temporarily from any serious prejudice until the relative interests in the block were determined in 1916 and 1917 (we discuss

89. Haapu, 'Te Ripoata o Mangatu', #A27, p 64
90. Haapu, 'Te Ripoata o Mangatu', #A27, p 68
91. Haapu, 'Te Ripoata o Mangatu', #A27, p 70
92. Waitangi Tribunal, *Turanga Tangata*, vol 2, p 678

the Crown's policy of determining relative interests in chapter 4, see paragraphs 149).[93]

55 Ngāriki/Ngā Ariki Kaipūtahi's mana whenua was further undermined by the Crown's policy by the 1890s of requiring the Court to determine owners' relative interests, and the Crown's intervention in the Mangatū process in 1917 to allow Te Whānau a Taupara to reargue their interests in Mangatū 1, without giving Ngāriki/Ngā Ariki Kaipūtahi that opportunity (see chapter 4, paragraph 148). The tortuous proceedings took several years to establish relative interests, and involved grouping owners first by descent, then by whānau. In the Tūranga report, the Tribunal found that 'the lengthy Native Land Court hearing and appeals process pitted hapu against hapu and whanau against whanau, leaving a legacy of bitterness in its wake'.[94] The named claimant for Ngā Ariki Kaipūtahi and kaumātua Owen Lloyd gave evidence that their uneasy relationship with the Mangatū Incorporation can be traced back to the rifts created by their experience of the Native Land Court process.[95]

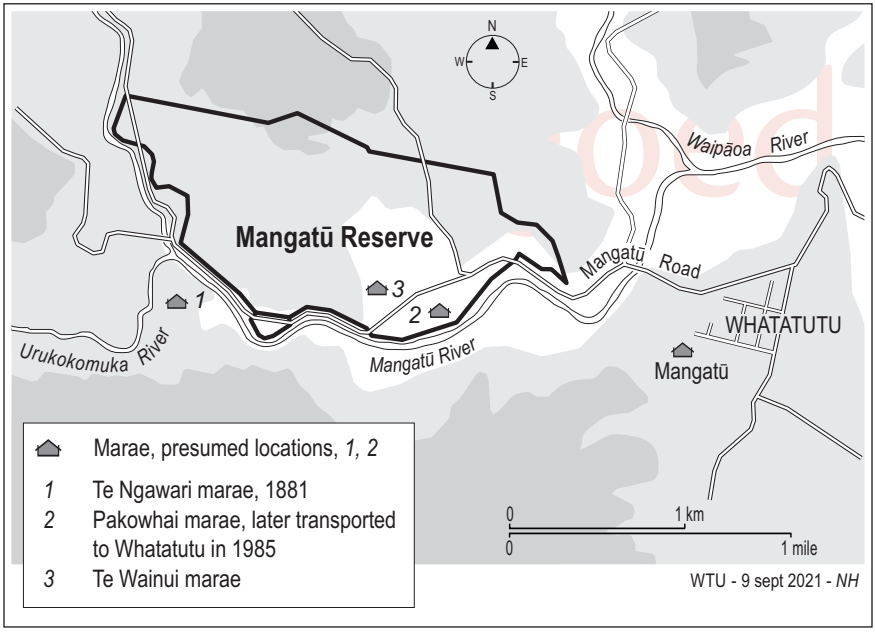
56 The Tribunal found that the Native Land Court's 1881 decision led some of the original 179 owners to downplay their Ngāriki connections and join the Ngāti Wahia lists of owners. In 1916, a committee of owners initially divided the list of 179 names into four groups: those descended from Ngāti Wāhia alone (a total of 51 people), those descended from Ngāriki alone (64), those descended from both Ngāti Wāhia and Ngāriki (63), and a list of those included through 'aroha'(9).[96] During the first determination of relative interests in 1917, the Native Land Court reallocated the individuals into three lists: Ngāti Wāhia, Ngāriki, and those placed on the block through aroha. The Tribunal observed 'the earlier distinction between tuturu Ngati Wahia and individuals who were taha rua Ngati Wahia and Ngāriki was thus lost'.[97] The Ngāriki list was decreased from 64 to 47 names, and those owners were awarded 15,000 acres in the block. Wi Pere's whānau received 12,000 acres, Wi Haronga's whānau 11,000, and the balance of 60,000 acres was awarded to the Wāhia list.[98] As we noted in chapter 4, the Court established a further division of shares in 1918, with Ngāti Wāhia receiving 58,000 shares, Te Whānau a Taupara 40,000 shares and the Ngāriki group 8,000 shares.[99] When the determination of relative interests came before the Court again between 1922 and 1923, a group of Ngāriki/Ngā Ariki Kaipūtahi owners were eventually awarded 4,000 shares, with the other 4,000 going to other Ngāriki owners.[100]

93. Waitangi Tribunal, *Turanga Tangata*, vol 2, p 678
94. Waitangi Tribunal, *Turanga Tangata*, vol 2, p 692
95. Evidence of Owen Lloyd, 20 April 2014, #121, paras 1.33–1.134
96. Waitangi Tribunal, *Turanga Tangata*, vol 2, p 679
97. 'Taha rua,' meaning having affiliation to both Ngāti Wāhia and Ngāriki: Waitangi Tribunal, *Turanga Tangata*, vol 2, p 681.
98. Waitangi Tribunal, *Turanga Tangata*, vol 2, p 683
99. Waitangi Tribunal, *Turanga Tangata*, vol 2, p 689
100. Waitangi Tribunal, *Turanga Tangata*, vol 2, p 691

57 Through the Native Land Court process of determining relative interests, Ngāriki/Ngāriki Kaipūtahi claim they experienced a steady reduction of their interests in Mangatū and an ongoing diminution of their mana.[101] During our 2018 hearings, Gareth Kiernan, an economist at Infometrics, provided us with estimates of the total value of the lost opportunities suffered by Ngāriki/Ngā Ariki Kaipūtahi as a result of their reduced interests.[102] Mr Kiernan proposed that if Ngāriki/Ngā Ariki Kaipūtahi had been given 20 per cent ownership of Mangatū 1 after 1922, then the value of their lost opportunities would be greater than $16.3 million. If they had been given 40 per cent ownership, their loss would exceed $32.6 million, and with 60 per cent ownership, their loss would have been greater than $48.9 million (we discuss the economic evidence of Mr Kiernan and others in chapter 7).[103] While there is insufficient evidence to make clear findings on the extent of the economic prejudice suffered by Ngāriki/Ngā Ariki Kaipūtahi, it is possible to make some general observations.

58 Although the population of Ngāriki/Ngā Ariki Kaipūtahi was small, they also had limited land interests and 'any loss of land, therefore, would have been acutely felt by the iwi'.[104] Following the 1881 decision, many Ngāriki/Ngā Ariki Kaipūtahi still lived on the Mangatū block. John Robson gave evidence that 'Ngariki Kaiputahi had a concentration of dwelling sites at two locations at Pukutarewa; one on the southern bank of the Urukokomuka Stream, and another slightly to the east and on the northern bank of the Mangatu River called Pakowhai.'[105] During this period, Pera Te Uatuku built the Te Ngawari meeting house for Te Kooti on the south bank of the Urukokomuka stream.[106] After this land was leased by Wi Pere, the papakāinga was relocated one kilometre east at Pakowhai, on the north bank of the Mangatū river.[107] This land was set aside by the Incorporation to accommodate whānau working on the Mangatū block, although it is not clear if it was ever officially established as a reserve.[108]

101. Waitangi Tribunal, *Turanga Tangata*, vol 2, p 694
102. Evidence of Gareth Kiernan, 28 May 2018, #P11
103. This value represents the value of the dividends Ngāriki/Ngā Ariki Kaipūtahi would have received following the return of the Mangatū 1, 3, and 4 blocks to their Māori owners in 1948. Mr Kiernan accepted that financial problems prior to 1950 make it difficult to determine an appropriate estimate of their losses: Evidence of Gareth Kiernan, #P11, pp 3–6
104. Evidence of Anthony Patete, 28 May 2018, #P21, p 36
105. John Robson, 'Ngāriki Kaipūtahi Mana Whenua Report', November 2000, #A22, para 4.10
106. Evidence of Owen Lloyd, no dated, #C23, para 50; Judith Binney, *Redemption Songs: A Life of Te Kooti Arikirangi Te Turuki* (Auckland: Bridget Williams Books, 2012), p 370
107. The Evidence of Peneha Tamahouia to the Native Land Court: *Mangatu 1 & 4* (1921) 46 Gisborne MB 144 (46 TRW 144), p 173; document bank, #A21(c), p 158; evidence of Owen Lloyd, #C23, para 50
108. A 1900 plan marks of a surveyed area of 526 acres which is labelled 'native reserve'. A later survey plan from 1937 shows an almost identical plot, but does not label it as a reserve: Robson, 'Ngāriki Kaipūtahi Mana Whenua', #A22, para 4.24



Mangatū Marae and reserve

59 When Pera Te Uatuku moved from the southern side of Urukokomuka to Pakowhai, Te Ngawari was rebuilt. However, the meeting house was accidentally destroyed by fire and rebuilt in 1922.[109] As Mr Robson's evidence showed, flooding and silting in the upper Mangatū river catchment then led to the marae's relocation to a third site close by, where land had been donated by Pera's granddaughter Ruahinekino Paraone in 1944.[110] During the 1950s, ongoing flooding forced the entire nearby township of Whatatutu to higher ground. Much of the settlement at Pakowhai followed suit and the reserve was vested back within the Mangatū block under section 44 of the Māori Affairs Amendment Act 1967.[111] The Mangatū marae and Te Ngawari were also relocated to the Whatatutu township in 1985, and remain the heart of the Ngāriki/Ngā Ariki Kaipūtahi community today.[112]

60 In this Inquiry, Ngāriki/Ngā Ariki Kaipūtahi have emphasised that the Mangatū lands are their core rohe. Mr Lloyd gave evidence that removing the marae from Mangatū had damaged the standing of Ngāriki/Ngā Ariki

109. Evidence of Owen Lloyd, no date, #C23, p75; Robson, 'Ngāriki Kaipūtahi Mana Whenua', #A22, para 4.23
110. Robson, 'Ngāriki Kaipūtahi Mana Whenua', #A22, para 4.23
111. Robson, 'Ngāriki Kaipūtahi Mana Whenua', #A22, para 4.24
112. Robson, 'Ngāriki Kaipūtahi Mana Whenua', #A22, para 4.23; evidence of Owen Lloyd, 20 April 2012, #I21, para 1.37

Kaipūtahi.[113] He told us that the divisions between groups caused by the 1881 title determination 'made Nga Ariki Kaiputahi virtual refugees on their own land'.[114] Even now, they experience ongoing problems accessing the land because their activities in Mangatū, such as hunting, might affect the Incorporation's farming operations.[115]

61 The economic and cultural prejudice Ngāriki/Ngā Ariki Kaipūtahi have suffered as a result of reduced interests in Mangatū 1 is typical of the widespread poverty caused by the operation of the Crown's legislation as administered by the Native Land Court. The displacement of their community from their traditional lands also meant the loss of access to resources and traditional means of subsistence and production. Up until the 1930s, subsistence farming, casual and seasonal wage labour, and dividends all generated income for the Ngā Ariki Kaipūtahi people remaining on the papakāinga lands at Mangatū. However, following the Second World War, as rural work became scarcer and floods more common in the area, many people were forced to transition to urban wage labour.[116] Mr Lloyd gave evidence during the Tūranga Inquiry that following the loss of their tribal land base: 'Those who were left with nothing had to focus on surviving day to day. The pursuit of self-actualisation and cultural development has taken second place to the need to provide for our families with food, homes and clothing.'[117]

62 Professor Brian Murton suggested in his evidence that Te Kooti's kupu whakaari (prediction) about the Mangatū lands captured this intersection between the economic and cultural effects of land loss:

> E kite ake ana au i to koutou whenua e tere ana e tere ana ki te moana, a a, (e) kore rawa e pupuri
>
> I see your land drifting, drifting to the sea. And you will not be able to retain it.[118]

63 Professor Murton suggested:

> This could be a prediction about the erosion and flooding that was to come by the early twentieth century, but it also symbolises the loss of land, especially for some Nga Ariki whanau who have always felt that their claims to Mangatu have

113. Evidence of Owen Lloyd, #C23, para 81
114. Evidence of Owen Lloyd, #I21, para 1.33
115. Evidence of Owen Lloyd, #I21, para 1.34
116. Evidence of Anthony Patete, #P21, p 27
117. Evidence of Owne Lloyd, #C23, pp 15–16
118. Murton, 'Te Aitanga a Māhaki, 1860–1960', #A26, p 663; Binney references the sources of this kupu whakaari as a speech given by Edward Mokopuna Brown at Mangatū Marae in 1982: Judith Binney and Gillian Chaplin, *Ngā Mōrehu: The Survivors* (Auckland: Auckland University Press and Bridgette Williams Books, 1990), p 36

not been recognised properly. Perhaps the 'drifting' could also have referred to people leaving the land, being aimlessly adrift in a new world, and moving to the coastal cities.[119]

64 Throughout the twentieth century, Ngāriki/Ngā Ariki Kaipūtahi used protest and petition to express their frustration at the dilution of their interests and the undermining of their mana. As Bernadette Arapere commented in her research report, 'Ngariki Kaiputahi have created ongoing traditions and narratives of resistance as they have attempted in many ways and in many forums to achieve justice over the ownership of the Mangatu lands.'[120]

65 Their dissent began immediately after the final determination of relative interests in 1923. Ngāriki/Ngā Ariki Kaipūtahi individuals promptly appealed their allocations but only Te Hira Te Uetuku was able to increase his shares slightly.[121] A later generation, led by Edward Mokopuna Brown, would continue to dispute the status of Ngāriki/Ngā Ariki Kaipūtahi in Mangatū. Brown petitioned Parliament in 1958, seeking recognition for Ngariki Kaiputahi as 'the original owners of Mangatu'.[122] He presented another petition in 1975 that claimed '[w]hen Rueben Brown arrived at Mangatu in 1894 he saw a garden and orchard of apples along the Mangatu River and heard the land referred to as belonging to Rawiri Tamanui'.[123] For Ngāriki/Ngā Ariki Kaipūtahi, losing their ability to live on the land and exercise mana whenua and rangatiratanga in Mangatū remains a significant source of economic, cultural and spiritual prejudice.

The administration of Mangatū 1 by trustees, 1899–1947

66 Having considered the specific prejudice suffered by Ngāriki/Ngā Ariki Kaipūtahi, we now examine the prejudice suffered by all the Mangatū customary owners as a result of the administration of their land through two trust arrangements between 1899 and 1947. As we discussed previously, in 1893 Wi Pere and William Rees promoted the establishment by statute of the Mangatū Incorporation, in order to retain the large Mangatū 1 block in Māori ownership (see chapter 4, paragraph 136). By becoming incorporated with their own committee of management, the owners hoped to protect their tino rangatiratanga, including their governance and management of the land.

67 Despite their success in establishing the Incorporation, it struggled financially because, as a Māori entity, it was unable to borrow money (we discuss the obstacles facing Māori incorporations in raising finances in chapter 4, see

119. Murton, 'Te Aitanga a Māhaki, 1860–1960', #A26, p 663
120. Bernadette Arapere, 'Ngāriki Kaiputahi Research Report', 18 December 2000, #A21, p 37
121. Arapere, 'Ngāriki Kaiputahi Research Report', #A21, p 40
122. Document bank, #A21(d), p 260
123. Document bank, #A21(d), p 276

paragraphs 126–127).[124] In order to develop the land, the Mangatū 1, 3, and 4 blocks were vested in three trustees who administered mortgage and lease transactions in the block from 1899 until 1917: Henry Jackson (the receiver for the Carroll Pere Trust, see chapter 4, paragraph 160), Wi Pere, and the Hawkes Bay Commissioner for Crown Lands. During this trust arrangement, Kathryn Rose observed that 'the potential for the owners of Mangatu to lose control over the block was reduced by an arrangement to have three trustees rather than just one and the decision to retain the Mangatu Committee'.[125] However, following Wi Pere's death in 1915, Mangatū 1 came under the control of the East Coast Commissioner until 1947, when it was returned to the shareholders of the Mangatū Incorporation (we discuss both these trust arrangements in chapter 4, see paragraphs 138–140).

68 Under the administration of the initial three trustees, 59,845 acres of Mangatū 1 were leased to settlers by 1917.[126] As we discussed in chapter 4, leasing was the only feasible way for the trustees to obtain income from the land (see paragraphs 137–138). Because the lease terms could be up to 42 years, as Jacqueline Haapu described, 'in essence the owners had lost the right to utilise portions of traditional land for a substantial numbers of years'.[127] The owners have stories from this period that tell of lessees desecrating wahi tapū sites at Mangatū. Haapu records that one lessee pulled down the ancestral pā site of Ngāriki/Ngā Ariki Kaipūtahi rangatira Rawiri Tamanui in order to prevent the owners returning to the area.[128] Such acts illustrate the barriers that existed for the owners of Mangatū 1 during this period, and their inability to exercise their tino rangatiranga over their whenua.

69 From 1907, under section 11 of the Native Land Claims Adjustment and Laws Amendment Act the owners were able to borrow money to farm their lands themselves. In 1908, the trustees began farming an area of approximately 12,000 acres called Waitangirua Station.[129] At a 1911 general meeting, owners requested that the trustees halt leasing operations, and increase the area

124. Māori incorporations were unable to raise finance prior to Native Land Laws Amendment Act 1903 which enabled Māori to borrow against livestock, chattels and land. The Maori Land Settlement Act enabled Maori to access 10-year loans at 5 per cent interests from public sources. However, the Tribunal observed that 'despite the legislative changes 'access to finance remained problematic'. H C Jackson, the trustees for the Mangatū 1, 3 and 4 blocks, as well as the lawyer for the Waihirere and Waihirere No 2 Incorporation, commented at the time on the requirement that loans be paid to and administered by the Maori Land Board, 'I was not aware of this provision, nor do I pretend to understand the many Laws affecting Native Lands, as some fresh peculiarity crops up each day, and I am informed that such is the law': Waitangi Tribunal, *Turanga Tangata*, vol 2, pp 503–504
125. Kathryn Rose, 'Te Aitanga-a-Māhaki Land: Alienation and Efforts at Development, 1890–1970', 2000, #A18, p 157
126. Murton, 'Te Aitanga a Mahaki, 1860–1960', #A26, pp 160–161; Jacquiline Haapu provides the larger figures of 62,128 acres leased by 1912: Haapu, 'Te Ripoata o Mangatu', #A27, p 128
127. Haapu, 'Te Ripoata o Mangatu', #A27, p 125
128. Haapu, 'Te Ripoata o Mangatu', #A27, p 129
129. Waitangi Tribunal, *Turanga Tangata*, vol 2, p 506

farmed for the owners.[130] Many of the owners were employed as manual labourers for the lessees, working to clear the land of native vegetation for farming. Haapu observed that 'they could see the settlers reaping the benefits of their land and labour and wanted to farm the land themselves'.[131] However, Professor Murton's evidence was that the 'lessees took up the better country first, and even some of this proved to be difficult to develop'.[132] As a result, the owners were limited in the extent to which they could farm their own lands, with the majority of the block, and the best land, tied up in lease arrangements.

70 The clearances of this period rapidly created damaging environmental consequences for the land. Alan Haronga gave evidence that

> The lessees cleared the land through slashing and burning. There were stories about dense black clouds of smoke that were visible from as far away as Tolaga Bay and Gisborne. Most of the leasehold land had been cleared by 1914. Almost immediately, the land in the upper Waipaoa catchment started to erode.[133]

71 As the forest cover was cleared, erosion dramatically increased in Mangatū and throughout the Waipāoa catchment. Flooding became an increasing problem, causing considerable damage in Gisborne during the 1930s and 1940s. As we have discussed, persistent floods after the Second World War eventually drove those living at Pakowhai to higher ground at Whatatutu (see paragraph 59). The problem would ultimately lead the Government to take action to prevent further erosion and river aggradation in the 1960s. We return to this issue in the next section.

72 From 1917 until 1947, the administration of Mangatū 1 came under the control of the East Coast Commissioner. As we noted in chapter 4, the Mangatū owners were unable to exercise any control over management of their lands during this period, and many of the Commissioner's management policies that applied to the East Coast Trust lands were also applied in Mangatū 1.[134]

73 The Commissioner sought to clear the land from debt and overcome the maladministration of the previous trustees through continued leasing. In the early years of the Trust, the Commissioner had success in renegotiating lease terms. But economic conditions deteriorated during the late 1920s and 1930s. As it became increasingly clear that the land itself was deteriorating, more and more lessees elected to take compensation for improvements on the land, rather than to renew their terms.[135] To meet these costs, the Commissioner had to raise large loans from the Native Trustee and Public Trust office,

130. Evidence of Alan Haronga, 11 April 2012, #117, para 31
131. Haapu, 'Te Ripoata o Mangatu', #A27, p 129
132. Murton, 'Te Aitanga a Mahaki, 1860–1960', #A26, p 161
133. Evidence of Alan Haronga, #117, para 30
134. Murton, 'Te Aitanga a Māhaki, 1860–1960', #A26, p 174
135. Murton, 'Te Aitanga a Mahaki, 1860–1960', #A26, pp 178–179

and so accrued substantial external debt.[136] Murton observes that, by 1945, the Commissioner had taken over nearly 37,000 acres of land in Mangatū 1. Over time, the land was amalgamated, and new stations were created.[137] By 1941, a number of these stations were returning good profits from sheep and cattle farming, and the Tribunal concluded that 'by 1947 the position of the Mangatu Trust looked secure.'[138]

74 One factor that contributed to the extended period of the East Coast Commissioner's control was the financial pitfalls created by graduated land tax legislation. The Finance Act 1917 introduced progressively higher tax rates that recognised trustees as single owners. Murton described this legislation as 'disastrous for large areas of Maori land held by a single trustee, such as the East Coast Commission.'[139] As a result, between 1917 and 1922, the Mangatū lands received £26,002 in rentals, and paid £18,187 in land tax. This was an 'almost intolerable burden' imposed on, at this point, the 441 Māori owners of Mangatū 1. Following petitions by the Commissioner, and other Māori Trustees, the Inland Revenue Department admitted the mistake, and limited tax on Māori land to one-quarter of the revenue of a block. However, no rebate was paid.[140] Murton contended that 'this money would have been immensely useful to the operation of Mangatu at a time when compensation was being paid to former lessees, new loan obligations were being incurred and land development was being undertaken.'[141]

75 Despite the Commissioner's success in returning Mangatū 1 to Māori control as a profitable block in 1947, in our view, the Mangatū owners suffered prejudice as a result of the substantial period of alienation of their lands under the East Coast Commissioner. They were not only locked out of their land for many years, but also lost the right and opportunity to govern and protect their own land and its resources. They were not consulted about, or involved in, decisions about managing their economic base. This loss of the ability to exercise their tino rangatiratanga for 30 years with respect to the land was a source of spiritual and cultural prejudice for the owners. Ingrid Searancke gave evidence during our 2012 hearings that the owners felt disempowered during this period:

> I remember well the time leading up to the return of the land to Mangatu. At that time our people had not had any say in the running of our land for several decades. The land was controlled by the East Coast Commissioner, I remember the last one was Mr Jessep. He occupied our land and had total say over our

136. Murton, 'Te Aitanga a Mahaki, 1860–1960', #A26, p 188
137. Murton's evidence was that by 1933, the amount owed on mortgages totalled £162,304: Murton, 'Te Aitanga a Mahaki, 1860–1960', #A26, p 188
138. Waitangi Tribunal, *Turanga Tangata*, vol 2, p 508
139. Murton, Te Aitanga a Mahaki, 1860–1960', #A26, p 192
140. Murton, Te Aitanga a Mahaki, 1860–1960', #A26, pp 193–194
141. Murton, Te Aitanga a Mahaki, 1860–1960', #A26, p 194

whenua. Although it was still our land, it did not feel like that because we did not have control.[142]

76 We note that after 1917 the East Coast Commissioner made several small land alienations in Mangatū 1. These included the sale of 106 acres to a neighbouring landowner in 1927, and the exchange of 35 acres in Mangatū 1 for 8 acres owned by F W Williams in Mangatū 2L. This small area was added to the Mangatū 5 block, also under the Commissioner's control, so that the Mangatū owners received no compensation.[143] While these are not large losses, they went directly against the owners' firm commitment to preventing the loss of any further Māori land.

77 In addition to these smaller sales, the Mangatū owners were also prejudiced by the Commissioner's sale of their lands in the Mangatū 5 and 6 blocks. As we discussed in chapter 4 (see paragraph 175), these blocks came under the East Coast Native Trust Lands Board and approximately 18,398 acres were sold to private purchasers by the East Coast Commissioner between 1913 and 1919.[144] The remainder of the blocks was purchased by the Crown in June 1930.[145] Because of a defaulted mortgage, the 13,608-acre Mangaotane Station was eventually returned to the owners of Mangatū 1 in 1974. However, the land was encumbered with debt and in poor condition. Jacqueline Haapu commented that 'in essence the owners were handed back an estate which would continue to spiral into debt'.[146]

78 We consider that these alienations could have been avoided had the owners of Mangatū 1 been allowed to reacquire Mangatū 5 and 6 in 1899. Instead, the sale of Mangatū 5 and 6 was part of that 'long and weary tale of debt' incurred through the Tūranga trusts.[147] The Validation Court identified Mangatū 5 and 6 as 'debtor' blocks in 1908, and because of an administrative error, they came to be charged with compound interest on the debts.[148] This error was not recognised until 1922 (see chapter 4, paragraph 164). In the meantime, the Commissioner had moved to sell Mangatū 5 and 6 between 1913 and 1919 land to repay the general debts inherited from the Carroll Pere Trust.[149] It seems likely that more land could have been retained had the Crown intervened in the problems facing the Trust's lands before 1902.

79 It is also relevant to the question of prejudice that, following the Crown's appointment of the Commissioner in 1917, the owners received little economic benefit from their large asset over this long period. Prior to 1917, the

142. Evidence of Ingrid Searancke, 11 April 2012, #I15, para 11
143. Haapu, 'Te Ripoata o Mangatu', #A27, pp 145–146
144. Murton, 'Te Aitanga a Māhaki, 1860–1960', #A26, pp 266–267
145. Haapu, 'Te Ripoata o Mangatu'#A27, p 82; Rose, 'Te Aitanga-a-Mahaki', #A18, pp 316, 325
146. Haapu, 'Te Ripoata o Mangatu', #A27, pp 83–87
147. Haapu, 'Te Ripoata o Mangatu'#A27, p 84
148. Waitangi Tribunal, *Turanga Tangata*, vol 2, p 565; Macky, 'Trust Company Management', #F11, pp 296, 298
149. Haapu, 'Te Ripoata o Mangatu', #A27, p 84

owners had received dividend payments totally £6,508 7s 4d.[150] However, under the East Coast Commissioner, dividends could only be paid after all expenses had been met. As a result, no dividends were paid between 1917 and 1923, and the owners only received modest dividends from the late 1920s, at a rate of one shilling per share (this increased to two shillings per share in the 1940s), as the profits were reserved for improvements and future compensation payments to lessees.[151] The Great Depression was a period of significant hardship for many Te Aitanga a Māhaki, Ngāriki/Ngā Ariki Kaipūtahi and Te Whānau a Kai people, and the Trust's inability at times to provide dividends or other services were also matters of concern to the Commissioner.[152] As the Tribunal stated in the Tūranga report, this large asset had been 'effectively in receivership for 30 years'.[153]

80 In his evidence, Professor Murton suggested that, in the prevailing circumstances, it was not clear that 'Mangatu could ever have provided income for its owners'. He noted the constraints placed on the distribution of benefits by the Mangatū Incorporation's empowering legislation, and the subsequent trust agreements. From 1917, significant resources were required for land taxes, compensation for former lessees, and land improvements. The Commissioner also had to contend with periods of severe economic depression during the late 1920s and the 1930s, and the Mangatū lands were required to acquire significant debts 'in order to survive'.[154] All of these constraints meant, Murton suggested, that dividends could only be paid intermittently.

81 Clearly, the Mangatū owners would have faced some of these constraints even if the Crown had earlier supported Māori communities to manage and develop their own lands, and the land had not been vested in trustees. However, the leases that covered large tracts of the Mangatū 1 block from the early twentieth century were a direct consequence of the restrictions imposed on Māori landowners by the flawed titles created under the Crown's native land regime. The terms of the leases meant the process of taking back control over the land could take up to 42 years (see chapter 4, paragraph 137). In Mangatū 1, the lease terms lasted into the 1940s. Furthermore, the compensation required for any improvements caused the Commissioner to incur significant debts, which further delayed the return of the land to Māori ownership.

82 We note that while the Commissioner did establish profitable farming operations in a number of stations in Mangatū 1, the owners remained at the mercy of the lessees in other parts of the block. The Commissioner's success

150. These payments were not legal under the Mangatū deed of trust, but were considered appropriate by the trustees nonetheless. Murton notes that it is not clear how the dividends were distributed as the owners' relative shares had not yet been determined: Murton, Te Aitanga a Mahaki, 1860–1960', #A26, p 207
151. Waitangi Tribunal, *Turanga Tangata*, vol 2, p 507
152. Murton, 'Te Aitanga a Mahaki, 1860–1960', #A26, p 192
153. Waitangi Tribunal, *Turanga Tangata*, vol 2, p 508
154. Murton, 'Te Aitanga a Mahaki, 1860–1960', #A26, p 223

was partly due to the fact that a number of the stations that were taken over in the 1930s and 1940s were on some of the best Mangatū lands, and were 'immediately profitable'.[155] However, not all of the land returned to the Māori owners was in good shape. Rutene Irwin gave evidence that work continued on repairing some of the land that had been taken over from the lessees into the 1950s; 'they were in a shocking state, and we had to rebuild the whole lot', he told us.[156] These circumstances resulted in economic disadvantage for the owners when the land finally came back.

83 Had the Crown supported the Incorporation as a Māori entity to borrow money for development, the owners would still have expected to raise finance. However, with sound management the land could clearly support profitable farming operations. In our view, if the owners had been able to farm the lands themselves, as was their clear preference, they would at least have had an opportunity to make investments on their own behalf. They could have paid off the necessary debts, as the Commissioner did. Had they not been required to lease out large tracts of land and pay compensation to lessees, they could have been able to benefit from any profits the land produced much earlier. For one thing, they might have escaped the disproportionate tax burden imposed on trustees as a single owner under the Finance Act 1917. Any revenue could have gone towards further commercial investments, or to support the welfare of their communities (which was sorely needed during the early twentieth century – we discuss the socio-economic prejudice suffered by the claimants below). This is not pure speculation: we have the example of the Mangatū Incorporation today, which, over generations, has managed to build a successful business from the base of the Mangatū land it retained after 1961.

84 As it happened, the owners were denied the opportunity during the period when the land was held in trust, and received little benefit from their lands for over two generations. We are unable to calculate exactly what the lost opportunity meant for the owners in terms of its economic value. Nevertheless, we consider that the Mangatū owners suffered economic prejudice, as well as the diminution of their tino rangatiratanga in respect of their land as a result of the Crown's failure to support the Te Aitanga a Māhaki, Ngāriki/Ngā Ariki Kaipūtahi to manage and develop their own land.

85 For completeness, we note that Murton also reached a further conclusion on the impact of the Crown's native land regime on the Mangatū owners. He suggested that it was the determination of relative interests and the unequal allocation of shares within the community of owners that ultimately meant that many owners would receive little benefit from their land (we discuss the determining relative interests above, see paragraphs 55–57). He noted that the problem grew worse as the number of owners increased through each generation, and the succession rules imposed on Māori landowners meant that

155. Murton, 'Te Aitanga a Mahaki, 1860–1960', #A26, p 182
156. Evidence of Rutene Irwin, 11 April 2012, #I12, para 12

individuals held fewer and fewer shares.[157] The ownership of land by Māori communities with rights held under tikanga, which Wi Pere had sought to protect, 'was replaced by a new one in which the market mechanism dominated, ultimately even creating a market among the owners for their shares.'[158]

86 By 1966, Murton found that '812 shareholders held less than 10 shares . . . with 166 owners holding mere fractions of a share.'[159] Alan Haronga gave evidence during our 2012 hearings, that in February 2011 the distribution range of shares in the Incorporation was between 0.031 to 14,802 shares.[160] However, he told us that Mangatū Incorporation has more recently encouraged owners 'to set up whānau trusts to stop the fragmentation of their ownership interests and thus preserve them for future generations.'[161] In our view, additional prejudice was suffered by many of the Mangatū owners from the fractionation of their interests. This problem was not specific to the Mangatū blocks. It was an egregious feature of the Crown's native land regime that impacted Māori landowners throughout Tūranga. We return to the prejudice caused by the Crown's native land regime and its succession rules below (see paragraphs 130–131).

87 Overall, the economic, cultural and spiritual prejudice associated with the administration of Mangatū 1 by trustees, and the loss of the Mangatū 5 and 6 blocks would have been shared by the customary owners of the block and shareholders in the Mangatū Incorporation. As we discussed in chapter 4, these are Te Aitanga a Māhaki hapū, Ngāti Wāhia, Ngāriki, Te Whānau a Taupara, Ngāriki/Ngā Ariki Kaipūtahi, and the Te Whānau a Kai owners who have interests in Mangatū through their Ngāriki whakapapa.

The Crown's acquisition of land in Mangatū 1, 1961

88 Only 14 years after the Mangatū 1 block was returned to the control of its owners by the East Coast Commissioner, the Crown acquired 8,522 acres of land within the block for afforestation purposes.[162] The 1961 sale was the result of years of negotiations between Crown officials and the Mangatū committee of management. Throughout this period of engagement, the Crown failed to disclose its intentions to establish a commercially productive forest on the land. The owners had resisted the sale of their ancestral land, and sought alternative tenurial arrangements that could also facilitate the afforestation required for erosion control. However, the Crown did not seriously consider any alternatives to sale (see chapter 4, paragraphs 188–196). According to Hohepa Brown:

157. Murton, 'Te Aitanga a Mahaki, 1860–1960', #A26, p 223
158. Murton, 'Te Aitanga a Mahaki, 1860–1960', #A26, p 223
159. Murton, 'Te Aitanga a Mahaki, 1860–1960', #A26, p 214
160. Evidence of Alan Haronga, #I17, p 23
161. Evidence of Alan Haronga, #I17, para 62
162. Waitangi Tribunal, *Turanga Tangata*, vol 2, pp 719–721, 724;

> 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.[163]

89 For the Mangatū Incorporation, the land lost in the 1961 sale represents, among other things, a loss of heritage. Against a backdrop of rapid alienation, Wi Pere and William Rees had established the Incorporation under its own innovative legislation in 1893 as a strategy for retaining and controlling tribal land. The Māori owners were acutely aware of this legacy during their negotiations with the Crown in 1960–61, and it informed their resistance to the sale. Then-chair of the Incorporation, Henare Ngata, made this plain in a 1960 letter to F W Brown, the Commissioner for Crown Lands:

> The owners said they did not wish to lose part of a heritage which had been handed down to them by their forebears. This objection was finally overcome only after the greatest difficulty, and largely as a result of the proposal that the proceeds of a sale be set aside to buy other land.[164]

90 Today, the Mangatū owners retain this deep and long-standing connection with the Mangatū land, but the prejudice remains too. Alan Haronga gave evidence at the 2012 hearings that 'the 1961 land issues have always been a festering sore for our owners particularly our koroua and kuia who still have vivid memories of 1961.'[165] Te Aitanga a Māhaki kaumātua Rutene Irwin spent most of his life living and working on the Mangatū block, and described a relationship with the lands extending back for generations:

> My great-grandmother was always talking about Mangatu, I used to walk with her and she would pull me along behind her, she would meet someone from Mangatu and they would have a tangi . . . The Tribunal can get some sense of the history behind Mangatu Incorporation if you stop to think that it was established in my great-grandmother's lifetime. In fact, her father, my great-great grandfather Hori Puru, was one of the twelve trustees put in place as kaitiaki of Mangatu blocks following the 1881 [land] court decision.[166]

91 The Incorporation has fought hard to build a legacy of land retention and control; thus the Crown's acquisition of land in Mangatū 1 remains a significant source of pain for the members. It is exacerbated by the fact that the sale occurred only 14 years after the owners resumed control over their lands from the East Coast Commissioner. Ingrid Searancke gave evidence in 2012

163. Evidence of Hohepatahataha Brown, 5 April 2012, #113, pp5–6
164. Waitangi Tribunal, *Turanga Tangata*, vol 2, p722
165. Evidence of Alan Haronga, #117, para 39
166. Evidence of Rutene Irwin, #112, paras 8–9

that 'no sooner had Mangatu got on their feet after getting the land back then along came the business of taking the land for erosion control.'[167]

92 In addition to this prejudice, the claimants called expert evidence during our 2018 hearings in order to establish that the price paid for the 1961 land was unfair because it did not take sufficient account of the potential downstream economic benefits of the scheme to the wider community.[168] The Tribunal was not provided with conclusive evidence on this matter and we are unable to reach a firm finding on it.[169] However, we are satisfied that the 1961 land was a very significant asset to the Māori owners, especially considering the small number of other economically useful blocks left to them in the district. Its notable that Crown officials had rejected the owners' request for a land exchange on the basis that there was 'no Crown land available to offer in exchange.'[170] Alan Haronga gave evidence during our 2012 hearings that in took the Incorporation 18 years to acquire 5,355 acres of other land following the 1961 sale, at a cost of $2,107,042.[171]

93 In our view, the loss of the land, in these circumstances, is sufficient on its own to warrant a finding that we should return the whole or part of the CFL land in order to remove the prejudice. The price paid is not of itself material to reaching a conclusion on that central issue: even if the price paid had been higher than it was, the owners would still be prejudiced by the loss of their ancestral lands through negotiations where the Crown's conduct failed to comply with the Treaty standard of utmost good faith.[172]

94 The prejudice we are seeking to remove or compensate for with binding recommendations for the return of CFL land is the loss of mana whenua

167. Evidence of Ingrid Searancke, 5 April 2012, #I15, para 20
168. In his economic evidence adduced for the applicants, economist Dr Richard Meade argued that 'by definition a fair price cannot have been agreed when one of the parties to the negotiations was both under duress and misinformed about the nature of the transaction'. During our hearings, Dr Meade contended that the expected net social benefits of the scheme should have informed the 1960 negotiations, and that 'perhaps if the public good had been spelled out more fully to Māhaki they would have opposed the sale more strongly than they did': evidence of Richard Meade, 28 May 2018, #P6, paras 244.1.1–244.1.2, p 340; evidence of Richard Meade, 13 August 2018, #P42, para 63; transcript for hearing week one, #4.30, pp 320–321; transcript for hearing week two, 12–15 November 2018, #4.33, p 47.
169. This was the argument of Dr Richard Meade in his evidence for Te Aitanga a Māhaki and the Mangatū Incorporation, see footnote 168. In his evidence, Dr Meade refers specifically to forecasting done by the Poverty Bay Catchment Board in 1958 and 1959 on the commercial value it expected the scheme to produce, and expressed the view that the Mangatū committee of management were never provided with this information. But it is not clear to us that this information would have made a difference to the purchase price. In each of the evaluations of the scheme's benefits done by the catchment board in 1958 and 1959 the findings were more indicative than precise. The key point for the Government was that the scheme had significant benefits which outweighed the costs. This was not lost on the owners, as the importance of the scheme to the public interest also functioned as an additional pressure on them to acquiesce in the sale: Waitangi Tribunal, *Turanga Tangata*, vol 2, p 721.
170. Waitangi Tribunal, *Turanga Tangata*, vol 2, p 712
171. Evidence of Alan Haronga, 11 June 2012, #I36, para 22
172. Waitangi Tribunal, *Turanga Tangata*, vol 2, p 733

in respect of the 1961 land loss, something which is still deeply felt by the owners. This prejudice primarily impacted the shareholders of the Mangatū Incorporation, who in the main belong to Ngāti Wāhia, Ngāriki, Te Whānau a Taupara, and Ngāriki/Ngāriki Kaipūtahi. As we discussed in chapter 4, the owners also include Te Whānau a Kai people with interests in Mangatū through their Ngāriki whakapapa.

Prejudice associated with related Crown Treaty breaches

95 In the sections above, we set out our findings on the prejudice which resulted from the losses of Te Aitanga a Māhaki, Ngāriki/Ngā Ariki Kaipūtahi and Te Whānau a Kai in the Mangatū lands. However, these losses occurred within the context of the Crown's related Treaty breaches that were directed at the wholesale destruction of their autonomy, and where the Crown failed to uphold the tino rangatiratanga guarantee under Article 2 of the Treaty. These breaches included the Crown's attack on the defensive pā at Waerenga a Hika in 1865 to establish its control over Tūranga land and resources; and the deed of cession and the operations of the Poverty Bay Commission, both of which consolidated the Crown's authority in place of the tino rangatiratanga of Tūranga Maori. The Crown's subsequent policies facilitated Crown and private purchases of customary land on a massive scale.

96 As we detailed above, the loss of Mangatū 2 to private purchase and the reduction of Ngāriki/Ngā Ariki Kaipūtahi's interests in Mangatū occurred in this context. The claimant communities with interests in Mangatū each sought to retain some control and develop their lands in Tūranga through the trust initiatives of Wi Pere and William Rees. However, the Tūranga trusts faced a comprehensive succession of legal and political barriers to retaining and developing their own land, including the faulty Native Land Court titles, and the Crown's complex, costly and inefficient land transfer system. These obstacles combined with the lack of legal capacity to raise funds to secure development of their land themselves until 1894 when it was too little too late, contributed to the failure of the Tūranga trusts (see chapter 4, paragraphs 154–178). As a result of these wider developments, the lands retained in Mangatū 1 took on a greater importance to the Māori owners who had lost so much throughout their rohe.

97 In our view, the prejudice Te Aitanga a Māhaki, the Mangatū Incorporation, Ngāriki/Ngā Ariki Kaipūtahi, and Te Whānau a Kai suffered as a result of their losses in Mangatū is best understood with reference to the Crown's related Treaty breaches in Tūranga that occurred over the same period, and impacted the same people. To ignore the full picture of the claimants' experience and the highly prejudicial consequences of the Crown's actions for their communities would be inconsistent with the Tribunal's restorative approach and the equitable nature of the Tribunal's remedies jurisdiction under section 8HB.

98 In the sections below, we examine the cumulative effect of the Crown's related Treaty breaches on the Mangatū owners; and how their further losses

compounded the prejudice they felt from the loss of their Mangatū lands. Many of these losses are in themselves examples of severe prejudice resulting from the Crown's Treaty breaches in Tūranga.

Losses associated with the deed of cession (1868) and the Crown retained lands

99 In 1868, Tūranga Māori were effectively forced to cede to the Crown 1.195 million acres (483,599 hectares) in the face of the Crown's threats to remove its protection from the district in the immediate aftermath of Te Kooti's fatal attacks on Māori and Pākehā communities.[173] The Tribunal considered that this transfer of land on such a huge scale represented 'an acceptance under duress of the Crown's absolute authority'.[174] In imposing the cession, as noted in chapter 4, the Crown took advantage of the tension and distress in the district to achieve a long-held objective. It purported to extinguish native title over the ceded lands, and sought to reserve land for military settlement and to grant individualised interests in land to Māori who were deemed to be 'loyal'. In fact, similarly to other parts of the North Island, the Crown was also seeking to confiscate 'rebel' lands.[175]

100 Ultimately, the Crown retained 56,141 acres (22, 719 hectares) of fertile flat land in the Patutahi, Te Muhunga, and Arai blocks. The bulk of the confiscation was imposed on the owners of the combined Patutahi and Te Arai blocks of 50,746 acres (20,536 hectares), where Rongowhakaata and Te Whānau a Kai have interests.[176] This area included the rich Kaimoe flats and some of the most fertile land in the district; the 'choicest parts of their rohe'.[177] Te Aitanga a Māhaki have interests in the Te Muhunga block, which accounted for a further 5,395 acres (2,183 hectares) of the confiscated land. Professor Murton argued that the confiscation of this land was no accident. While it would still be possible for Tūranga Māori to grow subsistence crops on other land, 'the opportunities to participate in commercial agriculture in the twentieth century have been restricted by the loss of land of high horticultural potential'.[178]

101 The Crown's confiscation of fertile lands at Patutahi removed Te Whānau a Kai's access to their traditional economic base there. The Clarke Commission's report to Parliament in 1884, concerning Wi Pere's 1882 claim on behalf of Te Whānau a Kai, stated that they had been rendered 'absolutely landless near the coast . . . they are living on sufferance on his own property of fifty acres at Makauri, and on the land of other Natives.'[179] To address the gravity of their situation, Pere sought that a reserve consisting of land in Patutahi 'of

173. Waitangi Tribunal, *Turanga Tangata*, vol 1, p 254
174. Waitangi Tribunal, *Turanga Tangata*, vol 1, p 338
175. Waitangi Tribunal, *Turanga Tangata*, vol 1, p 262
176. Waitangi Tribunal, *Turanga Tangata*, vol 1, pp xxi, 328
177. Brian Gilling, 'Great Sufferers through the Cession: Te Whānau a Kai and the loss of Patutahi', December 2001, #C1, p 38
178. Murton, 'Te Aitanga a Māhaki, 1860–1960', #A26, p 116
179. 'A Report by Henry Clarke upon Certain Native Claims to Land, etc, Poverty Bay', 1 November 1883, *Appendix to the Journal of the House of representatives*, 1884, sess 2, vol 2, G-4, p 11

fair average quality' be set aside by the Clarke Commission for Te Whānau a Kai.[180] A reserve of sorts was established. However, Wi Pere described the land first selected from those areas the Crown made available as 'nothing but pumice; no food will grow there. That is the reason why they have not been already purchased by Europeans.'[181] The second selection made was similarly a steep and unusable hillside. The inadequacy of both selections suggests that Wi Pere was required to choose between meagre plots of land that were not already in Pākehā ownership. The award, which was made at less than five acres per head, did not provide Te Whānau a Kai with enough land even for subsistence, and cannot be said to have changed their circumstances.[182]

102 In evidence given before the 1920 Jones Commission (convened to investigate claims in respect of Patutahi), Te Whānau a Kai witnesses established their extensive rights in the Kaimoe block, at the northern end of Patutahi. They 'spoke of their occupation of Patutahi pa, they named the chiefs who resided in that place, they named relevant carved houses, and they gave the location of urupa, pa, tuna, cultivations, and kainga, particularly along the Whakaahu Stream' .[183] However, the Jones Commission's findings 'deleted Te Whanau a Kai from the list of those who lost land to the Crown in 1869'.[184]

103 Because of this displacement, Te Whānau a Kai have faced an ongoing struggle to maintain their autonomy and independent identity. Te Whānau a Kai leader David Hawea, gave evidence during our 2018 hearings that the upheavals of the period following Waerenga a Hika led to the loss or displacement of a significant number of their people.[185] Keith Katipa gave evidence that 'when Te Whānau a Kai was excluded from the confiscated Patutahi block my Peneha/Haua whānau went to live on Mangatū.'[186] In our view, this is evidence that, for Te Whānau a Kai people with interests in Mangatū, the loss of their core Patutahi lands meant they were more reliant on the lands retained elsewhere. With almost no other lands in Tūranga, they suffered heightened prejudice when they, along with the other owners, also lost control of land in Mangatū 1 under the East Coast Commissioner (see paragraph 75), and with the loss of the 1961 land.

104 We were reminded by Mr Hawea that 'Te Whānau a Kai have never received any kind of redress for the confiscation of the Patutahi block,' despite repeated efforts.[187] During the 1930s and 1940s, various attempts were made to provide redress for Te Whānau a Kai and Rongowhakaata's Patutahi losses. Following a 1949 hui, the two iwi made a joint offer to the Crown for the settlement of

180. 'A Report by Henry Clarke upon Certain Native Claims to Land, etc, Poverty Bay', 1 November 1883, *Appendix to the Journal of the House of Representatives*, 1884, sess 2, vol 2, G-4
181. Gilling, 'Great Sufferers through the Cession', December 2001, #C1, p 39
182. Gilling, 'Great Sufferers through the Cession', #C1, p 39
183. Waitangi Tribunal, *Turanga Tangata*, vol 1, p 336
184. Waitangi Tribunal, *Turanga Tangata*, vol 1, p 331
185. Evidence of David Hawea, 20 April 2012, #I20, para 5.8
186. Evidence of Ketih Katipa, 20 April 2012, #I19, para 2.10
187. Evidence of David Hawea, 28 May 2018, #P12, para 4.3

the Patutahi claim: Rongowhakaata would receive £60,000 and Te Whānau a Kai £40,000.[188] However, the Crown decided to deal with just one tribe, and offered £38,000 to Rongowhakaata only.[189] The Crown ignored the interests of Te Whānau a Kai, and the agreement between the two iwi. In our view, Te Whānau a Kai suffered particularly severe prejudice as a result of this confiscation.

Losses associated with the Poverty Bay Commission, 1869–1873

105 The Poverty Bay Commission was a unique body created in the wake of the deed of cession to record which lands the Crown would retain, and then to conduct a process of title adjudication to identify 'loyal' Māori owners of the ceded lands (see chapter 4, paragraphs 103–106). For iwi such as Te Aitanga a Māhaki, who had 40 per cent of their population detained on Wharekauri, the Commission's punitive function put substantial pressure on whānau to distance themselves from those who had resisted the Crown's incursions into Tūranga. In his evidence during the Tūranga Inquiry, Vincent O'Malley observed that 'few Maori were willing to disclose evidence of their "rebel" kin's landholding rights, since to do so invited confiscation. Instead the lands were quietly transferred into "loyalist" ownership.'[190]

106 Insufficient evidence adduced in the earlier Tūranga District Inquiry meant that the Tribunal could not make specific findings about the extent of Te Aitanga a Māhaki and Te Whānau a Kai losses as a result of the Commission's work. The Tribunal did consider that there was evidence of 'an almost complete exclusion of those sent to Wharekauri from title to lands awarded by the Poverty Bay Commission.'[191] The Tribunal was unable to identify women and children sent to Wharekauri by name and was therefore uncertain whether they too were excluded from titles, but concluded that on balance they probably were.[192] It was also unable to reach a firm view about the land interests of Te Aitanga a Māhaki or Te Whānau a Kai who were not members of the Whakarau but who may have been labelled as 'rebels'. It did note, however, that the ownership lists for blocks awarded to these two groups were considerably reduced as a result of the Commission's work.[193]

107 Despite finding it difficult to define precisely the number of individuals who lost interests through the Commission process, the Tribunal's earlier analysis suggested that a significant number of Te Aitanga a Māhaki and Te Whānau a Kai were excluded from titles, with significant long-term consequences. For instance, the Commission awarded the 12,360-acre Ngakora block to a list of only 33 owners. By comparison, Tangihanga was a similarly large block

188. Waitangi Tribunal, *Turanga Tangata*, vol 1, p 334
189. Waitangi Tribunal, *Turanga Tangata*, vol 1, p 334
190. Vincent O'Malley, '"An Entangled Web": Te Aitanga-a-Māhaki Land and Politics, 1840–1873', September 2000, #A10, p 371
191. Waitangi Tribunal, *Turanga Tangata*, vol 1, p 365
192. Waitangi Tribunal, *Turanga Tangata*, vol 1, p 365
193. Waitangi Tribunal, *Turanga Tangata*, vol 1, p 366

whose title was determined some years later by the Native Land Court; in this case, the Court was not exercising a confiscatory function and awarded interests in the block to a list of 71 owners.[194] This suggests that Te Aitanga a Māhaki and Te Whānau a Kai owners who were considered 'rebels' had their interests excluded from the Ngakora title. The Tribunal was able to come to the general conclusion that:

> Perhaps 30 per cent of owners were excluded from titles in the commission's processes. These people would have been included but for the commission's confiscation function.[195]

108 The claimant groups' tīpuna and their uri all lived with the stigma of being 'rebels'. Professor Murton observed that 'Te Aitanga a Māhaki were branded as the "arch-rebels" by settlers and Government, an attitude that persisted into the twentieth century in a variety of ways'.[196] Te Whānau a Kai and Ngāriki/Ngā Ariki Kaipūtahi were also widely considered to be 'rebel' groups. Ngāriki/Ngā Ariki Kaipūthai rangatira Pera Te Uatuku was arrested in March 1870 in the Waioeka River valley, and taken to Wellington to stand trial for 'Levying War against the Queen'.[197] The Tribunal also gave the example of Te Aitanga a Māhaki chief, Te Matenga Taihuka, who was detained on Wharekauri and then in Ōpōtiki until 1870, and who received no land from the Commission.[198] The Tribunal stressed the intergenerational prejudice that arose from the processes leading to the stigmatisation of those labelled 'rebels' – and for the members of the Whakarau who survived the hostilities of the 1860s, it meant their exclusion from the new Crown titles created in the lands returned by the Poverty Bay Commission. By contrast, the trustees named in 1881 to hold the Mangatū 1 block included both Pera Te Uatuku and Te Matenga Taihuka.[199] In our view, the experience of these rangatira illustrates that the exclusion of Te Aitanga a Māhaki, Ngāriki/Ngā Ariki Kaipūtahi, and Te Whānau a Kai 'rebels' from the lands returned by the Commission would have left these groups increasingly reliant on their other lands, such as Mangatū.

109 Those Māori who were deemed 'loyal' were also negatively impacted. The Tribunal found that the 'loyal' Māori who lost rights within the Crown's retained lands were never compensated.[200] The Crown failed to replace lands taken within Muhunga and Patutahi with lands of equal value outside these blocks, as it had promised. Professor Murton suggests that the dispossession 'loyal' Māori experienced was a further cause of dissent within whānau and

194. Waitangi Tribunal, *Turanga Tangata*, vol 1, pp 365–366
195. Waitangi Tribunal, *Turanga Tangata*, vol 1, p 66
196. Murton, 'Te Aitanga a Māhaki, 1860–1960', #A26, p 79
197. Robson, *Ngariki Kaiputahi Mana Whenua Report*, #A22, pp 21–22
198. Waitangi Tribunal, *Turanga Tangata*, vol 1, p 366
199. Murton, 'Te Aitanga a Māhaki, 1860–1960', #A26, p 152
200. Waitangi Tribunal, *Turanga Tangata*, vol 1, p 368

hapū.[201] Evidence presented to us during the 2018 hearings by Tony Tapp emphasised the prejudice suffered by Te Aitanga a Māhaki and Ngāti Matepu rangatira, Wi Haronga, as a result of the creation of joint tenancies in lands where he had interests.[202] Yet Vincent O'Malley described Haronga as one of the chiefs in late 1865 'whose "loyalty" was beyond question.'[203] During the fighting at Waerenga a Hika, Wi Haronga and his family had stayed to guard the mission property of Bishop William Williams, 'departing only at the last moment while others were too busy removing lead from the roof to use as ammunition against the arriving troops.'[204] In following years, Wi Haronga petitioned the colonial Government on two occasions, arguing that the confiscation of Tūranga land as punishment was disproportionate to the actions of those Māori considered to be 'rebels.'[205]

110 While Wi Haronga did not support the Pai Mārire in Tūranga, he was one of the last to grudgingly sign the deed of cession, along with Wi Pere, in 1868.[206] At his death in 1888, the Poverty Bay Herald recorded that:

> Wi Haronga was without exception the most extensive land owner in this district but owing to the very great injustice done him by the Government (after having ceded all his lands to the Crown) by making him a joint tenant instead of a tenant in common [that is, in accordance with the awards of the Poverty Bay Commission], he was deprived of his possessions.[207]

111 Some general comments may be made about the amount of land lost through alienation of interests, such as those of Wi Haronga, in blocks granted under joint tenancy to private parties and Crown purchasers. By the end of the 1860s, European settlement had accelerated in Tūranga, following the Crown's invasion of the district and the killing or detention of so many Tūranga Māori. In this period immediately following the deed of cession, leasing was often Te Aitanga a Māhaki's preferred means of dealing with their land.[208] Rose pointed to the lease of roughly 60,000 acres of Te Aitanga a Māhaki land by 1870 in the wake of the Poverty Bay Commission's work and the joint tenancy grants. However, private lessees sought total alienation, and viewed 'leasing only as a preliminary arrangement prior to purchase.'[209]

112 This process of alienation by lease and then purchase often took years, and involved the complex operation of the new native land regime (we discuss purchasing figures further in the next section). Because of this administrative

201. Murton, 'Te Aitanga a Māhaki, 1860–1960', #A26, p 85
202. Evidence of Anthony Tapp, 29 May 2018, #P27
203. O'Malley, 'An Entangled Web', #A10, p 130
204. O'Malley, 'An Entangled Web', #A10, p 152
205. O'Malley, 'An Entangled Web', #A10, p 282
206. O'Malley, 'An Entangled Web', #A10, p 341
207. 'The Poverty Bay Herald, 13 April 1888', evidence of Anthony Tapp, 29 Map 2018, #P27(a), p 43
208. Kathryn Rose, 'Te Aitanga-a-Māhaki Land and Autonomy, 1873–1890', 1999, #A17, p 21
209. Rose, 'Te Aitanga-a-Māhaki', #A17, pp 20–21

merger, the Tribunal considered it was difficult to trace the rate at which alienation occurred in lands where joint tenancies had been created by Crown grant.[210] However, the nature of the joint tenancies meant that Māori, as individuals, were exposed to greater pressure to sell their shares in land than they would have been if the land had been held by the community. As grantees passed away, their interests were distributed amongst the surviving owners, which meant that private purchasers had to deal with progressively fewer owners to negotiate a purchase. By 1887, Kathryn Rose stated, private purchasers had acquired 57,173 acres out of 93,462 acres in Te Aitanga a Māhaki blocks where the Commission had issued a Crown grant.[211]

113 Significant prejudice resulted from the loss of so much of the valuable flat lands, which were retained by the Crown or acquired by private purchasers or lessees following the deed of cession. As we discuss in relation to the Tūranga trusts, reacquiring these economically important lands in the hope of promoting tribal development would later impose significant debts on the Rees–Pere trusts, causing further alienations of land into the twentieth century (see the section of this chapter concerning the Tūranga trusts, starting from paragraph 134).

Losses associated with the Crown's native land regime and new native title

114 As we have seen, the Native Land Court continued the work begun by the Poverty Bay Commission: determining titles (despite the evidence at the time that this was not what Tūranga Māori wanted) and replacing customary ownership with individually tradable interests in land.[212] Facing low prices, the extinguishment of the rights of communities to decide titles and regulate alienation, and strong structural incentives to sell, Māori quickly lost control of the pace of alienation. In the Tūranga report, the Tribunal found, 'within 30 years, 70 per cent of the Māori land base had been sold at knock-down prices'.[213] The Tribunal was satisfied on the basis of the available evidence that all iwi and hapū in Tūranga 'were affected to a significant degree by the operation of the Native Land Court'.[214]

115 In the Tūranga report, the Tribunal recognised that without consistently calibrated statistics on land alienation, it would only be possible 'to distil an indicative picture' of the loss suffered by the claimants.[215] We are similarly restricted: however, both the extent and pace of land purchase are confirmed by Kathryn Rose's statistics. She estimated that out of Te Aitanga a Māhaki's overall land base of 700,000 acres, the Crown had purchased 203,352 acres by

210. Waitangi Tribunal, *Turanga Tangata*, vol 2, p 472
211. There blocks included Karaka, Makauri, Matawhero 1B and 1C, Ngakaroa, Pakake-a-Whirikoka, Pukepapa, Repongaere, Ruangarehu, Tahoka, Taruheru, Waikanae, Whaikohu, Wataupoko, and Whenuakura: Rose, 'Te Aitanga-a-Māhaki', #A17, p 357.
212. Waitangi Tribunal, *Turanga Tangata*, vol 2, p 443
213. Waitangi Tribunal, *Turanga Tangata*, vol 2, p 536
214. Waitangi Tribunal, *Turanga Tangata*, vol 2, p 746
215. Waitangi Tribunal, *Turanga Tangata*, vol 2, p 472

1897, and that an additional 256,948 acres had been sold to private purchasers by 1900 (Rose's figures also include Ngāriki/Ngā Ariki Kaipūtahi and Te Whānau a Kai lands).[216] She estimated that in 1900, Te Aitanga a Māhaki only retained approximately 256,245 acres of their original estate.[217] Rose's evidence captured the furious pace at which Te Aitanga a Māhaki's land came before the Court, was subdivided, and often sold: 'Between 1874 and 1877, thirty Te Aitanga-a-Mahaki blocks had been adjudicated on and seven subdivided. From 1880 to the end of 1883, eight further titles were investigated and there were 39 subdivision hearings most because of the sales.'[218]

116 These statistics were the outcome of what the Tribunal called the 'parallel purchase campaigns' of Crown and private settler purchasers 'on an unprecedented scale'.[219] Between 1873 and 1877, Crown purchaser J A Wilson focused his efforts on large inland blocks within the rohe of Te Aitanga a Māhaki hapū, Te Whānau a Kai, and Ngāriki/Ngā Ariki Kaipūtahi, including the Waikohu Matawai, Wharekopae, and Motu blocks.[220] The 1870s was an unsettled period in Tūranga, just a few years after the return of the Whakarau, the subsequent conflicts and bloodshed, and the Crown's immediate imposition of the Poverty Bay Commission. Wilson used leasing arrangements as a preliminary step towards purchase, and paid advances to individuals or small groups before the land had even been to the Court for title determination, to 'bind' the purchase.[221] The Tribunal found that by the end of Wilson's tenure in 1877, his negotiations in Te Aitanga a Māhaki lands covered 250,448 acres worth of individual interests.[222]

117 Private purchasers also acquired significant interests in Te Aitanga a Māhaki land during the 1870s. As we discussed above, private purchasers such as Frederick Tiffen targeted individual owners in blocks such as Mangatū 2. Another prominent purchaser was George Read, whom Murton described as 'one of the area's best known and most unscrupulous land speculators.'[223] As a trader, he was also able to take advantage of Māori debt while acquiring land interests.[224] By the time of his death in 1878, he had acquired interests in eight Te Aitanga a Māhaki land blocks.[225]

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216. It should be noted that some of the land sold was acquired by the Rees–Pere trusts and its successors: Waitangi Tribunal, *Turanga Tangata*, vol 2, p 472; Rose, 'Te Aitanga-a-Mahaki', #A17, p 8; closing submissions for Te Aitanga a Māhaki, 24 June 2002, #H1, pp 79, 85.
217. Rose, 'Te Aitanga-a-Mahaki', #A18, p 184
218. Rose, 'Te Aitanga-a-Mahaki', #A17, p 444
219. Waitangi Tribunal, *Turanga Tangata*, vol 2, p 482
220. Wilson arrived in Tūranga at the time of the August 1973 Poverty Bay Commission hearings: Rose, 'Te Aitanga-a-Mahaki', #A17, p 48
221. Rose, 'Te Aitanga-a-Mahaki', #A17, p 485
222. Of this number, 133,448 acres were purchased, and 117,00 acres were leased: Waitangi Tribunal, *Turanga Tangata*, vol 2, p 475.
223. Murton, 'Te Aitanga a Māhaki', #A26, p 94
224. Waitangi Tribunal, *Turanga Tangata*, p 481
225. These included Whataupoko, Kaiti, Makauri, Tahuniorangi, Whenuakura, Matawhero, Pakake-a-Whirikoka, Waikanae: Rose, 'Te Aitanga-a-Mahaki', #A17, p 164

118 In the face of the combined efforts of Crown and private purchasers, Te Aitanga a Māhaki's 'staunch opposition to the transformation of leases into sales was overcome'.[226] Accepting that many absolute alienations were inevitable, Te Aitanga a Māhaki rangatira directed their efforts at limiting new purchases. Te Whānau a Iwi leader Riperata Kahutia observed this change in approach was 'in the hope that . . . the residue of the land may become beneficial to the owners'.[227] They tried to protect their position by insisting on permanent inalienable reserves. Though some reserves were made, the legal protections for them proved ineffective, were removed or were evaded in short order 'by purchasers with ready cash and Maori owners in need of it'.[228]

119 Crown and private purchasing of the claimants' land continued at pace through to the beginning of the twentieth century. Crown agents such as W J Wheeler showed no regard for ongoing opposition from Māori to individual dealing, and sought to maximise purchases of Te Aitanga a Māhaki lands by dealing with individual owners.[229] Between April 1896 and October 1897, Wheeler purchased 45,461 acres of Te Aitanga a Māhaki and Te Whānau a Kai land.[230] Tiffen also presented a further 47 deeds to the Trust Commissioner for purchases in the Puhatikotiko block.[231]

120 For Te Aitanga a Māhaki, Ngāriki/Ngā Ariki Kaipūtahi, and Te Whānau a Kai, the cost of the Crown's native title and purchase system was devastating. Because the Crown would not empower owners to make collective decisions about the development and alienation of their land, purchasers dealt with individuals or small groups of owners listed on the memorials of ownership issued by the Native Land Court. As a result, purchases often took years to complete and the payments made to individuals – the majority less than £20 – were spread out over time.[232] The final purchase price would also have the value of any lease payments deducted, along with charges such as survey costs and Court fees. As the second generation of owners succeeded to their parents' remaining interests in a shrinking land base, the problem became worse. The upshot was that landowners – apart from a few of the largest owners – were left with limited options for utilising the proceeds they received. Even the sale of interests in four or five blocks would not have produced a significantly useful amount for anything other than consumption,

226. Rose, 'Te Aitanga-a-Mahaki', #A17, p 445
227. Rose, 'Te Aitanga-a-Mahaki', #A17, p 446
228. Waitangi Tribunal, *Turanga Tangata*, vol 2, p 460
229. Waitangi Tribunal, *Turanga Tangata*, vol 2, p 479
230. These blocks include Tahora 2C blocks, Wharekopae 1B blocks, Motu 2, Kopaatuaki, Waikohu Matawai 1, Waikohu Matawai A, Hangaroa Matawai, Waipāoa 3, Tutamoe, Paraeroa: Rose, 'Te Aitanga-a-Mahaki', #A18, p 133
231. Waitangti Tribunal, *Turanga Tangata Turanga Whenua*, vol 2, p 482
232. Rose records that many of the private purchases completed between 1885 and 1890, involving 24,689 acres of Te Aitanga a Māhaki land, had their origins in the private purchases of the 1870s. Similarly, Crown purchase agent Thomas Porter completed many of the purchases that Wilson had initiated in the late 1870s: Rose, 'Te Aitanga-a-Mahaki', #A17, p 164; Waitangi Tribunal, *Turanga Tangata*, pp 484–485.

given the cost of buying stock, and fencing.[233] As the Tribunal put it, there was 'no pattern of single large payments to communities in a way which would have made utilisation of the purchase price for capital investment possible'.[234]

121 In summary, in 1865, the overall land base of Te Aitanga a Māhaki was 700,000 acres; Rose estimates that by the start of the twentieth century they retained 256,243 acres.[235] During the 1890s alone, approximately 93,757 acres had been alienated.[236] These figures (which include the losses of Te Whānau a Kai, and Ngāriki/Ngā Ariki Kaipūtahi) demonstrate how quickly land was alienated over the first 35 years of the Native Land Court's operation. Much of what was retained was vested in various trusts, which we discuss in detail below. Rose estimated that only approximately 50,000 acres of 'residual land' were still owned by Te Aitanga a Māhaki and were not involved in any of the trusts established at that time.[237] The alienation of so much land during this period reflects the complete inadequacy of the safeguards provided to Māori landowners, and the Crown's failure to protect Māori against the consequences.[238] The Tribunal concluded that 'the extremely high level of land alienation in Turanga and equally low level of Maori participation in alternative capital investment, were effects of the system of tenure provided under the Native Lands Acts'. This was not the result of conscious choices by Māori communities; 'they were choices that Turanga Maori were pushed into by the structure and objectives of the native land system'.[239]

122 The specific losses suffered by Ngāriki/Ngā Ariki Kaipūtahi included private purchases in the 3187-acre Manukawhitikitiki 2 block. The block was subdivided several times in 1897 after several owners decided to sell their individualised interests. Pera Te Uatuku and Rewi Tamanui unsuccessfully challenged theses sales on the basis that they had not been paid for their shares.[240] This related loss heightened the importance of Ngāriki/Ngā Ariki Kaipūtahi lands in Mangatū 1. As a consequence, when their interests were reduced through the Native Land Court process of determining relative interests (see paragraphs 56–57 above), the prejudice they suffered was compounded by the fact that they had no other lands they could rely on. Anthony Patete gave evidence during our 2018 hearings that Ngāriki/Ngā Ariki Kaipūtahi 'had lost their rights of access to, and control over, land and resources'.[241] Patete

233. Waitangi Tribunal, *Turanga Tangata*, vol 2, pp 514–516
234. Waitangi Tribunal, *Turanga Tangata*, vol 2, p 485
235. Rose, 'Te Aitanga-a-Mahaki', #A18, p 183
236. Rose, 'Te Aitanga-a-Mahaki', #A18, p 184
237. Rose, 'Te Aitanga-a-Mahaki', #A18, p 184
238. Waitangi Tribunal, *Turanga Tangata*, vol 2, p 469
239. Waitangi Tribunal, *Turanga Tangata*, vol 2, pp 536–537
240. They challenged the sale through the Validation Court, established under the Native Land (Validation of Titles) Act 1893 to enable (among other things) partitions to be perfected in respect of transactions that did not comply with the procedural requirements in the Native land legislation: Bryan Gilling, 'The People, The Courts and the Lands: A Research Report for Ngāriki Kaiputahi', March 2001, #A32, pp 28–31; Waitangi Tribunal, *Turanga Tangata*, vol 1, p 76
241. Evidence of Anthony Patete, #P21, p 25

observed that 'the rights of Ngā Ariki Kaipūtahi in the Mangatū land are currently limited to a shareholding in the incorporation as part of a wider community of owners, and their use of resources on the land is limited by the operations of the incorporation.'[242]

123 Te Whānau a Kai also suffered significant losses in their wider rohe. In addition to the Crown's confiscation of their lands at Patutahi (see paragraphs 100–101 above), Crown purchases at Wharekopae, Hangaroa Matawai, and the Tahora 2C blocks before 1900 reduced their overall lands.[243] In particular, the history of the massive parent Tahora 2 block in the Native Land Court has become notorious.[244] We recognise that the Treaty breaches and consequent prejudice suffered by Te Whānau a Kai in relation to the Tahora 2C blocks may appear unrelated to those affecting the Mangatū CFL land. Nevertheless, there are clear links between the two. The evidence establishes that common to both was the administration of the Crown's native land system which impacted Te Whānau a Kai at different times and in different ways. In many cases, those Te Whānau a Kai prejudiced by the Crown's Treaty breaches in Tahora and in Mangatū were the very same people.[245] The losses suffered by Te Whānau a Kai in respect of Tahora 2C increased their dependency on the retention of their interests in the Mangatū CFL land. In our view, the Tahora 2C story is an important one, and must be told in this Inquiry.[246] It emphasises the fact that the losses of the claimants in other blocks, had major ramifications for them in Mangatū.

124 From 1882, Wi Pere had worked to keep the Tahora 2 block out of the Native Land Court 'until the Government had reformed the native land laws.'[247] But, the Tahora 2 block (estimated at 213,000 acres) was surveyed by C A Baker in 1887 without the knowledge of the Government or the Māori owners and, it

242. Evidence of Anthony Patete, #P21, p 26
243. Waitangi Tribunal, 8 vols, *Te Urewera* (Wellington: Legislation Direct, 2017), vol 3, pp 1069–71; Tui Gilling, 'Te Whānau a Kai: The Mana whenua and Alienation of Te Whānau a Kai Lands 1869–1910', April 2001, #A36, pp 28–29, 41; closing submissions for Te Whānau a Kai, #H5, p 45
244. See Waitangi Tribunal, *Te Urewera*, vol 3, pp 1062–1088
245. For instance, Wi Pere, Peka Kerekere, and Anaru Matete were involved in Native Land Court applications concerning the Tahora 2 block. They were also original trustees of the Mangatū 1 block: Brent Parker, 'Tahora No 2 Block', January 2005, #I4, paras 15, 21, 27, 140–141; Waitangi Tribunal, *Te Urewera*, vol 3, p 1068.
246. We provide only a brief summary of this complex history. For a full account, readers should refer to volume 3 of the Tribunal's *Te Urewera* report: Waitangi Tribunal, *Te Urewera*, vol 3.
247. In 1879, Wi Pere had negotiated with Colonel Thomas Porter the Crown's purchase of 20,000 acres in the approximately 100,000 acre Te Houpapa block, hoping to raise capital to pay for the survey and develop the rest of the block. In *Te Urewera*, the Tribunal found that the same day that this purchase deal was concluded, the Crown had agreed to purchase land in the Te Wera block from Tūhoe and Whakatōhea leaders, 'which seemed to cover much the same land (under two different block names)'. Once this fact was exposed, Tūhoe and Whakatōhea leaders travelled to Gisborne to protest the oppose the survey of their lands, Ngāti Kahungunu also protested. The contest over the survey of these lands led to an impasse between the iwi until 1882, when Wi Pere claimed that they had negotiated an agreement not to survey the lands 'until new laws passed': Waitangi Tribunal, *Te Urewera*, vol 3, pp 1063–1067.

seems, without Government permission.[248] Despite the opposition of nearly all the groups with interests in it (from Te Urewera, Wairoa, Tūranga, and Ōpōtiki), the block was 'dragged into the land court' in 1889 by individuals who were found by the Native Land Court not to have interests in the land.[249]

125 In the wake of the Court hearing in 1889, came the question of the survey lien. To the fury of those who had been found to be owners, they were told they had to pay the cost of the clandestine survey they had not wanted, and which amounted to the very large sum of £1600.[250] They could not even share the costs among the various groups by cutting out a single tract of land in the middle of the block, because, according to the law, the costs had to be charged against the whole block, not against its divisions in which the block had been awarded, until they too were surveyed.[251] In the *Te Urewera* report, the Tribunal found that the owners were left vulnerable, especially when the surveyor's lawyers threatened to sell the entire block to meet the cost of the survey.[252]

126 The Crown made no attempt to help, but instead started to buy up undivided individual interests in the block in 1893, at a discounted price. At the request of Māori leaders, restrictions had been placed on virtually all of the Tahora 2 blocks. However, in practice they worked to exclude private purchasers, not the Crown.[253] Crown purchaser, John Brooking, gradually acquired individual interests in Te Whānau a Kai lands in both Tahora 2C2 and 2C3 blocks. By the middle of 1894, he had acquired 2,598 acres in Tahora 2C2 and 7,474 acres in Tahora 2C3.[254] When the Crown's application to have its interest cut out came before the Land Court in April 1896, 9,049 acres of the 12,856 Tahora 2C2 block and 20,637 acres of the total 33,990 acres in Tahora 2C3 were ordered in favour of the Crown.[255]

127 The residue of Te Whānau a Kai's lands, Tahora 2C3 section 2, and Tahora 2C2 section 2, was vested in the Carroll Pere Trust by the Validation Court in 1896 at the request of Wi Pere, acting on behalf of the owners (see paragraphs 135 below).[256] Thus the Tahora 2C lands of Te Whanau a Kai, which they had hoped to protect, would become part of the complex story of the Tūranga trust lands. We outline the final fate of Te Whanau a Kai's remaining Tahora 2C lands in the Tūranga trusts section below (see paragraphs 139–141).

248. Rose, 'Te Aitanga-a-Mahaki', #A18, p 107; Waitangi Tribunal, *Te Urewera*, vol 3, p 1029
249. Waitangi Tribunal, *Te Urewera*, vol 3, p 1223
250. Waitangi Tribunal, *Te Urewera*, vol 3, p 1228
251. The judge made two orders, one attaching the charge for the costs to Tahora 2, and one that the costs should be attached to the divisions when they were surveyed. Ultimately, the survey lien was divided and charged against each of the Tahora blocks: Waitangi Tribunal, *Te Urewera*, vol 3, pp 1229–1230, 1232
252. Waitangi Tribunal, *Te Urewera*, vol 3, pp 1228–1233
253. Waitangi Tribunal, *Te Urewera*, vol 3, p 1168
254. Waitangi Tribunal, *Te Urewera*, p 1134; Rose, 'Te Aitanga-a-Māhaki', #A18, p 116
255. Rose, 'Te Aitanga-a-Mahaki', #A18, pp 123–124
256. Rose, 'Te Aitanga-a-Mahaki', #A18, pp 123–124

128 The alienation of Māori land continued into the twentieth century. However, while land purchasing no longer dominated as it had in the latter part of the nineteenth century, the Tribunal found that 'the great majority of Tūranga Maori lands were tied up in leases, either through the Tairawhiti Maori Land Board, or through the East Coast Commissioner.'[257] This included the lands held by the other incorporations established by Te Aitanga a Māhaki in the early twentieth century (see chapter 4, paragraph 127). Rose found that out of the 48 incorporations established by Te Aitanga a Māhaki between 1900 and 1910, 33 had recorded their lands as under lease by the end of 1907.[258] As we have discussed, large areas of the claimants' land in Mangatū 1 were also leased during this period (see paragraph 68 above).

129 From 1912, the Tairawhiti Maori Land Board was responsible for 30 of these incorporations, and 'administered most of these leases'.[259] By 1907, 18,219 acres of Te Aitanga a Māhaki land had been leased by the Tairawhiti Land Board through 70 leases, and a further 90 leases of 10,919 acres were added the following year.[260] With lease terms as long as 42 years, leasing was an uneconomic use of the owners' land. By the end of the Second World War, tenants began to neglect maintenance of the land in anticipation of its return to the Māori owners. The results were startling. A survey in 1966 found that only 6 per cent of leased land in Tūranga was well farmed, 70 per cent was poorly farmed, and 24 per cent had reverted to scrub. On finally resuming their land, Te Aitanga a Māhaki, Te Whānau a Kai, and Ngāriki/Ngā Ariki Kaipūtahi owners were faced with run-down properties and immediate costs to return them to production.[261]

130 It is not surprising, either, that for many owners, it became increasingly difficult during the first part of the twentieth century to stay on the land. Professor Murton explained that the land they had managed to retain simply did not provide economic benefits for most Te Aitanga a Māhaki, Ngāriki/Ngā Ariki Kaipūtahi, and Te Whānau a Kai before the 1960s.[262] By the 1950s, the Crown began to try and control what was now seen as the 'problem' of multiple ownership (the result of its own titling system) and uneconomic interests by new legislative provisions, such as a scheme of determined acquisition of such interests by the Maori Trustee – compulsorily in the case of deceased owners.[263] Even so, successions continued in each generation, and the number of owners in partitioned blocks continued to grow. As the Tribunal put it: 'The problem returned once the next generation of succession

257. Waitangi Tribunal, *Turanga Tangata*, vol 2, p 509
258. Rose, 'Te Aitanga-a-Māhaki', #A18, p 373
259. Rose, 'Te Aitanga-a-Māhaki', #A18, p 373
260. Waitangi Tribunal, *Turanga Tangata*, vol 2, pp 497–498
261. Waitangi Tribunal, *Turanga Tangata*, vol 2, pp 498–499
262. Professor Brian Murton gave evidence for Te Aitanga a Māhaki in the Tūranga Inquiry but the scope of his report also included Ngāriki/Ngā Ariki Kaipūtahi and Te Whānau a Kai.
263. Waitangi Tribunal, *Turanga Tangata*, vol 2, p 502

had been processed. There simply was not enough land and there were too many people. No matter how the cake was cut, there was not going to be enough to go around . . . Remaining on the land was, for most, no longer an option.'[264]

131 According to Te Puni Kōkiri's Māori Land Information Base, in 1995, Te Aitanga a Māhaki owned 156,414 acres in 310 blocks. Fifty per cent of these blocks were 6 acres or less, while less than 5 per cent were over 1000 acres (these figures also include Ngāriki/Ngā Ariki Kaipūtahi and Te Whānau a Kai interests). At that time, just over half of these blocks had between one and ten owners, over 70 had between 11 and 50 owners, 20 had between 51 and 100 owners, and over thirty had 101 or more owners. The Tribunal gave the example of Okahuatiu 1A2, a 42-acre block that belonged to 69 owners, most of whom owned one share. By 1992 there were 928 owners, most owning less than a hundredth of a share.[265] It is apparent from Kathryn Rose's evidence on land use in these blocks that the more fractionated the ownership, the more likely the land was to be unutilised.[266] Rose concluded that the vast majority of blocks retained by Te Aitanga a Māhaki were 'uneconomic and/or inaccessible fragments'.[267] That is the lasting prejudice of the Crown's native title and purchase systems.

132 In terms of the value of what was lost, we heard new evidence during our 2018 hearings from Dr Richard Meade, a Senior Research Fellow in economics at the Auckland University of Technology. He proposed that one measure of Te Aitanga a Māhaki's losses is the current unimproved value of the land within their rohe that is not in Māori ownership (Dr Meade's figures also include Ngāriki/Ngā Ariki Kaipūtahi and Te Whānau a Kai's interests). Dr Meade estimated the unimproved value of all the land over which Te Aitanga a Māhaki has made claims is between $77 million and $582 million (as at 30 June 2018). He explained that valuing this loss was difficult, and produced a wide range of values for our consideration using different methods of calculation. The use of multiple methods was intended to provide the Tribunal with a robust measure of loss that would take into account the length of time that had elapsed since the Crown Treaty breaches, together with the changing political, economic, and legislative landscape.[268] Dr Meade submitted that the higher end of the estimated range would be more realistic, because much

264. Waitangi Tribunal, *Turanga Tangata*, vol 2, p 502
265. Waitangi Tribunal, *Turanga Tangata*, vol 2, p 500
266. Rose, 'Te Aitanga-a-Māhaki', #A18, pp 579–584
267. Rose, 'Te Aitanga-a-Māhaki', #A18, p 584
268. Evidence of Richard Meade, #P6, paras 610–615, 679.1–679.2

of the land development since 1885 was relatively unrestricted by resource management and other legislative provisions.[269]

133 We return to Dr Meade's evidence on the value of Te Aitanga a Māhaki's losses again in chapter 7, and discuss it further in the context of the other economic evidence brought in this Inquiry (see paragraphs 126–131). However, for the purpose of this chapter, it is sufficient to record that the lands lost by all of the claimants through the Crown's breaches were of enormous value to them in economic, as well as cultural and spiritual terms. We consider the extent to which land loss had longer-term social and economic impacts on these communities at paragraph 146 below.

Losses associated with the Tūranga trusts, 1878–1955

134 The failure of the Tūranga trusts impacted the lands of all claimant iwi and hapū over several generations – despite the fact that their main purpose was to preserve Tūranga lands for their owners by removing them from the orbit of the Crown's native land regime.[270] As we discussed in chapter 4, the Rees-Pere trusts were the first initiative of Wi Pere and William Rees to promote community structures for the development and retention of Māori land. However, they were defeated by the legal and political obstacles created by the Crown's native land laws, which did not support Māori development of their own lands. The debts incurred as a result would haunt the project ever after.

135 Wi Pere and Rees sought to rescue the trusts first through the New Zealand Land Settlement Company, a joint venture with Auckland property speculators. Following the Company's failure during the depression of the late 1880s, Wi Pere, James Carrol and the Bank of New Zealand established the Carroll Pere Trust as a vehicle to save the remaining lands. When that Trust was also overwhelmed by debt, the Crown belatedly intervened. In 1902, the Crown established the East Coast Native Trust Lands Board to administer the Carroll Pere Trust lands. The East Coast Commissioner then took over administration of the East Coast Trust from 1906 until 1955 (the East Coast Native Trust Lands Board and the East Coast Commissioner are collectively referred to as the East Coast Trust – see chapter 4, paragraphs 162–168 for a full discussion of the trusts' history and the Tribunal's findings on them in

269. Dr Meade instanced the fact that significant land development restrictions were only introduced by the Resource Management Act 1991. For this estimate of losses, Dr Meade did not include the lost opportunity value in relation to the asset. We note however, that in other estimations of loss Dr Meade applied the average return which the Mangatū Incorporation made on its investments, and that this was a higher rate of return than the most conservative adjustment rate (Post Tax Risk Free): Evidence of Richard Meade, #P6, para 707.1

270. Waitangi Tribunal, *Turanga Tangata*, vol 2, p 747

the Tūranga report). At every stage, the attempts were made to reduce the debt by selling off substantial amounts of the land vested by the owners.[271]

136 As the Tribunal found in the District Inquiry, Te Aitanga a Māhaki's losses through the trusts were extensive, as Wi Pere's key role in them meant a considerable amount of Te Aitanga a Māhaki land became involved in each of the Rees–Pere trusts, and all their successor bodies. Similarly, Ngāriki/Ngā Ariki Kaipūtahi lands in Mangatū were vested in the trusts, as were Te Whānau a Kai's residual lands in the Tahora 2C blocks.[272] Kathryn Rose gave evidence in the Tūranga Inquiry that Te Aitanga a Māhaki originally vested 75,000 acres in the Rees–Pere trusts.[273] She estimated that, by 1883, Te Aitanga a Māhaki had vested 115,000 acres in the New Zealand Native Land Settlement Company. This figure also includes Ngāriki/Ngā Ariki Kaipūtahi and Te Whānau a Kai lands.[274]

137 In the Tūranga report, the Tribunal determined that it was difficult to provide exact figures for the amount of land sold by the company.[275] However, the Tribunal found that approximately 39,330 acres of Te Aitanga a Māhaki land 'was quickly sold during the 1880s'.[276] Kathryn Rose gave evidence that a further 12,280 acres of Te Aitanga a Māhaki land was sold in 1891 in the Bank of New Zealand mortgagee sale to recoup the debt owed by the Land Settlement Company. It was Ms Rose's evidence that much of the land sold that day was 'generally the better-quality landholding on the Waipaoa plain and adjoining hill country – much of which was Te Aitanga a Mahaki land'.[277] The Tribunal noted that a substantial portion of this land was outside the Tūranga Inquiry District.[278] Nonetheless, in one day Te Aitanga a Māhaki lost significant tracts of the land they had originally vested in the Rees–Pere trusts.

138 Comparatively little land was sold during the Carroll Pere Trust period. However, the Trust's debt more than doubled during the 1890s. Despite the efforts of Wi Pere and Rees to secure the Government's earlier intervention, it was not until 1902 that the East Coast Native Trust Lands Board was established.[279] Further sales took place under the Native Trust Lands Board – and then from 1906 under the East Coast Commissioner, who was empowered to mortgage, sell, or lease the lands involved to pay off the debt. Between 1902 and 1906, 17,406 acres of Te Aitanga a Māhaki land was alienated to meet a

271. Waitangi Tribunal, *Turanga Tangata*, vol 1, pp xxiv–xxv
272. Waitangi Tribunal, *Turanga Tangata*, vol 2, pp 746–747
273. Waitangi Tribunal, *Turanga Tangata*, vol 2, p 581
274. Te Whānau a Kai have interests in the Okahuatiu and Tanihanga blocks which were vested in the company, and Ngāriki/Ngā Ariki Kaipūtahi had interested in the Mangatū 5 and Mangatū 6 blocks which were also vested in the company: Rose, 'Te Aitanga a Māhaki', #A17, p 417.
275. Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, vol 2, p 569
276. The Tribunal noted that these figures included the sale of 25,160 acres of Te Aitanga a Māhaki land in Okahuatiu 1; 5,000 acres in Okahuatiu 2; and 2,500 acres in Tangihanga 1C: Waitangi Tribunal, *Turanga Tangata*, pp 580, 582.
277. The total land sold was 39,000 acres: Rose, 'Te Aitanga-a-Māhaki', #A18, pp 170–171.
278. Waitangi Tribunal, *Turanga Tangata*, vol 2, p 581
279. Rose, 'Te Aitanga-a-Māhaki', #A18, pp 174–175

Bank of New Zealand debt.[280] Another 59,335 acres remained in the Board's control, but between 1906 and 1956, a further 32,794 were sold when the land came under the control of the East Coast Commissioner.[281]

139 When the Commissioner finally returned the lands to the beneficial owners, Te Aitanga a Māhaki received only 26,479 acres.[282] Ngāriki/Ngā Ariki Kaipūtahi's losses are included in these numbers but are restricted to the alienation of the Mangatū 5 and Mangatū 6 blocks (see paragraphs 77–78 above). Te Whānau a Kai also sustained significant losses during the period when the East Coast Commissioner controlled their lands. The alienation of the Tahora 2C2 section 2 and Tahora 2C3 section 2 blocks was particularly egregious.[283] These blocks had not been burdened with the Carroll Pere Trust's debt to the Bank of New Zealand. As a result, when they were vested in the East Coast Native Trust Lands Board in 1902 along with the Carroll Pere Trust lands, they could not be used to repay that debt.[284] But they were administered as part of the wider East Coast Trust, and could be used to settle other debts, and also to finance land development. At that time, Te Whānau a Kai's residual lands in Tahora 2C2 and Tahora 2C3 totalled 19,173 acres. Ultimately, they were administered by the East Coast Commissioner from 1906 until 1955, when only 5,279 acres was returned to the beneficial owners.[285]

140 The first sale of Tahora land during this period occurred in 1905, when the East Coast Native Trust Lands Board sold 6,244 acres of 2C1(3) and 3,326 acres of 2C3(2). This sale was the outcome of a 1903 agreement between the Land Board and the former trustees (including Wi Pere and Te Whānau a Kai rangatira Peka Kerekere).[286] During the Te Urewera Inquiry, Te Whānau a Kai accepted that this first sale of Tahora 2C3 land was not to repay the Bank of New Zealand mortgage, and for that reason made no claim about the sale.[287]

141 For Te Whānau a Kai, the more significant grievance occurred after the replacement of the Board by the East Coast Commissioner in 1906. In 1911, the Commissioner was empowered to sell land without consultation or consent of the Māori owners, and Te Whānau a Kai were excluded from

280. Rose, 'Te Aitanga-a-Māhaki', #A18, p178
281. These figures refer to the Carroll Pere Trust lands, and do not include the larger Mangatū 1 block which was administered by the East Coast Commissioner from 1917 to 1945: Waitangi Tribunal, *Turanga Tangata*, p582.
282. This figure includes the Tahora 2C blocks and 13,616 acres in the Mangaotane Station: Waitangi Tribunal, *Turanga Tangata*, p582.
283. These blocks were included in both Tūranga and Te Urewera inquiry districts; the initial intention was that the Tūranga Tribunal would consider the alienation of land, while the Te Urewera Tribunal would consider title determination. However, because the research report on the Tahora blocks was not completed in time, both matters were largely deferred to the Te Urewera Tribunal.
284. Waitangi Tribunal, *Te Urewera*, vol 3, p1432
285. Waitangi Tribunal, *Turanga Tangata*, vol 2, p579
286. Waitangi Tribunal, *Te Urewera*, vol 3, p1432
287. Waitangi Tribunal, *Te Urewera*, vol 3, p1432

decision-making.[288] In 1920, without consulting the owners, the then-Commissioner, Thomas Coleman Junior, offered 6,711 acres to clients of his private law firm. A further sale of 3,396 acres to the same private buyers in 1921 accounted for almost the whole of Tahora 2C3.[289] When Coleman was replaced as Commissioner by Judge W Rawson, the judge ensured that the second was completed by the end of March 1923. Rawson himself would sell a final 183 acres from Tahora 2C3 to the Crown in 1922.[290] With these sales, Te Whānau a Kai lost most of their remaining lands.

142 All the claimants in this Inquiry suffered significant land losses as a consequence of the Crown's failure to make adequate provision for community land management by Maori owners. In 1902, the Carroll Pere Trust estate that was vested in the East Coast Native Trust Lands Board had been reduced to 76,741 acres out of the original 115,000 acres vested by Te Aitanga a Mahaki, Ngāriki/Ngā Ariki Kaipūtahi, and Te Whānau a Kai in the New Zealand Native Land Settlement Company in 1883.[291] The land returned to the claimants after 1954 was only 26,479 acres.[292] This included the 13,616-acre Mangaotane Station that would not be returned to the Mangatū owners until 1974.[293] Of the 19,173 acres in the Tahora 2C blocks which were vested in the Carroll Pere Trust in 1906, only 5,279 acres were returned to Te Whānau a Kai.[294] The majority of the burden of this loss fell upon Tahora 2C3. In 1955, the owners agreed to transfer the last remaining 1,509 acres of the block to their neighbours and relations in Tahora 2C2.[295]

143 In the Tūranga report, the Tribunal observed that the communities which supported Rees and Wi Pere's Tūranga trusts initiatives with their land 'did so not only because they saw an economic future, but because the schemes were rooted in their own political and cultural landscape'.[296] Following the failure of the Rees–Pere trusts, the Tribunal described their agreement to enter into the New Zealand Land Settlement Company venture as a 'giant leap of faith', and concluded that the Crown could not be held responsible for its failure. However, the Crown was responsible for the constraints imposed on the Rees–Pere trusts and the Carroll Pere Trust by the Crown's native land regime and by the Native Land Court titles, 'which were useless to them in the market'.[297] The sum prejudice of the trusts' failures developed over several generations. At every point of the Tūranga trusts' story, Māori aspirations

288. Waitangi Tribunal, *Te Urewera*, vol 3, pp 1418–1419
289. Waitangi Tribunal, *Te Urewera*, vol 3, pp 1414–1415
290. Waitangi Tribunal, *Te Urewera*, vol 3, p 1415
291. These figures include Ngāriki/Ngā Ariki Kaipūtahi and Te Whānau a Kai lands: Rose, 'Te Aitanga-a-Mahaki', #A17, p 417; Rose, 'Te Aitanga-a-Mahaki', #A18, p 184.
292. Waitangi Tribunal, *Turanga Tangata*, vol 2, p 582
293. Haapu, 'Te Ripoata o Mangatu', #A27, pp 83–87
294. Waitangi Tribunal, *Turanga Tangata*, vol 2, pp 579, 582
295. Waitangi Tribunal, *Te Urewera*, vol 3, p 1443
296. Waitangi Tribunal, *Turanga Tangata*, vol 2, p 583
297. Waitangi Tribunal, *Turanga Tangata*, vol 2, p 583

were defeated by the Crown's imposition of a land regime deliberately designed to facilitate the transfer of Māori land to the Crown and settlers, and then by the Crown's subsequent failure to provide adequate protection and support for Māori initiatives to manage and develop their lands.

144 Based on the evidence before us we are satisfied that Te Aitanga a Māhaki, Ngāriki/Ngā Ariki Kaipūtahi, and Te Whānau a Kai suffered cultural, spiritual, and economic prejudice as their attempts to exercise tino rangatiratanga over their lands were undermined by the Crown's breaches. Throughout this period, Te Aitanga a Māhaki, Ngāriki/Ngā Ariki Kaipūtahi, and Te Whānau a Kai suffered the progressive alienation of the lands they had committed to the Tūranga trusts initiatives, for which they had such high hopes. Following the 1891 mortgagee sale, the owners watched the Carroll Pere Trust fall further into debt, leading eventually to the complete loss of Māori control of their lands under the East Coast Trust. The Tribunal observed that, in time, the East Coast Commissioner could develop lands and accrue commercial advantages 'along the lines of what Pere and Rees had hoped for'.[298] But this was only because the Commissioner had the necessary legal and structural support.

145 In the end, the return of some part of their land came at great cost for Te Aitanga a Māhaki, Ngāriki/Ngā Ariki Kaipūtahi, and Te Whānau a Kai. They were excluded from control over their land for more than two generations. Large areas of land had been sold without consultation under the East Coast Trust and Commissioner, and in the case of the Tahora 2C blocks in very dubious circumstances. These losses caused grievous prejudice to the claimants. Apart from the immense economic loss the claimants suffered, they would also have endured the grief and disappointment from the failure of a Māori enterprise intended to protect their tino rangatiratanga and mana whenua. They expected, entirely reasonably, to have an equal part in the economy of their district, alongside settlers. Instead, they were consigned to the margins of the developing Tūranga political, social and economic environment. This experience would also have heightened the importance of their Mangatū 1 lands when they were returned in 1947, and compounded the prejudice they suffered while this important asset was under the control of East Coast Commissioner, and when the Crown later acquired the 1961 land (see paragraphs 88–94 above).

Socio-economic prejudice

146 The evidence presented in both the Tūranga District Inquiry and this Remedies Inquiry strongly suggests a connection between the widespread loss of land and resources resulting from the Crown's title and land transfer system, and the ongoing socio-economic inequities experienced by the claimants. In the Tūranga report, the Tribunal cited the view expressed in 1940 by Horace Belshaw, Professor of Economics at Auckland University

298. Waitangi Tribunal, *Turanga Tangata*, vol 2, p 585

College, who commented that the greater part of the Māori population could not be provided for by farming: 'No tribe has sufficient land to support all its people'.[299] Belshaw pointed also to the lack of alternative employment opportunities for Māori, stating: 'If the official figures be interpreted literally, they afford evidence of a disparity in material standards between European and Maori which is inconsistent with the concept of economic self-sufficiency . . . as being a necessary basis for permanent adjustment and reconciliation of cultures.'[300]

147 Taken together, these statements illustrate two of the long-term consequences of the native land regime in Tūranga: the widespread transfer of resources to the settler population so that Māori were no longer able to support themselves, and the transformation of the economy into one where settler interests dominated and Māori were excluded from development opportunities. We tread cautiously in considering the socio-economic impact this had on the claimants. There are complex factors involved in the economic deprivation experienced by the majority of Te Aitanga a Māhaki, Ngāriki/Ngā Ariki Kaipūtahi, and Te Whānau a Kai individuals. However, in our view, Crown policies which allowed for the swift pace of land purchase by both Crown and private individuals, and the rapid advance of settlement in Tūranga during the latter part of the nineteenth century and into the twentieth century, had clear prejudicial effects for the customary owners of the Mangatū CFL land and these claimant groups more broadly. In forming this view, we rely on the important evidence of Professor Brian Murton.

148 Professor Murton's report focused on the socio-economic position of Te Aitanga a Māhaki between 1860 and 1960. However, his report also took account of the changes endured by Ngāriki/Ngā Ariki Kaipūtahi and Te Whānau a Kai's, and they are included in our findings in this section.[301] There is notably less evidence concerning the claimants' experience outside of Murton's timeframe. As a consequence, our discussion will focus particularly on the first half of the twentieth century – a significant period when the disempowerment and poverty which resulted from the loss of land and resources became embedded in the experience of the claimant communities. For many, it appears to have continued until the present day.

149 In summary, Professor Murton considered that the power imbalance between the Crown and Te Aitanga a Māhaki, Ngāriki/Ngā Ariki Kaipūtahi, and Te Whānau a Kai was closely connected to the claimants' poor socio-economic status.[302] As we have seen, the Crown used its political, legal, and coercive power to impose a property regime on them – a regime that replaced traditional property rights, and severely limited the claimants' economic capability in the new settler economy. For many whānau, the loss of entitlements

299. Waitangi Tribunal, *Turanga Tangata*, vol 2, p 522
300. Waitangi Tribunal, *Turanga Tangata*, vol 2, p 522
301. Murton, 'Te Aitanga a Māhaki, 1860–1960', #A26, p 26
302. Murton, 'Te Aitanga a Māhaki, 1860–1960', #A26, p 18

they had traditionally enjoyed, especially in land, impacted all aspects of life as 'Maori became members of a marginalised and dependent wage-earning class'.[303] Professor Murton characterised this as 'the underdevelopment of a people', and concluded that:

> The majority of Te Aitanga-a-Mahaki whanau were increasingly impoverished, 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.[304]

150 To illustrate these connections between the Crown's Treaty breaches and the ongoing disempowerment and impoverishment experienced by Tūranga Māori communities, we first examine the economic opportunities available to Te Aitanga a Māhaki, Ngāriki/Ngā Ariki Kaipūtahi, and Te Whānau a Kai following the widespread alienation of their lands. We then turn to consider how the insecurity and poverty experienced during this period was compounded by related factors such as poor health, housing, nutrition, and education.

151 By the beginning of the twentieth century, Te Aitanga a Māhaki, Ngāriki/Ngā Ariki Kaipūtahi, and Te Whānau a Kai had largely lost access to their traditional resource base. We noted above that the Crown had acquired large tracts of fertile Tūranga flat land following the 1868 deed of cession (see paragraph 100). The lands that they retained in Mangatū 1 were undeveloped and would be mortgaged and leased to settlers over following years. As the Tribunal found in the Tūranga report, the poverty experienced by the claimants in the late nineteenth and early twentieth centuries was directly correlated to the Crown's native land regime: 'The whole idea of individualised purchase, the complexity and contradiction of the legal regime and the cost of the process and subsistence prices were, together, capable of producing only landlessness and poverty.'[305]

152 Professor Murton gave evidence that, by 1910, much of the land retained by Te Aitanga a Māhaki was of lesser quality than that purchased by the Crown.[306] The sale and lease of the hill-country around the Waipāoa Valley led to 'the rapid removal of this land cover along with the many small and medium sized areas of native bush, [which] also markedly impacted on people's ability to gather forest food, trap birds and rats, hunt pigs and especially to use fern root.'[307] Anthony Patete gave similarly compelling evidence that the process left Ngāriki/Ngā Ariki Kaipūtahi with limited interests in land that was of inferior quality.[308]

303. Murton, 'Te Aitanga a Māhaki, 1860–1960', #A26, p 20
304. Murton, 'Te Aitanga a Māhaki, 1860–1960', #A26, p 639
305. Waitangi Tribunal, *Turanga Tangata*, p 521
306. Murton, 'Te Aitanga a Māhaki, 1860–1960', #A26, p 115
307. Murton, 'Te Aitanga a Māhaki, 1860–1960', #A26, p 116
308. Evidence of Anthony Patete, #P21, p 25

153 The loss of access to traditional resources, and the alienation of land without any ability for alternative investment, meant that most whānau initially became dependent on subsistence farming and on rural, seasonal, and casual labour. Professor Murton described the mix of economic activities supporting families living at Mangatū and other settlements until the late 1930s:

> Dividend income came occasionally from the Mangatu Trust (but at the best 1s. per share), and most of the men, plus a good number of women worked seasonally as shearers and casually as scrub cutters, fencers, and grass-seed sowers on the stations on the Mangatu blocks (their own lands) and on other Pakeha-owned stations. A few were employed permanently on these stations as well. On the papakainga lands at Mangatū, kumara, potatoes, maize, and other vegetables were grown, and a few livestock, including dairy cows, were kept. The income mix, therefore, included a subsistence component, wages, and dividends.[309]

154 The dependency on wage labour left Tūranga Māori vulnerable to economic downturns. During the Depression, a large proportion of Māori registered as unemployed. The proportion of the adult Māori population registered as unemployed nationally was already relatively high – 53 per cent in 1932. This fell to 41 per cent in 1935, but rose to 85 per cent in 1937.[310] From the evidence available, Professor Murton assumed that Te Aitanga a Māhaki were like other Māori in their unemployment profile.[311] Access to relief payments was limited during this period under the coalition Government (1931 to 1935), and social services 'discriminated against Maori on the grounds that since they did not live under the same conditions as Pakeha, they had fewer needs and consequently could be paid at a reduced rate.'[312]

155 While relief payments became more equitable from 1935 under the Labour Government, there was also a push to involve Māori in contract work throughout the Depression. However, there was little unemployment relief available, and that mostly through publicly funded schemes for road improvements and construction. Professor Murton noted that none of the Native Lands Department's development schemes were on Te Aitanga a Māhaki lands, and Māori labourers hoping to access these opportunities would have had to travel long distances, and purchase tents and tools.[313]

156 During the Second World War, a concerted Government push to involve Māori in the war effort saw a shift of workers to urban areas for specific

309. Murton, 'Te Aitanga a Māhaki, 1860–1960', #A26, pp 496–497
310. Murton, 'Te Aitanga a Māhaki, 1860–1960', #A26, p 425
311. Murton, 'Te Aitanga a Māhaki, 1860–1960', #A26, p 425 – 426
312. This changed under the Labour Government, where Māori received the relief at the same rates as Pākehā and became less reliant on subsistence farming as a result. However, from 1937, Māori who also relied on subsistence agriculture had their payments reduced to three quarters the rate, of which only one third was paid in cash: Murton, 'Te Aitanga a Māhaki, 1860–1960', #A26, p 427 – 429
313. Murton, 'Te Aitanga a Māhaki, 1860–1960', #A26, pp 427–429

industrial jobs. This trend continued after the war, with many Te Aitanga a Māhaki responding to high levels of population growth and rural unemployment by seeking employment in Gisborne and other urban centres. However, as Professor Murton points out, 'The levels of education being attained before 1945 did not prepare most for urban work, except in the lower skilled, lower paid, types of jobs.'[314] Nor did many whānau, with a few exceptions, receive much assistance from dividend payments during the boom years of the 1950s. Professor Murton's evidence was that 40 per cent of shareholders in the Mangatū Incorporation earned less than £15 in 1954 from dividends, and a further 32 per cent earned between £16 and £75. Despite these supplementary payments, the fact remained that the majority of Te Aitanga a Māhaki whānau were earning below the median income in New Zealand of £650 per year.[315] Professor Murton concluded that in the decades following the Second World War, 'the situation that had begun to be apparent during the 1930s of a marginalised and impoverished underclass did not basically change.'[316]

157 Throughout the first half of the twentieth century, the usual outcomes of poverty – poor housing, sanitation, and inadequate nutrition among them – made it even more difficult for Te Aitanga a Māhaki, Ngāriki/Ngā Ariki Kaipūtahi, and Te Whānau a Kai to improve their socio-economic conditions. During the late nineteenth century, Māori communities had faced new outbreaks of intestinal and respiratory diseases introduced by a growing settler population.[317] Furthermore, by 1900, the overall health of Te Aitanga a Māhaki communities was also being impacted by the loss of their resource base, which restricted access to land and had serious impacts on nutrition.[318] Whānau had to develop new and intensive techniques for land use, or to replace subsistence production with cash purchases of food. A decrease in food production during this time created what Murton described as a 'malnutrition-infection cycle', where malnutrition exposed the population to greater vulnerability to illness in a context where they were increasingly exposed to new pathogens introduced by Pākehā settlers.[319]

158 The prevalence of typhoid and dysentery in Māori communities became a matter of frequent concern to health officials in the early twentieth century. Despite important initiatives led by national Māori leaders to improve sanitation and water supply during this period, these diseases remained common in Te Aitanga a Māhaki communities. For instance, Gisborne experienced serious outbreaks of typhoid in the summer of 1910 and 1911, and again in 1916, 1921, 1929, and 1940.[320] After a serious outbreak of dysentery in Waihirere in 1927, improving the water supply and latrines in homes became an important

314. Murton, 'Te Aitanga a Māhaki, 1860–1960', #A26, p 478
315. Murton, 'Te Aitanga a Māhaki, 1860–1960', #A26, pp 505–507
316. Murton, 'Te Aitanga a Māhaki, 1860–1960', #A26, p 659
317. Murton, 'Te Aitanga a Māhaki, 1860–1960', #A26, pp 596–597
318. Evidence of Anthony Patete, #P21, p 30
319. Murton, 'Te Aitanga a Māhaki, 1860–1960', #A26, p 530
320. Murton, 'Te Aitanga a Māhaki, 1860–1960', #A26, pp 598–601

priority. However, in communities such as Waituhi and Mangatū, Professor Murton found apparently insufficient water supplies as late as 1941, and said that intestinal disease remained a significant contributor to death and ill health until after the Second World War.[321]

159 Along with sanitation and nutrition, housing in Te Aitanga a Māhaki communities was another source of concern throughout the first half of the twentieth century. During this period, Māori were suffering disproportionately from chronic respiratory diseases such as tuberculosis, and it was this conspicuous issue which brought attention to the inadequacy of housing in Te Aitanga a Māhaki communities. However, little was done to address the matter until the 1930s when research was carried out by Dr HB Turbott. He drew attention to the relationship between the incidence and severity of tuberculosis outbreaks, and the overcrowded and poor housing in Māori communities in the East Coast Health District.[322] In this Inquiry, Dr Peetikuia Bessie Wainui told us about 'ngā kāuta o Mangatū', and the cold and overcrowded conditions that families endured.[323] A survey in 1948 described the living conditions there:

> The living conditions are the worst the writer has ever seen and words cannot be found to describe the misery the womenfolk and the little children must endure in the winter months cooped up in a leaky unlined shack with wide cracks gaping holes in the weatherboards.[324]

160 It was Professor Murton's evidence that 'conditions in other Te Aitanga-a-Māhaki settlements appear to have been very similar in the late 1940s'.[325] Furthermore, the overcrowded housing got worse in the 1940s and 1950s as the Te Aitanga a Mahaki population grew rapidly.[326] By 1951, new state house style dwellings were being built in Mangatū, which, for many whānau, offered a significant change in housing conditions.[327] However, by the end of the decade, it was realised that ongoing flooding and silting from the Mangatū and Waipāoa Rivers meant that the site was no longer suitable for new housing. Eventually many of those living in Mangatū relocated to higher ground in Whatatutu.[328]

161 By the early 1960s, many more individuals and families began leaving papakāinga and moving to urban centres, such as Gisborne, where state rental housing was available. Professor Murton found that this demographic trend

321. Murton, 'Te Aitanga a Māhaki, 1860–1960', #A26, pp 535–536, 601
322. Murton, 'Te Aitanga a Māhaki, 1860–1960', #A26, pp 537–538
323. Evidence of Peetikuia Bessie Wainui, 11 October 2018, #P25(b)(i)
324. Evidence of Anthony Patete, #P21, p 28
325. Murton, 'Te Aitanga a Māhaki, 1860–1960', #A26, p 549
326. Murton, 'Te Aitanga a Māhaki, 1860–1960', #A26, p 559
327. Murton, 'Te Aitanga a Māhaki, 1860–1960', #A26, p 565
328. Robson, 'Report for Ngāriki Kaipūtahi', #A22, para 4.23

created a sense that the housing crisis had been addressed; as a result, housing in rural areas received little attention during this period of rapid urbanisation.[329] The incidence of tuberculosis among Māori had begun to decline dramatically during the 1960s. However, Murton notes that it remained many times higher than among Pākehā, and that 'while the incidence rate of this disease had been brought down from its previous horrendous high rate, it had by no means been eliminated'.[330]

162 Even though housing for rural Māori had become less of a concern nationally, not much had changed for Te Aitanga a Māhaki living in the district. By the 1970s, the shortage of land available for housing in Waikohu County (where many Te Aitanga a Mahaki lived), or at Waituhi or Waihirere, meant that housing was again a growing problem. Te Karaka was the only place where state rental homes were built and, by the 1980s, much of the housing there was again considered to be substandard.[331] In 1988, the National Housing Commission reported a decline in Māori home ownership. Of the total households nationally estimated to be in serious housing need in 1988, 51 per cent were Māori.[332] Despite the housing programmes of the 1950s and 1960s, the persistence of poor housing illustrates what Professor Murton described as 'an uphill battle against the social and economic disadvantages which continued to be the major determinant of poor living conditions for Māori'.[333] Along with poor housing, Professor Murton also drew attention to sanitation and nutrition as 'a crucial linkage between poverty and poor health'.[334]

163 Professor Murton also found consistent disparities existed between members of Te Aitanga a Māhaki and New Zealanders generally in terms of their employment status. He said that in 1951, '1.3 percent of employed Māori males were in professional, technical, administrative or management positions compared with a New Zealand total of 7.7 percent'.[335] While Māori were able to enjoy an increase in employment opportunities during the prosperous years of the 1950s and 1960s, they were largely 'at the bottom of the wage-labour pyramid'.[336] This dynamic remained essentially unchanged during the 1970s and 1980s, as accelerating inflation impacted the least skilled wage earners first and hardest. In 1981, 3.1 per cent of Māori were in professional, technical, administrative or management positions compared to 16.5 per cent

329. Murton, 'Te Aitanga a Māhaki, 1860–1960', #A26, p 576
330. In 1952, the Māori incidence rate of tuberculosis was seven times that of Pākehā. By 1962, the Māori rate had dropped from 50.8 cases per 1000 people, to 28.3 cases per 1000 people. However, the rate among Pākehā was only 3.4 cases per 1000: Murton, 'Te Aitanga a Māhaki, 1860–1960', #A26, pp 629–630
331. Murton, 'Te Aitanga a Māhaki, 1860–1960', #A26, p 579
332. Murton, 'Te Aitanga a Māhaki, 1860–1960', #A26, p 579
333. Murton, 'Te Aitanga a Māhaki, 1860–1960', #A26, p 581
334. Murton, 'Te Aitanga a Māhaki, 1860–1960', #A26, p 520
335. Murton, 'Te Aitanga a Māhaki, 1860–1960', #A26, 460
336. Murton, 'Te Aitanga a Māhaki, 1860–1960', #A26, p 660

for all New Zealanders.[337] John Ruru gave evidence on the changes he experienced growing up in Te Karaka in the post-war period:

> In the 1950s Te Karaka was however, a busy and thriving country town. The railway passed through there, and our people were not short of labouring opportunities . . . By the 1960's things started to change. Gisborne became the place of commerce. The freezing works were well established having ease of access to the Port, which was thriving. With improved roads, and better access to farms, the movement of stock by truck and trailer soon replaced the railway.
>
> In a short time, work became harder to come by, and our people had to travel further afield to get employment. It was not uncommon for our men folk to leave their families for weeks at a time chasing fencing, scrub cutting or shearing contracts. As the workers in our rohe, our people had become susceptible to the decisions of others. By the 1970's, Te Karaka was a shadow of its former self. Today it's more like a ghost town.[338]

164 By the 1990s, after three decades of changing employment patterns, some Te Aitanga a Māhaki had qualifications in the trades, nursing, teaching, and technical works, or university degrees. A few were in highly skilled professional, managerial, technical, and educational positions. However, at the same time, 46 per cent of those over 15 years old either had no qualifications or did not specify them. Most of those who were employed worked in a range of urban jobs; many were in semi-skilled and unskilled jobs that lacked security, and thus constantly faced the threat of unemployment.[339] Professor Murton considered that a culturally inappropriate education system had also impacted Te Aitanga a Māhaki's ability to seek out better employment opportunities. He pointed to the consequences of the 'almost entirely monocultural' school system through the first half of the twentieth century, and its assimilationist philosophy which 'artificially isolated Maori students from their own culture, [and] yet . . . did not give them the tools to succeed in the Pakeha world'.[340]

165 In the decades following the Second World War, Murton noted that Māori faced further structural constraints as they were frequently directed into non-academic streams 'because their skills (English and Mathematics) were considered too poorly developed to achieve academic success'. During this period, School Certificate marks were scaled so that only 40 per cent of students taking non-academic subjects (such as industrial or agricultural subjects) received passing grades, making it less likely for non-academic students (amongst whom Māori were over-represented) to pass School Certificate.[341]

337. Murton, 'Te Aitanga a Māhaki, 1860–1960', #A26, 460
338. Evidence of Eric John Tupai Ruru, 26 April 2012, #125, paras 15–19
339. Murton, 'Te Aitanga a Māhaki, 1860–1960', #A26, pp 460, 481
340. Murton, 'Te Aitanga a Māhaki, 1860–1960', #A26, pp 477, 484
341. Murton, 'Te Aitanga a Māhaki, 1860–1960', #A26, p 481

Writing in the 1990s, Professor Murton concluded that such structural constraints had been 'difficult to overcome, despite being identified'.[342] He noted that in 1991, only 10 per cent of Te Aitanga a Māhaki had School Certificate in one or more subjects, 7.9 had a trade certificate, 3.3 per cent had a teaching or nursing certificate, 1.3 per cent had a technician's certificate, and 2.1 per cent had a university degree.[343]

166 In our 2018 and 2019 hearings, we heard further evidence indicating that these inequities have continued until the present day. Economist Dr Ganesh Nana surveyed socio-economic outcomes for Gisborne Māori across several different measures of welfare and performance, and found that many disparities remain in areas such as education and the job market. In 2017, he said, Gisborne Māori remained significantly less likely than non-Māori to own, or partly own, their usual residence.[344] Further, he showed from 2017 Income Survey data that the mean personal income of Māori in Gisborne ($29,650) was 25 per cent lower than the mean for the total Gisborne population, at $37,170.[345] Dr Nana viewed this income gap 'as a proxy for the economic loss currently endured by Gisborne Māori'.[346] We return to this evidence in chapter 7, where we discuss further how the redress required to restore their tribal economic base might be valued. However, for our present purposes, it is enough that Dr Nana's evidence demonstrates that patterns of inequity, which we have traced through the twentieth century, remain today.

167 While Dr Nana's evidence is limited to measures such as income and home ownership, similar evidence of ongoing inequity in health is also readily available. It is uncontroversial that Māori health outcomes today remain significantly worse nationally, across a wide range of indicators and measures, than those of non-Māori. In Stage One of the Waitangi Tribunal's Health Services and Outcomes Inquiry, it was accepted by all parties 'that Māori health inequities are not only caused by health issues but influenced by a wide range of factors, including income and poverty, employment, education, and housing'.[347] In that Inquiry, the Tribunal heard evidence from experts in the area of Māori health and found that the impact of colonisation was 'an ongoing process, not something begun and ended in the nineteenth century'.[348]

168 Those Tribunal findings are mirrored by the evidence of the claimants in this Inquiry. Owen Lloyd, the named claimant for the Ngā Ariki Kaipūtahi claim,

342. Murton, 'Te Aitanga a Māhaki, 1860–1960', #A26, p 48
343. Murton, 'Te Aitanga a Māhaki, 1860–1960', #A26, p 482
344. Evidence of Ganesh Nana, 28 May 2018, #P10, para 6.2
345. Evidence of Ganesh Nana, #P10, para 11.6; We also received similar evidence from Dr Richard Meade, who used 2013 census data to find that the mean income for Te Aitanga a Māhaki individuals was $23,800, where it was 28,500 for all New Zealanders and 30,900 for Pākehā New Zealanders: evidence of Richard Meade, #P6, para 866
346. Evidence of Ganesh Nana, #P10, para 3.2–3.3.
347. Waitangi Tribunal, *Hauora: The Report on Stage One of the Health Services and Outcomes Kaupapa Inquiry* (Wellington: Legislation Direct, 2019), p 20
348. Waitangi Tribunal, *Hauora*, p 21

has had a career working in health services in Tairāwhiti. He also gave telling evidence in the Tribunal's Health Services and Outcomes Inquiry:

> As Ngā Ariki Kaipūtahi our physical health is inevitably tied to the physical health of our whenua. Our whenua has been suffering, as a consequence, so has the health of our people. The average age in our urupā is just 37 years old. Māori make up 65 percent of admissions to Gisborne Hospital. The health gains of Māori in Tairāwhiti, even though Māori make up nearly 50% of the population, are improving at a lower rate than non-Māori which continues to enhance the inequalities in the region.[349]

169 Dr John Yeabsley, who gave economic evidence for the Crown, criticised Dr Nana's evidence and questioned whether the current income gap was a credible estimation of economic loss. He contended:

> The fact of an income gap (a difference in income) may be due to a wide range of factors including a difference in choices about education, occupation, place to live and lifestyle made by individuals. To call it a measure of economic loss implies that it is imposed through restriction of opportunities as a result of the groups' claims, but no evidence is provided for this.[350]

170 But having reviewed all the evidence, we are satisfied that the clear picture we have been given of severe and lasting socio-economic prejudice – if not entirely due to the Crown's Treaty breaches discussed in this report – is nevertheless due to a significant extent to the political and economic prejudice suffered by Te Aitanga a Māhaki, Ngāriki/Ngā Ariki Kaipūtahi, and Te Whānau a Kai. The following factors particularly weigh with us:

(a) As the settlement of Tūranga progressed rapidly during the nineteenth century, the customary owners of the Mangatū CFL land were prevented from developing their lands.
(b) The low prices paid for land, and high costs associated with survey and title transfers, provided little opportunity for other investments.
(c) From the late nineteenth and early twentieth centuries, many of the Mangatū owners came to rely on wage labour and subsistence farming.
(d) The underdevelopment of this community of owners has created structural obstacles and inequities for Te Aitanga a Māhaki, Ngā Ariki Kaipūtahi and Te Whānau a Kai.

171 These inequities, across many areas of social and economic life, have persisted throughout the generations and remain today. Unremedied, they will continue to affect the lives of future generations to the same degree.

349. Evidence of Owen Lloyd, 27 July 2018, Wai 2575 ROI, #A45, para 3
350. Evidence of John Yeabsley, 30 July 2018, #P36, para 23

Tribunal determination

172 Having considered the prejudice the customary owners of the Mangatū CFL land have experienced as a result of the Crown's Treaty breaches, the Tribunal must now determine whether the remedy for this prejudice should include the return of the whole or part of the Mangatū CFL land – and if so how much. Alternatively, the Tribunal may determine that a recommendation for the return of land is not required, and that the CFL land should be cleared from liability for return.

173 In considering the merits of these two options, we have carefully examined the prejudice suffered by the claimants as a result of the loss of their Mangatū lands, and the temporary alienation of those lands for long periods of time. As we have shown, the alienation of the Mangatū 2 block to private purchasers was emblematic of how the Crown's native land regime, having removed Māori community control over their lands, imposed immense pressures on individual landowners to sell. The Mangatū 1 block, because of the steps taken by Wi Pere and Rees to protect it by statute, avoided any significant permanent alienations until 1961. However, the barriers imposed by the Crown's native land regime prevented the Mangatū owners from deriving any real economic benefit from their asset for much of its history. From the beginning of the twentieth century, the Crown's failure to provide mechanisms for the management or development of Māori land meant large areas of the owners' ancestral land was leased for two generations, while the entire Mangatū 1 block was administered by the East Coast Commissioner between 1917 and 1947.

174 We have also considered how this prejudice could only be fully understood against the backdrop of related Crown Treaty breaches. Before the Crown's attack on Tūranga autonomy which began at Waerenga a Hika in 1865, almost no land had been alienated in Tūranga.[351] Following the Crown's invasion, it sought to replace customary land rights with Crown-derived titles through the processes of the Poverty Bay Commission and the Native Land Court. Both failed to provide for community ownership and collective management of Māori land. The provision made for Māori incorporations in 1894 came too late for many owners who had earlier sold their interests in other blocks.[352] The consequences of this failure were made worse by the land title and transfer regime which was complex, contradictory, and costly. As we have seen, the Crown left Tūranga Māori unable either to develop their land or to derive any real benefit from selling the small interests they held in it.[353] In addition to the lands retained by the Crown following the deed of cession, 70 per cent

351. Waitangi Tribunal, *Turanga Tangata*, vol 1, p 48
352. The Native Land Court Act 1894 made general provision for Māori incorporations; however, the Act did not empower the new incorporations to raise finance: Waitangi Tribunal, *Turanga Tangata*, vol 2, pp 503–504
353. Waitangi Tribunal, *Turanga Tangata*, vol 2, p 536

of the land returned to Māori in Tūranga was subsequently alienated between 1869 and 1908 (see paragraphs 115).

175 During the latter part of this period, following the loss of so much land to Crown and private purchasers, Te Aitanga a Māhaki, Ngāriki/Ngā Ariki Kaipūtahi, and Te Whānau a Kai increasingly depended on their remaining land in Mangatū 1 for a residual economic base. The Māori owners of the Mangatū 1 block were unable to develop their land themselves as a result of the constraints imposed by the Crown's property regime. The block was taken over by three trustees, and the process of leasing it to settlers began.[354] The block was returned to the management of its owners by the East Coast Commissioner in 1947, and again took on a new importance for iwi and hapū who had suffered extensive losses elsewhere. It was one of the last significant areas of their ancestral lands, and the only block where they might exercise the autonomy they had once enjoyed. The intense prejudice suffered by the customary owners when their mana whenua was again trampled by the Crown's insistence on acquiring several thousand acres of land in Mangatū 1, only 14 years after its return to their control, can only be understood when seen as part of this longer history.

176 The Crown's Treaty breaches were not isolated events. They affected Māori people and communities whose political autonomy had been forcefully overthrown and who had seen Tūranga transform from a Māori district to one dominated by settler interests. The Tribunal described how the Crown's related Treaty breaches from the mid-nineteenth century all contributed cumulatively to the highly prejudicial circumstances suffered by Te Aitanga a Māhaki, Ngāriki/Ngā Ariki Kaipūtahi and Te Whānau a Kai, as Tūranga Māori:

> 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.[355]

177 Each claimant group – Te Aitanga a Māhaki, Ngāriki/Ngā Ariki Kaipūtahi, and Te Whānau a Kai – has clearly suffered greatly as a result of the Crown's efforts to impose a defective and inappropriate land tenure system on Tūranga Māori, and to pressure owners to accept alienations or sell their lands at

354. Waitangi Tribunal, *Turanga Tangata*, vol 2, p 510
355. Waitangi Tribunal, *Turanga Tangata*, vol 2, p 750

unfairly low prices. The Crown's system significantly affected not only those who suffered prejudice at the time of the breaches, but also their descendants over successive generations.

178 Before finally determining whether the action required to compensate for or remove the prejudice caused by the Crown's breaches 'should include' the return of CFL land, we briefly revisit the factors the Tribunal identified in the *Muriwhenua Lands Report* as important to its restorative approach to remedies (see paragraph 24).[356] These factors offer another lens through which to consider the claimants' experiences, and especially the prejudice they have faced as a result of the Crown's actions.

The seriousness of the case (the extent of property loss and the extent of consideration given to hapū interests)

179 The Crown's repeated breaches of the tino rangatiratanga guarantee under Article 2 of the Treaty led to devastating losses of land and resources for Te Aitanga a Māhaki, Ngāriki/Ngā Ariki Kaipūtahi, and Te Whānau a Kai. For Te Aitanga a Māhaki, the majority of their tribal rohe had passed through the hands of both Crown and private purchasers by the end of the nineteenth century, including the Mangatū 2 block, leaving them in debt and dependent on subsistence farming and wage labour. The steady alienation of Te Aitanga a Māhaki land continued throughout the first half of the twentieth century, mostly through the lease of land to Pākehā farmers. However, a particularly significant loss during the second half of the twentieth century was the Crown's acquisition of land in Mangatū 1 from the Mangatū Incorporation, for afforestation purposes. For the owners, who had only just resumed control of Mangatū 1 in 1947, this breach was a source of cultural, spiritual, and economic prejudice. The loss remains in living memory as a deep source of hurt for the owners.

180 For Ngāriki/Ngā Ariki Kaipūtahi, their claim includes the specific allegation about the reduction of their interests in Mangatū 1 following the 1881 Native Land Court title determination. While we are unable to quantify what Ngāriki/Ngā Ariki Kaipūtahi's interests should have been, it is clear that the loss of the ability to exercise their full customary rights within Mangatū, their core rohe, remains a highly significant grievance. We consider that their losses in Mangatū are bound up in the broader operation of the Crown's native land regime which individualised, fragmented, and fractionated title and also breached the tino rangatiratanga guarantee under Article 2 of the Treaty. For Ngāriki/Ngā Ariki Kaipūtahi, the process through which relative interests were determined after 1915 (including the Crown's intervention, which favoured Te Whānau a Taupara) led to litigation and increasingly acrimonious disputes. The progressive loss of control over their core lands diminished their mana and led to the impoverishment of their community.[357]

356. Waitangi Tribunal, *Muriwhenua Land Report*, p 406
357. Waitangi Tribunal, *Turanga Tangata*, vol 2, p 749

181 Te Whānau a Kai also suffered prejudice as owners in Mangatū 1. However, their significant land losses are in the Patutahi and the Tahora 2C blocks. These blocks represent a smaller area than that lost by Te Aitanga a Māhaki. However, the Crown's confiscation of Patutahi meant an important Te Whānau a Kai resource base was lost. In the 1920s, the East Coast Commissioner's sale of their Tahora land, without consultation, meant that they lost most of their remaining lands in the district. The impact of these losses was enormous for a smaller group such as Te Whānau a Kai. Without lands and the ability to support themselves, Te Whānau a Kai have encountered ongoing difficulty in maintaining the autonomy which is so essential to their independent identity and way of life. David Hawea, the lead Te Whānau a Kai claimant, described the loss of Patutahi as 'the principal uncompensated raupatu claim in New Zealand today'.[358] This statement reflects the ongoing severity of the grievance felt by Te Whānau a Kai.

The impact of that loss, having regard to the numbers affected and lands remaining

182 The Tribunal pointed out that in 1865, Tūranga 'remained a Maori district, with a Maori population of approximately 1500, compared with perhaps 60 or 70 Pakeha'.[359] However, almost one fifth of the Māori population was displaced following the heavy casualties suffered at Waerenga a Hika, combined with the subsequent detention of those taken prisoner by Crown forces, and at Ngātapa[360] Professor Murton's evidence was that those detained on Wharekauri made up 40 per cent of the total Te Aitanga a Māhaki population.[361]

183 Approximate census data indicates that, by 1874, the Te Aitanga a Māhaki population was only 217, a figure which likely included Ngāriki/Ngā Ariki Kaipūtahi and Te Whānau a Kai. It had risen to 477 by 1881.[362] The 179 customary owners of Mangatū represented a significant portion of this wider population. Professor Murton gave evidence that the Te Aitanga a Mahaki population increased over the twentieth century at a rate similar to the overall Māori population.[363] In 2013, the census figure for the Te Aitanga a Māhaki population was now 6,258.[364] Similar data is not available for the Ngāriki/Ngā Ariki Kaipūtahi or Te Whānau a Kai population, but they are likely to be represented in that figure to some extent.

184 For what was, essentially, a recovering population after the conflict at Waerenga a Hika and Ngātapa, the large-scale transfer of resources from 1873 onwards to a rapidly growing settler population was devastating. Te Aitanga

358. Evidence of David Hawea, #P12, para 4.5
359. Waitangi Tribunal, *Turanga Tangata*, vol 1, 40
360. Waitangi Tribunal, *Turanga Tangata*, vol 1, pp 42, 123
361. Murton, 'Te Aitanga a Māhaki, 1860–1960', #A26, pp 70–71
362. Murton, 'Te Aitanga a Māhaki, 1860–1960', #A26, p 588
363. Murton, 'Te Aitanga a Māhaki, 1860–1960', #A26, pp 584–585
364. Evidence of Richard Meade, 28 May 2018, #P6(b), app DD, p 1

a Māhaki, Ngāriki/Ngā Ariki Kaipūtahi, and Te Whānau a Kai were increasingly unable to rely on the economic base which had previously supported them. Kathryn Rose estimated that in 1900, Te Aitanga a Māhaki retained 256,243 acres of land from their original tribal land base of 700,000 acres. Mangatū 1, 3, and 4 made up 89,902 acres of that area. However, by 1917, 59,845 acres of Mangatū 1 would be leased by settlers for 21-year terms, with a right of renewal.[365] A further 75,457 acres, including Te Whānau a Kai's Tahora 2C lands, were vested in the Carroll Pere Trust, and became heavily burdened by debt before being transferred to the East Coast Native Trust Lands Board in 1902.[366] The remaining tribal estate eroded further throughout the twentieth century as land sales continued under the management of the East Coast Trust and, subsequently, the East Coast Commissioner. Long-term leases to Pākehā farmers, under the East Coast Trust or the Tairawhiti Maori Land Board, ultimately left some of what remained in deteriorating condition.

185 By the end of the twentieth century, Te Aitanga a Māhaki owned 156,414 acres in 310 blocks. Rose described much of this remaining land as 'uneconomic and/or inaccessible fragments'.[367] The fragmentation of land and fractionation of title were processes that helped both the Crown and private purchasers acquire further interests, leading to further partitions. This left the Māori owners unable to unlock the potential of what was retained except in a handful of larger blocks – including Mangatū 1. However, the attrition of Māori land interests over many generations meant in practice that Te Aitanga a Māhaki, Ngāriki/Ngā Ariki Kaipūtahi, and Te Whānau a Kai owners were left with uneconomic interests in small isolated blocks. For most shareholders in the Mangatū Incorporation, the financial benefits they received from dividend payments would be insufficient to ameliorate the socio-economic disadvantages facing many whānau. Furthermore, the significance of Mangatū 1 as one of the only land blocks that had escaped permanent alienation made the prejudicial impact on the owners of the loss of the 1961 lands all the greater (see paragraphs 88–94).

The socio-economic consequences

186 We have noted that Tūranga Māori, including the claimants in this Inquiry, remain less well-off on average than other New Zealanders. Even more significant are the socio-economic disparities between Tūranga Māori and the overall Gisborne population. The economic evidence brought by the claimants in this Inquiry has demonstrated that such inequities exist across many areas, including education, home ownership, and median income. In our view, the weight of evidence suggests a strong connection between the

365. Murton, 'Te Aitanga a Mahaki, 1860–1960', #A26, pp 160–161; Jacquiline Haapu provides the larger figures of 62,128 acres leased by 1912: Haapu, 'Te Ripoata o Mangatu', #A27, p 128
366. Rose, 'Te Aitanga-a-Mahaki', #A18, p 184
367. Rose, 'Te Aitanga-a-Mahaki', #A18, p 584

prejudice arising from the Crown's Treaty breaches, and the deprivation suffered by the claimants throughout subsequent generations.

187 Professor Murton noted in his evidence that the socio-economic status of Te Aitanga a Māhaki should be understood not just as the outcome of land loss, but as the product of various processes of political and economic disempowerment as colonisation proceeded. Traditional rights and responsibilities based in tikanga were replaced by a market-based system which Māori could only enter through alienation of their land. Te Aitanga a Māhaki, Ngāriki/Ngā Ariki Kaipūtahi, and Te Whānau a Kai were subsequently left at a structural disadvantage, having largely been deprived of the ability to accumulate and invest their capital. Through the first half of the twentieth century, underdevelopment resulted in poor housing and sanitation in Tūranga communities, including at Mangatū, and persistent socio-economic inequities. The Tribunal concluded that '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'.[368]

The effect on the status and standing of the people

188 Prior to 1865, Te Aitanga a Māhaki, Ngāriki/Ngā Ariki Kaipūtahi and Te Whānau a Kai had gone to great lengths to protect their autonomy and preserve peace between themselves and settlers. Between 1840 and 1865, Tūranga Māori 'decided how and when contact with colonists would occur – if at all'.[369] The Tribunal found that before 1865, 'the autonomy promised in the Treaty was a reality on the ground, but it was not the Crown's intention that this should continue'.[370] The Crown's adoption of policies and its enactment of laws specifically designed to destroy Māori autonomy had long-term prejudicial effects on the claimants' standing in the district. In particular, the Crown's attack at Waerenga a Hika against Māori who were not in rebellion – including many customary owners of the Mangatū lands – was motivated by its desire to impose its authority over the district, including the lands at Mangatū.

189 The Crown also used the label of 'rebels' to undermine Te Aitanga a Māhaki, Ngāriki/Ngā Ariki Kaipūtahi, and Te Whānau a Kai's control over their lands. The deed of cession and the work of the Poverty Bay Commission institutionalised the labels of 'loyal' and 'rebel' Māori as the basis for the confiscation of their lands and the exclusion of the Whakarau from the land returned by the Poverty Bay Commission. However, Murton gave evidence that even 'loyal' Te Aitanga-a-Mahaki 'were stigmatised as rebels-at-heart'.[371] He contended

368. Waitangi Tribunal, *Turanga Tangata*, vol 2, p 738
369. Waitangi Tribunal, *Turanga Tangata*, vol 1, p 39
370. Waitangi Tribunal, *Turanga Tangata*, vol 2, p 739
371. Murton, 'Te Aitanga a Māhaki, 1860–1960', #A26, p 301

that the prejudiced attitude of settlers and government against the claimant community 'persisted into the twentieth century'.[372]

190 For rangatira such as Pera Te Uatuku, who was present at Waerenga a Hika and joined Te Kooti in the escape from Wharekauri, his participation in the hostilities of the 1860s loomed over his later dealings in the Native Land Court (see chapter 4, paragraph 83–84).[373] Coupled with the Crown's unlawful actions and its use of force against Tūranga Māori, the stigmatisation of the Whakarau and their uri was a source of significant mistrust between Te Aitanga a Māhaki, Ngāriki/Ngā Ariki Kaipūtahi, and Te Whānau a Kai, and the Crown.[374]

191 In our view, this was borne out in the exclusion of Te Aitanga a Māhaki, Ngāriki/Ngā Ariki Kaipūtahi and Te Whānau a Kai from economic opportunities in the district, including the development of their lands. Instead, the Crown's native land regime forced the claimants to give up the control of large tracts of land, including Mangatū 1, 5, and 6 blocks, to entities created by the Crown and run by Pākehā including the East Coast Trust and the Tairawhiti Maori Land Board. All these consequences of the Crown's laws and policies prevented the claimants from exercising mana whenua in their lands. This harsh reality clashed with the vision of Wi Pere and other leaders. They sought to ensure that Māori would be economic partners in the district from the late nineteenth century, and many claimant communities supported them in that vision. The example of the Mangatū Incorporation demonstrates that the claimants were capable of managing and developing their lands effectively once the barriers were removed. But claimants were denied that opportunity, and instead became reliant on wage labour.

The benefits returned from European settlement

192 The Treaty of Waitangi promised Māori equal treatment and access to the benefits of settlement. However, these promises have not been realised for Te Aitanga a Māhaki, Ngāriki/Ngā Ariki Kaipūtahi, and Te Whānau a Kai. In the Tūranga report, the Tribunal focused on three important ideals inherent in the Treaty: the rule of law, just and good government, and the protection of autonomy. In contravention of these ideals, the Crown disregarded its own laws when it found it politically expedient to do so; set about devising policies and promoting laws that were designed to destroy Māori autonomy; and intentionally sought to defeat Māori interests.[375]

372. Murton, 'Te Aitanga a Māhaki, 1860–1960', #A26, p 644
373. Robson, 'Ngariki Kaiputahi', #A22, para 5.11(c)
374. Murton, 'Te Aitanga a Māhaki, 1860–1960', #A26, p 79
375. Waitangi Tribunal, *Turanga Tangata*, vol 2, pp 735–739

The lands necessary to provide a reasonable economic base for the hapū to support future development opportunities and to re-establish the people in the social and economic life in the district

193 An economic base consists of the lands and resources required for iwi or hapū to exercise their tino rangatiratanga, to participate in and contribute to the economy of the district, and to pursue opportunities to increase their community well-being and development. It is clear that none of the claimants in this Inquiry have retained sufficient land to meet their present needs, or to take up future development opportunities. We were reminded throughout our hearings of the concerns of the claimants about their past losses, and the struggles of their tīpuna to retain, protect, and develop their lands on their own terms. For the claimants, the restoration of their tūrangawaewae on land they had occupied for generations was central to their progress and development, as well as their vision for the future and the well-being of their communities.

194 Both Te Whānau a Kai and Ngāriki/Ngā Ariki Kaipūtahi have faced considerable difficulties in exercising their autonomy and expressing a tribal identity, having lost almost all their original tribal land base. Similarly, Te Aitanga a Māhaki kaumatua Wirangi Pera told us of Te Aitanga a Māhaki's aspirations to promote work for their people, develop their asset base, and protect and restore their marae.[376] While Te Aitanga a Māhaki have retained some land, mostly in Mangatū 1, they have still endured the loss of most of their tribal rohe. Mr Pera explained that 'the return of the Mangatū Crown forest land has come to represent one of the last bastions for Te Aitanga a Māhaki'.[377]

The impact of reparation on the rest of the community

195 The Crown did not present us with any evidence on the impact of reparation on the rest of the community, nor any local or national economic constraints for us to consider. However, we did receive evidence on the economic challenges faced by the local community in Tūranga. Dr Ganesh Nana told us that Tūranga Māori remain less well-off across a number of different socio-economic measures. He also argued that targeted investments in education, as an example, could help to address these disparities.[378] On the basis of that evidence, we can say at least that no disadvantage to the local community is likely to result from the return of the CFL land to Māori ownership and the injection of capital into the economy provided by the associated compensation under Schedule 1 of the CFAA. There is every reason to believe that the return of the CFL land to Māori ownership may bring real economic and social benefits not only to the claimants, but to the wider Tūranga community.

376. Evidence of Wirangi Pera, 28 May 2018, #P15, para 6
377. Evidence of Wirangi Pera, #P15, para 26
378. Evidence of Dr Ganesh Nana, #P10, paras 3.2–3.3, 15.2

Conclusion

196 In considering whether to recommend the return of land, we are guided by Treaty principles, and the nature and extent of the prejudice suffered by the claimants as a result of Crown Treaty breaches related to the CFL land. Land is an essential foundation for hapū and iwi identity. Their rights in and authority over land were to be protected under Article 2 of the Treaty, which guaranteed not only the possession of land but 'full chiefly control and management'.[379] In the preceding discussion, we have found the Crown's conduct to be inconsistent with the principles of the Treaty. In particular the Crown's failure to fulfil the guarantee under Article 2 of the Treaty of te tino rangatiratanga resulted in the claimant communities, who have customary rights and interests in Mangatū, suffering calamitous losses of land and resources, including losses in the CFL land. These losses not only had devastating and far-reaching socio-economic consequences, but also severed the claimant communities' cultural and spiritual connection with the CFL land. Together with their wider related losses, the prejudice caused by the Crown's breaches undermined the claimants' autonomy and tribal identity.

197 It is possible that the economic prejudice flowing from the Crown's Treaty breaches could be compensated for or removed with a monetary payment. However, such redress would not account for the spiritual significance of land to Māori as 'a repository of cultural meaning' over and above its economic value.[380] The Tribunal explained in the Tūranga report:

> The control and management of a group's rohe was expressed through the distribution of finely differentiated rights of access to resources rather than through 'ownership', as it would be understood in English law . . . The control of resources was intertwined with ancestral deeds and cemented in whakapapa. Rights in land were sourced in a number of ways: ancestral inheritance, the discovery and naming of places by ancestors, victory in battle (commonly followed by marriage into the defeated group), and inter-group transfers (although these often carried reciprocal obligations). These are commonly called the four take: take tupuna, take taunaha, take raupatu, and take tuku. All take had to be consummated by the regular exercise of rights held. The term according to tikanga is 'ahikaroa' or 'kauruki turoa.'[381]

198 Te Aitanga a Māhaki and the Mangatū Incorporation, Ngāriki/Ngā Ariki Kaipūtahi, and Te Whānau a Kai have suffered multiple Crown breaches in respect of their Mangatū lands, and multiple forms of prejudice. We stress that we are not dealing with just a single breach suffered by a single claimant community, with a single consequence. The Crown breaches impacting the

379. Waitangi Tribunal, *The Mohaka ki Ahuriri Report*, p 24
380. Murton, 'Te Aitanga a Māhaki, 1860–1960', #A26, p 663
381. Waitangi Tribunal, *Turanga Tangata*, vol 1, p 17

customary owners of the Mangatū CFL land were many, and the consequential prejudice lasting for over 100 years has been severe.

199 In our view, land is a necessary part of the cultural and spiritual redress Te Aitanga a Māhaki, Ngāriki/Ngā Ariki Kaipūtahi and Te Whānau a Kai receive. Each having lost so much, the return of land would help to restore their tribal identity and autonomy. It could also constitute part of an economic base for the claimants. The Mangatū CFL land could be expected to provide the claimants with some capital to grow, whether that be financially or in other economic or cultural endeavours. However, we do not wish to overstate this point. The evidence we received on the future value and commercial viability of the Mangatū CFL land was limited. While we cannot be certain about the extent of economic benefit which will flow from the land, its return would at least create new opportunities for the claimants to exercise rangatiratanga in managing their resources, and to seek to improve the welfare and well-being of their communities.

200 We consider that the remedy required to restore the claimants' mana whenua, and the economic, cultural, and spiritual well-being of their communities should include the return of the CFL land – indeed, it must. We will make a recommendation for the return of CFL land under section 8HB(1) to Māori ownership; it follows that the land should be returned to its customary owners. As we stated in chapter 4, Te Aitanga a Māhaki hapū have well-recognised interests in Mangatū. It is also well established that the Mangatū lands are the core rohe for Ngāriki/Ngā Ariki Kaipūtahi.[382] In our view it is particularly appropriate that the customary interests of these hapū and iwi are recognised in the return of the Mangatū CFL land. Although their most significant losses were at Patutahi and Tahora, outside of Mangatu, we concluded in chapter 4 that Te Whānau a Kai have interests in Mangatū through their Ngāriki whakapapa (see paragraphs 61–62).

201 Accordingly, we consider that the claimant groups discussed above should be included in the return of the Mangatū CFL land. They are:

(a) the hapū of Te Aitanga a Māhaki (including Ngāti Matepu), represented by the Te Aitanga a Māhaki Trust;
(b) Ngāriki/Ngā Ariki Kaipūtahi; and
(c) Te Whānau a Kai.

202 The Mangatū Incorporation's shareholders whakapapa to the Ngāti Wahia, Ngāriki and Te Whānau a Taupara hapū of Te Aitanga a Māhaki, to Te Whanau a Kai, and also to Ngāriki/Ngā Ariki Kaipūtahi, and will benefit accordingly from the return of CFL land to those claimant groups. We discuss

382. Second amended statement of claim for Te Aitanga a Māhaki, not dated, #SOC1; amended statement of claim for Ngāriki Kaipūtahi, 18 April 2001, #SOC3; Waitangi Tribunal, *Turanga Tangata*, pp 23–27; Ngāti Matepu claimant Tony Tapp gave evidence concerning Te Rangiwhakataetaea, and his son Wi Haronga's occupation and exercise of mana in Mangatū: evidence of Anthony Tapp, 28 May 2018, #P27, paras 18–23

further how each group will receive the returned CFL land, as well as the allocation each group will receive, in chapter 6 (see paragraphs 167–171).

203 Because we are returning the land to three groups each with multiple well-founded claims that relate to the CFL land, and each requiring significant redress, we consider that the whole of the CFL land should be returned to Māori ownership. In addition, we find that there are other significant elements of prejudice suffered by the claimants that will not be remedied solely through the return of land. These include:

(a) the political disempowerment resulting from the Crown's efforts since the mid-1860s to overthrow Tūranga Māori autonomy, the transformation of title and tenure in the district, and the enormous transfer of other lands and resources from Māori to the settler population;

(b) the loss of opportunities to contribute to the economy of the district, and to manage and develop their lands themselves, including Mangatū for significant periods; and,

(c) the social and economic disadvantages suffered by generations of Tūranga Māori in health, housing, education, and employment, arising from these losses.

204 In this wider context, the Mangatū CFL land represents only a fraction of what was lost by the claimants. Remedying the wider prejudice will require further action by the Crown. Because this Remedies Inquiry has a specific focus on the return of the Mangatū CFL land, we make additional general non-binding recommendations in chapter 8.

WAIATA MŌ TE TANGATA TE TAKE

Ae, ka hōmai e Ihowā te mea pai

CHAPTER 6

WHO IS TO RECEIVE THE TRIBUNAL'S SECTION 8HB RECOMMENDATION?

Introduction

1 We found in chapter 4 that the claimants in this Inquiry all have well-founded claims that relate to the Mangatū CFL land. We also determined in chapter 5 that the whole of the Mangatū CFL land should be returned to Māori ownership to compensate for or remove prejudice suffered by Te Aitanga a Māhaki, Ngāriki/Ngā Ariki Kaipūtahi, and Te Whānau a Kai. These findings and determinations establish that the members of these groups should receive the benefit from the return of the Mangatū CFL land and any associated compensation.

2 We have, therefore, identified those to whom the land and any associated compensation should be returned. However, for the purposes of the final step in the four-step legal test set out in section 8HB(1) (discussed in chapter 3, see paragraph 11), we must now proceed to determine whether the governance entities the claimant groups have proposed are properly representative of and accountable to the members of Te Aitanga a Māhaki, Ngāriki/Ngā Ariki Kaipūtahi, and Te Whānau a Kai. We must, in other words, determine that those entities are the appropriate beneficiaries of the Tribunal's binding recommendation for return of the CFL land and any compensation.

3 In the sections below, we set out our approach to identifying the beneficiaries' governance entities to receive the land and any compensation. We begin by outlining our responsibility under the statutory scheme. We then discuss the requirement for each of the claimants to have established, prior to our interim recommendations, a legally recognised governance entity to receive the benefit of any Tribunal recommendations. We consider this to be required under the statute. We then outline the steps parties have taken to prepare to receive any CFL land returned by the Tribunal; and determine how both the CFL land and the statutory compensation accompanying the land returned are to be allocated between the three claimant groups. (In chapter 7, we will determine the actual proportion of compensation to accompany the land under Schedule 1 of the CFAA.)

4 Finally in this chapter, we consider the practical and legal questions arising from the return of the land to multiple groups. It is important for us to decide whether the land should be returned to the three groups undivided; or be partitioned on the ground into separate parcels with separate titles for each of the groups. We consider the parties' submissions on all those options. We also assess what terms and conditions are appropriate to accompany our recommendations for the return of the Mangatū CFL land. We then set out our decisions on these issues.

Identifying the Governance Entities Representing the Beneficiaries of the Tribunal's Section 8HB Recommendations

5 Section 8HB(1)(a) of the TOWA states that the Tribunal's recommendation for the return of CFL land to Māori ownership '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'. As we explained in chapter 3, once the Tribunal makes its recommendation, the groups identified as the recipients of the returned land have a 90-day period within which, should they wish to do so, they may enter into negotiations with the Crown to settle the claim under section 8HC on different terms. During this period, the Tribunal's recommendation is interim in nature. They become final and binding at the end of the 90-day period if the parties do not reach an alternative agreement with the Crown for the settlement of the claims (see chapter 3 for a full discussion of the statutory scheme). In this section, we set out the Tribunal's approach, beginning with a summary of the parties' submissions.

The parties' positions

6 During our hearings, claimants and the Crown disagreed on how the Tribunal should exercise its statutory responsibility to identify the recipient or recipients of the returned CFL land. An important issue was whether the Tribunal should require that the claimants constitute a legally recognised governance entity once the Tribunal had determined that the land should be returned.[1] Alternatively, some of the claimants put it to us that the Tribunal might simply identify the successful claimants to whom the land is to be returned, and address any practical issues concerning the entities that would receive the title to the CFL land after the 90-day period, as part of the terms and conditions for its return.

7 The Crown contended that the Tribunal should be satisfied that a recipient is appropriately constituted before making recommendation in its favour. In principle, all parties broadly agreed that the Tribunal should ensure that our interim recommendation under section 8HB(1) of the TOWA can become final

1. That is, a legal entity that can receive and hold the land and compensation on behalf of its members.

immediately following the completion of the 90-day period. In the sections below, we outline the parties' positions on these issues.

The Māhaki Trust and the Mangatū Incorporation

8 The Māhaki Trust and the Mangatū Incorporation submitted:

(a) The statutory scheme does not require that the Tribunal make recommendations under section 8HB in favour of an already established and ratified recipient entity. However, 'the group must be sufficiently representative'.[2]

(b) 'The "group of Māori" wording does not amount to a statutory prerequisite that the group must have first established and ratified a recipient entity. The reference to a group implies rather that the Tribunal must at least identify the conceptual class that is to receive the redress (ie the iwi or hapū or other entity), but that the mechanics of how that is done (ie the legal recipient entity for the group) may be the subject of the terms and conditions imposed.'[3]

(c) If there are three individual governance entities, 'the Tribunal can direct ratification within the 90 day period or within a period that is no later than, say, six weeks following the 90 day period'.[4]

(d) Section 8HC of the TOWA does not cause the Tribunal, having made its interim recommendations, to become *functus officio* [having no further official authority or legal effect]. It may include as part of its interim recommendations 'a provision enabling the Tribunal to intervene in the event that ratification did not occur in accordance with its directions'.[5]

Ngāriki / Ngā Ariki Kaipūtahi

9 Ngāriki Kaipūtahi claimants (Wai 499 and Wai 874) argued in their closing submissions that:

(a) 'The exact details of the recipient entity ought not to be the decisive factor in whether the Tribunal orders resumption.' The creation of a suitable entity 'can readily be a condition of resumption'.[6]

(b) The Tribunal has appropriately read into the section 8HB(1) requirement 'that it must ensure that any recipient body is representative of and accountable to its beneficiaries'.[7]

10 Ngā Ariki Kaipūtahi (Wai 507) argued in their closing submissions that:

2. Closing submissions for Te Aitanga a Māhaki and the Mangatū Incorporation, 10 December 2018, #2.682, para 151.3
3. Memorandum of counsel for Te Aitanga a Māhaki and the Mangatū Incorporation, 6 March 2020, #2.800, para 15
4. Memorandum of counsel for Te Aitanga a Māhaki and the Mangatū Incorporation, 23 February 2020, #2.793, para 54
5. Memorandum of counsel for Te Aitanga a Māhaki and the Mangatū Incorporation, #2.793, para 55
6. Closing submissions for Ngāriki Kaipūtahi, 10 December 2018, #2.681, para 57
7. Closing submissions for Ngāriki Kaipūtahi, #2.681, para 59

(a) The Tribunal's interim recommendation under section 8HB must be able to become binding following the expiry of the 90-day period.[8]
(b) To facilitate this, the Tribunal could indicate through an 'iterative process' its initial position on how the land may be returned; and allow parties to make further submissions on the allocation of land, whether the land will be held by a common vehicle or subdivided, and how that will be accomplished.[9]
(c) The Tribunal would then be in a position to provide a specific 'default position' in the terms and conditions attached to the return of the land.[10]

11 Counsel for both Ngāriki/Ngā Ariki Kaipūtahi claimants later developed a joint and more refined position in their further submissions:

(a) Ngāriki/Ngā Ariki Kaipūtahi would not be comfortable with an approach that requires the recipient entities to be established during the 90-day period 'as it introduces considerable uncertainty'.[11]
(b) They would 'need clear guidance beforehand on what happens if one party fails to ratify in the period for example'.[12] Ngāriki/Ngā Ariki Kaipūtahi 'would not be comfortable with any other party claiming to represent their interests in negotiations'.[13]

Te Whānau a Kai

12 Te Whānau a Kai submitted:

(a) The Tribunal can ensure through its terms and conditions 'that any award of land, or any interest in land, and consequent compensation is going to be appropriately managed by the group that receives it, and importantly that the recipient entity appropriately recognises and represents the customary group whose interests were prejudiced by the breach.'[14]
(b) The Tribunal should ensure that the recipient entity is representative of the claimant groups 'therefore it should impose a condition that the claimant group carry out a process to prove that representation before they can receive redress.'[15]

8. Under section 8HC of the TOWA, once the Tribunal makes its recommendations the parties have a 90-day period to enter into negotiations with the Crown to settle the claim, during which period the recommendations are interim in nature, see chapter 3 for a full discussion of the statutory scheme. Closing submissions for Ngā Ariki Kaipūtahi, 11 December 2018, #2.684, para 253; Amended closing submissions for the Crown, 12 February 2019, #2.688(b), para 173.1
9. Closing submissions for Ngā Ariki Kaipūtahi, #2.684, paras 253(a)-253(c)
10. Transcript for hearing week four, 19–21 December 2018, #4.35, p140
11. Memorandum of counsel for Ngāriki/Ngā Ariki Kaipūtahi, 24 February 2020, #2.795, para 15
12. Memorandum of counsel for Ngāriki/Ngā Ariki Kaipūtahi, #2.795, para 15
13. Memorandum of counsel for Ngāriki/Ngā Ariki Kaipūtahi, #2.795, para 16
14. Closing submissions for Te Whānau a Kai, 11 December 2018, #2.683, para 22.2
15. Closing submissions for Te Whānau a Kai, #2.683, para 22.4

(c) The terms and conditions imposed by the Tribunal 'do not need to be fulfilled within the 90-day period imposed for a recommendation to become final under section 8HC'.[16]

13 Te Whānau a Kai further developed their submissions on whether the Tribunal should impose as a term or condition that a recipient entity or entities should be ratified during, or after, the 90-day period. They submitted:

(a) 'The Crown is unlikely to be willing to negotiate with members of a group who are representatives of an entity that has yet to be ratified by the group.'[17]

(b) 'Difficulties may arise with groups being expected to negotiate with the Crown while also attending to ratification matters.'[18]

(c) If the parties are to ratify a collective recipient entity 'there can be no "fall back position" if one of the groups is unable to complete ratification during the 90-day period . . . The Tribunal will not be able to make interim recommendations in favour of a holding trust that has not been ratified by all claimant groups.'[19]

Te Rangiwhakataetaea–Wi Haronga–Ngāti Matepu

14 Ngāti Matepu supported and adopted the position taken by Te Aitanga a Māhaki and the Mangatū Incorporation.[20] They also submitted:

(a) In identifying the beneficiary of the return of the CFL land, 'the Tribunal is not required or limited to simply naming any claimant (or applicant)'.[21]

(b) This Tribunal is well able to include Ngāti Matepu in such an identification, despite their claim not being well-founded.[22]

The Crown

15 The Crown submitted:

(a) The 'Māori or group of Māori' must be a person, group or entity legally able to hold property . . . it is not sufficient to make the establishment or identification of a suitable recipient entity a term or condition of the recommendation to return the land.[23]

(b) The Tribunal can expect to receive sufficient evidence demonstrating that claimant groups:

- Agree and define their claimant community (if there was more than one claimant community the Tribunal could expect their claimant definitions to have regard to each other);

16. Closing submissions for Te Whānau a Kai, #2.683, para 22.11
17. Memorandum of counsel for Te Whānau a Kai, 24 February 2020, #2.794, para 9(a)
18. Memorandum of counsel for Te Whānau a Kai, #2.794, para 9(b)
19. Memorandum of counsel for Te Whānau a Kai, #2.794, para 10
20. Memorandum of counsel for Ngāti Matepu, 25 February 2020, #2.797
21. Closing submissions for Te Rangiwhakataetaea–Wi Haronga–Ngāti Matepu, 10 December 2018, #2.680, para 23
22. Closing submissions for Te Rangiwhakataetaea–Wi Haronga–Ngāti Matepu, #2.680, para 23
23. Amended closing submissions for the Crown, 12 February 2019, para 173.1

- Establish an appropriately accountable entity to receive the redress on behalf of their claimant community; and
- Demonstrate through a fair, open, and transparent process that the claimant community has agreed the proposed recipient should receive, hold, and manage the recommended remedies on their behalf.[24]

(c) In the case of any vehicle representing more than one group, the Tribunal will have to determine that any vehicle proposed is suitable and accounts appropriately for the beneficial entitlement to remedies recommended by the Tribunal in favour of each group.[25]

16 The Crown further developed its position on whether the Tribunal should impose as a term or condition that recipient entities be ratified during, or after, the 90-day period. Counsel for the Crown submitted:

(a) 'The Tribunal should not issue any interim recommendations subject to terms and conditions that a recipient entity/entities must be ratified before transfer of land/compensation can occur.'[26]

(b) 'There is no fall-back position if one of the groups is unable to complete ratification in the 90-day period . . . this is important because claimant parties and the Crown may not negotiate an alternative outcome before the end of the 90-day period and the interim recommendations may become binding.'[27]

(c) Under section 8HC, the Tribunal may amend its interim recommendations in two circumstances: if the claimants and the Crown settle the claim; or, in the case of a clerical mistake in the Tribunal's interim recommendations. Otherwise, 'the Tribunal is functus officio once it issues interim recommendations and it would have no ability to provide oversight during any subsequent ratification process.'[28]

(d) 'As part of this litigation the Tribunal must adopt for itself standards as well as processes so that the Tribunal itself can be satisfied that proposed recipient entities are appropriately fit for purpose and have the support of the communities whose claims will be resolved as a result of the Tribunal's recommendations for remedies.'[29]

(e) 'The Tribunal should adapt for its own circumstances and use its own jurisprudence for guidance on steps remaining in this inquiry to demonstrate how promoted recipient bodies have been developed in consultation with affected claimant communities and have been approved by these communities.'[30]

(f) 'The Tribunal must ensure each claimant group develops a register of its members, allows an appropriate time for descendants of each group

24. Amended closing submissions for the Crown, #2.688(b), paras 170–171
25. Amended closing submissions for the Crown, #2.688(b), para 174
26. Memorandum of counsel for the Crown, 24 February 2020, #2.796, para 21
27. Memorandum of counsel for the Crown, #2.796, para 23
28. Memorandum of counsel for the Crown, 3 August 2020, #2.842, paras 17–17.2
29. Memorandum of counsel for the Crown, #2.796, para 4
30. Memorandum of counsel for the Crown, #2.796, para 5

to register or to take part in the vote through other means if they are not prepared to register. Then each group should provide members with the opportunity to take part in the ratification process through receiving material explaining any allocation proposal (and other submissions to the Tribunal) and recipient entity/entities, and by having the opportunity to vote on it.'[31]

(g) 'The Tribunal should not put pressure on itself or on claimant groups to complete a ratification process in an unreasonably short period of time.'[32]

Tribunal analysis

17 A key question arising from the parties' submissions is whether there must, or should, be suitable governance entities, ratified by the claimant communities, to receive the returned CFL land before the Tribunal makes its interim recommendation. To reach a position on this question, we consider the purpose of the statutory scheme which we are implementing, the relevant directions of the Courts, the Tribunal's own jurisprudence on the restorative approach to overlapping interests, and particularly the evidence we heard in this Inquiry – including the evidence of forestry experts. In the following sections, we address these considerations before setting out the approach we will take to identifying the recipients of our recommendation for the return of CFL land and associated compensation.

The Courts' directions

18 As explained in chapter 3, the Tribunal performs an adjudicatory function under section 8HB of the TOWA. This means that once we have determined that the statutory prerequisites are fulfilled, the Tribunal must make a recommendation under section 8HB(1). However, the purpose of the scheme is fundamentally remedial.[33] It provides additional protections for Māori claimants to ensure they can access effective and tangible redress to compensate for, or remove, prejudice caused by Crown Treaty breaches. Throughout this Inquiry, we have sought to appropriately recognise and carry out the adjudication under section 8HB, as well as to take proper account of the remedial purpose of the statutory scheme.

19 In chapter 5, we determined that the return of Mangatū CFL land 'should' be included in the remedies to be received by Te Aitanga a Māhaki, Ngāriki/Ngā Ariki Kaipūtahi, and Te Whānau a Kai. These claimants represent the groups who have suffered the prejudice and should receive the benefit of the Tribunal's recommendation for the return of CFL land. Accordingly, the

31. Memorandum of counsel for the Crown, #2.796, para 13
32. Memorandum of counsel for the Crown, #2.796, para 15
33. *Mercury NZ Ltd and Ors v Waitangi Tribunal and Ors* [2020] NZHC 654, para 86; Waitangi Tribunal, *Turangi Township Remedies Report* (Wellington: GP Publications, 1998), p10

statutory scheme next requires us to decide on the allocation between these groups. In *Haronga*, the Supreme Court found that:

> The language of s 8HB(1)(a) ('shall identify') highlights that it is the obligation of the Tribunal to decide between competing claims once it has determined that the claim is 'well-founded' and that the action to be taken to compensate for or remove the prejudice 'should include the return to Māori ownership' of the land or part of it.[34]

20 The Supreme Court stated that within the limited discretion under section 8HB(1):

> [The Tribunal] has the power under s 8HB to arrive at the outcome it thinks right. It 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 . . . The Tribunal has ample power to impose terms and conditions and to adjust interests if that seems necessary.[35]

21 The Supreme Court referred to adjustments to the amount of CFL land returned and associated compensation when considering the Tribunal's power to impose terms and conditions.[36] In that case, the Supreme Court made its comments in circumstances where there was only one applicant for a binding recommendation before the Court.

22 In this Inquiry, however, the claimants are three closely related groups that share whakapapa and have shared experiences of historical Crown Treaty breaches within their rohe. But they have also suffered prejudice stemming from breaches that have had particular impacts on each group. The Court of Appeal recognised the challenge presented by their competing claims:

> The Tribunal's concern not to create a fresh set of grievances is justified. Indeed, an irony would result if a binding order of the Tribunal prejudicially affected other claimants or related parties. But it must be inferred from the terms of the Act and the CFAA, construed against the background of the Forest Lands Agreement, that Parliament was confident the Tribunal was best placed to pre-empt that consequence by exercising the additional remedial powers which it was entrusted. As noted in the long title of the Act, the Tribunal is the expert body appointed 'to determine whether certain matters are inconsistent with the principles of the Treaty'. The legislature saw the Tribunal as 'the appropriate vehicle to carry into effect the purpose of the CFAA amendments to the principal Act and the Forest Lands Agreement: the transfer of Crown forest land to Māori

34. *Haronga v Waitangi Tribunal* [2012] 2 NZLR 53 (SC), para 106
35. *Haronga v Waitangi Tribunal* [2012] 2 NZLR 53 (SC), para 107
36. *Haronga v Waitangi Tribunal* [2015] NZHC 1115, para 103

> ownership and payment by the Crown to Māori of compensation in the event of successful claims.[37]

23 Here, the Court's discussion takes us beyond the Tribunal's discretion to adjust the redress provided by its recommendation, and refers also to the purpose of the Tribunal's governing legislation and the 1989 Forests Agreement. The full long title of the TOWA states:

> An Act 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 practical application of the Treaty and to determine whether certain matters are inconsistent with the principles of the Treaty.

24 We read the Court of Appeal's observations as supporting our view that the Tribunal's adjudicative function under section 8HB(1) must be exercised in a manner compatible with the principles of the Treaty of Waitangi as developed by the Courts and the Tribunal. We also believe that exercising this function is conducive to doing justice between the claimants and the Crown (see chapter 3, paragraph 67). This means that in exercising our additional remedial power under section 8HB, the Tribunal must also ensure our recommendations are consistent with the 'practical application of the Treaty', as the TOWA requires. Under section 8HB(1)(a), the Tribunal can attach such terms and conditions as we consider appropriate to ensure these outcomes.

25 In the next section, we consider the correct application of the Tribunal's restorative approach to remedies in this light.

The Tribunal's restorative approach

26 As we have discussed, the Tribunal's restorative approach was developed to identify remedies that would compensate for or remove prejudice suffered by Māori, and which relate to the practical application of the Treaty. However, the Tribunal has not to date considered how to identify an appropriate legal entity to receive a binding recommendation for the return of CFL land under section 8HB, or to represent claimants in negotiations with the Crown during the 90-day period.

27 In the *Turangi Township Remedies Report*, the Tribunal faced no difficulty in identifying the recipient representing those claimants who suffered the prejudice before making an interim recommendation for the return of the land to them.[38] Ngāti Tūrangitukua was the sole claimant group in that Inquiry, and the Tribunal commended their efforts in establishing the Ngāti Tūrangitukua Charitable Trust and 'for their considerable effort in compiling

37. *Attorney-General v Haronga* [2017] 2 NZLR 394 (CA), para 74
38. Waitangi Tribunal, *The Turangi Township Remedies Report* (Wellington: GP Publications, 1998), pp 102–103

their whakapapa and register of beneficiaries'.[39] The Tribunal observed that 'the hapu has put in place a legal identity and management structure to administer assets for the benefit of some 5000 or more people who identify as Ngati Turangitukua'.[40] After receiving the Tribunal's recommendations, Ngāti Tūrangitukua negotiated alternative terms of settlement with the Crown during the 90-day period.

28 The circumstances in this present case are different. We must adjudicate multiple applications for return of the Mangatū CFL land. In addressing the claimants' overlapping claims, we are assisted by the Tribunal's jurisprudence on the establishment of legal entities to represent claimant communities.[41] The Tribunal commented in 2007 in *The Tāmaki Makaurau Settlement Process Report* that the claimants' right to determine the legal structure or structures through which their interests are represented and governed should be protected.[42] The Tribunal found in *The Ngātiwai Mandate Inquiry Report* (2017), and *The Whakatōhea Mandate Inquiry Report* (2018) that a process was required to ensure robust testing of community support for the structures or entities representing claimant communities in settlement negotiations. This process must be sensitive to the groups' tikanga in order to protect the close intertribal relationships existing between the claimants, and should not be unduly rushed.[43]

39. Waitangi Tribunal, *Turangi Township Remedies Report*, p 76
40. Waitangi Tribunal, *Turangi Township Remedies Report*, p 76
41. Waitangi Tribunal, *The Te Arawa Mandate Report: Te Wahanga Tuarua* (Wellington: Legislation Direct, 2005); Waitangi Tribunal, *The Ngāpuhi Mandate Report* (Wellington: Legislation Direct, 2015); Waitangi Tribunal, *The Ngātiwai Mandate Inquiry Report* (Wellington: Legislation Direct, 2017; Waitangi Tribunal, *The Ngāti Maniapoto Mandate Inquiry Report* (Wellington: Legislation Direct, 2019); Waitangi Tribunal, *The Hauraki Settlement Overlapping Claims Inquiry Report* (Wellington: Legislation Direct, 2020)
42. The Tribunal stated in *The Tāmaki Makaurau Settlement Process Report:* 'Article 11 guarantees te tino rangatiratanga, which is the absolute authority of chiefs to be chiefs, and to hold sway in their territories. By that guarantee, the Crown recognised and confirmed Māori relationships and property that were in existence when the Treaty was signed. Confirmation of te tino rangatiratanga is about the maintenance of relationships. In traditional Māori society, chiefs were only rarely autocrats. They sprang out of and were maintained in their positions of authority by their whanaunga; their kin. Whanaungatanga was therefore a value deeply embedded in the maintenance of rangatiratanga. It encompassed the myriad connections, obligations, and privileges that were expressed in and through blood ties, from the rangatira to the people and back again: Waitangi Tribunal, *The Tāmaki Makaurau Settlement Process Report* (Wellington: Legislation Direct, 2007), p 6.
43. In the *Ngātiwai Mandate Inquiry Report*, the Tribunal found 'the Crown has obligations to ensure that hapū can determine how and by whom they will be represented in settlement negotiations and are able to make decisions according to their tikanga': Waitangi Tribunal, *The Ngatiwai Mandate Inquiry Report*, p 78; In the *Whakatōhea Mandate Inquiry Report*, it found, 'Where the historical wrongs are grievous and the contemporary hapū politics complex and divided, the honour of the Crown requires statesmanship over pragmatism. This includes advocacy for taking the time required to get it right. When the Crown reacts to political pressure to get it done, it is Māori who suffer from the divisive and unfair process that follows': Waitangi Tribunal, *Whakatōhea Mandate Inquiry Report* (Wellington: Legislation Direct, 2018), p 95.

29 But this jurisprudence concerns Treaty claims about the Crown's settlement policy, which is of limited relevance to our Inquiry. We are adjudicating separate applications for binding recommendations under section 8HB of the TOWA. The Tribunal's jurisdiction does not, however, require us to resolve tensions created by competing and overlapping historical interests. Rather, findings from previous mandate-related inquiries suggest that a restorative process should provide parties with an opportunity to collectively work through how any returned land would be held and managed for the benefit of all the claimant communities. In the context of this Inquiry, we are of the view that, as much as is practicable, the claimant communities should be involved in the process of determining how the benefits arising from the return of CFL land are to be distributed, governed, and managed in the best interests of the beneficially entitled.

The forestry experts' evidence

30 In identifying a suitable recipient, or recipients, of the returned land and compensation, we also give weight to the evidence presented by forestry experts in this Inquiry. During the 2012 and 2018 hearings, this evidence addressed the incremental return of CFL land under section 17(4)(c)(ii) of the CFAA following a final recommendation under section 8HB that the land be returned to Māori.[44] In particular, the forestry experts described for the Tribunal some of the practical implications, costs, responsibilities, and liabilities that would accompany the return of the Mangatū CFL land through this process. We take note of these factors when considering the requirement for the governance entities to have adequate structure and capacity to undertake these responsibilities and represent their beneficiaries.

Issues arising as the land is incrementally returned by the current licensee

31 Registered forestry consultant Dr Andrew McEwen, who gave evidence for the Crown, described the process set out in section 16 of the Mangatū Crown forestry licence for the return of CFL land to Māori once the Tribunal's interim recommendation under section 8HB becomes final, and explained how it would work.[45] First, the Crown would issue a termination notice to the licensee. In the case of Mangatū, the license would terminate after 35 years (the termination period). Under the terms of the license, the termination period begins on the following 30 September after the Crown issues the termination notice.[46] If the Tribunal's interim recommendation becomes final the new Māori proprietors would become the licensors from the date that the land is returned.

44. Crown Forest Assets Act 1989, section 17(4)(c)(ii)
45. 'Crown Forestry Licence, Mangatū Forest', 1992, Crown document bank, March 2002, #F33, vol 5, p 1730
46. Evidence of Andrew McEwen, 2 November 2012, #K5, para 27.3; 'Crown Forestry Licence, Mangatū Forest', 1992, Crown document bank, March 2002 #F33, vol 5, p 1730

32 Secondly, from the beginning of the termination period, the licensee would be required to return to the proprietors any land not required for protecting, managing, harvesting, and processing timber standing on the land.[47] Dr McEwen explained that 'this means that from the beginning of the termination period a process starts that will see a progressive transfer of occupancy from licensee to the proprietors'.[48] If any planting is required during this period by any authority, covenant, or condition of the licence, then that will fall to the proprietors unless otherwise stated in the licence.[49] The terms of the licence also state that during the termination period the new proprietors and the licensee will likely share roads and other improvements, as well as sharing some of the outgoing maintenance costs. These matters 'shall be subject to prior consultation and negotiation between the proprietors and the licensee for the purposes of reaching agreement'.[50] If any disputes arise during, or at the expiry of, the 35-year termination period, clause 16.9 provides for the matter to be referred to arbitration.[51]

33 Dr McEwen also told us that as the Mangatū CFL land is incrementally returned, the new owners could face immediate resource management obligations. He noted that large areas of the CFL land were unstable and suggested the licensee could decide to return the highly unstable land that makes up the huge Tarndale and Mangatū slips on the very first day after return is granted.[52] Dr McEwen also provided examples during the 2012 hearings of resource consent applications that were granted to Ernslaw One Ltd, which expire in March 2030. The conditions for these consents detail the technical obligations incumbent upon the proprietors in Mangatū that would become the responsibilities of the new owners upon the land being transferred.[53] For example, the territorial authority's District Plan requires that Mangatū land be kept in forestry. This means that as the forest land is returned, the owners will be required to replant it immediately upon taking possession from the current licensee. Clause 16.6 of the licence also provides that any replanting obligations within the CFL will fall on the proprietors during the termination period.[54]

34 We heard evidence from Alan Haronga, the chair of the Mangatū Incorporation, that if the Tribunal recommended the return of the Mangatū CFL land, the new owners would be required to:

47. Evidence of Andrew McEwen, #K5, para 29
48. Evidence of Andrew McEwen, #K5, para 30
49. ' Crown Forestry Licence, Mangatū Forest', Crown document bank, #F33, vol 5, p 1732
50. 'Crown Forestry Licence, Mangatū Forest', Crown document bank, #F33, vol 5, p 1734
51. 'Crown Forestry Licence, Mangatū Forest', Crown document bank, #F33, vol 5, p 1736
52. Transcript for remedies hearing, 8–11 October 2012, #4.29, pp 260–283
53. ' Resource Consent (RC201124)', evidence of Andrew McEwen, 2 November 2012, #M4(f)
54. 'Mangatu Crown Forestry Licence 1992', Crown document bank, #F33, vol 5, p 1732

- manage and/or renegotiate the Crown forest licence(s) with the current licensee, including negotiating an extension of the licence if warranted . . .;
- assume ownership of hand-back forest land and replant the same to continue sustainable productive use of the land and avoid deforestation liabilities as specified in the Climate Change Response Act; and
- assume landowner responsibilities for hand-back areas in respect of the Resource Management Act and other relevant legislation that affects land use.[55]

35 If these obligations are not met swiftly, the proprietors could be exposed to significant liability. According to Mr Haronga, the primary risks associated with Mangatū are the still-active Tarndale and Mangatū slips, and the threat of 'slash' being washed into the river system following a weather event.[56] For instance, slash inflicted terrible damage during a weather event in nearby Tolaga Bay in 2018. Dr McEwen described the circumstances of that disaster:

> As far as I can understand what happened was most of the trees were removed in that catchment all about the same time, over a short space you know two or three years or something like that, so just about the whole catchment was harvested . . . So, the thing about trees is that while they're growing they help bind the soil and lessen erosion and the difficulty is if you have an extreme weather event in the five to seven years after harvest . . . you've got this point of vulnerability and put that together with the vulnerable catchment and the storm coming just at the time you get the maximum damage.[57]

36 We are satisfied Dr McEwen's evidence supports Mr Haronga's assessment that similar liabilities would accompany harvesting of the current tree crop in Mangatū. Dr McEwen said there would have to be robust governance and forest management in place from day one; he added that because of changing conditions on the ground, it is only possible to describe the current tree crop profile of the Mangatū blocks in general terms. However, he provided the Tribunal with this summary:

(a) Across the entire Mangatū forest (including the Waipaoa blocks that are in the East Coast inquiry district), the first rotation was planted between 1961 and 1978. 'Harvesting of the first rotation started in 1990/91 and is nearing completion.'

(b) 'Assuming harvested stands are replanted within 1–2 years of harvest . . . the second rotation crop will have been planted over 22–23 years from 1991 to 2014.'

55. Evidence of Alan Haronga, 6 July 2012, #K6, para 78
56. Transcript for remedies hearings, #4.29, p 15
57. Transcript for hearing week three, 27–28 November, #4.34, p 92

(c) 'The second rotation is almost entirely radiata pine. We can assume a harvesting age of between 29 and 35 years . . ., although the actual age of harvest is at the licensee's discretion.'

(d) 'Based on the assumptions above, harvest of the second rotation is likely to start between about 2020 and 2026 and continue until between 2043 and 2048.'[58]

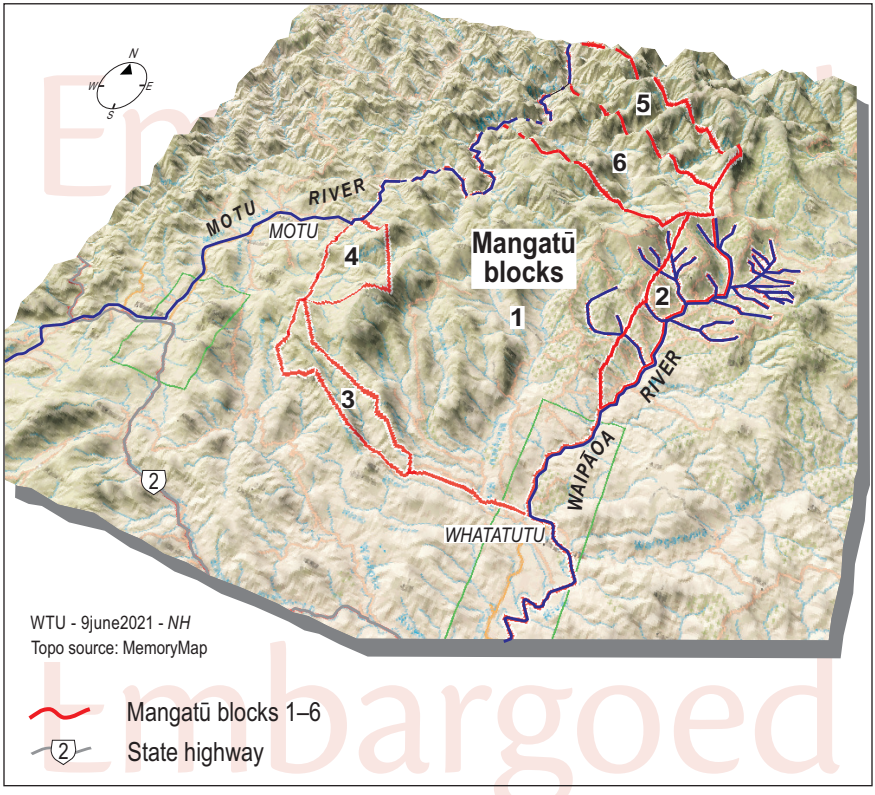
37 While the forestry experts did not give evidence on what the replanting costs might amount to, the Māhaki Trust and Mangatū Incorporation submitted a forest management plan which estimated the total cost of replanting the Mangatū forest, including the CFL land in the Waipāoa blocks, at approximately $11.336 million by 2046.[59] This estimate was produced using the current licensee's harvesting data from 2012. In our assessment, the Tribunal did not receive sufficient evidence in this Inquiry to be able to reach any conclusive view about the replanting costs that would be imposed upon the recipients of a binding recommendation for the return of the Mangatū CFL land. We found it difficult to accurately define such costs precisely, because of the limited information presently available from the licensee.

Issues arising from partition of the Mangatū CFL land on the ground

38 Survey, partition and access issues are complex. We heard from claimant and Crown witnesses about the practical considerations associated with partitioning the forestry land on the ground, which is currently managed as a whole. At the 2012 hearings, John Ruru – former chair of the Mangatū Incorporation, forestry expert, and important witness and leader for Te Aitanga a Māhaki – told us of his efforts during the 1970s to expand forestry operations by retiring land from farming. Mr Ruru emphasised the importance of looking at the Mangatū forest as part of a larger picture of forestry operations in the East Coast region. He gave evidence that forestry managers require significant resources to keep their employees in full-time work and pay for equipment.[60] Mr Ruru also told us about difficulties associated with separating out the management of separate parcels of the Mangatū forest with straight boundary lines on a map. For instance, the boundary line between Mangatū 1 and 2 tracks from 1,000 metres above sea level and then drops back down to about 500–600 metres at the Waipāoa River.[61]

39 One consequence of this topography is that the boundary line between the blocks would not serve as a practicable boundary for separate forestry operations. This was emphasised by Dr McEwen. He stated:

58. Evidence of Andrew McEwen, #K5, para 53
59. 'Māhaki Mangatū Forestry Management Plan 2019', appendix to closing submissions for Te Aitanga a Māhaki and the Mangatū Incorporation, 11 December 2018, #2.682(a), p 31
60. Transcript for remedies hearing, 18–22 June 2012, #4.28, p 419
61. Transcript for remedies hearing, #4.28, p 413



Topographical map of Mangatū blocks

> Now when a license is split the Crown is required to create access and other rights between the various licences to make sure that there is access there and that can be quite complex particularly in areas with more difficult terrain . . . So, I even encourage you to consider the use of practical boundaries when you come to that sort of thing which I guess is a little bit of a warning against the boundary between Mangatū No 1 and Mangatū No 2.[62]

40 Any partition of the CFL land on the ground would also be complicated by the location of the productive forest land within the Mangatū blocks. Donn Armstrong, a professional valuer who was called to give evidence on behalf of the Crown, noted that the potentially productive land area (PPA) within Mangatū might not be evenly distributed within the block. Therefore, if it was proposed to partition the block, the location of the PPA would significantly affect the value of the discrete parcels within it.[63] Mr Armstrong also described

62. Transcript from hearing week three, #4.34, pp 90–91
63. Evidence of Donn Armstrong, 31 July 2018, #P31, paras 28–30

the productive area within Mangatū as 80 per cent 'hauler land', meaning that the land has a gradient greater than 22 degrees and requires more expensive equipment for the harvesting operation.[64] The evidence of Michael Marren, a registered forestry consultant, also addressed the risks involved with dividing forestry land into smaller forests. He told us that smaller forests come with greater risk: for example, if the forestry stock was damaged in a storm, the owners of a smaller forest would not be able to recover that loss by harvesting elsewhere.[65]

Issues related to the regulatory regime

41 Updated evidence from Mr Haronga set out the risks associated with possible changes to the current regulatory regime, and how the operations in Mangatū 1 and Mangatū 2 would be affected. Mr Haronga told the Tribunal that, under the Gisborne Regional Freshwater Plan, the local council was 'seeking the ability to refuse the granting of a resource consent to harvest our forests'.[66] He explained that hearings were being held in the Environment Court to examine the current regulations affecting much of the area.[67] The Mangatū Incorporation has been involved in this process over several years and is required to seek outside legal and technical expertise to adapt to the new requirements.[68]

42 Mr Haronga also told us that changes in the Emissions Trading Scheme could create uncertainty for forestry operations/management in the area.[69] Conversely, evidence from Oliver Hendrickson – then Director of Spatial, Forestry and Land Management within Te Uru Rākau – suggested any changes to the scheme would be unlikely to affect the CFL land in Mangatū. Mr Hendrickson said that as most of the Mangatū forest comprises pre-1990 forest land, it can be harvested and replanted without surrendering any New Zealand Units (NZU).[70] However, because the Mangatū forest 'was established to control significant erosion on land then under pasture, it is likely that it will remain in forest cover'.[71]

43 Mr Hendrickson also gave evidence on the development of the National Environmental Standards for Plantation Forestry. He told us that under

64. Evidence of Donn Armstrong, #P31, para 46
65. Transcript for hearing week three, #4.34, p 58
66. Evidence of Alan Haronga, 28 May 2018, #P17, para 26
67. Transcript for hearing week one, 27–31 August 2018, #4.30, paras 491–492
68. Evidence of Alan Haronga, #P17, para 17
69. Evidence of Alan Haronga, #P17, para 19
70. NZUs are credits traded under the Emissions Trading Scheme. Under the scheme, registered landowners can incur a liability when they harvest any forest planted after 1989. A post-1989 forest earns NZUs as it grows. For forests planted before 1990, they may be harvested and replanted with no need to surrender NZUs. However, if the land is converted away from forestry the landowners must surrender NZUs to the Crown to account for the increased emissions that result from the change in land use: evidence of Oliver Hendrickson, 31 July 2018, #P37, paras 28 – 29
71. Evidence of Oliver Hendrickson, #P37, para 35

these standards, 69 per cent of the Mangatū State Forest had been given an Erosion Susceptibility Classification as 'Red Zone'. This means that the land in question is at high risk of erosion and most forestry activities will require a resource consent granted by the regional council.[72] Because the Gisborne District Council already requires consents for forestry in most cases, Mr Hendrickson's evidence was that the National Environmental Standard will not introduce new consent requirements for the Mangatū forest. However, it would allow councils to charge to monitor permitted activities. We were told at the time of our 2018 hearings that the Gisborne District Council had already indicated that it has changed its charging policy 'to be able to recover more costs and do more compliance monitoring'.[73]

44 Having considered the foresters' evidence on issues arising on the return of CFL land, we now consider whether the existing claimant entities are appropriate for the purpose of receiving such land.

Appropriateness of existing claimant entities for the return of the CFL land and compensation

45 Under section 6(1) of the TOWA, the Tribunal accepts claims filed on behalf of individuals, whānau, hapū, iwi, and even larger inter-tribal groupings. It is not a requirement under the Act that claimants possess legally constituted entities before they can seek findings on their claims and remedial recommendations from the Tribunal. However, in practice, claimant groups often do establish legal entities to assist them in pursuing their claims, or they may seek the assistance of an already established entity such as a charitable trust. Such was the case for some of the claimants in this Inquiry (see our discussion in chapter 2).

46 The purpose of the claimant entities that began these remedies proceedings was, at least in part, to assist them to pursue their claims before the Tribunal. However, they were not initially adequately constituted to receive the CFL land; nor to hold it on behalf of those beneficiaries who suffered prejudice from the Crown's breaches. For instance, the Māhaki Trust is a charitable trust constituted (amongst other purposes) to receive, hold, and manage Te Aitanga a Māhaki's fisheries settlement assets.[74] It was not constituted to negotiate with the Crown on behalf of Te Aitanga a Māhaki over any interim recommendations the Tribunal might make for return of the CFL land, or to receive and manage CFL land if the recommendation becomes final.

47 Similarly, claimant Owen Lloyd gave evidence during our hearings that Ngā Ariki Kaipūtahi were in the process of seeking charitable status for Te Runanganui o Ngā Ariki Kaipūtahi Trust. The trust deed provides for a company to be established should significant assets return to Ngā Ariki Kaipūtahi

72. Evidence of Oliver Hendrickson, #P37, para 17
73. Evidence of Oliver Hendrickson, #P37, para 23
74. 'Te Aitanga a Māhaki Trust Deed', evidence of Pehimana Haapu Brown, 29 May 2018, #P26(a), p 8

through the Tribunal inquiry process.[75] The Te Whānau a Kai Trust was also constituted for charitable purposes, and has assisted the claimants in presenting and negotiating their claims. But it was not established to negotiate with the Crown on the Tribunal's interim recommendations or, importantly, to receive and manage CFL land returned through that process.[76]

48 Questions over the representativeness of the claimant groups remained controversial and unresolved for much of our hearing programme. Two main issues were apparent at the outset. The first was the claim on behalf of the Māhaki Trust to represent the same interests as the Ngāriki/Ngā Ariki Kaipūtahi claimants led by Mr Lloyd, Mr Brown, and the Te Whānau a Kai claimants led by Mr Hawea. Throughout the hearings, the Ngāriki/Ngā Ariki Kaipūtahi and Te Whānau a Kai claimants each consistently asserted their separate status as iwi with customary rights, independent from Te Aitanga a Māhaki and the Māhaki Trust.[77]

49 The second issue concerned the two applications brought on behalf of the interests of Ngā Ariki Kaipūtahi by Mr Lloyd (Wai 507), and Ngāriki Kaipūtahi by Mr Brown and Ms Rogers (Wai 499 and Wai 874). Both groups made applications for the return of the CFL land on behalf of the same claimant population but were divided over who authentically represented Ngāriki/Ngā Ariki Kaipūtahi's interests. During our hearings, Mr Lloyd on the one hand sought the return of Mangatū CFL land to Te Runanganui o Ngā Ariki Kaipūtahi Trust; on the other hand, Mr Brown and Ms Rogers sought its return to the Ngāriki Kaipūtahi Tribal Authority (see chapter 2, paragraph 28).

Tribunal conclusion – the requirement for ratified governance entities

50 Having reflected on all the submissions from the parties, we determined that the Tribunal should not recommend the return of CFL land to a claimant group that lacks an appropriate governance entity for such purpose.[78] As we discussed above, none of the existing entities were adequate for the purpose of receiving the benefits of a binding recommendation. In order to receive such benefits, the claimant parties would require either a single governance entity to represent all groups, or a separate governance entity for

75. Evidence of Owen Lloyd, 28 May 2018 #P20, paras 14–17; 'Ngā Ariki Kaipūtahi Iwi Trust Deed', evidence of Owen Lloyd, 28 May 2020, 28 May 2018, #P20(a), pp 10–56.
76. 'Te Whanau a Kai Trust: Deed of Trust', evidence of David Hawea, 20 April 2012, #I20(a), p 3
77. Evidence of David Hawea, 10 September 2018, #P45; evidence of Keith Katipa, 14 August 2018, #P44; evidence of Rawiri Brown, 14 September 2018, #P39(a), para 3; transcript for hearing week one, #4.30, p 616; transcript for hearing week one, #4.30, pp 645–646; transcript for hearing week two, 12–15 November 2018, #4.33, pp 209–211, 328–329
78. For instance, the significant representational issues apparent between competing groups included Mr Ruru's claim on behalf of the Māhaki Trust to represent the same interests as the Ngāriki/Ngā Ariki Kaipūtahi claimants led by Mr Lloyd, Mr Brown, and the Te Whānau a Kai claimants led by Mr Hawea. There was a further question of whether the claimant groups would be able to reach agreement on a single recipient entity to receive and manage the CFL land on their behalf.

each. Whether just one or more than one, each entity should be appropriately legally constituted to receive CFL land. Likewise, it should be representative of and accountable to its claimant community. Furthermore, the support from the claimant community would have to be of such a quality and strength to evidence their representative authority in any negotiations with the Crown during the statutory 90-day period.

51 During and since our remedies hearings in 2012, the Tribunal encouraged parties to coordinate and work together to secure benefits from the return of both whenua and pūtea for their communities, especially for 'those who are to come after all of us'.[79] We recognised that parties were clearly considering issues related to 'the structure or structures to receive land and compensation, and the process to transfer any such compensation to recipients'.[80] We urged parties to confer with each other during the remainder of the Tribunal's hearing programme 'in order to reach agreement on such matters as they are able'.[81] In the August 2018 hearings, we explored in some detail what might be preferred outcomes with the leaders of each claimant group. We acknowledged some of the barriers to preferred outcomes being achieved, including the fact that claimants would have to set up a governance entity – with all the associated effort, time, and cost involved – without knowing if they would receive any benefit from a binding recommendation. We understood that this was, for some, an untenable prospect.[82] We were mindful that not all the claimants in this Inquiry had access to the same, or adequate, levels of funding for consultation within their claimant communities or for mediation.

52 In our view, a governance entity must not only be representative of its claimant group, but also remain ultimately responsible for the sound management of the land, and eventually, the forestry operation. Both Dr McEwen and Mr Marren detailed for us the numerous uncertainties around the future commercial value of the forest land.[83] The owners are required to replant as the land is returned by the licensee, and the length of a forestry crop rotation means that they will have little income from the forest until the new stands are harvested. Beyond the cost of replanting, the recipients of the CFL land also require resources to secure expert advice, to negotiate with the licensee, to cope with Resource Management Act requirements, and to deal with other issues arising.

53 On top of these longer-term considerations, the claimants would be under significant time pressure during the 90-day period following the Tribunal's interim recommendation. In very short order, they would need to set up an appropriately constituted governance entity or entities, conduct negotiations with the Crown, liaise with the licensee, and prepare to have the land

79. Transcript for hearing week two, 4 December 2018, #4.33, pp 209–211, 328–329; transcript for hearing week one, #4.30, pp 645–646
80. Memorandum–directions of the presiding officer, 4 October 2018, #2.638, para 14
81. Memorandum–directions of the presiding officer, #2.638, para 15
82. Closing submissions for Te Whānau a Kai, #2.683, para 13.7
83. Transcript for hearing week three, #4.34, pp 60–62, 146–147

returned (possibly very quickly for some parts). In our view, it is unreasonable to expect claimants and the Crown to satisfactorily address all these matters within a short 90-day period, especially in light of the need to obtain sufficient support and assent from claimant communities to any proposed governance entity/entities. Furthermore, the Tribunal is *functus officio* [having no further official authority or legal effect] once we have made our section 8HB interim recommendation – that is, without any power to change our substantive decision[84] – and unable to be involved in any matter arising after its interim recommendation has been published.[85] In memorandum–directions dated 7 August 2020, we reminded parties:

> As the Courts have pointed out, the Tribunal is engaged in an adjudication and once the relevant determinations are made, the exercise of the Tribunal jurisdiction is concluded. What the Tribunal has decided will be binding unless the parties negotiate and agree some other arrangement.[86]

54 We therefore concluded that the claimants must establish an appropriate governance entity or entities prior to the issue of the Tribunal's recommendation. A robust process involving ratification by the claimant communities was required. Consistent with the Tribunal's restorative approach, the claimants needed to be given the time and opportunity to determine the governance entity for their group in accordance with their tikanga. The process had to provide for notification and distribution of information; consultation with claimant communities; registration of their members; and for the voting process itself to satisfy the Tribunal that the governance entity or entities had sufficient community support. The claimants would clearly require additional resources for further steps such as obtaining expert advice in order to draft trust deeds, designing the consultation process, and conducting the voting process with the oversight of an independent returning officer.

55 In the final analysis, we are required to identify the Māori or group of Māori who are the appropriate recipients for the purpose of compensating for or removing prejudice. We sought to do so by enabling Te Aitanga a Māhaki, Ngāriki/Ngā Ariki Kaipūtahi, and Te Whānau a Kai to move forward in order to receive the full benefit of the Tribunal's recommendation. We also sought to avoid exacerbating tensions between these groups, by providing as much

84. The exceptions to this rule are if the claimants and the Crown settle the claim during the 90-day period, under section 8HC(5) the Tribunal shall as the case may require, cancel or modify the interim recommendations and may make, if necessary, a final recommendation under section 8HB(1)(a) or section 8HB(1)(b). Under section 8HC(7), the Tribunal may correct a clerical mistake or an error arising from any accidental slip or omission, or if any interim recommendations are so drawn up as not to express what was actually decided and intended.

85. Transcript for judicial conference, 29 July 2020, #4.41, p 76

86. Memorandum–directions of the panel, 11 August 2020, #2.849, para 52; *Haronga v Waitangi Tribunal* [2012] 2 NZLR 53 (SC), para 107

assistance as we could to ensure a durable outcome for those prejudiced by the Crown's Treaty breaches.

56 In consultation with parties, we settled upon a process that would create opportunities for them to engage with each other and address issues arising once the Tribunal issued its interim recommendation. As a first step towards what came to be called the 'iterative process', the Tribunal provided some preliminary indications of its decisions in relation to some of the statutory prerequisites for a binding recommendation under section 8HB.[87] We did so to assist the parties in reaching agreement on a governance entity or entities and on the process for their ratification by the claimant communities. Both claimant parties and the Crown accepted that it was unlikely that such outcomes would be achieved with one hui or judicial conference. Indeed, the process involved a number of hui, followed by reports back to the Tribunal on the progress made by the parties. Where necessary, the Tribunal issued directions on next steps. It was in this sense a truly 'iterative process' in which the parties and the Crown participated fully so as to prepare for the Tribunal's interim recommendation and to implement it efficiently, including its terms and conditions.

What the Parties Have Done to Establish Suitable Entities – the Iterative Process

57 The 'iterative process' began in July 2019, and we now outline its features. A preliminary judicial teleconference was convened on 21 June 2019 for counsel to discuss the possibility of mediation between the Ngāriki Kaipūtahi (Wai 499 and Wai 874) claimants and the Ngā Ariki Kaipūtahi (Wai 507) claimants as a first step.[88] In memorandum–directions dated 3 July 2019, we noted that the parties had recognised the need to prepare collaboratively for the possibility of receiving binding recommendations and that 'mediation and facilitated discussion will likely help parties reach an agreed position'.[89] We observed that 'following the completion of hearings and closing submissions in December 2018 there remained no agreement between parties, or between parties and the Crown concerning a governance structure or structures to assist our determinations'.[90] Furthermore, we stated that:

> The Tribunal will require evidence of a properly constituted entity or entities, that has/have received the endorsement of those they represent; and is/are accountable to them; and has/have full legal capacity to receive any land returned together with associated compensation in line with statutory requirements. Ideally that would be an agreed position among the successful parties.

87. Memorandum–directions of the panel, 3 July 2019, #2.721, paras 77–78
88. Memorandum–directions of the presiding officer, 21 June 2019, #2.714
89. Memorandum–directions of the panel, #2.721, para 66
90. Memorandum–directions of the panel, #2.721, para 64

> We consider mediation and facilitated discussion will likely help parties reach an agreed position.[91]

58 We emphasised to the parties that this process and its desired outcome were fundamentally different from the ratification processes referred to in Crown Treaty settlement policy. As we explained:

> In this remedies inquiry the Tribunal must assess the particular structures which are to receive and act for the claimant community to ensure that they are appropriate and suitable to receive returned CFL land and any compensation that may be awarded. What the Tribunal seeks in the ratification process from the claimant community is an indication that they are satisfied with the representativeness and accountability of the proposed trustees and the proposed structure. But the Tribunal is not seeking the claimant groups' approval of the Tribunal's allocation determination.[92]

59 To help parties to prepare to receive the Tribunal's recommendations, we indicated our decision on whether the Wai claims before us relate to the CFL land and are well-founded, both of which are prerequisites of section 8HB(1) and section 8HB(1)(a). We found that all claimants before the Tribunal have well-founded claims that relate to the Mangatū CFL land.[93]

60 Following these determinations, the first steps in the iterative process involved facilitated or mediated hui between all claimant groups, as proposed by counsel for Te Aitanga a Māhaki and the Mangatū Incorporation on 8 July 2019. Counsel submitted that hui would be convened 'to endeavour to agree upon the nature of a representative governance entity or entities which is or are legally capable of receiving any returned lands and associated compensation and on the ways in which that entity, or those entities, would receive the endorsement of those they represent'.[94] As we told parties, this was an encouraging response to the Tribunal's direction of 3 July 2019.

61 Shortly afterwards, we scheduled a judicial conference in Gisborne on 26–27 August 2019. It was intended as a way for the panel to check on parties' progress in working towards an agreed position, and 'to guide and encourage claimants and their counsel to talk and work together on setting up a legally recognised governance entity, or entities, that are fit for the purpose of receiving the benefit of any remedies recommendations'.[95] To further assist parties, we also indicated that the Tribunal had determined that all Mangatū CFL

91. Memorandum–directions of the panel, #2.721, para 66
92. Memorandum–directions of the panel, #2.849, para 53
93. Memorandum–directions of the panel, #2.721, paras 77–78; this does not include Ngāti Matepu, who participated in the Inquiry as an interested party.
94. Memorandum of counsel for Te Aitanga a Māhaki and the Mangatū Incorporation, 8 July 2019, #2.741, para 4.1
95. Memorandum–directions of the presiding officer, 8 July 2019, #2.722, para 1; memorandum–directions of the presiding officer, 12 September 2019, #2.759, para 8

land available within the Tūranga Inquiry District ought to be returned.[96] We stated that the remaining requirements to be met under section 8HB of the TOWA included the identification of the Māori or group of Māori to whom the land is to be returned, the terms and conditions, and the determination of the percentage of compensation under section 36 of the CFAA. We indicated to parties our view that 'questions of the entity/entities and distribution were tied together, and that until the appropriate entity/entities were put in place we were in a holding pattern'.[97]

62 During these proceedings, it was clear that the procedural requirements for confirming an appropriate entity or entities between the groups could not be fully predicted until mediation had occurred between the parties. While it remained uncertain whether groups would be able to come together as part of a single entity, or would form multiple entities, it would have been premature to place requirements on the process of confirming those entities. In the view of Crown counsel, process issues associated with funding or confirmation of representation should not drive the mediation between parties.[98] There was consensus that the Ngāriki/Ngā Ariki Kaipūtahi claimants should be allowed to address their internal issues before an all-party mediation to facilitate the establishment of an agreed governance entity.[99]

Mediation between Ngāriki Kaipūtahi (Wai 499 and Wai 874) and Ngā Ariki Kaipūtahi (Wai 507) claimants

63 At the 21 June 2019 judicial teleconference, counsel for both Ngā Ariki Kaipūtahi (Wai 507) and Ngāriki Kaipūtahi (Wai 499 and Wai 874) indicated their clients' willingness to enter mediation and to liaise with each other to agree on procedure, logistics, and timeframes for the process.[100] The matter of mediation was raised again at the 26 August 2019 judicial conference in Gisborne. There, parties reaffirmed their consensus that the Ngāriki/Ngā Ariki Kaipūtahi claimants should have the opportunity to address their internal issues before all-party mediation.[101] Subsequently, the presiding officer directed the 'Ngāriki Kaipūtahi and Ngā Ariki Kaipūtahi groups to hui as soon as possible to see if they could resolve their representation issues and unite for the purposes of this Inquiry, including participating as one group in the Tribunal mediation scheduled for all claimant groups in the week starting 14 October 2019'.[102]

64 Following a facilitated hui on 1 October 2019, counsel for both Ngāriki/Ngā Ariki Kaipūtahi claimants filed a joint submission dated 14 October 2019, advising the Tribunal that their discussions had concluded, and that 'the

96. Memorandum–directions of the presiding officer, #2.759, para 13
97. Memorandum–directions of the presiding officer, #2.759, para 9
98. Transcript for judicial conference, 26 August 2019, #4.37, p 34
99. Memorandum–directions of the presiding officer, #2.759, para 26
100. Memorandum–directions of the presiding officer, #2.714, paras 1–2
101. Memorandum–directions of the presiding officer, #2.759, para 26
102. Memorandum–directions of the presiding officer, #2.759, para 34

claimants have agreed to set up a new entity to move forward as a united Iwi. This will be known as Ngā Uri o Tamanui Trust.'[103] This outcome represented a significant achievement by the claimants and their counsel. It also enabled all parties, including the Crown, to proceed to a full Tribunal-referred mediation.[104]

Mediation between all parties

65 At the August 2019 judicial conference, all parties present agreed that Tribunal-led mediation would help them agree on the governance entity/entities suitable to receive the benefit of any binding recommendation the Tribunal might make. This mediation would follow an outline proposed by counsel for Te Aitanga a Māhaki and the Mangatū Incorporation at the judicial conference. The Tribunal summarised the proposed process as follows:

(a) Within each group consultation will take place with its claimant community, and a place must be reached where each group is authorised by its claimant community to come together with the other groups to discuss the structure of the recipient entity/entities and the method by which the entity/entities will be endorsed by the claimant communities.
(b) All groups will then come together collectively and in good faith to try to reach agreement on the form of the entity/entities to be developed and the process for obtaining approval of the entity/entities from the claimant communities.
(c) The entity or entities that the collective groups are to discuss may take various forms – that is one of the matters for discussion amongst the groups, and there are different models that could be considered.
(d) Once the form of entity/entities and the process to obtain the claimant communities' support for the entity/entities have been agreed, they will be put forward for the approval of the Tribunal, at which point Crown funding may then become available for developing the entity/entities and completing the claimant communities' approval process.[105]

66 Following an oral application by counsel for Te Aitanga a Māhaki and the Mangatū Incorporation, and Te Whānau a Kai for Tribunal-directed mediation under clause 9A of the Treaty of Waitangi Act 1975, the Tribunal referred the following claims to Judge Damien Stone of the Māori Land Court as mediator in September 2019:

- Wai 274 – the Mangatū State Forest claim.
- Wai 283 – the East Coast raupatu claim.
- Wai 499 – Mangatū 1 block claim.

103. Joint memorandum of counsel, 14 October 2019, #2.765, para 3
104. The Tribunal may refer claims for mediation under section 9A of the Treaty of Waitangi Act 1975
105. Memorandum–directions of the presiding officer, #2.759, para 35

- Wai 507 – Mangatū block claim.
- Wai 874 – Mangatū block claim.
- Wai 892 – Patutahi, Muhunga, and other lands and resources (Te Whānau-a-Kai) claim.
- Wai 995 – Te Whānau a Te Rangiwhakataetaea claim.
- Wai 1489 – Alan Haronga and Proprietors of Mangatū Blocks Incorporated claim.[106]

67 The mediation between parties continued over approximately five months between October 2019 and February 2020, but was ultimately unsuccessful.[107] However, though parties were unable to reach agreement on how they wished to receive and govern any CFL land returned by the Tribunal, the mediation appeared to assist the groups in understanding more clearly their own positions. In the next section, we describe how parties were able to reach agreement on some important issues while protecting their positions through separate ratification processes.

Separate ratification processes following the unsuccessful mediation

68 The Tribunal directed claimant groups to advise on the form of their governance entities, including their constitutions and detailed ratification plans and timeframes, in January 2020.[108] However, after the mediation ended, we required updated submissions on the parties' positions and once again directed parties (in memorandum–directions dated 23 March 2020) to submit on how the CFL should be returned since agreement was not possible on a collective governance entity. We also sought updated and more detailed information on the proposed governance entities representing each group's interest and their ratification plans.[109] We proposed that this information be scrutinised by the Tribunal ahead of a further judicial conference where we could determine whether the parties' proposed entities and ratification processes were adequate.

69 In the same 23 March 2020 direction, we informed parties that the timeframe for our report would be extended so that the 90-day period would not overlap unduly with the General Election period. It was important, in our view, 'that ratification of Treaty-consistent [governance] entities, in a manner and with an outcome satisfactory to the Tribunal, must occur before we issue any interim recommendations'.[110] It would be inappropriate 'for such an important proceeding to be unduly rushed at this point especially in view of all the hard work and progress achieved to date'.[111] We did not want the claimants or the Crown to be distracted or delayed by reason of a General Election.

106. Memorandum–directions of the presiding officer, #2.759, para 39
107. Mediator's final report, 25 June 2020, #2.935(a); memorandum–directions of the presiding officer, 17 June 2020, #2.823, para 4
108. Memorandum–directions of the presiding officer, 21 January 2020, #2.780, para 8
109. Memorandum–directions of the presiding officer, 23 March 2020, #2.805, paras 53, 59
110. Memorandum–directions of the presiding officer, #2.805, para 37
111. Memorandum–directions of the presiding officer, #2.805, para 43

70 The same reasoning applied in respect of the December and January holiday period – it would be unhelpful to all parties to have the 90-day negotiation period overlapping the time when Government Ministers were likely to be unavailable to give proper instructions. We considered that as much of the 90-day period as possible should be available to the parties for negotiations and preparations for receipt of the returned land. We expressed our intention 'to report as soon as the government is formed after the election, and for that purpose will adopt timeframes for completion of the ratification process.'[112] Ultimately, however, we would have to accept further delays in the release of our report and interim recommendations under section 8HB.

71 A further factor influencing the ratification and reporting timetable was the Government's nationwide lockdown and other measures relating to social distancing and group gatherings implemented from late March 2020 in response to the Covid-19 pandemic. In these circumstances, we revised our timeframes and directed parties to submit on when they would be in a position to provide the Tribunal with updated and more detailed governance entity information and ratification plans.[113] Once the Tribunal received these submissions, we scheduled a judicial teleconference for 12 June 2020 to discuss next steps, and the parties' proposed governance entities and ratification process.[114]

72 During those proceedings we repeated our requirement that the parties submit further detailed updates on their individual governance entities, ratification processes, and completion timeframes.[115] We directed that in order for our report to be released after the formation of a new government, ratification processes were to be completed, and their results filed with the Tribunal, by 4 September 2020.[116] This timeframe would allow the Tribunal to issue its report so that the 90-day period would not overlap to any significant degree with the December and January holiday period. We also required claimants to provide the Tribunal with specific information from their registers including the names of those registered with each group, their date of birth, iwi and hapū affiliations, and total number of persons eligible to vote on the register.[117] This information was required in order for the Tribunal to be able to assess the number of registrants, the participation rates in each group's ratification process, and to assist with analysis of the ratification results once they were to hand.[118]

73 After a request from parties that the Tribunal confirm its ratification requirements had been met, it subsequently became necessary for the Tribunal

112. Memorandum–directions of the presiding officer, #2.805, para 47
113. Memorandum–directions of the presiding officer, 28 April 2020, #2.806, para 5
114. Memorandum–directions of the presiding officer, 19 May 2020, #2.814, para 45
115. Memorandum–directions of the presiding officer, 16 June 2020, #2.822, para 3
116. Memorandum–directions of the presiding officer, #2.822, para 7
117. Memorandum–directions of the presiding officer, 13 August 2020, #2.850, para 4
118. Memorandum–directions of the presiding officer, 21 December 2020, #2.907, paras 6–7

to conduct an independent audit of the ratification results for the three processes. In the following sections, we discuss the entities the claimants proposed after the 12 June 2020 judicial teleconference, the results of their ratification processes, and the findings of the Tribunal's independent audit. We then state our conclusions on the outcome of the ratification processes.

The Māhaki Forest Settlement Trust

74 On 2 June 2020, counsel for Te Aitanga a Māhaki and the Mangatū Incorporation filed a draft trust deed for a proposed common law trust named the Māhaki Forest Settlement Trust.[119] The deed proposed that four initial trustees would be appointed 'for the establishment phase, and to seek ratification on that basis'.[120] The Trust would be mandated to receive binding recommendations from the Waitangi Tribunal and also negotiate with the Crown for settlement of all Te Aitanga a Māhaki's claims.[121]

75 The beneficiary definition in the draft trust deed included both Ngā Uri o Tamanui and Te Whānau a Kai. Counsel for the Māhaki Trust explained in submissions that 'it needs to be established whether the [Te Whānau a Kai] and [Ngā Uri o Tamanui] claimant groups have the majority support of their people'.[122] The Māhaki Forest Settlement Trust and ratification resolutions provided specifically for the entity to obtain 'a mandate' to receive any returned CFL land on behalf of Te Whānau a Kai and Ngā Uri o Tamanui and to represent their interests in negotiations with the Crown. The draft deed also provided that the Māhaki Forest Settlement Trust would set up 'fresh trusts' for both Ngā Uri o Tamanui and Te Whānau a Kai and distribute to each their allocation of the redress.[123] We discuss below the allocations proposed by the Māhaki Trust (also see chapter 2, paragraphs 19–20).

76 The proposed ratification process involved those registered on the Māhaki Trust, the Mangatū Incorporation, and the Wi Pere Trust Board. The Māhaki Trust would also compile additional registers for Te Whānau a Kai and Ngā Uri o Tamanui. A series of information hui were to be held in Tūranganui a Kiwa and in urban centres around New Zealand, and all registered beneficiaries would also receive information packs in advance of the hui. Voting would occur between 22 July and 23 August 2020 with the results being reported to

119. Memorandum of counsel for Te Aitanga a Māhaki and the Mangatū Incorporation, 2 July 2020, #2.828, para 40; 'Trust deed for Māhaki Forest Settlement Trust', appendix to memorandum of counsel for Te Aitanga a Māhaki and the Mangatū Incorporation, 2 July 2020, #2.828(a), pp 37–99
120. Memorandum of counsel for Te Aitanga a Māhaki and the Mangatū Incorporation, #2.828, para 41
121. Memorandum of counsel for Te Aitanga a Māhaki and the Mangatū Incorporation, #2.828, para 43
122. Memorandum of counsel for Te Aitanga a Māhaki and the Mangatū Incorporation, #2.828, para 42.2
123. Memorandum of counsel for Te Aitanga a Māhaki and the Mangatū Incorporation, #2.828, para 42.3.2

the Tribunal by 4 September.[124] They informed us that Electionz would report on the results, though we note that Te Puni Kōkiri ultimately performed this role.[125]

77 The Māhaki Trust's proposed ratification of their 'mandate' to represent Te Whānau a Kai and Ngā Uri o Tamanui was quickly opposed by both those claimant groups in this Inquiry.[126] On 23 July 2020, counsel for Ngā Uri o Tamanui filed a further memorandum, on behalf of themselves, Te Whānau a Kai and the Crown, submitting to the Tribunal that the Māhaki Trust and the Mangatū Incorporation had initiated their ratification prior to the Tribunal accepting their proposed process. Counsel submitted that the Māhaki Trust published newspaper advertisements and public information inviting registered beneficiaries to vote in August 2020 on the entity it proposed should represent the interests of Te Aitanga a Māhaki, Ngāriki Kaipūtahi, and Te Whānau a Kai.[127] Counsel expressed their concern:

> That this process is being undertaken while the Tribunal is considering opposing submissions on these very issues and parties are awaiting Tribunal directions and orders as to next steps. There is a real danger of confusion, voters acting on mistaken information about what they are voting on and why, as well as risks to the integrity of the Tribunal's own processes by a party breaking ranks and going to beneficiaries to secure an outcome before the Tribunal has ruled on whether it is satisfied with the processes each party has proposed for seeking community endorsement.[128]

78 In response, we announced an urgent judicial conference to be held on 28 July 2020. We directed counsel for the Māhaki Trust and Mangatū Incorporation to file all current and updated information on their governance entity and ratification process for the Tribunal to review prior to the judicial conference.[129] The Māhaki Trust's ratification hui information contained a slide directing members to register and vote for their proposal, and that those who

124. Memorandum of counsel for Te Aitanga a Māhaki and the Mangatū Incorporation, #2.828, para 45
125. Memorandum of counsel for Te Aitanga a Māhaki and the Mangatū Incorporation, #2.828, p 27; 'Te Puni Kōkiri declaration of voting results', appendix to memorandum of counsel for the Māhaki Trust, 15 September 2020, #2.869(a)
126. Memorandum of counsel for Ngāriki/Ngā Ariki Kaipūtahi, 7 July 2020, #2.829, para 10; memorandum of counsel for Te Whānau a Kai, 13 July 2020, #2.831, para 3
127. Memorandum of counsel for Ngāriki/Ngā Ariki Kaipūtahi, 21 July 2020, #2.833, para 2
128. Memorandum of counsel for Ngāriki/Ngā Ariki Kaipūtahi, #2.833, para 4
129. Memorandum–directions of the presiding officer, 24 July 2020, #2.834, paras 1, 6; memorandum of counsel for Te Aitanga a Māhaki and the Mangatū Incorporation, 28 July 2020, #2.836; 'Te Aitanga a Māhaki letter and voting form', appendix to memorandum of counsel for Te Aitanga a Māhaki, 28 July 2020, #2.836(a); 'Power point presentation for the ratification hui', appendix to memorandum of counsel for Te Aitanga a Māhaki, 28 July 2020, #2.836(b); 'Draft trust deed for Māhaki forest settlement trust', appendix to memorandum of counsel for Te Aitanga a Māhaki, 28 July 2020, #2.836(c)

were entitled by whakapapa 'must' also register in the ratification processes for, and vote against, the proposals of Ngā Uri o Tamanui Trust and the Te Whānau a Kai Trust.[130] Shortly after this information was filed, we received further submissions from counsel for Ngā Uri o Tamanui Trust contending that the Māhaki vote was proceeding on the misconceived basis that the Māhaki Trust would receive the allocation proposed by the Trust if they received sufficient votes. Ngā Uri o Tamanui Trust argued that such statements misrepresented the fact that 'it is for the Tribunal to determine what TWAK and NUOT receive'.[131]

79 These documents were extensively discussed during a two-day judicial conference on 28 and 29 July 2020.[132] We informed parties that, having received preliminary information from each claimant group, many aspects of the proposed ratification processes they would undertake were satisfactory, including:

(a) The extent of notice – the number and geographical spread of newspaper advertisement, and/or postal pānui, and/or availability of information through the claimant group's website.
(b) The length of notice, bearing in mind the differing methods being adopted by each group to give notice, and the length of time from first notification to close of voting.
(c) The consultation methods – the number and location of hui, again bearing in mind the nature and size of each group, as well as the availability of information through various different means.
(d) The arrangements for voting – including the appointment of independent returning officers, the provision for postal voting as well as in-person voting, and for Ngā Uri o Tamanui and Māhaki/Mangatū, electronic voting.[133]

80 We observed that the Māhaki Trust and Mangatū Incorporation governance entity and the ratification information for their ratification process was nearly complete, and with small changes we could accept their proposal. It was also apparent that the Māhaki Trust ratification would be able to comply with the Tribunal's 4 September deadline, whereas Ngā Uri o Tamanui and Te Whānau a Kai would not (their ratification processes are discussed separately below).[134] It was important, in our view, that the Māhaki process be able to proceed within the period proposed. To address the concerns raised by the

130. 'Power point presentation for the ratification hui', appendix to memorandum of counsel for Te Aitanga a Māhaki, #2.836(b), p 6
131. Memorandum of counsel for Ngā Uri o Tamanui, 28 July 2020, #2.837, para 11
132. The judicial conference was adjourned early on 28 July due to changes in claimant representatives for the Māhaki Trust, and reconvened on 29 July 2020: memorandum–directions of the presiding officer, 30 July 2020, #2.840, paras 3, 12; For a full consideration of the issues arising in these proceedings see memorandum–directions of the panel, #2.849.
133. Memorandum–directions of the panel, #2.849, para 13
134. Memorandum–directions of the panel, #2.849, paras 15, 20

other claimants and the Crown about the information they objected to in the Māhaki Trust's slide, we directed that it also include in its presentation the following text:

> The Tribunal has already determined that all the Mangatū CFL land should be returned to those who have suffered the prejudice caused by the Crown's Treaty breaches, as represented by the claimants before us.
>
> The Tribunal will make the final decision as to allocation of land and associated compensation regardless of the proposals put to it by the claimant groups; it also may require amendment of the trust deed or deeds put before it.
>
> The purpose of the ratification processes is to ensure that the proposed recipient trust or trusts properly represent and are accountable to the beneficiaries; and that the beneficiaries have a reasonable opportunity to consider the different proposed trust or trusts and to vote in favour of the one they consider appropriate. Individuals can only vote once in favour of a proposed recipient trust.[135]

81 Crown counsel disputed that individuals should vote only once in favour of a proposed governance entity. During the judicial conference, counsel submitted that members of the claimant community who whakapapa to more than one of the claimant groups should be able to vote in favour of each group's governance entity.[136] In memorandum–directions we addressed this submission, stating:

> It is important that claimant community members have freedom of choice in terms of which entity they vote for. What the Tribunal is looking to exclude is the possibility that a claimant community member can vote in favour of more than one entity to receive the returned CFL land and assets. The decision the Tribunal is asking them to consider and make is which entity do they think best represents them. Accordingly, we expect their vote should be exercised only in favour of that one . . . Their eligibility to benefit from any binding recommendation about the return of CFL land and any compensation that the Tribunal may make is not dependent on their vote but on their membership of the relevant group or groups.[137]

82 Counsel for Ngā Uri o Tamanui also argued that the Māhaki Forest Settlement Trust would be advantaged by their ratification process proceeding before that of the Ngā Uri o Tamanui Trust and the Te Whānau a Kai Trust.[138] To avoid any disadvantage being caused to the other groups, we directed that the Māhaki Trust also include descriptions of both the Ngā Uri o Tamanui

135. Memorandum–directions of the presiding officer, #2.840, para 13(a)
136. Transcript for judicial conference, #4.41, p 51; memorandum–directions of the panel, #2.849, para 43
137. Memorandum–directions of the panel, #2.849, paras 46–47
138. Memorandum of counsel for Ngā Uri o Tamanui, 31 July 2020, #2.841, para 10; memorandum–directions of the panel, #2.849, para 26(h)

Trust and Te Whānau a Kai positions, and links to their relevant ratification information.[139] Counsel for the Māhaki Trust agreed to this proposed solution during the judicial conference.[140] A position statement was provided by Te Whānau a Kai, and this was included in the Māhaki Trust information sent to beneficiaries and presented at the information hui.[141] Ngā Uri o Tamanui declined to provide a position statement.[142]

83 A final amendment to the Māhaki Trust proposal concerned the inclusion of the Ngāti Matepu claimants, who were an interested party in this Inquiry. Before the start of the second day of our judicial conference, counsel for Ngāti Matepu informed the Tribunal that discussions had taken place with the Māhaki Trust and the present trust deed 'would benefit from Ngāti Matepu input and perspective'.[143] As a result, counsel advised that they 'will urgently work together with a view to reaching agreement on the text of those provisions'.[144] On 3 August 2020, counsel for Ngāti Matepu confirmed that they had reached agreement on the text of the trust deed and 'any issue of acknowledging Ngāti Matepu involvement in relation thereto is resolved from my client's point of view'.[145] This was helpful cooperation between counsel for Te Aitanga a Māhaki and Ngāti Matepu and their respective claimants.

84 Following the July judicial conference, the Māhaki Trust made the necessary amendments to their ratification information and included a slide setting out Te Whānau a Kai's position.[146] They also submitted a revised trust deed for the Māhaki Forest Settlement Trust, which now provided that the trustees would have 'the full power and authority to make payment to the confirmed mandated entity for Te Rangiwhakataetaea of $4m'.[147] Ngāti Matepu would also be covered by provisions for the recognition of new Te Aitanga a Māhaki hapū and marae.[148]

139. Memorandum–directions of the presiding officer, #2.840, para 13(b)–(c)
140. Transcript for judicial conference, #4.41, p 534; memorandum–directions of the panel, #2.849, para 35
141. Memorandum of counsel for Te Aitanga a Māhaki and the Mangatū Incorporation, 3 August 2020, #2.844, para 3
142. Memorandum of counsel for Te Aitanga a Māhaki and the Mangatū Incorporation, #2.844, para 4
143. Memorandum of counsel for Ngāti Matepu, 29 July 2020, #2.839, para 1.1
144. Memorandum of counsel for Ngāti Matepu, #2.839, para 1.1
145. Memorandum of counsel for Ngāti Matepu, 4 August 2020, #2.845, para 2
146. Memorandum of counsel for Te Aitanga a Māhaki and the Mangatū Incoproation, #2.844; 'Letter to Voters with voting form', appendix to memorandum of counsel for Te Aitanga a Māhaki and the Mangatū Incorporation, 3 August 2020, #2.844(a); 'Power point presentation towards a united Māhaki settlement', appendix to memorandum of counsel for Te Aitanga a Māhaki and the Mangatū Incorporation, 3 August 2020, #2.844(b); 'Deed of trust of the Māhaki Forest Settlement Trust', appendix to memorandum of counsel for Te Aitanga a Māhaki and the Mangatū Incorporation, 3 August 2020, #2.844(c)
147. 'Deed of trust of the Māhaki Forest Settlement Trust', appendix to memorandum of counsel for Te Aitanga a Māhaki and the Mangatū Incorporation, #2.844(c), p 11
148. Memorandum of counsel for Te Aitanga a Māhaki and the Mangatū Incorporation, #2.844, para 5

85 The Crown submitted that there were some outstanding issues with the trust deed. It noted that the deed provided for future amendment to the set of trust obligations, such as to account for a final deed of settlement. It submitted that 'such amendments will likely require use of the trust instrument's powers and processes'.[149] The Crown also submitted that clause 29 of the deed says the trust will be exempt from perpetuities, but that 'the legal authority for this is not clear and the trust instrument should be finalised so that it can become operative in advance of any conferral of an exemption from applicable perpetuity rules'.[150] It proposed that 'there should be a process for winding up and distribution in case this is required by law'.[151]

86 In response to these submissions, the Māhaki Trust stated that the trust deed was drafted 'to not only give effect to the Tribunal's binding recommendations but also to give effect to any subsequent settlement arrangements with the Crown'.[152] They submitted that the draft deed 'follows the Crown model for approved PSGEs and follows the principles of being representative, transparent, and accountable'.[153] Finally, they explained that clause 29 concerning perpetuities was included 'on the basis that there would ultimately be a subsequent settlement with the Crown with the settlement legislation providing that the rule against perpetuities would not apply to the Māhaki Forest Settlement Trust'.[154] In the absence of a settlement, the Māhaki Trust representative told us 'the relevant provisions of the Trusts Act 2019 will be included in clause 29 to provide for a term of 125 years for the Trust'.[155]

87 On the basis that the necessary amendments had been made to the information provided to voters, we approved the Māhaki Trust ratification process. The Māhaki Trust voting form asked voters to declare their affiliation to one or more of Te Aitanga a Māhaki, Ngā Uri o Tamanui, and Te Whānau a Kai.[156] On 17 August 2020, the Māhaki Trust filed its membership register with the Tribunal, which included separate lists for those who identified as Te Aitanga a Māhaki, Te Whānau a Kai, and Ngā Uri o Tamanui.[157] At that date, 2,840 eligible voters were registered with the Māhaki Trust as Te Aitanga a Māhaki, 332 people were registered with the Trust as Te Whānau a Kai, and 76 as Ngā Uri o Tamanui.[158] Our analysis of the Māhaki Trust's register found that the Te Whānau a Kai and Ngā Uri o Tamanui lists provided by the Māhaki Trust overlapped with the Te Aitanga a Māhaki Trust list with only very limited

149. Memorandum of counsel for the Crown, 2 October 2020, #2.878, paras 14–15
150. Memorandum of counsel for the Crown, #2.878, para 17
151. Memorandum of counsel for the Crown, #2.878, para 17
152. Memorandum of the Māhaki Trust representative, 19 October 2020, #2.884, para 6
153. Memorandum of the Māhaki Trust representative, #2.884, para 7
154. Memorandum of the Māhaki Trust representative, #2.884, para 8
155. Memorandum of the Māhaki Trust representative, #2.884, para 8
156. 'Te Aitanga a Māhaki voting form', appendix to memorandum of counsel for the Māhaki Trust, #2.844(a), p [2]
157. Memorandum–directions of the presiding officer, 15 September 2020, #2.870, para 3
158. Memorandum of the representative for the Māhaki Trust, 23 November 2020, #2.894, para 9

exceptions, and we consider that the additional lists do not represent a large number of additional beneficiary members of the Te Aitanga a Māhaki Trust register.[159]

88 The first round of voting on the proposed Māhaki Forest Settlement Trust ratification proceeded from 1 August 2020 until 12 pm on 31 August 2020. Voters responded to six resolutions seeking support for the proposed trust and its trustees, as well as for proposals to distribute allocations of land and financial compensation to separate governance entities established by the Ngā Uri o Tamanui and Te Whānau a Kai beneficiaries of the Māhaki Trust.[160] The results were certified by an independent returning officer from Te Puni Kōkiri and submitted to the Tribunal on 15 September 2020.

89 The returning officer reported that 1,374 voters indicated that they belonged to Te Aitanga a Māhaki, 446 voters indicated that they belonged to Te Whānau a Kai, and 232 voters indicated that they belonged to Ngā Uri o Tamanui.[161] The reported result was that the Māhaki Trust received over 90 per cent support from each group on its register. In the report provided by Te Puni Kōkiri, the votes received by each group (Te Aitanga a Māhaki, Te Whānau a Kai, and Ngā Uri o Tamanui) were added together to produce a vote total. The overall result declared by Te Puni Kōkiri was 2,009 votes in favour and 41 against. This figure apparently took into account the separate votes for those also registered as Te Whānau a Kai and Ngā Uri o Tamanui as further votes for the Māhaki governance entity.[162]

90 The Māhaki Trust submitted that the results were only interim, and voting would continue until 30 September 2020. The representative for the Māhaki Trust informed the Tribunal that the Trust would continue 'following up with members from Te Whānau a Kai, Ngā Uri o Tamanui, and wider Te Aitanga a Māhaki (including Ngāriki Kaipūtahi) who ha[d] not voted yet'.[163] The Crown responded to the extension of the Māhaki Trust's polling period by submitting that 'the basis on which the earlier declared voting period has been extended . . . is not clear'.[164] The Crown submitted that it appeared that a low number of Te Aitanga a Māhaki had participated in the poll. Furthermore, it noted that it was unclear how many people had voted in the poll because 'the report filed in September by the poll's returning officer records that 2009 votes were received in favour of the proposed trust (the Māhaki Forest Settlement Trust) by combining the votes received from each of the three

159. Confidential membership register for Te Aitanga a Māhaki, 18 August 2020, #P68
160. 'Te Aitanga a Māhaki voting form', appendix to memorandum of counsel for the Māhaki Trust and the Mangatū Incorporation, #2.844(a), p [2]
161. 'Te Puni Kōkiri declaration of voting results', appendix to memorandum of representative for the Māhaki Trust, #2.869(a)
162. 'Te Puni Kōkiri declaration of voting results', appendix to memorandum of representative for the Māhaki Trust, #2.869(a), p 1
163. Memorandum of the representative for the Māhaki Trust, #2.869, para 5
164. Memorandum of counsel for the Crown, 2 October 2020, #2.878, para 4

claimant communities but does not indicate how many persons voted.'[165] In response to the Crown's submissions, the Tribunal directed the representative for the Māhaki Trust to:

> (a) provide the final ratification results at the same time as Ngā Uri o Tamanui and Te Whānau a Kai;
> (b) advise the Tribunal as to the number of registrants and how many people voted in the Te Aitanga a Māhaki ratification poll; and
> (c) provide information on how to reconcile the differences between the number of those who voted in the Te Aitanga a Māhaki ratification process as Te Whānau a Kai or Ngā Uri o Tamanui, given that the poll numbers appear to be greater than the number of registrants shown in their register (to date) as having Te Whānau a Kai and Ngā Uri o Tamanui whakapapa.[166]

91 The Tribunal also informed parties that 'further submissions may be made by all claimant groups and the Crown on the results of the various ratification processes two weeks after all results are available'.[167] On 2 November 2020, the Māhaki Trust advised the Tribunal that the Trust's final results would be provided to the Tribunal by 10 November, and did not mention a further extension to the Māhaki Trust's voting period.[168] The Māhaki Trust's final results were certified by a returning officer from Te Puni Kōkiri and submitted on 30 November 2020. The final results included not only votes collected between 31 August and 30 September 2020, but also votes received up to 31 October 2020 – a period of over eight weeks.[169]

92 The returning officer reported that a total 279 further votes were collected during this period. The number of votes received from people registered as Te Aitanga a Māhaki was 279 (the same as the total number of votes cast in this period), with 76 people registered as Te Whānau a Kai, and 21 registered as Ngā Uri o Tamanui voting.[170] The Māhaki Trust informed us that, as at 31 October 2020, 3,810 people were registered with the Māhaki Trust as Te Aitanga a Māhaki, 756 were registered as Te Whānau a Kai, and 267 were registered as Ngā Uri o Tamanui.[171] The Māhaki Trust informed the Tribunal that the total result from both rounds of voting was over 90 per cent support of the voters from each group which participated in their ratification process.

165. Memorandum of counsel for the Crown, #2.878, para 9
166. Memorandum–directions of the presiding officer, 9 October 2020, #2.881, para 10
167. Memorandum–directions of the presiding officer, #2.881, para 12
168. Memorandum of counsel for the Māhaki Trust, 2 November 2020, #2.890, para 1
169. Te Puni Kōkiri declaration of voting results – round two', appendix to memorandum of counsel for the Māhaki Trust, 30 November 2020, #2.895(a), p [1]
170. Te Puni Kōkiri declaration of voting results – round two', appendix to memorandum of counsel for the Māhaki Trust, #2.895(a), p [2]
171. Memorandum of counsel for the Māhaki Trust, 23 November 2020, #2.894, paras 5, 7; confidential membership register for the Te Aitanga a Māhaki Trust as at 31 October 2020, 24 November 2020, #P71

The Māhaki Trust's representative provided the Tribunal with the following results for their first resolution:

> 'That the Mahaki Forest Settlement Trust represents Te Aitanga a Mahaki for the purposes of remedying Te Aitanga a Mahaki historical Treaty of Waitangi claims and includes all hapu and marae of Te Aitanga a Mahaki:'
>
> | | | |
> |---|---|---|
> | Te Aitanga a Māhaki: | 1620 yes votes; | 31 no votes; |
> | Te Whānau a Kai: | 500 yes votes; | 22 no votes; |
> | Ngā Uri o Tamanui: | 242 yes votes; | 11 no votes.[172] |

93 In response to the Tribunal's direction, the Māhaki Trust reported that a total of 2,428 people voted over the two voting periods in their ratification process.[173] However, this submission did not clarify the number of votes cast in the first round of voting in August 2020. We also note that the Ngā Uri o Tamanui and Te Whānau a Kai beneficiaries of the Māhaki Trust are included in the 3,810 registered voters and do not represent additional votes.[174]

94 The Māhaki Trust ratification process and outcome was reviewed in the Tribunal's independent audit and will be considered later. First, though, we consider the separate polls undertaken by the Ngā Uri o Tamanui Trust and the Te Whānau a Kai Trust, and then set out the findings of the audit.

Ngā Uri o Tamanui Trust

95 Following the successful mediation between the two Ngāriki/Ngā Ariki Kaipūtahi groups in October 2019, the claimants reached agreement to establish the Ngā Uri o Tamanui Trust to receive any Mangatū CFL land returned on behalf of its beneficiaries.[175] In submissions filed in February 2020, Ngā Uri o Tamanui included for our consideration a draft trust deed for the Ngā Uri o Tamanui Trust. Counsel informed the Tribunal that when mediation between all parties had concluded, they would continue to work towards the establishment of the Trust in accordance with the draft deed.[176]

172. Neither the Māhaki Trust nor their returning officer reported a total result for the remaining resolutions polled in their ratification process. However, we note that results reported by the returning officer for both Māhaki Trust polling period indicate that the proposed trustees received similar levels of support: 'Te Puni Kōkiri declaration of voting results', appendix to memorandum of representative for the Māhaki Trust, #2.869(a); memorandum of representative for the Māhaki Trust, 30 November 2020, #2.895, para 2; 'Te Puni Kokiri declaration of voting results – round two', appendix to memorandum of counsel for the Māhaki Trust, #2.895(a).
173. Memorandum of representative for the Māhaki Trust, #2.895, para 2; 'Te Puni Kokiri declaration of voting results – round two', appendix to memorandum of counsel for the Māhaki Trust, #2.895(a), p [2]
174. Confidential membership register for the Te Aitanga a Māhaki Trust as at 31 October 2020, #P71
175. Joint memorandum of counsel, #2.765, para 3
176. Memorandum of counsel for Ngā Uri o Tamanui, #2.795, para 11; 'Ngā Uri o Tamanui draft trust deed', appendix to memorandum of counsel for Ngā Uri o Tamanui, 24 February 2020, #2.975(b); memorandum of counsel for Ngā Uri o Tamanui, 29 June 2020, #2.824, para 5

96 Ngā Uri o Tamanui told us Electionz would oversee the voting in their ratification, and they would also provide for online voting.[177] Information hui were to be held around the country, if permitted by Covid-19 alert levels. These hui would be restricted to Auckland, Hamilton, Hastings, Wellington, Christchurch, Invercargill, and Gisborne because of lack of access to funding; pānui would be published in local papers and on social media.[178] The Ngā Uri o Tamanui voting form would:

(a) ask for votes for seven trustees on the Ngā Uri o Tamanui Trust;
(b) test support among Ngā Uri o Tamanui for the trust to receive any Mangatū CFL land that may be returned with associated compensation as part of this Inquiry; and
(c) test support for the trust to represent Ngā Uri o Tamanui in settlement negotiations with the Crown that may take place in the 90-day period.[179]

97 On 29 June 2020, Ngā Uri o Tamanui updated the Tribunal that the Ngā Uri o Tamanui Trust was 'being established in a skeleton form with two initial trustees, and is preparing its register for a nationwide vote to fill vacancies for seven trustees on the board that will receive the resumption assets following Tribunal orders'.[180] They told us that the trust structure was based upon previous entities the Crown had approved for Treaty settlements, and that the Crown had agreed to review their draft deed.[181]

98 In response to the Tribunal's 4 September deadline, Ngā Uri o Tamanui submitted they had 'sought to slim down the process, while still maintaining accountability and legitimacy. It appears that completion in mid-September may be possible'.[182] However, during the 28 and 29 July judicial conference, counsel filed written submissions informing the Tribunal that 'the time frame is now realistically looking to be the end of October'.[183] In memorandum–directions filed following those proceedings, we acknowledged that this was the first time Ngā Uri o Tamanui were undertaking such a ratification process, and that the Covid-19 restrictions earlier in the year would have impacted their progress. We also intended that the claimants have sufficient time to prepare their registers. We stated our acceptance of the Crown's submission that all ratification processes must be concluded before the Tribunal issues its recommendations. Accordingly, we recognised that Ngā Uri o Tamanui required additional time to complete their ratification process and directed that this should now be done, and their ratification results filed by 2 November 2020.[184]

177. Memorandum of counsel for Ngā Uri o Tamanui, 18 May 2020, #2.813, para 9
178. Memorandum of counsel for Ngā Uri o Tamanui, #2.824, para 5
179. Memorandum of counsel for Ngā Uri o Tamanui, #2.813, para 10
180. Memorandum of counsel for Ngā Uri o Tamanui, #2.824, para 12
181. Memorandum of counsel for Ngā Uri o Tamanui, #2.824, para 15
182. Memorandum of counsel for Ngā Uri o Tamanui, #2.824, para 17
183. Memorandum of counsel for Ngā Uri o Tamanui, #2.837, para 24
184. Memorandum–directions of the panel, #2.849, paras 55–56, 61

99 On 21 August 2020, the Tribunal received the Ngā Uri o Tamanui Trust's confidential register.[185] We then provided Ngā Uri o Tamanui with feedback on their draft trust deed in memorandum–directions dated 11 September 2020.[186] A final trust deed was filed with the Tribunal on Friday 18 September. The Crown did not make any further submissions on the Ngā Uri o Tamanui Trust deed, and noted that 'Ngā Uri o Tamanui have received comments from the Crown on the draft deed'.[187]

100 At this point, counsel for Ngā Uri o Tamanui informed the Tribunal that the results of their vote could be provided no sooner than 13 November 2020. However, on 13 November, counsel for Ngā Uri o Tamanui notified the Tribunal that they would require until 26 November to collect votes to rectify a mistake made in distributing ballots to their registrants.[188] They also noted that the substantial increase in registrants had created a delay between registration and the actual receipt of voting materials.[189] The Tribunal accepted the reasons given by Ngā Uri o Tamanui as to why additional time was required, and set a deadline of 30 November 2020 for their results to be filed with the Tribunal.[190]

101 Two resolutions were put to the Ngā Uri o Tamanui claimant population. The first concerned the ratification of the Ngā Uri o Tamanui Trust as governance entity to receive any remedies awarded by the Waitangi Tribunal. The second concerned the ratification of the Ngā Uri o Tamanui Trust as the governance entity for any further redress that may be negotiated with the Crown. They also sought votes for the Trust's initial trustees.[191] On 30 November 2020, the Tribunal received the interim results of the Ngā Uri o Tamanui ratification process. A total of 523 votes were received.[192] However, counsel submitted that these were only preliminary results as a small number of provisional ballots remained to be verified. They submitted that the final result would be available by 4 December 2020.[193] On 9 December, counsel for Ngā Uri o Tamanui filed a further memorandum informing the Tribunal that they still awaited provisional ballots cast in the election. They submitted that 'the issue preventing verification is whether one tipuna was a whangai'.[194] The claimant groups were in stalemate over this issue, which they told us would 'be

185. Memorandum–directions of the panel, #2.870, para 5; confidential membership register for Ngā Uri o Tamanui Trust, 21 August 2020, #P70
186. Ngā Uri o Tamanui submitted a further draft trust deed on 7 August 2020. Tribunal feedback was provided on this draft: memorandum of counsel for Ngā Uri o Tamanui, 7 August 2020, #2.847; memorandum–directions of the presiding officer, #2.870
187. Memorandum of counsel for the Crown, #2.878, para 18
188. Memorandum of counsel for Ngā Uri o Tamanui, 13 November 2020, #2.888, para 6
189. Memorandum of counsel for Ngā Uri o Tamanui, #2.888, para 6
190. Memorandum–directions of the presiding officer, 20 November 2020, #2.891, paras 10, 12
191. Memorandum of counsel for Ngā Uri o Tamanui, 30 November 2020, #2.898, para 6
192. Memorandum of counsel for Ngā Uri o Tamanui, #2.898, para 5
193. Memorandum of counsel for Ngā Uri o Tamanui, #2.898, para 8
194. Whāngai are children adopted in accordance with Māori custom; memorandum of counsel for Ngā Uri o Tamanui, 9 December 2020 #2.900, para 4

referred to a disputes committee under the trust deed before the ballots can be confirmed'.[195]

102 On 22 February 2021, counsel for the Ngā Uri o Tamanui Trust informed the Tribunal that the issue had been settled and submitted the final results of their poll, as reported by Electionz.[196] The final results reported by the returning officer were:

> 'I approve NUOT Trust to receive the Mangatuū Crown forest assets awarded by the Waitangi Tribunal by binding recommendations:'
>
> - 469 yes votes;
> - 36 no votes.
>
> 'I approve NUOT Trust to receive any other redress for NUOT Treaty claims that may be negotiated with the Crown':
>
> - 475 yes votes;
> - 25 no votes.[197]

103 In addition, seven trustees had been elected. The returning officer reported that 518 voters had returned ballots, being 30.9 per cent of eligible voters.[198] The Ngā Uri o Tamanui Trust ratification process and outcome were also reviewed in the Tribunal's independent audit and will be considered later.

Te Whānau a Kai Trust

104 On 7 February 2020, Te Whānau a Kai informed the Tribunal that they were in the process of updating an existing trust deed for the Te Whānau a Kai Trust 'to allow the Trust to receive its share of benefits from any binding Tribunal recommendation'.[199] In May 2020, Te Whānau a Kai filed updated information including more detail on the governance entity structure, which would include the Te Whānau a Kai Trust as a 'post-settlement governance entity' and 'subsidiary entities'.[200] These included a charitable entity taking the form of the pre-existing Te Whānau a Kai Trust, a company called Te Whānau a Kai Trustee Services Limited to be incorporated on the finalisation of the trust deed for the Te Whānau a Kai Trust, as well as further committees and other entities that could be established as subsidiaries.[201] They informed the Tribunal that 'the disruption caused by the Covid-19 lockdown

195. Memorandum of counsel for Ngā Uri o Tamanui, #2.900, para 5
196. Memorandum of counsel for Ngā Uri o Tamanui, 22 February 2021, #2.915, para 2
197. A declaration of result for the NUOT ratification and trustee vote, appendix to memorandum of counsel for Ngā Uri o Tamanui, 22 February 2021, #2.915(a)
198. A declaration of result for the NUOT ratification and trustee vote, appendix to memorandum of counsel for Ngā Uri o Tamanui, #2.915(a)
199. Memorandum of counsel for Te Whānau a Kai, 7 February 2020, #2.781, para 4
200. Memorandum of counsel for Te Whānau a Kai, 12 May 2020, #2.809, paras 5–6
201. Memorandum of counsel for Te Whānau a Kai, #2.809, para 6(a)–(d)

restrictions [had] meant that progress on drafting and finalising the draft Trust Deed has been slower than expected'.[202]

105 The ratification process proposed by Te Whānau a Kai would involve postal voting and voting at ratification hui, both to be conducted by an independent returning officer.[203] Information packs would be mailed to members with their postal ballots. They proposed a five-week interval between when postal ballots and accompanying information were distributed to members, and the voting deadline.[204] Ratification hui were to be held in Gisborne, Hamilton, and Wellington, and Te Whānau a Kai planned to livestream the hui presentation for members unable to attend.[205] Te Puni Kōkiri officials would oversee these hui.[206] In response to Tribunal questions, Te Whānau a Kai informed us that members would be given 21 days' notice of ratification hui to be published in local newspapers.[207]

106 We received an initial draft deed of trust for the Te Whānau a Kai Trust on 6 July 2020, and a further draft on 7 August 2020.[208] These documents were clearly in draft form and required further work to finalise. By the time of our judicial conference on 28 and 29 July 2020, it was clear that Te Whānau a Kai would not be able to meet the Tribunal's 4 September deadline for filing of ratification results. We provided some general feedback on the draft trust deed in memorandum–directions dated 11 August 2020 and 11 September 2020, which we need not repeat here.[209] We recognised, as with Ngā Uri o Tamanui, that Te Whānau a Kai would require extra time to complete their ratification process. We directed that this should now be done, and their ratification results filed by 2 November 2020.[210]

107 On 17 August 2020, we received Te Whānau a Kai's confidential register.[211] Counsel submitted that a total of 1,667 iwi members were presently registered with the Te Whānau a Kai Trust.[212] However, the contact details of only 740 registrants were available and only those people would be able to participate in the ratification process. The final trust deed for the Te Whānau a Kai Trust was filed with the Tribunal on 24 September 2020.[213]

202. Memorandum of counsel for Te Whānau a Kai, #2.809, para 7
203. Memorandum of counsel for Te Whānau a Kai, #2.809, para 9
204. Memorandum of counsel for Te Whānau a Kai, #2.809, paras 10, 14
205. Memorandum of counsel for Te Whānau a Kai, #2.809, para 11
206. Memorandum of counsel for Te Whānau a Kai, #2.809, para 14
207. Memorandum of counsel for Te Whānau a Kai, 30 June 2020, #2.826, paras 77(a)–(b)
208. 'Amended deed of Trust of Te Whānau a Kai Trust', appendix to memorandum of counsel for Te Whānau a Kai, 6 July 2020, #2.826(a)
209. Memorandum–directions of the panel, #2.849, paras 94 – 97; memorandum–directions of the presiding officer, 11 September 2020, #2.867, paras 4–6, 8
210. Memorandum–directions of the panel, #2.849, para 61
211. Memorandum–directions of the presiding officer, #2.870, para 8
212. Memorandum of counsel for Te Whānau a Kai, 18 August 2020, #2.856, para 8
213. 'Deed of Trust of Te Whānau a Kai Trust', appendix to memorandum of counsel for Te Whānau a Kai, 24 September 2020, #2.876(a)

108 The Crown made helpful submissions to assist Te Whānau a Kai to improve the draft Te Whānau a Kai Trust deed. It suggested that the language in the background section of the deed 'might be inappropriately limiting', as it only covered the Trust's power to 'receive and hold assets provided by the Crown and Crown-related trusts under the terms of recommendations made by the Waitangi Tribunal'.[214] The Crown also noted that the definition of historical claims says 'that the term has the same meaning given to historical claims in the Deed of Settlement and Settlement Act'. The Crown submitted that 'this is an anticipatory definition (in anticipation of the trust instrument later being amended to accommodate the outcomes of any negotiated settlement process)'.[215] The Crown's comments were accepted by counsel for Te Whānau a Kai, and they submitted that appropriate changes had been made to the background, and historical claims definition sections of the deed.[216]

109 Also on 24 September 2020, counsel for Te Whānau a Kai informed the Tribunal that progress in their ratification process had been delayed and the results could not be provided before 13 November 2020.[217] However, as the process was carried out, even further time was required. The Te Whānau a Kai Trust polling period began on 7 October 2020 and concluded on 27 November 2020.[218]

110 Two resolutions were put to the Te Whānau a Kai claimant population regarding the ratification of the Te Whānau a Kai Trust, and the initial trustees.[219] An independent returning officer from Election Services Limited certified and submitted the final results of the Te Whānau a Kai ratification process to the Tribunal on 30 November 2020. Counsel informed the Tribunal that the total number of iwi members registered with the Te Whānau a Kai Trust was 2,195 at 27 November 2020. However, the contact details of some registrants were not available, and consequently they did not receive voting packs.[220] Out of this total, 1,429 members were issued a postal or electronic voting pack, and 855 were returned.[221] The Te Whānau a Kai Trust returning officer reported the following results:

> 'I as a member of Te Whānau a Kai agree that the Te Whānau a Kai Trust will be the Post Settlement Governance Entity to receive and manage the Mangatū Crown forest licensed land settlement redress on behalf of Te Whānau a Kai:'
>
> - 780 yes votes;

214. Memorandum of counsel for the Crown, #2.878, para 21
215. Memorandum of counsel for the Crown, #2.878, para 22
216. Memorandum of counsel for Te Whānau a Kai, 20 October 2020, #2.885, paras 7, 9
217. Memorandum of counsel for Te Whānau a Kai, 24 September 2020, #2.876, para 6
218. Memorandum of counsel for Te Whānau a Kai, 30 November 2020, #2.896, para 4(b)
219. 'Te Whānau-a-Kai Iwi trust post settlement governance entity ratification poll', appendix to memorandum of counsel for Te Whānau a Kai, 30 November 2020, #2.896 (a), p 3
220. Memorandum of counsel for Te Whānau a Kai, #2.896, para 4(d)
221. 'Te Whānau-a-Kai Iwi trust post settlement governance entity ratification poll', appendix to memorandum of counsel for Te Whānau a Kai, #2.896(a), p 3

- 72 no votes; and
- three left the form blank.

'I as a member of Te Whānau a Kai agree that the initial trustees of the ratified Te Whānau a Kai Trust will be the current trustees of the current trustees of the existing Te Whānau a Kai Trust:'

- 766 yes votes;
- 84 no votes; and
- four left the form blank.[222]

111 The result reflected approximately 90 per cent support for both resolutions.[223] Overall, 59.8 per cent of eligible voters who were sent a voting pack participated in the ratification process. The independent returning officer reported that this was 'an above average turnout when compared with other iwi ratification polls'.[224] In the next section, we discuss the steps taken by the Tribunal to ensure that its requirements were met by the three ratification processes, and the findings of the independent audit.

The Tribunal's audit of the three ratification processes and results

112 On 20 November 2020, counsel for all claimants, the interested party (Ngāti Matepu), and the Crown filed a joint memorandum suggesting that the Tribunal should consider the ratification results and issue its own feedback prior to parties submitting on the results. In particular, parties submitted:

> The Tribunal will need to determine a process to meet its requirement of checking that all members of the claimant community across Te Aitanga a Māhaki, Ngā Uri o Tamanui and Te Whānau a Kai have only voted in favour of one recipient entity.[225]

113 Counsel noted that between the three ratification processes there was no common roll, or common independent returning officer. Counsel suggested that the unique identifiers allocated to the voters who participated in each poll 'could form a basis for a Tribunal checking process but this would appear to require manual identification of persons who participated in more than one ballot and then a further, and manual, assessment of whether such participation resulted in more than one vote in support of a recipient entity'.[226] They submitted that it was not clear at that stage what the consequences would be if the Tribunal did identify voters who voted more than once in support of

222. 'Te Whānau-a-Kai Iwi trust post settlement governance entity ratification poll', appendix to memorandum of counsel for Te Whānau a Kai, #2.896(a), p 7
223. 'Te Whānau-a-Kai Iwi trust post settlement governance entity ratification poll', appendix to memorandum of counsel for Te Whānau a Kai, #2.896(a), p 3
224. 'Te Whānau-a-Kai Iwi trust post settlement governance entity ratification poll', appendix to memorandum of counsel for Te Whānau a Kai, 30 November 2020, #2.896(a), p 6
225. Joint memorandum of counsel, 20 November 2020, #2.893, para 3
226. Joint memorandum of counsel, #2.893, para 4

separate governance entities.[227] Parties requested that the Tribunal indicate the process it intended to follow to evaluate the ratification results, whether the Tribunal would conduct this evaluation, and whether the Tribunal agreed that the evaluation should be undertaken and released to parties ahead of their submitting on the results.[228]

114 The Tribunal responded to these requests from the parties in memorandum–directions dated 2 December 2020. We noted that while the Tribunal had received the beneficiary registers for all groups at this point, we did not have access to the voting information that would allow the Tribunal to perform a checking process, as described in the parties' joint submission.[229] We stated that the Tribunal itself would not conduct a primary evaluation to verify whether voters had voted in favour of more than one governance entity. We stated that claimant parties should arrange for independent returning officers 'to confer – while maintaining strict confidentiality as they are qualified to do – and together vet all three polls to identify if any person has voted in favour of more than one recipient entity'.[230]

115 This proposed approach to verifying the ratification results proved to be unworkable. Both Ngā Uri o Tamanui and Te Whānau a Kai opposed the returning officers evaluating the results of the three polls together, and the Māhaki Trust noted that without the agreement of all parties, 'it has not proved possible to make any arrangements'.[231] The Crown and the Māhaki Trust agreed that the Tribunal would itself have to determine how the results were to be evaluated, 'even if the Tribunal commissions another body, such as Te Puni Kōkiri or a commercial election provider company'.[232]

116 In response to these submissions, the Tribunal issued memorandum–directions, dated 10 February 2021, informing parties that an audit of all the ratification processes and results would be arranged 'for the purpose of checking that our requirement that members of the claimant community should only vote in favour of one recipient entity was met'.[233] The audit would also include a review of the methodology used by each of the returning officers to ensure that their processes were 'fair, sound in principle and robust in application'.[234] We directed parties that the Tribunal would require the returning officers to provide confidentially 'all relevant information held concerning those pro-

227. Joint memorandum of counsel, #2.893, para 4
228. Joint memorandum of counsel, #2.893, para 6
229. Memorandum of the presiding officer, 2 December 2020, #2.899, para 7
230. Memorandum of the presiding officer, #2.899, para 8
231. Memorandum of counsel for Ngā Uri o Tamanui, 18 December 2020, #2.905, para 26; memorandum of counsel for the Māhaki Trust and the Mangatū Incorporation, 18 December 2020, #2.906, para 6; memorandum of counsel for Te Whānau a Kai, 18 December 2020, #2.908, para 18
232. Memorandum of counsel for the Māhaki Trust and the Mangatū Incorporation, #2.906, paras 7.1–7.2; memorandum of counsel for the Crown, 15 January 2021, #2.909, para 23
233. Memorandum–directions of the presiding officer, 10 February 2021, #2.914, para 7
234. Memorandum–directions of the presiding officer, #2.914, para 7

cesses and results'. This information would be confidential to the Tribunal, used for the purposes of the audit only, and would include:

- a list of those to whom the voting packs were sent;
- information showing how each vote received was recorded as against the unique identifier;
- the original voting forms themselves, and;
- any other information that could assist with the assessment such as further explanation of the returning officer's methodology for verifying each voter against their unique identifier.[235]

117 The Tribunal's audit process was conducted by Audit New Zealand. We received its final report on 22 July 2021. The audit followed five key lines of inquiry that focused on the returning officers' processes for collecting and verifying votes, compiling vote totals, and reporting the results. Audit New Zealand also reviewed specific issues that included whether the voters' names were listed on the relevant beneficiary registers, and that voters only voted once in each poll. They also specifically reviewed whether the ratification processes had complied with the Tribunal's requirement that individual voters who could participate in more than one poll only voted in favour of one proposed governance entity.[236]

118 Audit New Zealand found that the parties had provided varying levels of detail on the process for their ratification voting. They concluded that 'Te Aitanga a Māhaki and Te Whānau a Kai provided adequate detail on the process while Ngā Uri o Tamanui provided limited detail'.[237] Given the documentation available after the processes had already been completed, Audit New Zealand was not able to determine 'if the voting process was performed as described for any of the three parties'. However, they stated that '[t]his is an inherent limitation of a retrospective review as it is difficult to determine if the controls were applied without observing the process at the time.'[238]

119 Audit New Zealand identified 31 votes from the parties that did not appear to be on the relevant beneficiary register, including:

235. In order to acquire the information required for the purposes of the audit the Tribunal issued two summonses under section 4C of the Commissions of Inquiry Act 1908 to the returning officers of the Ngā Uri o Tamanui Trust and Te Whānau a Kai Trust ratification processes. The information provided by the returning officer for the Māhaki Trust process in the first instance was incomplete and the Tribunal was required to direct the Trusts representative to provide further information: memorandum–directions of the presiding officer, #2.914, para 9; memorandum–directions of the presiding officer, 23 March 2021, #2.919, para 10; memorandum–directions of the presiding officer, 24 March 2021, #2.920; memorandum–directions of the presiding officer, 13 May 2021, #2.927.
236. Final report on Mangatū voting process review, 22 July 2021, #2.939(a), pp 1–3
237. Final report on Mangatū voting process review, #2.939(a), p 10
238. Final report on Mangatū voting process review, #2.939(a), p 10

- Twenty-three votes that do not appear to have a match on the Te Aitanga a Māhaki beneficiary register.
- Eight votes that do not appear to have a match on the Te Whānau a Kai beneficiary register.[239]

120 Audit New Zealand identified 22 people who voted more than once in the same ratification process:

- Eleven people voted more than once in the Te Aitanga a Māhaki vote.
- Seven people voted more than once in the Te Whānau a Kai vote.
- Four people voted more than once in the Ngā Uri o Tamanui vote.[240]

121 The votes that were not linked to a member of the beneficiary register, or from people who voted more than once in a single poll, were excluded from Audit New Zealand's findings on the votes documented in each ratification process. Their overall findings on the voting details documented are set out in the tables below. For the Māhaki Trust ratification results, Audit New Zealand determined the following vote details:

Ballot	Totals	Yes	No	Informal
Online	1,050	1,015	16	19
Paper	290	275	7	8
Total votes	1,340	1,290	23	25
Beneficiary register	3,810			

Audit New Zealand's findings on the Māhaki Trust ratification voting details

Source: #2.939(a), p 8

122 For the Ngā Uri o Tamanui Trust ratification results, Audit New Zealand determined the following vote details:

Ballot	Totals	Yes	No	Informal
Online	442	402	33	7
Paper	76	67	3	6
Total votes	518	469	36	13
Beneficiary register	1,916			

Audit New Zealand's findings on the Ngā Uri o Tamanui Trust ratification voting details

Source: #2.939(a), p 9

239. Final report on Mangatū voting process review, #2.939(a), p 11
240. Final report on Mangatū voting process review, #2.939(a), p 11

123 For the Te Whānau a Kai Trust ratification results, they determined the following vote details:

Ballot	Totals	Yes	No	Informal
Online	708	658	43	7
Paper	147	122	24	1
Total votes	855	780	67	8
Beneficiary register	2,168			

Audit New Zealand's findings on the Te Whānau a Kai Trust ratification voting details
Source: #2.939(a), p 10

124 Across the three separate ratification processes, Audit New Zealand's analysis identified 59 people who voted in favour of more than one proposed governance entity. They found:

- Two people voted for Te Aitanga a Māhaki, Ngā Uri o Tamanui, and Te Whānau a Kai.
- Twenty-nine voted for Te Aitanga a Māhaki and Ngā Uri o Tamanui.
- Twenty-six voted for Te Aitanga a Māhaki and Te Whānau a Kai.
- Two voted for Te Whānau a Kai and Ngā Uri o Tamanui.[241]

125 In the following sections, we set out the parties' submissions on the result of the audit, and our conclusions.

Parties' submissions on the result of the audit

The Māhaki Trust

126 The Māhaki Trust submitted:

(a) 'Te Aitanga a Mahaki has no concern with the Audit NZ report as it is written.'[242]

(b) The scope of the report did not cover Te Aitanga a Māhaki beneficiaries who are also Te Whānau a Kai and or Ngā Uri o Tamanui and 'were unable to register to exercise a vote'.[243]

Ngā Uri o Tamanui

127 Ngā Uri o Tamanui (NUOT) submitted:

(a) 'It is unclear what the Review was meant to establish and how its findings may affect the mandate processes'. There is no significance assigned to the 'bare statistics' provided by Audit New Zealand.[244]

241. Final report on Mangatū voting process review, #2.939(a), p 11
242. Memorandum of the representative for Te Aitanga a Māhaki, 23 August 2021, #2.942, para 6
243. Memorandum of the representative for Te Aitanga a Māhaki, #2.942, para 7
244. Memorandum of counsel for Ngā Uri o Tamanui, 10 August 2021, #2.941, para 2

(b) The review only looked at one resolution per group, and 'does not reveal much about the other questions.'[245]
(c) The Tribunal's decision to allow the Māhaki Trust ratification process has created a 'contested mandate' where it is impossible to draw any comparison between the results.[246]
(d) The Tribunal can 'rely on the outcome of the vote for NUOT. The voting was overseen by a well-established and experienced election management company, the process was open and showed a lot of engagement and support from within the iwi.'[247]
(e) 'We are concerned that the Review may have failed to identify that there are a number of individuals with the same names and, occasionally, same addresses, in NUOT. Given the limitations of the Review we are concerned that these may not have been picked up, and therefore not included in the determined totals for NUOT.'[248]
(f) The Māhaki Trust 'determined to undertake a competing mandate for NUOT'. We do not see 'how the Review assists in clarifying any aspects of competing mandate'.[249]

Te Whānau a Kai

128 Te Whānau a Kai submitted:

(a) Te Whānau a Kai are 'satisfied with the review of the voting results that is set out in the AuditNZ report'.[250]
(b) Audit New Zealand found that Ngā Uri o Tamanui provided limited detail for the voting process. This 'must be cause for concern for the Waitangi Tribunal given the professed importance to the Tribunal of transparent and robust ratification processes'.[251]
(c) Te Whānau a Kai's polling period was six weeks shorter than the Māhaki Trust's polling period. This 'discrepancy in polling periods averted to is patently unfair'. In these circumstances, 'the Māhaki Trust polling period should be adjusted so that it aligns with that of Te Whānau a Kai'.[252]
(d) The Māhaki Trust's ratification process 'was resourced to a much greater degree than that of Te Whānau a Kai'. The difference in resourcing 'skewed the polling results between the two groups in favour of Māhaki'. The Tribunal should 'issue interim recommendations that account for the apparent inequity'.[253]

245. Memorandum of counsel for Ngā Uri o Tamanui, #2.941, para 9
246. Memorandum of counsel for Ngā Uri o Tamanui, #2.941, paras 14–15
247. Memorandum of counsel for Ngā Uri o Tamanui, #2.941, para 17
248. Memorandum of counsel for Ngā Uri o Tamanui, #2.941, para 18
249. Memorandum of counsel for Ngā Uri o Tamanui, #2.941, paras 19–20
250. Memorandum of counsel for Te Whānau a Kai, 10 August 2021, #2.940, para 4
251. Memorandum of counsel for Te Whānau a Kai, #2.940, para 7
252. Memorandum of counsel for Te Whānau a Kai, #2.940, paras 8–9
253. Memorandum of counsel for Te Whānau a Kai, #2.940, para 10

The Crown

129 The Crown submitted:

(a) The Crown does not have substantive submissions to make but notes the following points:

- The Tribunal should have a process to check the ratification processes were transparent and robust but the details of that process are for the Tribunal to determine.
- The report from the independent auditor has been useful but, as noted in the report, there are difficulties inherent in conducting a retrospective analysis of the ratification processes.
- The Tribunal could consider excluding the votes of persons who voted in favour of more than one recipient entity. It appears that this would not materially change the levels of support disclosed by the voting results which claimant parties have filed in the Tribunal. This in turn, would mean that the Tribunal's use of the report could be said to deliver some assurance that the level of support demonstrated for each claimant group (as shown by the voting results) was not materially dependent on any instances identified by the report of multiple voting.[254]

Tribunal conclusions on the ratification of governance entities

130 The Audit New Zealand report found that, in terms of those who participated in each process, the various governance entities received the following levels of support:

(a) The Māhaki Forest Settlement Trust: 96.2 per cent.
(b) The Ngā Uri o Tamanui Trust: 90.5 per cent.
(c) The Te Whānau a Kai Trust: 91.2 per cent.

131 As these results show, each of the claimant group's ratification proposals was supported by overwhelming majorities. The submissions of the Māhaki Trust, Te Whānau a Kai, and the Crown on the Audit New Zealand report reflect a level of agreement between them that the Tribunal can rely on the level of support for each governance entity demonstrated through their ratification processes. The Māhaki Trust and Te Whānau a Kai both accepted the findings included in Audit New Zealand's report. Ngā Uri o Tamanui raised concerns about the purpose of the audit, and its findings.

132 As we have previously advised parties, an important purpose of the Tribunal's independent audit report was to ensure that the Tribunal's requirement 'that members of the claimant community should only vote in favour of one recipient entity was met'.[255] We explained to parties in memorandum–directions dated 11 August 2020 and 7 September 2020, that claimant community members should carefully consider and vote for the recipient entity they think is best able to represent them. We also stated that those entitled through

254. Memorandum of counsel for the Crown, #2.943, para 3.3
255. Memorandum–directions of the presiding officer, #2.914, para 7

whakapapa to register with more than one governance entity would be able to do so, and accordingly receive the benefit of the Tribunal's remedies recommendations.[256] We note that *all* claimants and the Crown jointly submitted in November 2020 that the Tribunal would need to determine a process to ensure that this requirement had been met.[257]

133 Contrary to Ngā Uri o Tamanui's submissions, we did not consider that the three separate ratification processes were in competition with each other. As we said in our memorandum–directions in August 2020, Māori who whakapapa to more than one claimant community but who were only permitted to vote in favour of one governance entity, are still eligible to register with other ratified governance entities. We told parties that the voters' 'eligibility to benefit from any binding recommendation about the return of CFL land and any compensation that the Tribunal may make is not dependent on their vote but on their membership of the relevant group or groups'. Instead, parties, 'what the Tribunal seeks in the ratification process from the claimant community is an indication that they are satisfied with the representativeness and accountability of the proposed trustees and the proposed structure'.[258]

134 As we noted above, it was important that the ratification processes were not unduly rushed, and that the respective claimant communities were given sufficient notice, and sufficient opportunity to consult and discuss the governance entities proposed for each group. In the same memorandum–directions, we noted that the proposed ratification processes all included adequate notice periods of 14 days.[259] To ensure that all the requirements were able to be met without undue haste, the Tribunal accepted necessary extensions of Ngā Uri o Tamanui's and Te Whānau a Kai's ratification timetables.[260]

135 In arranging for an independent audit of the ratification processes, we also sought assurance that the returning officers' processes for validating the votes, tallying the totals, and reporting the results were robust. Audit New Zealand was limited in the conclusions it could reach in its retrospective review of controls applied by the returning officers.[261] However, it is significant that Audit New Zealand found only a small number of voters who did not have a match on the beneficiary register, or who appeared to have voted twice. This is evidence that the three reputable, experienced, and qualified returning officers who oversaw the three ratification processes had appropriate controls in place to validate votes and report the results. In our view, the Audit New Zealand report provides no basis for a different conclusion.

136 We also consider that the low number of voters who voted in favour of more than one ratification proposal is evidence that the claimant communities

256. Memorandum–directions of the panel, #2.849, paras 42–49; memorandum–directions of the presiding officer, 7 September 2020, #2.866
257. Joint memorandum of counsel, #2.893, para 3
258. Memorandum–directions of the panel, #2.849, para 53
259. Memorandum–directions of the panel, #2.849, para 101
260. Memorandum–directions of the panel, #2.849, paras 55–56
261. Final report on Mangatū voting process review, #2.939(a), p 10

understood the complexities created by the separate ratification processes and responded appropriately. The fears that some claimants expressed – that their community would be confused, and the results would be compromised – were not borne out in the results. We note that the proposed Te Whānau a Kai Trust and Ngā Uri o Tamanui Trust governance entities and trustees received greater levels of support than the Māhaki Trust's proposal to establish different entities on behalf of these groups. Accordingly, we are satisfied that these groups have not been significantly disadvantaged by the Māhaki Trust's ratification process beginning ahead of the other claimant groups or by the extension of its polling period. Furthermore, the small number of voters who voted in favour of more than one proposal supports our observation throughout this Inquiry that, while the claimant groups have shared whakapapa and history, they nevertheless represent distinct communities.

137 We agree with Crown counsel that the number of voters who voted in favour of more than one proposal does not materially change the levels of support shown in the results.[262] The Audit New Zealand report confirmed that there is substantial support for the proposed governance entities and their respective trustees to represent the claimants' interests in negotiations during the 90-day period, and receive any remedies on behalf of their beneficiaries upon the Tribunal's recommendation becoming final.

138 We note that the participation rate of each ratification process was as follows (to avoid confusion, we have relied on the figures provided in the Audit New Zealand report):

(a) The Māhaki Forest Settlement Trust: 34.4 per cent
(b) The Ngā Uri o Tamanui Trust: 26.3 per cent
(c) The Te Whānau a Kai Trust: 39 per cent

139 We consider that these participation rates reflect good engagement from the claimant communities. While the Crown provided some support and funding for the ratification processes, they were still conducted within a limited time period, and with limited resources.[263] We note that the independent returning officer for the Te Whānau a Kai Trust ratification process commented that the participation rate in that poll was above average for iwi voting processes.[264] In our view, this is also likely to be true for the Māhaki Trust and, to a lesser extent, for the Ngā Uri o Tamanui Trust. Furthermore, we would not consider it fair to compare these participation rates to other similar processes, such as local body elections, that have greater resources and substantial infrastructure to support public engagement.

140 It was clear to us that the claimant groups made great efforts in this context to reach and reconnect with their members. However, with beneficiary

262. Memorandum of counsel for the Crown, #2.943, para 3.3
263. The Crown made available up to $50,000 to each claimant group to support the development of a governance entity, and the ratification process for that entity: memorandum of counsel for the Crown, 15 November 2019, #2.774, para 5
264. 'Te Whānau-a-Kai Iwi Trust Post Settlement Governance Entity Ratification Poll', appendix to memorandum of counsel for Te Whānau a Kai, #2.896(a), p 6

populations widely scattered in different urban centres and other countries (particularly Australia), this would have been a substantial task for the claimants. We note that as a new entity, the Ngā Uri o Tamanui Trust faced a particular challenge in this respect.

141 It was not our expectation that all the registered beneficiaries would take part in the ratification process. Instead, the results reflect the participation of those active in each claimant community. It is to be expected that the active members are only a portion of those who might be registered. The overwhelming support of those active members provides us with further confidence in the positive results favouring the proposed governance entities and trustees. If there were serious concerns in the claimant communities, we would have expected this to be reflected in the 'no' votes.

142 Because of the significant levels of support received for each proposed governance entity, and the reasonable participation rates within the claimant communities, we determine that the Māhaki Forest Settlement Trust, the Ngā Uri o Tamanui Trust, and the Te Whānau a Kai Trust and the respective proposed trustees have been ratified by their claimant communities, and are appropriate governance entities to receive the benefit of the Tribunal's remedies recommendations.

What Share of the Forest Should Each Group Receive?

143 Following the ratification of the claimants' governance entities, there remain several outstanding practical and logistical issues relating to the return of CFL land and the distribution of benefits to the different groups. Our first task is to determine what allocation of redress Te Aitanga a Māhaki, Ngā Uri o Tamanui, and Te Whānau a Kai should each receive in our recommendations under section 8HB. We take into account the following:

(a) the tikanga of making separate allocations;
(b) the claimants' connection to Mangatū;
(c) the prejudice each claimant group has suffered; and
(d) the economic base required to restore each group.

144 In the sections below, we set out the allocations sought by the Māhaki Trust, Ngā Uri o Tamanui, and Te Whānau a Kai. We discuss the considerations listed above, and state our decision. Then, we must consider what terms and conditions should be placed on return of the land to the claimant community.

What allocations do the claimants seek?

145 The allocations sought by the claimants are set out in greater detail in chapter 2. We revisit them briefly below, before outlining the factors we take into consideration in determining allocation.

146 The allocation sought by the Māhaki Trust and Mangatū Incorporation was 100 per cent of the Mangatū CFL land, with the associated compensation and accumulated rentals. They submitted that:

(a) As part of the agreement between the Māhaki Trust and the Mangatū Incorporation, the Māhaki Trust would transfer the CFL land in Mangatū 1 to the Incorporation (the 1961 land), along with the accumulated rentals, NZUs, and $10 million of Schedule 1 compensation.[265]
(b) The Te Whānau a Kai entity established through the Māhaki Trust would receive a 20 per cent allocation of the value of the CFL land, and 20 per cent of the Schedule 1 compensation awarded.[266]
(c) The Ngā Uri o Tamanui entity established through the Māhaki Trust would receive 8 per cent of both land and Schedule 1 compensation (the CFL land transferred to Ngā Uri o Tamanui would be in the Mangatū 2 block).[267]

147 The allocation sought by the Ngā Uri o Tamanui Trust includes:
(a) The return of 2,304 hectares (5,693.3 acres) of the CFL land if the Tribunal recommends that Te Whānau a Kai are to receive an individual allocation. This amounts to an allocation to them of a 30 per cent interest, along with the associated compensation. In this allocation, Te Aitanga a Māhaki would receive a 40 per cent allocation and Te Whānau a Kai a 30 percent allocation.
(b) 3,455 hectares of the CFL land if the Tribunal does not recommend that Te Whānau a Kai receive an individual allocation. This amounts to a 45%/55% division between Ngā Uri o Tamanui and Te Aitanga a Māhaki respectively.'[268]

148 In closing submissions, Te Whānau a Kai sought 'a fair and appropriate portion of the Mangatū CFL lands,' recognising that other claimant groups are entitled (along with Te Whānau a Kai) to the return of some land.[269] However, during the iterative process Te Whānau a Kai made further submissions and

265. The Māhaki Trust and the Mangatū Incorporation signed a memorandum of understanding dated 6 May 2014, and a deed of undertaking dated 16 June 2017. These agreements set out how they will work to transfer the 1961 lands to the Incorporation with different levels of the Schedule 1 compensation, depending on what was awarded to the Trust. However, the resolutions and voting information provided to the Tribunal specified that the Incorporation would receive $10 million of Schedule 1 compensation: memorandum of counsel for Te Aitanga a Māhaki Trust and the Mangatū Incorporation, #2.828, para 43; 'Memorandum of Understanding of Te Aitanga a Māhaki Settlement Committee and the Proprietors of Mangatū Blocks Incorporation', evidence of William Stirling Te Aho, 28 August 2018, #P18(a)(iii)
266. The claimants sought this allocation of interests whether the land was returned in undivided shares, or whether the Tribunal ordered a division of the CFL land on the ground: memorandum of counsel for Te Aitanga a Māhaki Trust and the Mangatū Incorporation, #2.828, paras 27.1, 38
267. 'Te Aitanga a Māhaki voting form', appendix to memorandum of counsel for the Māhaki Trust, #2.844(a), p [2]; 'Power Point Presentation: Toward a United Māhaki Settlement', memorandum of counsel for Te Aitanga a Māhaki and the Mangatū Incorporation, #2.844(b), p 5
268. Memorandum of counsel for Ngāriki/Ngā Ariki Kaipūtahi, #2.824, para 33
269. Closing submissions for Te Whānau a Kai, #2.683, para 1.2

now seek a 90 per cent interest in the CFL land, along with all of the associated compensation and accumulated rentals.[270]

Tribunal analysis

149 In determining allocation, we have regard to a number of considerations. Te Aitanga a Māhaki, Ngā Uri o Tamanui, and Te Whānau a Kai have all suffered significant prejudice, including the loss of their autonomy and their land. As we have discussed throughout this report, the purpose of returning CFL land to Māori ownership is to restore the customary owners' tino rangatiratanga and mana whenua in the land (we discuss the tikanga of customary interests and mana whenua in Mangatū further in chapter 4, see paragraphs 37–52). It is also consistent with our restorative approach to remedies, that we recognise the customary owners of the Mangatū CFL land and ensure that their rights and interests are reflected in the Tribunal's recommendations under section 8HB(1)(a).

150 To determine what allocation of CFL land each group should receive, we must consider the redress appropriate to each group. We give weight in particular to their association with the Mangatū CFL land. We also consider the prejudice that is shared by all groups as a result of Crown Treaty breaches, the specific prejudice experienced by each group, and the economic base needed to restore each claimant group. We begin by considering the tikanga of making separate allocations to multiple claimant groups below.

The tikanga of making separate allocations

151 We considered the customary ownership in Mangatū in detail in chapter 4, and the nature of the overlapping kinship groups that have interests there. We saw how Wi Pere sought to accommodate these diverse interests by vesting the entire Mangatū 1 block in 12 trustees who represented the different interrelated groups, descendants of key tīpuna, who were included in the ownership list. We also saw how the process of determining relative interests through the Native Land Court, in accordance with the statutory processes of the time, damaged relationships within the community of owners. Those processes created lasting divisions amongst the claimant groups.

152 In this Inquiry, an ideal outcome would have been the return of the CFL land to the whole community of owners without making separate allocations to each claimant group. This outcome could have been achieved by the claimants reaching agreement during mediation on the manner in which the land would be returned to their collective ownership. However, despite the parties' commendable efforts to achieve agreement, this did not prove possible. Ultimately, all groups requested that the Tribunal make separate allocations to them. As a result of the lack of agreement between the parties on these important issues, we are required by the statute to make a decision on the

270. Memorandum of counsel for Te Whānau a Kai, #2.826, para 30

respective allocations. This accords with the directions of the Court of Appeal that we 'determine relativities and equity between claimants'.[271]

153 In our 2018 hearings, historian Dr Grant Young asserted during cross-examination that any determination of allocation the Tribunal makes will be inconsistent with the claimants' tikanga.[272] We note that no claimant witnesses or counsel supported this argument; nor do we agree. During the iterative process, we observed how the discussions between groups allowed the claimants to clarify their positions; they arrived at a point where their clear preference was for separate allocations in the returned land.[273] This is the outcome they consider will best provide for the exercise by each group of their tino rangatiratanga. It would be inappropriate in the circumstances for the Tribunal to impose an outcome that does not differentiate between the claimant groups, when they have so strongly expressed their desire for separate allocations of land and compensation.

154 We note that following the mediation, the Māhaki Trust and the Ngā Uri o Tamanui Trust both sought Tribunal orders that the land be partitioned on the ground and separate portions awarded to each group. In our view, this is a separate matter, aside from the allocation the groups should receive. A division on the ground raises specific issues. The parties' submissions on that matter are addressed later (see paragraphs 174–179). In the next section, we consider the claimants' respective connections to Mangatū and how their interests should be recognised in the allocations they receive.

The claimants' connection to Mangatū

155 While we have established that each of the claimant groups in this Inquiry have rights in Mangatū as customary owners, the nature of these rights varies between groups. The well-established customary interests of Ngāriki/Ngā Ariki Kaipūtahi and the Te Aitanga a Māhaki hapū, Ngāti Wahia, Ngāriki, Ngāi Tamatea, Te Whānau a Taupara, and the connections of Ngāti Matepu in the Mangatū CFL land, have been reviewed in detail (see chapter 4, paragraphs 52–62).[274] In chapter 5, we expressed our view that it is particularly important that these hapū are returned land in Mangatū, because it was their connection with the CFL land which was severed by the Crown's Treaty breaches. The nature of Te Whānau a Kai's customary interests in the Mangatū lands through their Ngāriki whakapapa is also clear.

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271. *Attorney-General v Haronga* [2017] 2 NZLR 394 (CA), para 70
272. Transcript for hearing week two, #4.33, pp 239–241
273. Memorandum of counsel for Ngā Uri o Tamanui, #2.824, para 28; memorandum of counsel for Te Aitanga a Māhaki and the Mangatū Incorporation, #2.828, para 4; memorandum of counsel for Te Aitanga a Māhaki and the Mangatū Incorporation, 19 August 2020, #2.855, para 13
274. Waitangi Tribunal, *Turanga Tangata, Turanga Whenua: The Report on the Turanganui a Kiwa Claims*, 2 vols (Wellington: Legislation Direct, 2004), vol 1, pp 23–27; Merata Kawharu, 'Te Mana Whenua o Te Aitanga a Māhaki', 2000, #A25, pp 183–384; Ngāti Matepu claimant Tony Tapp gave evidence concerning Te Rangiwhakataetaea, and his son Wi Haronga's occupation and exercise of mana in Mangatū: Evidence of Anthony Tapp, 28 May 2018, #P27, paras 18–23

156 As we have said, Te Aitanga a Māhaki, Ngā Uri o Tamanui and Te Whānau a Kai all have interests in Mangatū 1. In recognition of the customary interests of Ngāti Wahia, Ngāriki, Ngāi Tamatea, Te Whānau a Taupara, and Ngāti Matepu in the Mangatū lands, we conclude that the Māhaki Forest Settlement Trust should receive the largest allocation in the returned Mangatū CFL land. In coming to this decision, we have taken account not only of the interests of these hapū in Mangatū 1, but also those of Ngāi Tamatea in Mangatū 2, whose ownership was uncontested in the Native Land Court.

157 We also consider the Ngā Uri o Tamanui Trust should receive a sizeable allocation in recognition of their status as customary owners in Mangatū, and their lost papakāinga land (see chapter 5, paragraphs 54–65).

158 Te Whānau a Kai's allocation is smaller than those of the other two groups, recognising that their most important customary lands were not in Mangatū (as we discussed in chapter 4). However, the land and resources in Mangatū would have been increasingly important to Te Whānau a Kai as their other Tūranga lands were lost as a consequence of Crown Treaty breaches affecting those lands (see chapter 5, paragraphs 100–101, 126, 141–142).

159 We do not consider it necessary to make any additional provision for the Mangatū Incorporation. Its shareholders will benefit from the allocations that the Māhaki Forest Settlement Trust, the Ngā Uri o Tamanui Trust, and Te Whānau a Kai Trust receive on behalf of the customary groups. Submissions for the Māhaki Trust included reference to provisions in the Māhaki Forest Settlement Trust's constitution for the return of some of the Mangatū CFL land to the Incorporation.[275] We are uncertain as to how the Māhaki Forest Settlement Trust intends to carry out the agreement between the Māhaki Trust and the Incorporation. Nevertheless, the relationship between the Māhaki Trust and the Incorporation is sufficiently strong that we expect a fair and equitable arrangement will be made between them. The representative for the Māhaki Trust emphasised the whakatauki 'i riro whenua atu, me hoki whenua mai', underscoring the tikanga that should guide the Māhaki Forest Settlement Trust in negotiating with the Incorporation.[276] We are satisfied that by returning the land to the customary owners with the allocations outlined below, we are providing for the Incorporation's shareholders who suffered prejudice as a result of the Treaty breach whereby the Crown acquired Mangatū 1 land in 1961.

275. Closing submissions for the Māhaki Trust and the Mangatū Incorporation, #2.682, para 89.1; memorandum of counsel for the Māhaki Trust and the Mangatū Incorporation, #2.828, para 39.4

276. 'As land was taken, so land should be given back': This whakatauki is attributed to the second Māori King, Tūkāroto Pōtatau Matutaera Te Wherowhero: Closing submissions for Te Aitanga a Māhaki and the Mangatū Incorporation, #2.862, para 89.1; memorandum of counsel for Te Rangiwhakataetaea–Wi Haronga–Ngāti Matepu, 6 March 2020, #2.801, para 9

The prejudice each claimant group has suffered

160 Another important element that we take into account in determining allocation is the prejudice that each group has suffered (see chapter 5, for our full analysis). Our claim-specific findings on prejudice include that:

- Te Aitanga a Māhaki, and its constituent hapū endured not only the alienation of the greater part of their tribal estate by the end of the twentieth century, but also the fragmentation of much of what remained into small, uneconomic and/or inaccessible blocks. The alienation of Ngāi Tamatea land in Mangatū 2 through private purchase is an example of how the claimants lost land as a result of the Crown's imposition of its native land regime, with devastating consequences for the hapū. This land loss relates specifically to the CFL land in the district. Another particular and specific loss related to the CFL land was the Crown's acquisition of 8,522 acres of land in Mangatū 1 from the Mangatū Incorporation for afforestation purposes in breach of the Treaty of Waitangi.[277] This loss was a significant source of spiritual, cultural, and economic prejudice for the owners, who had only just resumed control of Mangatū 1 in 1947.
- Ngā Uri o Tamanui suffered the reduction of their shares in Mangatū 1 and the diminution of their mana as a result of the imposition and operation of the Crown's native land regime. The prejudice flowing from this Treaty breach was made worse by a Crown decision to allow only Te Whānau a Taupara to reargue their case in Mangatū 1 in the Native Land Court. As a result of these Treaty breaches, Ngā Uri o Tamanui have lost the ability to exercise their full customary rights within their core rohe in Mangatū. The loss of the ability to reside on the land remains a significant grievance for Ngā Uri o Tamanui.
- Te Whānau a Kai were deprived of their richest resource in Tūranga following the Crown's confiscation of their Patutahi lands. Due to this displacement, Te Whānau a Kai have faced an ongoing struggle to maintain their autonomy and independent identity. Te Whānau a Kai also sustained significant losses during the period that the East Coast Commissioner controlled their lands. The alienations of parts of the Tahora 2C2 and Tahora 2C3 blocks, at times in very dubious circumstances, were particularly serious.[278] Te Whānau a Kai were therefore more dependent on their interests in Mangatū 1 and suffered prejudice during extensive periods, when the land was controlled by the East Coast Commissioner, and as a result of the Commissioner's actions, and then again when the Crown acquired land in 1961.

161 Some of these elements of Crown Treaty breach and prejudice directly concern the Mangatū lands. For instance, Ngāi Tamatea's losses in Mangatū 2, and Ngāriki/Ngā Ariki Kaipūtahi's claim concerning Mangatū 1 reflect these claimants' close customary connection with the land. All of the claimants

277. Waitangi Tribunal, *Turanga Tangata, Turanga Whenua*, vol 2, pp 719–721, 724;
278. These blocks were included in both Tūranga and Te Urewera Inquiry Districts.

with interests in Mangatū 1 suffered cultural, spiritual, and economic prejudice during the period when the block was administered by the East Coast Commissioner. Furthermore, the Te Aitanga a Māhaki and Mangatū Incorporation's claim concerning the Crown's 1961 acquisition of land in Mangatū 1 reflects the customary interests of the Incorporation's shareholders, who belong to the Te Aitanga a Māhaki hapū, Ngāti Wahia, Ngāriki, and Te Whānau a Taupara, and to Ngāriki/Ngā Ariki Kaipūtahi. Members of Te Whānau a Kai with interests in Mangatū 1 were also affected.

162 While Te Whānau a Kai's most important land losses are outside the Mangatū CFL lands, they involve egregious Crown breaches of Article 2 of the Treaty. The Crown's confiscation of their lands at Patutahi is in effect a raupatu claim, for which Te Whānau a Kai have never been compensated. This loss, and the sale of their Tahora 2C lands by the East Coast Commissioner without their consent, are significant grievances for Te Whānau a Kai. In our view, the severity of the Crown's breaches and their impact on Te Whānau a Kai should also be recognised in the allocation they receive.

The economic base required to restore each group

163 We must also consider the economic base required to restore each group. Two factors informing this consideration are population size and the present circumstances of each group. However, the evidence we received concerning these two factors was not as robust as we would have liked. For instance, the population data provided on behalf of the Crown by Lilian Anderson, then the Deputy Secretary for Crown/Māori relations at the Ministry of Justice, used the 1949 electoral roll to provide figures for Ngāriki/Ngā Ariki Kaipūtahi and Te Whānau a Kai populations.[279] In addition, the number of people registered with each governance entity is an imperfect indicator of population size. It is not lost on us that one of the reasons why it is difficult for these claimant groups to create a comprehensive register of their members is the underdevelopment of their tribal infrastructure and economic base, referred to in the evidence of Professor Murton, and the disconnection felt by some of their members living outside of their rohe (we discuss the socio-economic prejudice the claimants suffered as a result of Crown Treaty breaches in chapter 5, paragraphs 146–173).

164 As could be expected, the number of registrants increased for each group during their ratification of the new governance entities. We expect that their registers will continue to increase following this Inquiry as the benefits of redress become available. Furthermore, the register information we received during the iterative process only represents the number of eligible voters in each group's population. It does not include those under 18 years old. The governance entities will not only be concerned with assisting the present generation, but will wish to undertake education, health, and welfare initiatives

279. Evidence of Lilian Anderson, 30 July 2018, #P29, p 11

for those who come after them. The following figures are thus only indicative of each group's size:

- 3,810 persons were registered with the Māhaki Trust as eligible voters as at 31 October 2020.[280]
- 2,195 persons were registered with the Te Whānau a Kai Trust as at 27 November 2020. However, only 1,429 of these registrants have updated contact details and were issued voting packs during the ratification process.[281]
- 1,677 persons were registered with the Ngā Uri o Tamanui Trust as at 26 November 2020.[282]

165 Those who affiliate primarily to Te Aitanga a Māhaki represent the largest group. The registers provided by the claimants show that Te Whānau a Kai have the second largest beneficiary population, with slightly over half the number of Te Aitānga a Māhaki's beneficiaries, while Ngā Uri o Tamanui currently have slightly less than half the number of beneficiaries as the Māhaki Trust. The economic base required to restore each group should reflect their size, and be sufficient 'to secure livelihoods for the affected people'.[283]

166 In our view, Te Whānau a Kai and Ngā Uri o Tamanui will face particular challenges following the return of the CFL land, including the need to support both the management of their governance entities and the equitable distribution of the benefits to their beneficiaries. Then-trustee for Te Runanganui o Ngā Ariki Kaipūtahi, Robert Akuhata, highlighted in his evidence that the Crown Forestry Rental Trust found in 2007 that annual operating costs for a post-settlement governance entity ranged between $500,000 and $1.5 million. Mr Akuhata told us that the costs for a group the size of Ngā Ariki Kaipūtahi would be at the lower end of that scale, but that these figures would have substantially increased in the time since the Crown Forestry Rental Trust report.[284] In our view, while the Ngā Uri o Tamanui Trust and Te Whānau a Kai Trust will not have to provide for as large a population as the Māhaki Forest Settlement Trust, they will still require a sizeable economic base to meet the costs of operating, to make meaningful investments in their communities' welfare, and to grow their resource base.

280. The representative for the Māhaki Trust informed the Tribunal that the number of registrants for Te Aitanga a Māhaki was 3,810, and that the Māhaki Trust had registered 756 as Te Whānau a Kai, and 267 as Ngā Uri o Tamanui. Their representative did not specify whether these names represented additional registrants. However, an examination of their registers confirmed that the names included on the Te Whānau a Kai and Ngā Uri o Tamanui register were also included on the main Te Aitanga a Māhaki list: memorandum of counsel for the Māhaki Trust, #2.894, para 5
281. Memorandum of counsel for Te Whānau a Kai, #2.896, para 4(d)
282. Confidential updated membership register for Ngā Uri o Tamanui supplied by Electionz, 3 February 2021, #P73
283. Waitangi Tribunal, *Muriwhenua Lands Report*, p 406
284. Evidence of Robert Akuhata, 28 May 2018, #P19, para 11

Tribunal determination

167 We have considered the connection between the people and the land; the nature and extent of the prejudice suffered by Te Aitanga a Māhaki, Ngā Uri o Tamanui, and Te Whānau a Kai; and the economic base required by each group. We summarise our conclusions as follows:

- Te Aitanga a Māhaki's losses – including Mangatū 2, the loss of control of Mangatū 1 for two generations under the East Coast Commissioner, and the Crown's acquisition of the 1961 land – represent significant land losses in the Mangatū CFL land.
- Te Aitanga a Māhaki require the largest economic base to remedy the prejudice suffered by their many hapū.
- Ngā Uri o Tamanui's core rohe is in Mangatū 1. Their principal claim concerns the reduction of their interests in the land as a result of the operation of the Crown's native land regime, and specific Crown intervention in the relative interests process.
- Ngā Uri o Tamanui and Te Whānau a Kai members, as shareholders in the Mangatū Incorporation, also suffered prejudice from the loss of control of Mangatū 1 for two generations under the East Coast Commissioner, and from the loss of the 1961 land in Mangatū 1. Other Crown Treaty breaches have left them virtually landless in this Inquiry district.

168 Inevitably, the outcome of our decision on allocation will not satisfy all claimants. There is a strong argument for each claimant group to receive a large portion of the returned CFL land. All of them have multiple claims concerning multiple Crown Treaty breaches that relate to the CFL land. Full compensation in terms of return of CFL land for the prejudice they have suffered from those many Treaty breaches is simply not available. Therefore, the only option open to us is to allocate each group a portion of the CFL land. The Tribunal has determined an allocation we consider to be fair and just to each party; which responds appropriately to the evidence we have heard, and the prejudice we have found each of the claimant communities has suffered; and which reflects the practical application of the Treaty.

169 Our conclusion on allocation is that Te Aitanga a Māhaki, Ngā Uri o Tamanui and Te Whānau a Kai should receive the following percentage interest in the Mangatū CFL land:

- For the Māhaki Forest Settlement Trust, a 68 per cent interest.
- For the Ngā Uri o Tamanui Trust, an 18 per cent interest.
- For the Te Whānau a Kai Trust, a 14 per cent interest.

170 The cultural and spiritual prejudice suffered by each of these groups, and the importance of recognising their mana whenua and restoring their tino rangatiratanga in the CFL land together provide a more than sufficient basis to return the whole of that land to the customary owners of the Mangatū 1 and 2 blocks. In addition, the claimants suffered lasting economic prejudice for which a remedy is also required.

171 In the next section, we consider how the Mangatū CFL land should be returned to the claimants; whether they should receive their allocations in the land undivided as tenants in common, or whether the Tribunal should order a division to be made on the ground. We also consider what terms and conditions should accompany the binding recommendation.

Should the Tribunal Return the CFL Land Divided or Undivided?

172 Having identified the ratified governance entities and their respective allocations, we now address practical and legal issues arising from returning the land to multiple separate entities. Throughout the iterative process, the parties made helpful submissions on whether the land should be returned to the claimants undivided as tenants in common, with shares corresponding to the allocations made by the Tribunal, or by means of a division on the ground. These submissions raised both jurisdictional and practical issues associated with the return of CFL land to multiple governance entities.

173 In the following sections, we address the parties' submissions and discuss the Tribunal's jurisdiction to return CFL land undivided or divided to multiple Māori owners. We then state our decision on how the land should be returned to the claimants in this Inquiry.

The parties' positions on whether the CFL land should be returned divided or undivided

174 In submissions filed in June and July 2020, counsel for the Māhaki Trust, the Mangatū Incorporation, Ngā Uri o Tamanui, and Te Whānau a Kai highlighted issues associated with returning the CFL land to the three groups as tenants in common in undivided shares. Counsel for Ngā Uri o Tamanui contended that the statutory scheme did not allow for the return of land undivided.[285] They submitted that any order to do so 'would mean that claimants would not have available to them some of the options under the Schedule 1 compensation because some of them are calculated explicitly on the basis that there is a division of estates on the ground'.[286]

175 The Māhaki Trust and Te Whānau a Kai both accepted that the Tribunal had the power to return the CFL land to the claimants as tenants in common, but observed that, in that situation, the claimant groups would be required to cooperate and function as co-owners.[287] In the absence of any prior agreement among the groups to this effect, the Māhaki Trust submitted 'it would not be responsible for the Tribunal to return the CFL land in this way

285. Memorandum of counsel for Ngā Uri o Tamanui, #2.824, para 23
286. Memorandum of counsel for Ngā Uri o Tamanui, #2.824, para 26
287. Memorandum of counsel for Te Whānau a Kai, #2.826, paras 10, 15; memorandum of counsel for the Māhaki Trust and the Mangatū Incorporation, #2.828, paras 19

without putting a CRE (collective recipient entity) in place that enables effective and efficient governance of a complex commercial/protective forestry operation.'[288] However, if the Tribunal did decide to return the CFL land undivided, counsel for the Māhaki Trust submitted 'the Tribunal will need to impose a CRE and determine its form, because the claimant groups cannot reach agreement on that.'[289] To assist the Tribunal, the Māhaki Trust and the Mangatū Incorporation provided a draft trust deed for a collective governance entity.[290]

176 The Māhaki Trust and the Mangatū Incorporation, and Ngā Uri o Tamanui requested that the Tribunal order a division of the land on the ground. The Māhaki Trust submitted that 'it is plain that the iwi/hapū groups want to go their own separate ways and to exercise their tino rangatiratanga/mana motuhake.'[291] In the absence of agreement on a collective governance entity, Ngā Uri o Tamanui also sought 'a distinct part of the land' to be returned to them.[292]

177 In contrast, counsel for Te Whānau a Kai submitted that the Tribunal should return the land undivided and impose a limited liability partnership (LLP) between the parties. Counsel argued that 'the major benefit of utilising an LLP is that the assets, any compensation or rent accruals can be provided directly to the claimant groups' respective post-settlement governance entities.'[293] They further proposed that an agreement would set out principles for how the partners should run the business. The structure could be additionally responsible for the ongoing management of the forest land.[294]

178 The Crown responded to the claimants' submissions by stating that 'each option for return of the Crown forest licensed land is available to the Tribunal – allocate all of the land to be held collectively by different entities or return different parts of the land to different recipient entities'.[295] The Crown recognised that the Māhaki Trust, the Mangatū Incorporation, and Ngā Uri o Tamanui had indicated that they did not want to share the land with other claimants. However, they submitted that if the Tribunal determined it appropriate to return the land undivided, 'then the Crown suggests the Tribunal can structure this appropriately with terms and conditions'.[296]

179 The Crown raised several significant issues that it said would arise if the Tribunal decided to return the CFL land divided between the different groups. It submitted that the Tribunal would have to factor in the variation in

288. Memorandum of counsel for the Māhaki Trust and the Mangatū Incorporation, #2.828, para 20
289. Memorandum of counsel for the Māhaki Trust and the Mangatū Incorporation, #2.828, para 26
290. 'Trust deed for collective recipient entity', appendix to memorandum of counsel for the Māhaki Trust and the Mangatū Incorporation, 2 July 2020, #2.828(a), p 2
291. Memorandum of counsel for the Māhaki Trust and the Mangatū Incorporation, #2.828, para 24
292. Memorandum of counsel for Ngā Uri o Tamanui, 30 June 2020, #2.824, para 28
293. Memorandum of counsel for Te Whānau a Kai, #2.826, para 22
294. Memorandum of counsel for Te Whānau a Kai, #2.826, para 22
295. Memorandum of counsel for the Crown, 14 July 2020, #2.832, para 4
296. Memorandum of counsel for the Crown, #2.832, para 32

value across different parts of the CFL land. They noted some of the CFL land is unproductive, and that different areas within the potentially productive area (PPA) would be unplanted as a result of normal forestry operations.[297] Furthermore, variation in the age and species of the forest would create complex variation for the valuation of the forest land, which the Tribunal would need to consider when recommending 'which parts of the land are to be transferred to which recipients'.[298] The Crown pointed to Mr Marren's evidence that different topographical features of the land, such as large gullies and eroded areas, also affect the value of forest land depending on the age-class and species growing in different portions of a single forest.[299]

Tribunal analysis and decision on whether to return the CFL land divided or undivided

180 As we noted, counsel for Ngā Uri o Tamanui's position was that section 8HB does not allow for the return of CFL land in undivided shares to multiple parties as tenants in common. They submitted that the statutory compensation that accompanies the returned CFL land is calculated 'explicitly on the basis that there is a division on the ground'.[300] In particular, they point to 'the market value' method for calculating compensation under clause 3(a) of Schedule 1, and to 'the stumpage method' under clause 3(b) (for a full discussion of the statutory scheme governing the monetary compensation under Schedule 1 of the CFAA, see chapter 7). They argued that the scheme requires that 'a particular area on the ground' be defined for the purposes of defining the market value of the trees, or their stumpage, which would not be possible with multiple tenants in common.[301]

181 We reject this argument. There is nothing in section 8HB of the TOWA which suggests that the Tribunal *must* subdivide the land and award separate parcels to multiple groups. Counsel for Ngā Uri o Tamanui instead rely for this submission on clauses 3(a) and 3(b) of Schedule 1 of the CFAA. In short, these clauses deal with the value of the forest crop: 3(a) calculates the market value of the trees, while 3(b) calculates the quarterly stumpage payments received by those to whom the CFL land is returned. Mr Marren defined stumpage for the Tribunal as:

> The value of standing tree[s]. Usually expressed as the value per cubic metre (or tonne of logs by quality) in the tree. Generally derived from the sale value of logs at the point of sale by deduction of all costs incurred in getting the tree off the stump to that point of sale.[302]

297. Memorandum of counsel for the Crown, #2.832, paras 42–44
298. Memorandum of counsel for the Crown, #2.832, para 41
299. Memorandum of counsel for the Crown, #2.832, para 46; transcript for hearing week three, #4.34, p 56
300. Memorandum of counsel for Ngā Uri o Tamanui, #2.824, paras 26–27
301. Memorandum of counsel for Ngā Uri o Tamanui, #2.824, paras 26–27
302. Evidence of Michael Marren, 23 November 2018, #P32(c), para 74

182 It is not clear from Ngā Uri o Tamanui's submissions why the recipients of an undivided area of CFL land under section 8HB would be prevented from electing either of these options. If the Tribunal ordered a division of the land on the ground, each group would have to be returned an area of CFL land that has the same value as the percentage share of the whole they were allocated. As the Crown submitted, the Tribunal would refer to evidence concerning the variation in value across the CFL land when recommending which areas were to be returned to the different groups.[303] The separate parcels of land identified for return to each group would have to account for differences in the productive value of forest so that each group received the value the Tribunal had allocated to them. In that case, the basis for calculating 'the market value' or 'the market stumpage' would derive from the percentage interest each group was allocated, whether the land was divided or undivided. We see no reason why an arithmetical calculation of Ngā Uri o Tamanui's share in the market value of the trees or of the stumpage of the whole forest would not fulfil the requirements of either clause 3(a) or clause 3(b).

183 Similarly, compensation under clause 3(c), 'the net proceeds' method, is calculated using the original sale value of the forest, which is adjusted to maintain its 'real value' over time.[304] Like 'the market value' and 'the market stumpage' method, 'the net proceeds' method also involves an averaging exercise because the Mangatū CFL was sold as part of a job lot of forests, where the price for each forest in the lot was not given.[305] The clause 3(c) method of calculating compensation is not affected by whether the forest is returned undivided or divided. For these reasons, we do not accept Ngā Uri o Tamanui's submission that the scheme does not allow the Tribunal to recommend the return of CFL land undivided to tenants in common.

184 While the statute does not limit the Tribunal's power to return the land undivided or with a division on the ground, it was the clear preference of both the Māhaki Trust and Ngā Uri o Tamanui that the Tribunal return separate parcels of the Mangatū CFL land to each group. However, there are clearly significant difficulties with ordering a division on the ground for separate parcels of land. Counsel for Te Whānau a Kai expressed the view that 'such an exercise is likely to be costly and time-consuming and difficult to achieve fairly'.[306] We agree.

185 In order for the Tribunal to recommend the return of separate parcels of land, we would need to be certain of the size and value of the parcels to be allocated to each group. To make these determinations we would require

303. Memorandum of counsel for the Crown, #2.832, para 41
304. If the Tribunal determines, a further rate of return is applied to the proceeds after a period of four years or longer. This return is equivalent to the return on 1-year New Zealand Government stock plus an additional 4 per cent per annum: Crown Forest Assets Act, Schedule 1, Clause 5(a)–(b)
305. Michael Marren estimated that the price the Crown received for the Mangatū lands specifically was approximately $23 million in 1992: evidence of Michael Marren, #P32, p 19
306. Memorandum of counsel for Te Whānau a Kai, #2.826, para 27

up-to-date survey information, and updated evidence on the productive and unproductive areas within the CFL land. Only then could we be assured that each group would receive the value of the percentage allocation the Tribunal has determined for them. We have been given no evidence suggesting that the Mangatū CFL land has been surveyed in recent years. In the absence of recent information, undertaking a new survey of the CFL land could pose further practical difficulties at significant cost, and would likely take many months, if not years, to resolve.[307]

186 Even if it was possible to produce the necessary evidence in a timely manner, the forestry experts gave convincing evidence that the topography of the Mangatū land would create complications for any efforts to create a workable partition for the proprietors. Further consideration would also need to be given to their location relative to accessways and any new boundaries established through the Tribunal's recommendation. Finally, a division on the ground would complicate any arrangement between the claimants and the licensee.[308] Dr McEwen's evidence was that apart from the unproductive parts of the land (including the huge Mangatū and Tarndale slips), which might be handed over by the licensee reasonably quickly, the crop rotation cycle suggests that land will be continuously released from the licence over the next 23–38 years. This estimate is based on his evidence that the harvest of the second rotation of forest crop is likely to begin between 2020 and 2026, and continue until between 2043 and 2049.[309] While it might be possible to address all these problems eventually, doing so would require significant work and time.

187 In order to minimise the time needed to partition the CFL land on the ground through a survey of the different parcels to be returned to each group, the Māhaki Trust suggested that the Tribunal could broadly indicate the different areas each group was to receive and then require the Crown to complete a survey. However, because of the uncertainty associated with valuations of PPA, and with the need to survey the whole of the CFL land, it is likely that further issues would arise between the groups over which parcels of land each group would receive. The Tribunal would be unable to resolve such issues or disputes over the surveyed areas. As noted, once the Tribunal has issued the interim recommendations, it is *functus officio*, except for the very specific circumstances set out in the statute. The claimants and the Crown all agreed,

307. For example, we have no evidence as to the state of the old survey pegs; whether the standing forest will interfere with the surveyor's ability to take sightings and measurements; whether the steep nature of the topography will impede the surveyor's work; and what changes erosion and flooding may have made to the size and configuration of the existing blocks, amongst other things.

308. Mr Marren observed that dividing the forest on the ground meant the licensee would have to deal with multiple licensors. It was his evidence that such a division would introduce further costs associated with operation and rental reviews: transcript for hearing week three, #4.34, p 58

309. Evidence of Andrew McEwen, #K5, para 53.5

in relation to the ratification of their governance entities, that the Tribunal should ensure that its interim recommendations can become final and effective immediately following the statutory 90-day period. It follows that any proposal for division of the land on the ground should also be capable of finalisation by that time. We consider that such an outcome, as a practical matter, is simply not possible.

188 Counsel for Ngā Uri o Tamanui proposed that these issues could be addressed 'on the basis of expert evidence at a further hearing so that the Tribunal can consider options for division'.[310] However, the principal evidential hearings in this Inquiry closed in December 2018, although we held a further joint hearing with the Wairarapa Remedies Tribunal in July 2019 to consider further economic evidence. Any further evidential hearings would delay even more the redress we have determined is due to those who suffered the Crown's Treaty breaches, and their descendants. Even if this additional work was undertaken, it would not necessarily make partition of the land on the ground more amenable to an equitable and satisfactory result for all groups. We do not consider it appropriate to re-open the Inquiry to receive further evidence at this late stage.

189 Furthermore, while the Māhaki Trust, the Mangatū Incorporation, and Ngā Uri o Tamanui seek a division on the ground, the areas they are seeking overlap. In particular, the Māhaki Trust seeks to transfer the 1961 lands to the Incorporation.[311] This land accounts for all CFL land in Mangatū 1. Ngā Uri o Tamanui also seek the return of interests in Mangatū 1, which they have reminded us are the 'core lands within the NUOT customary rohe'.[312] For these reasons, any division of land on the ground will inevitably produce a result that will be undesirable for at least one of these parties (as well as for Te Whānau a Kai, who oppose any division on the ground).

190 We remind ourselves that the Supreme Court directed us to proceed with urgency in adjudicating the first remedies applications before us, that of the Mangatū Incorporation. There are now multiple applications in relation to which comprehensive evidence has been heard. Because of the expanding nature of what has been at issue and the steps required by the iterative process, the time taken to complete this Inquiry has been longer than any of the participants could have anticipated. We now wish to delay no further. It is incumbent on the Tribunal to avoid prolonging the Inquiry unduly. The claimant communities ought finally to receive the redress they have sought for so long, and which is required to compensate for or remove the prejudice they have all experienced, and continue to experience.

310. Memorandum of counsel for Ngāriki/Ngā Ariki Kaipūtahi, #2.824, para 35
311. 'Memorandum of understanding of Te Aitanga a Māhaki Settlement Committee and the Proprietors of Mangatū Blocks Incorporation', appendix to evidence of William Stirling Te Aho, #P18(a)(iii)
312. Memorandum of counsel for Ngāriki/Ngā Ariki Kaipūtahi, #2.824, para 51

191 We consider that returning separate parcels of land to the claimant groups presents considerable difficulties. However, while the return of land undivided to the Māhaki Forest Settlement Trust, the Ngā Uri o Tamanui Trust, and Te Whānau a Kai Trust and the creation of a tenancy in common removes many of the problems referred to above, it also comes with other challenges: we turn to these now.

192 Both the Māhaki Trust and the Mangatū Incorporation argue that 'a tenancy in common is too difficult to manage in the context of a complex forestry operation.'[313] They submitted that 'there was 'a risk of complete paralysis without an effective governance mechanism.'[314] Ngā Uri o Tamanui's rationale also concerns their desire to go their own way, and they submitted that the Tribunal should 'proceed on the basis that claimant groups have not reached agreement and cannot do so.'[315] We also note their submission that 'the Tribunal needs to be reasonably assured that the part of the land to be returned can make a reasonable economic return.'[316]

193 It is our assessment that the positions taken by the Māhaki Trust, the Mangatū Incorporation, and Ngā Uri o Tamanui fail to take sufficient account of the challenges, both legal and practical, associated with trying to divide the land in the first place, and its consequences for forest management. We are strongly influenced by the evidence given by John Ruru, an acknowledged forestry expert and named claimant of Te Aitanga a Māhaki, about the necessity of dealing with this forest in the context of forestry management across the whole East Coast.[317] We think it inevitable that the groups will need to deal with each other, even if they are given separate blocks of land. Sooner or later, they will have to consider how to collectively manage forestry operations as the land is incrementally returned by the licensee.[318]

194 Moreover, we have seen that the claimant groups have been able to work together from time to time during this Inquiry. For instance, the two Ngāriki/Ngā Ariki Kaipūtahi claimant groups agreed to set up a new entity to move forward as a united grouping known as Ngā Uri o Tamanui Trust.[319] Similarly, we noted the inclusion of Te Whānau a Kai's position statement in the Māhaki Trust's voting information sent to beneficiaries and presented

313. Memorandum of counsel for Te Aitanga a Māhaki and the Mangatū Incorporation, #2.828, para 22
314. Memorandum of counsel for Te Aitanga a Māhaki and the Mangatū Incorporation, #2.828, para 22
315. Memorandum of counsel for Ngāriki/Ngā Ariki Kaipūtahi, #2.824, para 28
316. Memorandum of counsel for Ngāriki/Ngā Ariki Kaipūtahi, #2.824, para 56
317. Mr Ruru passed away in July 2019, before the conclusion of these proceedings.
318. Dr Andrew McEwen's evidence was that apart from the unproductive parts of the land, which might be handed over by the licensee reasonably quickly, the crop rotation cycle suggests that land will be continuously released from the licence over the next 23–38 years. This estimate is based on his evidence that the harvest of the second rotation of forest crop is likely to begin between 2020 and 2026, and continue until between 2043 and 2049: evidence of Andrew McEwen, #K5, para 53.5.
319. Joint memorandum of counsel, #2.765, para 3

at the information hui.[320] Te Whānau a Kai, the Mangatū Incorporation, the Māhaki Trust, and Ngāti Matepu have also been able to agree on terms and conditions that they propose should accompany the Tribunal's recommendations (discussed below).[321]

195 For all these reasons, we have determined that the Tribunal should return the CFL land undivided. This will provide the claimants with the best opportunity to benefit from the Tribunal's recommendations in a timely manner. It will ensure the CFL land can be returned to the governance entities in a much shorter timeframe. As soon as the Tribunal's recommendations become final, the governance entities will be in a position to proceed with the necessary negotiations between co-owners and with the licensee, with such expert advice as they may require. They will not be immediately burdened by the complications of survey and valuations, both of which would be required to partition the land. Furthermore, the claimants will have ample opportunity themselves to pursue the partition of the land into separate parcels after receiving the land, meeting the immediate demands of managing the land, and negotiating with the Crown and the licensee. They will be able to confer amongst themselves and take steps to achieve that outcome, or any other which they consider necessary or desirable.

196 Accordingly, our decision is that the land is to be returned undivided with each claimant group's interests in the land corresponding to their respective percentage interests as we determined at paragraph 169. Having determined that the CFL land should be returned to Māori ownership undivided, we now turn to the terms and conditions we consider appropriate to protect the claimants' interests as tenants in common.

What Terms and Conditions Are Appropriate to Accompany the Return of the CFL Land?

197 Terms and conditions are an important feature of the statutory scheme that enable the Tribunal to carry out the purpose of the 1989 Forests Agreement: 'the transfer of [CFL] land to Māori ownership and payment by the Crown to Māori of compensation in the event of successful claims'.[322] In circumstances where there are multiple competing claimant groups with claims that relate to the CFL land, terms and conditions allow the Tribunal to do what is fair and just between the parties. In this Inquiry, the claimants have taken mutually exclusive positions on how the land should be returned, and what type of ownership or governance arrangements flow from that return. The Court of Appeal commented that the Tribunal is the appropriate body to carry out the

320. Memorandum of counsel for Te Aitanga a Māhaki and the Mangatū Incorporation, #2.844, para 3

321. 'Terms and Conditions', appendix to memorandum of counsel for the Mangatū Incorporation, 17 August 2020, #2.854(a)

322. *Attorney-General v Haronga* [2017] 2 NZLR 394 (CA), para 74

purpose of the 1989 Forests Agreement,[323] and in doing so the Tribunal has a broad discretion to attach terms and conditions to our recommendations under section 8HB.[324]

198 During the iterative process, the Tribunal received submissions on what terms and conditions are appropriate to accompany the returned CFL land. Following the 29 July 2020 judicial conference in Wellington, we asked parties for further submissions, specifically on the nature of terms and conditions required for CFL land to 'be returned undivided to a collective recipient entity which can hold assets in trust on behalf of, and then return to, groups whose recipient entities are ratified by the relevant claimant communities'.[325] We also asked parties to submit on what other terms and conditions they considered necessary.[326]

199 In November 2020, we directed parties to submit on the possibility of the Tribunal requiring through terms and conditions that the claimants establish a 'Committee of Management' that would be responsible for proper governance, administration, and management of the returned land.[327] The proposed 'Committee of Management' was not supported by any of the claimant groups, and it is unnecessary for us to detail their positions on this option. However, their submissions assisted the Tribunal by setting out the inherent difficulty in making decisions about governance options when the nature of the ownership of the land had not been established.[328]

200 We then asked parties to submit on a number of other options (set out below) to address both the ownership and the governance structure for the returned land. The options were:

> (1) A transfer of the legal title from the Crown to the ratified recipient entities as tenants in common, followed by the constitution of a single collective governance/management trust. This model would allow the groups to receive directly the land and financial compensation pursuant to the Crown Forest Assets Act 1989 in the first instance, but might require a transfer of the land to the collective trust in order to allow efficient management of the land as it is progressively returned from the licensee.
>
> (2) A collective trust structure where the title to the land is returned from the Crown to a collective trust, instead of to the ratified recipient entities as tenants in common . . . This model would have fewer steps in it than the model in [(1) above]but the ratified recipient entities would not see themselves on the title at an early stage, and financial compensation would be paid in the first instance to the collective trust which might then need to pass it on to the ratified recipient entities.

323. *Attorney-General v Haronga* [2017] 2 NZLR 394 (CA), para 74
324. *Haronga v Waitangi Tribunal* [2012] 2 NZLR 53 (SC), para 107
325. Memorandum–directions of the presiding officer, #2.840, para 17
326. Memorandum–directions of the presiding officer, #2.849, para 63
327. Memorandum–directions of the presiding officer, 13 November 2020, #2.887
328. Memorandum–directions of the presiding officer, 11 March 2021, #2.917, para 35

(3) The CFL land is transferred from the Crown to the ratified recipient entities which establish a limited liability partnership . . . This model would allow the ratified recipient entities to receive their respective undivided interest in the land and the financial compensation directly, while also providing a way in which the land could be collectively managed, but so as to recognise each ratified recipient entity's identity and contribution to the partnership.
(4) The ratified recipient entities establish a company trustee to which title to the CFL land would be transferred from the Crown. The shareholding in the company would be held by the ratified recipient entities.
(5) Legal title would be transferred from the Crown to the ratified recipient entities as tenants in common without the Tribunal stipulating any particular governance or management structure.[329]

201 After reviewing submissions on these five options in April 2021, we sought a final round of submissions on a further option, 'whereby Mangatū CFL land is returned to a collective recipient trust with individual ratified recipient entities as its beneficiaries'.[330] In the sections below, we summarise the positions taken by parties, and provide our analysis. First, we set out the parties' submissions on the various options for the ownership and governance of the land, and state our decision. Second, we detail the other terms and conditions proposed by the claimants, the Crown's response, and our conclusions. We then lay out the Tribunal's terms and conditions for the return of the Mangatū CFL land to the Māhaki Trust, the Ngā Uri o Tamanui Trust, and the Te Whānau a Kai Trust. The terms and conditions concerning Schedule 1 compensation under section 36 of the CFAA, will be set out at the end of chapter 7 in which our decisions on the compensation are made.

Parties' positions on the ownership and governance of the returned land

202 The Māhaki Trust, the Mangatū Incorporation, and Ngā Uri o Tamanui, all made submissions stating their opposition to the Tribunal imposing a collective governance entity to receive or hold the returned land.[331] These groups observed that the Tribunal's proposed option for a limited liability partnership would only be appropriate if the parties wanted to work together.[332] The preference of the Māhaki Trust, the Mangatū Incorporation, and Ngā Uri o Tamanui remained that the land be returned divided into separate parcels – a proposal we have already discussed above and declined.

329. Memorandum–directions of the presiding officer, #2.917, paras 43(a)–(e)
330. Memorandum–directions of the presiding officer, 27 April 2021, #2.926, para 9
331. Memorandum of counsel for Te Aitanga a Māhaki and the Mangatū Incorporation, #2.855, para 13; memorandum of counsel for Ngā Uri o Tamanui, 21 August 2020, #2.862, para 5; memorandum of counsel for Te Aitanga a Māhaki, 18 May 2021, #2.929, para 4; memorandum of counsel for Ngā Uri o Tamanui, 1 April 2021, #2.922, paras 17–26; memorandum of counsel for Ngā Uri o Tamanui, 17 May 2021, #2.928, para 4
332. Memorandum of counsel for Te Aitanga a Māhaki and the Mangatū Incorporation, 1 April 2021, #2.923, p 4; memorandum of counsel for Ngā Uri o Tamanui, #2.922, para 21

203 While the Māhaki Trust and Mangatū Incorporation did not favour any of the options put forward by the Tribunal for the ownership and governance of the returned land, they argued for the further option of an independent trustee. They submitted that if the land is returned undivided, then an independent trustee should be appointed to allocate the Schedule 1 compensation to the three governance entities, appoint an independent forestry manager, and in time subdivide and allocate the CFL land to the three groups according to the Tribunal's decision on relative interests.[333] This arrangement, they contended, would provide a simple solution to possible disagreements between claimants, and also allows the three groups 'to go their own separate ways'.[334]

204 The Māhaki Trust and Mangatū Incorporation noted that a draft trust deed for a governance entity, with the independent trustee being the Public Trustee, had been provided to the Tribunal first in August 2020, and then again in September of that year, once the Trust terms had been agreed upon by the Te Whānau a Kai and Ngāti Matepu claimants.[335] We note that in August 2020, the Māhaki Trust and Mangatū Incorporation also submitted a further draft trust deed for a trust entity to receive and hold the returned land, Schedule 1 compensation, accumulated rentals, and NZUS on an ongoing basis, on behalf of the claimants. This draft deed provided for the recipient groups identified in the Tribunal's recommendations to appoint a trustee each, with each group's trustee to have voting power based on the percentage interest the group was allocated by the Tribunal.[336]

205 Ngā Uri o Tamanui argued that imposing a fresh trust arrangement on top of the process for return of the land already detailed in the Crown forestry licenses would 'introduce unnecessary complexity and cost'.[337] In response to the options put forward by the Tribunal, Ngā Uri o Tamanui submitted that they would 'require one vote per entity' in any collective trust structure.[338] They stated their concern that a collective trust arrangement 'will place NUOT in virtually the same position they occupied while Mangatū 1 was held by Mangatū Incorporation before 1961'.[339] They contended that 'a mandatory

333. Memorandum of counsel for Te Aitanga a Māhaki and the Mangatū Incorporation, #2.923, para 6; memorandum of counsel for Te Aitanga a Māhaki and the Mangatū Incorporation, #2.929, para 6
334. Memorandum of counsel for Te Aitanga a Māhaki and the Mangatū Incorporation, #2.923, paras 8.1–8.3
335. Mangatū Forest Collective Trust Deed Draft, appendix to memorandum of counsel for the Māhaki Trust and the Mangatū Incorporation, 8 August 2020, #2.855(b); Mangatū Forest Collective Trust Deed Draft, appendix to memorandum of counsel for the Māhaki Trust and the Mangatū Incorporation, 18 September 2020, #2.873(a)
336. Memorandum of counsel for Te Aitanga a Māhaki and the Mangatū Incorporation, #2.855, para 15(a); 'Mangatū Forest Collective Trust Deed Draft', appendix to memorandum of counsel for the Māhaki Trust and the Mangatū Incorporation, 17 August 2020, #2.855(a)
337. Memorandum of counsel for Ngā Uri o Tamanui, #2.862, para 9
338. Memorandum of counsel for Ngā Uri o Tamanui, #2.928, para 6
339. Memorandum of counsel for Ngā Uri o Tamanui, #2.922, para 18

joint trust . . . has real potential to create a fresh grievance of the same type that they are seeking a remedy for'.[340]

206 Te Whānau a Kai have consistently supported creating a collective entity to hold and manage the land.[341] They argued that 'it is imperative that there is co-ordination, co-operation and agreement amongst the claimant groups' prior to the Tribunal issuing its final recommendations. They contended that a collective management structure would also enable the groups to maximise their commercial opportunities.[342] Te Whānau a Kai submitted that if a trust structure was used, the trustee representation should be constituted by one trustee each from Te Aitanga a Māhaki, Ngā Uri o Tamanui, and Te Whānau a Kai with equal voting power. Each group would also appoint an advisory trustee, and management decisions would be made through a majority vote.[343] However, Te Whānau a Kai's preference was for a limited liability partnership. They argued that this arrangement 'maximises the respective claimant groups' mana or tino rangatiratanga and their efficient use of CFL land'.[344] A limited liability partnership, Te Whānau a Kai noted, allows for the immediate return of the CFL land and Schedule 1 compensation directly to the claimant groups. Their submissions also pointed to other commercial and tax benefits associated with a limited liability partnership.[345]

207 The Crown submitted that 'in the absence of full agreement between claimant groups, the Tribunal should make a decision that, in its expert view, appropriately balances the parties' interests'.[346] However, the Crown did not support the creation of a trust to receive the CFL land and then distribute it to the separate ratified governance entities, because this 'would have the effect of creating an additional governance structure which is neither required nor desirable'.[347]

208 The Crown noted that 'tenancies in common are a frequent form of ownership and are permitted under the Crown Forest Assets Act 1989'.[348] For tenants in common, the Crown said, 'there is an understandable preference for agreement in advance as to how the co-owners will manage their joint interests'.[349] The Crown pointed out that CFL land was transferred to four post-settlement governance entities (PSGEs) under a tenancy in common as part of the Te Aupōuri settlement, and 'the relevant deeds of settlement require the four

340. Memorandum of counsel for Ngā Uri o Tamanui, #2.928, para 13
341. Memorandum of counsel for Te Whānau a Kai, #2.826, para 22; memorandum of counsel for Te Whānau a Kai, 21 August 2020, #2.863, para 3; memorandum of counsel for Te Whānau a Kai, 1 April 2021, #2.921, para 5
342. Memorandum of counsel for Te Whānau a Kai, #2.921, para 6
343. Memorandum of counsel for Te Whānau a Kai, #2.921, para 9; memorandum of counsel for Te Whānau a Kai, 18 May 2021, #2.930, para 5
344. Memorandum of counsel for Te Whānau a Kai, #2.921, para 13
345. Memorandum of counsel for Te Whānau a Kai, #2.921, paras 14–15
346. Memorandum of counsel for the Crown, 19 April 2021, #2.925, para 3.1
347. Memorandum of counsel for the Crown, 25 August 2020, #2.864, para 61
348. Memorandum of counsel for the Crown, #2.925, para 3.3
349. Memorandum of counsel for the Crown, #2.909, para 15

PSGEs to put in place a management agreement'.[350] It is open to the Tribunal, the Crown submitted, to 'impose terms and conditions on the return of the land specifically to facilitate the durability of co-ownership'. For instance, the Tribunal could 'modify to some extent, using imposed terms and conditions, the common law setting otherwise applicable to best serve the interests of the parties in the long term'.[351]

Tribunal analysis of the ownership and governance of the returned land

209 Through the iterative process, we provided the parties with opportunities to identify an arrangement for their ownership and governance of the land, ideally acceptable to them all. Differences of opinion and approach arose early in that process. The claimants' positions on the relative merits of various options canvassed during the iterative process seemed inherently irreconcilable. In our view, the claimants' positions leave us with only two practical alternatives. One is to return the CFL land to the three governance entities as tenants in common, with no accompanying governance or management structure to assist them to deal with the issues they will all inevitably face. The second alternative is to return the CFL land to a collective entity which will hold that land for those prejudiced by the Crown's Treaty breaches, and where the three governance entities ratified by the claimants are the beneficiaries of the collective entity. It falls to us to make a determination as to which of these alternatives we think will best serve the interests of the claimant communities in the short term, until the three governance entities work out the arrangement which they consider will be most suitable for the future.

210 The Crown filed submissions on the option of returning the land undivided to the ratified governance entities as co-owners in a tenancy in common.[352] However, this option was not supported by the claimant groups. The Māhaki Trust noted that without a governance structure, all decisions would be by consensus between the entities, creating 'the obvious potential for stalemate if agreement cannot be reached'.[353] Te Whānau a Kai made similar submissions, noting that 'there are doubts that the claimant groups could agree to a tenancy in common'.[354]

211 As we have already discussed, we are sympathetic to the claimants' concerns regarding a tenancy in common. In the example of the Te Aupōuri settlement, as the Crown submitted, the four post-settlement governance entities were required to create a management structure for the land. In our view, it would be inappropriate to place a similar requirement in our terms and conditions. If the claimants cannot reach agreement on the tenancy in common, as they submitted would be the case, this would likely create substantial

350. Memorandum of counsel for the Crown, #2.909, para 21
351. Memorandum of counsel for the Crown, #2.925, para 3.3
352. Memorandum of counsel for the Crown, #2.925, para 3.3
353. Memorandum of counsel for the Māhaki Trust and the Mangatū Incorporation, #2.923, p 4
354. Memorandum of counsel for Te Whānau a Kai, #2.826, para 15

uncertainty and risk for the owners. Stalemate between the co-owners would be undesirable in their negotiations with the licensee, and in meeting their own responsibilities regarding the land. Tenancies in common also allow for co-owners to access and lease parts of the land without agreement of the other co-owners. This would also be an undesirable outcome if the claimants were unable to reach agreement on the governance and management arrangements for the land. It is clear to us that the situation the claimants would face is fraught with potential for conflict. For these reasons, we reject the option of a tenancy in common.

212 Having determined that we will return the land undivided and having excluded the option of a tenancy in common, we are left with a collective entity to be in the form of either a limited liability partnership or a trust. Te Whānau a Kai's preference remained a limited liability partnership.[355] That kind of arrangement would require the parties to agree on a number of matters – importantly, the terms of a limited liability partnership agreement and the appointment of a general partner who would be responsible for the management of the limited partnership.

213 This option was not supported by the other claimant groups. The Māhaki Trust and the Mangatū Incorporation opposed this option on the basis that the parties did not wish to work together on a commercial venture.[356] Ngā Uri o Tamanui argued that a limited liability partnership would 'create additional complexity and add a further layer of commercial abstraction between NUOT and the forest land'.[357] In our view, it would be inappropriate to make a term and condition of our section 8HB recommendation that the Māhaki Trust, the Ngā Uri o Tamanui Trust, and Te Whānau a Kai Trust create a limited liability partnership. To impose such a long-term arrangement on these groups would be impractical and unrealistic, based on the evidence adduced before us.

214 We now move to consider a trust structure. In our view, a trust established for the ownership and governance of the returned CFL land does present a recognised and well-understood option for the claimants' collective purposes. As counsel for the Māhaki Trust and the Mangatū Incorporation submitted, 'the Trusts Act 2019 and the common law of equity provide a substantial body of law to govern the trust and a principled framework for the resolution of any disputes'.[358]

215 The claimants' submissions have addressed two kinds of trust structures. First, a trust with a sole independent trustee (the Māhaki Trust have proposed the Public Trustee) which would pass the land through to the governance entities after their ratification. We refer to this option as a 'passing-through

355. Memorandum of counsel for Te Whānau a Kai, #2.921, para 13
356. Memorandum of counsel for the Māhaki Trust and the Mangatū Incorporation, #2.923, p 4
357. Memorandum of counsel for Ngā Uri o Tamanui, #2.922, para 24
358. Memorandum of counsel for the Māhaki Trust and the Mangatū Incorporation, #2.906, para 10.2

trust'. Secondly, a collective trust structure where the trustees are selected by the three governance entities, who would manage the land in the longer term until the beneficiaries could reach an agreement either to partition the land or to continue with a collective governance and management entity. We refer to this option as a 'collective trust'.

216 Agreement was reached by the Māhaki Trust and the Mangatū Incorporation, Ngāti Matepu, and Te Whānau a Kai on some aspects of a passing-through trust structure to receive the returned CFL land and Schedule 1 compensation in the first instance, before passing it on to the ratified governance entities.[359] However, Te Whānau a Kai later reiterated that their preference remained a limited liability partnership rather than a passing-through trust structure. They argued that any governance structure should be an ongoing entity responsible for forest management.[360] The passing-through trust was similarly opposed by the Crown as an unnecessary step in distributing the redress to the claimant groups.[361]

217 We have significant reservations about returning the CFL land to a passing-through trust. As a temporary arrangement, this would not provide the claimants with the opportunity for input in decision-making with respect to their lands. As we observed in memorandum–directions dated 11 March 2021, 'the tino rangatiratanga of the claimant groups ought to be acknowledged and reflected in how the land is returned to them'.[362] The passing-through trust would defer this outcome, and the claimant groups would be reliant on the Public Trustee completing the partition of the CFL land within a short period before transferring it to the Māhaki Trust, the Ngā Uri o Tamanui Trust, or the Te Whānau a Kai Trust. For the reasons we have discussed (see above, paragraphs 185–187), we consider that the division of the land on the ground could be a lengthy and difficult process. Any significant delay on that account in the return of the Mangatū CFL land to Māori ownership would be inappropriate.

218 In our view, the ownership and governance arrangement most appropriate for the return of the CFL land to Māori ownership is a collective trust, which would be called the Mangatū Forest Collective Trust.[363] The trustees would be selected by each of the governance entities. The three ratified governance entities would be the beneficiaries of the trust.

219 The trustees would be responsible for the governance and management of the CFL land on behalf of all the beneficiaries. We consider that this is the best option to balance the preferences of each group, and to restore the

359. 'Deed of Trust of Mangatū Fores Land Settlement Trust', appendix to memorandum of counsel for the Māhaki Trust and the Mangatū Incorporation, #2.873(a)
360. Memorandum of counsel for Te Whānau a Kai, #2.921, para 8(b)
361. Memorandum of counsel for the Crown, #2.864, para 61
362. Memorandum–directions of the presiding officer, #2.917, para 36
363. A draft trust deed was provided by the Māhaki Trust and Mangatū Incorporation: 'Mangatū Forest Collective Trust Deed Draft', appendix to memorandum of counsel for the Māhaki Trust and the Mangatū Incorporation, 17 August 2020, #2.855(a)

tino rangatiratanga and mana whenua of Te Aitanga a Māhaki, Ngā Uri o Tamanui, and Te Whānau a Kai over the Mangatū CFL land. This arrangement would also allow the CFL land to be directly returned to Māori ownership without further delay.

220 We are conscious that a collective trust was not supported by all the claimants because of the difficulties they experienced in reaching agreement during the iterative process.[364] In making this determination we have reached a compromise position which we consider best balances the claimants' preferences and interests. As we have made clear throughout our Inquiry, the claimants will be required to work together and collaborate on various issues, no matter how the land is returned. As it is, we are returning the land undivided, and the requirement that the claimants work together remains. We have also decided to provide for the appointment of an additional trustee, who will be independent of the three claimant groups' governance entities, to act as chairperson of the trustees. The independent chairperson will be able to provide expert and neutral guidance to the other trustees, and to help them resolve their differences. If necessary, the trustees can resort to the Trusts Act 2019 and the common law for a robust and principled framework for dispute resolution to protect the claimants' interests.[365]

221 On 18 August 2020, counsel for the Māhaki Trust submitted to the Tribunal a draft trust deed for the Mangatū Forest Collective Trust.[366] Generally, the terms of this deed provide appropriate powers, duties, and protections to support the receipt of the returned CFL land. However, we consider that some changes are needed to ensure that the entity will best reflect and restore the tino rangatiratanga of all of the groups to whom the CFL land is returned. We provide for the necessary amendments in our terms and conditions. The draft deed also requires updating to accord with the Trusts Act 2019.

222 The question then arises as to whether the trustees should have equal voting powers or whether each trustee's vote should represent the beneficial interest of their appointing governance entity. Ngā Uri o Tamanui and Te Whānau a Kai argued that equal voting power would be required for any collective entity. The Māhaki Trust disagreed, arguing that trustees should be appointed by the ratified entities in proportion to their beneficial interest. They submitted that, without majority decision-making, a collective trust would be 'unworkable'.[367] The Crown made submissions that unanimity was the default setting for trustees, and that 'any relaxation from unanimity might be to require decisions by consensus in the first instance, including by reference

364. Memorandum of counsel for Ngā Uri o Tamanui, #2.824, para 28; memorandum of counsel for the Māhaki Trust and the Mangatū Incorporation, #2.923, p 4
365. Memorandum of counsel for the Māhaki Trust and the Mangatū Incorporation, #2.906, para 10.2
366. Memorandum of counsel for Te Aitanga a Māhaki and the Mangatū Incorporation, #2.855, para 15(a); 'Mangatū Forest Collective Trust Deed Draft', appendix to memorandum of counsel for Te Aitanga a Māhaki, #2.855(a)
367. Memorandum of counsel for Te Aitanga a Māhaki and the Mangatū Incorporation, #2.923, p 4

to tikanga Māori, with voting by majority only if consensus is not able to be reached within a reasonable period of time.'[368] We consider that the terms and conditions that we include can overcome problems of the kind raised by the Māhaki Trust.

223 As counsel for the Māhaki Trust and the Mangatū Incorporation submitted, 'trust law imposes clear and onerous duties on trustees.'[369] For instance, trustees are required to act honestly and in good faith, and they must act for the benefit of all beneficiaries.[370] Section 35 of the Trusts Act 2019 provides for a default duty of impartiality which requires trustees to 'act impartially in relation to the beneficiaries', and to 'not be unfairly partial to one beneficiary or group of beneficiaries to the detriment of the others'. The Māhaki Forest Settlement Trust will have the largest beneficial interest in the collective trust. However, it will not be disadvantaged by the equal voting power and representation for each beneficiary group, just as the Ngā Uri o Tamanui Trust and Te Whānau a Kai Trust beneficiaries will not be advantaged.

224 We therefore consider that the Māhaki Forest Settlement Trust, the Ngā Uri o Tamanui Trust, and the Te Whānau a Kai Trust should each appoint two trustees to the Mangatū Forest Collective Trust within two weeks of the Tribunal's recommendation becoming final and binding, a total of six trustees. In reaching this conclusion, we are also guided by the evidence we received on the tikanga underlying Wi Pere's selection of 12 trustees in 1881 to represent the mana whenua of the customary groups with interests in Mangatū 1 (we discuss this in chapter 4, see paragraphs 48–49, 134). The claimants gave evidence that whakapapa, together with the principles of whanaungatanga and manaakitanga, governed the relationships between the interconnected customary groups in Mangatū. These principles will remain important when the land is returned to Māori ownership, and the trustees assume the responsibility of acting for the benefit of the larger collective.

225 To ensure that the six trustees representing the three governance entities can promptly make arrangements for negotiation with the licensee and fulfil their management responsibilities, a condition will be that they meet within seven days of their appointment. The first order of business for the trustees will be to appoint the independent seventh trustee, who will be the chairperson. If the trustees cannot reach agreement, the appointment of the independent chairperson is to be made by Te Hunga Rōia Māori o Aotearoa Law Society, in consultation with the New Zealand Law Society, within one month of the first meeting of the trustees.

226 Accordingly, clause 8 of the August 2020 draft of the Mangatū Forest Collective Trust Deed will require amendment to provide for the appointment of two trustees from each of the beneficiary groups, and for the

368. Memorandum of counsel for the Crown, #2.864, para 71
369. Memorandum of counsel for Te Aitanga a Māhaki and the Mangatū Incorporation, #2.906, para 10.2
370. The Trusts Act 2019, sections 25–26

appointment of the independent additional trustee. As is already provided for in the draft deed, any matter requiring decision at a meeting of the trustees will be decided by a majority vote of the trustees, and each trustee will have one vote. Under clause 12 of the trust deed, it will be a requirement that all trustees receive reasonable and appropriate remuneration, and reasonable expenses in relation to the discharge of their duties as trustees.[371] In our view, it would be beneficial if the appointed trustees have forest management experience – though this is not a requirement. The trustees will be able to seek advice from, employ, or contract in, expertise such as is considered necessary.

227 In recognition of the fact that a collective trust arrangement was not sought by the claimants, clause 19 of the Mangatū Forest Collective Trust Deed is to be amended such that the term of the trust will be for a period of five years from the date that all trustees are appointed. The trustees will also have the power to determine by majority that the trust shall terminate at a different time.[372] It will then be up to the trustees to decide whether to extend the period of the trust at any point from its establishment. The trustees will be able to decide by majority to divide the CFL land on the ground and provide the Māhaki Forest Settlement Trust, the Ngā Uri o Tamanui Trust, and the Te Whānau a Kai Trust with separate parcels. The trustees will also be responsible for beginning any necessary negotiations with the licensee; they should then have better access to information about the commercial viability of the forest, and their options as the land is gradually returned.

228 Finally, we consider it is important to provide the claimants with an opportunity to exercise their autonomy and tino rangatiratanga, and determine for themselves how the Mangatū CFL land is to be governed and managed in the years following its return to Māori ownership. The Māhaki Trust and the Ngā Uri o Tamanui Trust have maintained their preference for a separate parcel of land. If the trustees decide by majority to make such a distribution to the three claimant governance entities, it would be appropriate for the trustees to ensure that some part of the 1961 land is transferred to the Māhaki Forest Settlement Trust, and some part of the Mangatū 1 block is transferred to the Ngā Uri o Tamanui Trust – in recognition of their strong customary interests in the CFL land. In our view, this condition on the division of the land between the claimants will ensure that Te Aitanga a Māhaki and Ngā Uri o Tamanui claimants are returned lands within their core rohe.

229 We now turn to the parties' submissions on what other terms and conditions would be appropriate to accompany the Tribunal's section 8HB recommendations.

371. 'Mangatū Forest Collective Trust Deed', appendix to memorandum of counsel for the Māhaki Trust and the Mangatū Incorporation, #2.855(a), section 9.3–9.4

372. Section 18 of the trust deed will also be revised so that the trustees may amend the deed by majority vote: 'Mangatū Forest Collective Trust Deed', appendix to memorandum of counsel for the Māhaki Trust and the Mangatū Incorporation, #2.855(a), section 18

Parties' positions on other terms and conditions

230 In August 2020, counsel for the Māhaki Trust and for the Mangatū Incorporation, Ngāti Matepu, and Te Whānau a Kai conferred and agreed among themselves on a set of terms and conditions.[373] They submitted that, if the CFL land was returned to a passing-through trust, appropriate terms and conditions included:

(a) The Tribunal's recommendation under section 8HB do not fully compensate for nor remove the prejudice suffered by the claimants.

(b) A collective recipient entity known as the Mangatū Forest Land Settlement Trust be implemented on the terms set out in its trust deed.[374]

(c) Under section 8HB and section 8HC of the TOWA, the Crown will transfer the portion of the Mangatū forest the Tribunal recommends be returned to Māori ownership with the accompanying monetary compensation under Schedule 1 of the CFAA, accumulated rentals, and New Zealand Units (NZUS) held by the land under the Emissions Trading Scheme to the trust in accordance with the beneficial interests determined by the Tribunal.

(d) The accumulated rentals, Schedule 1 compensation, and NZUS are to be transferred to the Trust on the Tribunal's interim recommendation becoming final under section 8HC, or in accordance with a settled agreement with the Crown:

- the Crown is to complete the transfer of the balance of these assets within 12 months of the Tribunal's interim recommendation becoming final under section 8HC;
- as soon and as far as is practicable, the Crown will provide a schedule for the transfer of these assets to each beneficiary following the issuance by the Waitangi Tribunal of its interim recommendation that will achieve the transfer within the 12-month period;
- the Crown will consult with each beneficiary if the Crown considers that the transfer of the assets cannot be achieved within the 12-month period.

(e) The trust will appoint a forestry manager who has been approved by the Waitangi Tribunal to manage the forest. The office of the forest

373. 'Terms and Conditions', appendix to memorandum of counsel for the Mangatū Incorporation, #2.854(a)

374. Counsel for the Mangatū Incorporation also submitted two draft trust deeds for the Mangatū Forest Land Settlement Trust. The first trust deed filed on the ROI under #2.855(a) presents a model 'under which the resumed land, compensation, accumulated rentals and NZUs would be held on an ongoing basis by the trust on the basis of percentage beneficial interests allocated by the Tribunal to each claimant group'. The second trust deed filed on the ROI under #2.55(b) 'presents a model under which resumed land would be held by the trust solely for the purpose of passing it through to claimant entities, once ratification processes, approved by the Tribunal, have been completed': memorandum of counsel for the Mangatū Incorporation, #2.855, para 15

manager will be separate to that of the licence holder, and the manager will act on behalf of each beneficiary of the trust.

(f) The Crown will bear the responsibility and cost of transferring the CFL land and the necessary access easements to the Trust.

(g) The Crown shall be subject to the vendors' warranties and undertakings as expressed and implied under clause 7 of 10th edition of the ADLS/REINZ Agreement for Sale and Purchase of Real Estate.[375]

(h) The Crown is to commission an independent report to the Waitangi Tribunal on whether the Mangatū forest is subject to disease, has sustained wind damage, suffers from pest control issues, suffers from fire control issues, and if so, to what extent. The report would also address whether the Mangatū forest is properly fenced, and if not, the extent of any fencing issues. Furthermore, that the Crown is liable to rectify any of issues discovered in the independent report.

(i) The Crown is liable to meet the reasonable costs of replanting any part of the Mangatū forest and any economic or financial loss arising as a result of the operation of the current or any future central and local government regulatory regime that impact the operation of the Mangatū forest in an efficient and/or profitable manner in comparison with general forestry operations.

(j) That the Crown is and remains liable in the event that any part of the Mangatū forest is found to be contaminated or otherwise in breach of the Resource Management Act 1991, prior to the Tribunal's interim recommendations becoming final.

(k) That any part of the Mangatū forest that is not generating an income and is deemed non-rateable pursuant to the Local Government Act 2002, the Local Government (Rating) Act 2002, and any relevant policy of the Gisborne District Council.

(l) The trust and every beneficiary of the trust are exempt from any tax liability upon recipient of the assets from the Crown.

(m) The trust is to work with the licensee of the forest to formulate and agree on a management plan. This plan can include a plan for the transitional hand back of harvested areas or ongoing licensee management.

(n) The Crown is to meet all reasonable costs associated with facilitating an agreed management plan between the Licensee and the trust or beneficiaries of the Trust, as determined by the Tribunal.[376]

231 Taking a different approach, Ngā Uri o Tamanui appeared to consider that further terms and conditions were unnecessary, as the Crown forestry licenses 'already provide in a detailed way for the return of part or all of the

375. Counsel provided clause seven of this agreement in the appendix to their proposed terms and conditions: 'Terms and Conditions', appendix to memorandum of counsel for the Māhaki Trust and the Mangatū Incorporation, #2.854(a), pp [4]–[5]

376. 'Terms and Conditions', appendix to memorandum of counsel for the Māhaki Trust and the Mangatū Incorporation, #2.854(a), para 9

land to Māori proprietors, including arrangements between the new Māori proprietors and the outgoing licensee as the licensee progressively leaves the land'.[377]

232 The Crown responded to the terms and conditions proposed by the Māhaki Trust and the Mangatū Incorporation, Ngāti Matepu, and Te Whānau a Kai with detailed submissions. The Crown's fundamental position on the Tribunal's discretion under section 8HB(1)(a) was that terms and conditions 'are to apply to the transfer of the relevant land and not other matters more generally'.[378] On that basis, the Crown challenged the rationale behind many of the terms and conditions proposed by the claimants – such as that the Tribunal's recommendation under section 8HB does not address all prejudice (see item (a) in the list in paragraph 230).[379]

233 The Crown further submitted:

(a) The Tribunal is unable to impose terms or conditions concerning matters that would be decided under separate statutory regimes. For instance, the proposed terms concerning the transfer of accumulated rentals and NZUs to the governance entities 'encompass elements that are not part of the Tribunal's decisions to make a CFL recommendation'.[380] The transfer of accumulated rentals is subject to decision-making by the Crown Forest Rental Trust, and that NZUs 'are subject to separate decision-making by the trustees of Te Hā o Tānemahuta – the Forestry Emissions Unit Trust, and are not Tribunal decisions'.[381]

(b) The claimants' proposed term concerning the appointment of a forest manager (item (e) in the list of terms and conditions) would be unenforceable. This term would be more appropriately phrased as:

> A condition that the trustees of each recipient entity negotiate with the other recipient entities with a view to appointing a forest manager to act on behalf of the licensors and in the best interests of the beneficiaries (collectively) of the new licensors.[382]

(c) The Crown opposed the proposed term covering vendors' warranties and undertakings, which included standard terms for real estate sale and purchase agreements. The transfer 'will occur by operation of law and while there may be a transfer instrument there will not be any documentation such as an agreement for sale and purchase'.[383] If warranties were intended for the CFL land, 'the legislation and license would have provided for these'. The proposed vendors' warranties and under-

377. Memorandum of counsel for Ngā Uri o Tamanui, #2.862, para 9
378. Memorandum of counsel for the Crown, #2.864, para 8.2
379. Memorandum of counsel for the Crown, #2.864, para 12
380. Memorandum of counsel for the Crown, #2.864, para 20
381. Memorandum of counsel for the Crown, #2.864, paras 20.1–20.2
382. Memorandum of counsel for the Crown, #2.864, para 31
383. Memorandum of counsel for the Crown, #2.864, para 35

takings, derived from real estate agreements for sale and purchase, were not applicable for transferring CFL land 'where the improvements on the land are owned by a third party and do not transfer to the new owner, and the land remains subject to a licence to a third party.'[384]

(d) The Crown opposed the claimants' proposal (item (h)) that the Tribunal require the Crown to commission an independent report on the status of the license and the forest.[385] There was no basis to make the Crown liable for the licensee's improvements, or responsible for any replanting costs or 'future unspecified costs.'[386] In circumstances where the land had been contaminated, or any other breach of the Resource Management Act, the Courts would have to determine responsibility.[387]

(e) It is outside of the Tribunal's jurisdiction to set terms and conditions addressing the new proprietors' liability for rates and tax, as the claimants had proposed.[388]

(f) Finally, the Tribunal cannot compel the licensee to enter into an agreement with the new proprietors and licensors; the licensee's obligations are set out in the licence and 'the parties are free to reach an arrangement that varies this.'[389] The Crown would not be involved in any interactions between the licensee and licensors, and the cost of these engagements 'would be a cost arising in the ordinary course of business and should be met by the parties to such an arrangement.'[390]

Tribunal analysis of other terms and conditions

234 The terms and conditions proposed by the Māhaki Trust, the Mangatū Incorporation, Ngāti Matepu, and Te Whānau a Kai suggest that they consider the Tribunal's discretion to impose terms and conditions under section 8HB(1)(a) is subject to very few limitations. In closing submissions, counsel for Ngāriki Kaipūtahi similarly submitted that the Tribunal should take a broad interpretation of its discretion to attach the terms and conditions it considers appropriate to its recommendations under section 8HB.[391]

235 The Crown takes a more restricted view. To the extent that we understand the Crown's submissions to be that the discretion is limited to terms and conditions concerning the transfer of the CFL land only, we do not agree. We have already stated that the purpose of any recommendations the Tribunal makes under section 8HB is not simply to transfer CFL land, but to return the land *to Māori ownership*. The terms and conditions should be appropriate to

384. Memorandum of counsel for the Crown, #2.864, para 35
385. Memorandum of counsel for the Crown, #2.864, paras 36–39
386. Memorandum of counsel for the Crown, #2.864, paras 40–49
387. Memorandum of counsel for the Crown, #2.864, para 48
388. Memorandum of counsel for the Crown, #2.864, paras 50–54
389. Memorandum of counsel for the Crown, #2.864, para 55
390. Memorandum of counsel for the Crown, #2.864, para 55
391. Closing submissions for Ngāriki Kaipūtahi, #2.681, para 86

achieving this outcome, as part of the action to be taken under section 6(3) of the Act to compensate for or remove prejudice caused by Crown Treaty breaches.

236 Section 8HB(1)(a) gives the Tribunal the discretion to impose the terms and conditions it considers appropriate to achieve the purpose of the section 8HB recommendations and the 'practical application of the Treaty'.[392] The statute places no express limitation on the Tribunal's discretion of the kind contended for by the Crown. Nor did the Supreme Court in *Haronga* suggest our discretion over terms and conditions is limited in that way.[393]

237 In our view, many of the terms and conditions proposed by the claimants are not, in fact, terms and conditions. For instance, the claimants' first term and condition, set out above in paragraph 230, calls for determinations that are the prerogative of the Tribunal. The proposed term at (c) concerns the Tribunal's recommendations under section 8HB of the TOWA, and determinations under Schedule 1 of the CFAA. Point (d) addresses the return of the land, along with the transfer of the accumulated rentals from the Crown Forestry Rental Trust, and the transfer of NZUs from the Forestry Emissions Unit Trust. This does not need to be specified in terms and conditions because the transfer of land, compensation, and other assets to the governance entities will follow by operation of law following the Tribunal's determinations. However, it is appropriate for the Crown to notify the Crown Forestry Rental Trust and the Forestry Emissions Unit Trust of the Tribunal's recommendation in order that those entities undertake their responsibilities consequent upon the Tribunal's recommendation becoming final.

238 As we outlined above, clause 16 of the Crown forestry licence sets out the steps the Crown must take when the Tribunal's interim recommendation becomes final. However, we note that part of the Mangatū CFL land lies outside the Tūranga Inquiry District. As a result, the Crown will have to take steps to cut out the title for the returned land from the multiple titles that currently constitute the total area. The claimants are entitled to the return of the CFL land as soon as possible. However, the process of creating the new titles to the CFL land will also require time, and it is appropriate that the Crown is allowed enough time to create the separate title and complete the transfer process. We consider that 12 months is an appropriate timeframe for the Crown to address these matters. This is an appropriate term to accompany the Tribunal's recommendations.

239 In the Crown's submission, the claimants' proposed term (e) concerning the appointment of a forest manager would be unenforceable. The Crown says an alternative term could be that the claimants negotiate together about the appointment of a forestry manager or managers.[394] With this submission, the Crown appears to go further than its previous position that terms and

392. Treaty of Waitangi Act 1975, long title
393. *Haronga v Waitangi Tribunal* [2012] 2 NZLR 53 (SC), para 107
394. Memorandum of counsel for the Crown, #2.864, para 31

conditions should only relate to the transfer of land. Instead, we understand this submission to mean that terms and conditions requiring the claimants to consult, negotiate in good faith, and seek agreement on these important decisions about the management and governance of the land, are appropriate for the purpose of achieving the practical application of the Treaty. We agree. Ultimately, the claimants may reach agreement on dividing the land themselves. Or, as the Crown also submitted, they could establish some other permanent trust structure through the Māori Land Court, or by some other means. However, in the meantime, interim protections are appropriate and necessary to ensure the claimants can effectively negotiate with the licensee, and efficiently manage the land from the point at which it is returned.

240 In relation to item (f) in the claimants' proposed terms and conditions, we accept the Crown's submission that the licence and statutory scheme provides mechanisms for the transfer of the CFL land, and that the Crown will meet the cost of doing so.[395] Since the land is to be returned undivided, it would be inappropriate to attach terms and conditions addressing easements. The existing easements are provided for in the licence, and we expect the Crown will protect the licensee's requirements. If the parties ultimately decide to subdivide the land themselves, they can then consider what other easements will be needed.

241 In respect of item (g), we accept the Crown's submission that the vendors' warranties and undertakings normally found in real estate agreements do not apply in this circumstance, where CFL land is being returned to Māori ownership.[396] However, we consider that appropriate warranties are required to ensure that Māori, to whom ownership is being returned, receive what they bargained for in the 1989 Forests Agreement. The Crown forestry licence was created by the Crown, and it is reasonable to expect it will do due diligence to ensure the licensee has complied with the terms of the licence.

242 The CFL land is also subject to all the controls prescribed by applicable legislation, including the Resource Management Act, and statutory authorities. These liabilities may pass to the new proprietors upon the return of the land. It is appropriate that the Māori owners are protected from liability for any breaches that may have occurred while the Crown retained ownership of the land, and for which the new owners might be held liable. It follows that the Crown should indemnify the new proprietors if there has been a breach of the terms of the licence, or any other relevant statute or law, or notice given by a relevant authority in relation to the CFL land, prior to the transfer of title being effected. It would be inconsistent with the Treaty principle of active protection if any responsibilities that should have been met or provided for by the Crown were passed on to the new Māori owners. This term and condition is appropriate to ensure that the Māhaki Forest Settlement Trust, the Ngā Uri o Tamanui Trust, and the Te Whānau a Kai Trust receive the

395. Memorandum of counsel for the Crown, #2.864, para 34
396. Memorandum of counsel for the Crown, #2.864, para 35

remedies provided for in the 1989 Forests Agreement, and in the statutory provisions.

243 The remaining terms and conditions proposed by the claimants can be dealt with in short order. The proposed independent report on the status of the forest set out in (h) is not relevant, as the claimants are not receiving the forest itself but the CFL land. This is a request for further evidence which the Crown rightly describes as 'unnecessary and inappropriate'.[397] We likewise agree with the Crown that term (i) – that the Crown be liable for replanting costs arising out of financial losses related to regulatory regimes – is not within the Tribunal's jurisdiction and is contrary to the scheme set out in the 1989 Forests Agreement, and prescribed by statute. Similarly, items (j)–(n) all address matters outside the Tribunal's jurisdiction. We consider that a reasonable warranty on the land should protect the new proprietors in case of any contamination or other breach of the Resource Management Act that has occurred during the period that land has been in Crown ownership. Otherwise, issues such as the rateability of the land, the tax liability of the governance entities, any agreement with the licensee about management, and the cost of such engagements are all negotiating points which the claimants will be able to take up with the Crown during the 90-day period. It would therefore be inappropriate for us to include terms and conditions on any of these matters.

244 In light of our analysis, we list below the Tribunal's recommendation under section 8HB and the terms and conditions that we consider appropriate to ensure that the return of the Mangatū CFL land is effective in compensating for or removing the relevant prejudice, and achieves the practical application of the Treaty.

Tribunal conclusion on terms and conditions pursuant to section 8HB(1)(a) of the TOWA

245 Here we make our interim binding recommendation for return of the CFL land under section 8HB(1)(a) (it has already been foreshadowed throughout this chapter, and will be repeated in chapter 8, as part of the full suite of Tribunal recommendations). We then list those terms and conditions that address the Crown's obligations to effect the Tribunal's recommendation when and if it becomes binding following the 90-day period. There are further terms and conditions that will be addressed in chapter 7 as they relate to the payment of financial compensation under Schedule 1 of the CFAA.

Tribunal interim recommendation under section 8HB(1)(a)

246 The Tribunal makes a recommendation that the Crown return the whole of the Mangatū CFL land within the Tūranganui a Kiwa Inquiry District comprising some 7,676.8 hectares, being previously described as part Mangatū 1 and Mangatū 2 blocks comprised and described in GS6A/15, and being

397. Memorandum of counsel for the Crown, #2.864, para 36

part lots 1–27, DP 8162, to a collective trust to be called the *Mangatū Forest Collective Trust*, which is to hold the land on behalf of Te Aitanga a Māhaki, Ngāriki/Ngā Ariki Kaipūtahi, and Te Whānau a Kai whose equitable interests in the land we determine as follows:

- For the Māhaki Forest Settlement Trust on behalf of all the hapū of Te Aitanga a Māhaki, a 68 per cent interest.
- For the Ngā Uri o Tamanui Trust on behalf of Ngāriki/Ngā Ariki Kaipūtahi, an 18 per cent interest.
- For the Te Whānau a Kai Trust on behalf of Te Whānau a Kai, a 14 per cent interest.

Terms and conditions under section 8HB(1)(a)

247 The Tribunal's terms and conditions under section 8HB(1)(a) include:

(1) The Mangatū Forest Collective Trust is to have the terms set out in the trust deed filed with the Tribunal on 18 August 2020 having document number #2.855(a) on the Tribunal's Wai 814 Record of Inquiry.[398] The terms contained in that trust deed are to be amended to include the following provisions:

   a) The duration of the trust will be for a period of five years from the date that all trustees are appointed, unless the trustees by majority determine that the trust shall terminate at a different time.

   b) On termination of the trust, the trustees shall distribute the returned CFL land and trust assets to the beneficiaries in accordance with the beneficial interests listed at paragraph 246 above, and subject to the provisions of 1(c) below.

   c) In making the distribution in 1(b) above, the trustees shall ensure that some part of the 1961 land is transferred to the Māhaki Forest Settlement Trust, and some part of the 1961 land is transferred to the Ngā Uri o Tamanui Trust.

   d) The trust deed is to be updated where appropriate to ensure that references are to the Trusts Act 2019.

   e) The trust deed is to make provision for reasonable remuneration of trustees, together with their reasonable expenses incurred in the discharge of their duties as trustees.

   f) The trustees may by majority make any alteration, modification, variation, or addition to provisions of the trust deed in any of the cases provided for under clause 18(a)–(d) of the draft trust deed #2.855(a).

We make provision for a pūtea to support the administration and operation of the Mangatū Forest Collective Trust at the end of chapter 7. The parties, including the claimant groups and the Crown, may agree to amend the terms of the trust deed during the 90-day period,

398. 'Mangatū Forest Collective Trust Deed Draft', appendix to memorandum of counsel for the Māhaki Trust and Mangatū Incorporation, #2.855(a)

provided that such amendments are consistent with the Tribunal's terms and conditions. We expect that those definitions in the trust deed which still await completion will be provided for by the terms of the recommendation and directions of the Waitangi Tribunal, effective from the date of the appointment of the trustees. We also acknowledge that some amendment may be required in the trust deeds provided to the Tribunal for each of the Māhaki Forest Settlement Trust, the Ngā Uri o Tamanui Trust, and the Whānau a Kai Trust to take account of the Tribunal's recommendation and terms and conditions.

(2) The Māhaki Forest Settlement Trust, the Ngā Uri o Tamanui Trust, and the Te Whānau a Kai Trust will each appoint two trustees to the Mangatū Forest Collective Trust, and these six trustees will appoint a further independent trustee.

The three governance entities are each to appoint two trustees to the Trust *within two weeks* of the Waitangi Tribunal's recommendation under section 8HB of the TOWA becoming final. Each governance entity is to notify the other governance entities of their nominated trustees as soon as they are appointed. The appointed trustees will have their first meeting *within seven days* from the date that all three governance entities have notified the appointment of their trustees, and the first order of business will be to appoint by majority agreement a suitably qualified and experienced independent (seventh) trustee who will be the chairperson of the trustees. If the trustees fail, at their first meeting, to agree on the appointment of the seventh trustee, they must forthwith notify Te Hunga Rōia Māori o Aotearoa Law Society, who will, in consultation with the New Zealand Law Society, appoint the independent trustee and chairperson *within one month* of the first meeting of the trustees.

(3) Pursuant to section 8HB(1)(a) of the TOWA, the Crown is to create a separate title for the returned Mangatū land.

The Crown shall take all necessary steps, obtain all necessary consents, and provide all necessary easements, covenants, and other instruments in order to create a separate full fee simple title for the CFL land being returned; and will indemnify the Māori owners as necessary.[399]

The Crown shall also:

a) ensure, that in creating a separate title, reasonable access to the CFL land is provided to the Māori owners; and,

b) facilitate the initial engagement between the licensee and the trustees of the Mangatū Forest Collective Trust for all purposes consistent with the terms of the licence.

399. This is required because the CFL land extends beyond the Tūranganui a Kiwa Inquiry District, and the Tribunal can only return the CFL land as a remedy for well-founded claims within the district. Therefore, the CFL land to be returned to Māori ownership must be separated from the CFL land outside the Inquiry District and a full and proper Land Information New Zealand registered title created.

Within 12 months of the date of the Tribunal's section 8HB recommendation for return of the CFL land becoming final, the Crown is to provide the Mangatū Forest Collective Trust with a registerable memorandum of transfer for the land being returned.

(4) Crown warranty and indemnity.
The Crown must warrant that the terms of the Crown forest licence have been complied with by both the Crown and the licensee as at the date the transfer of title to the Māori owners is effected. The Crown will indemnify the Māori owners for any breach of the licence, or any relevant statute or law, or notice given by a relevant authority in relation to the CFL land requiring action or imposing liability on the part of the Crown prior to the transfer of title being effected.

(5) Notice to the Crown Forestry Rental Trust.
The Crown is to give notice to the Crown Forestry Rental Trust of the Tribunal's final recommendation under section 8HB of the TOWA so that it will make payment of the accumulated rentals to the Mangatū Forest Collective Trust.

(6) Notice to the Forestry Emission Unit Trust.
The Crown is to give notice to the Forestry Emission Unit Trust of the Tribunal's recommendation under section 8HB of the TOWA so that it will transfer the New Zealand Units to the Mangatū Forest Collective Trust.

WAIATA KAMUPEIHANA

Ka tukua mai ōna hua ki tō tātou whenua

CHAPTER 7

COMPENSATION

Introduction

1 In this chapter, we consider the issue of how much statutory compensation is to accompany the return of the whole of the Mangatū CFL land under Schedule 1 of the Crown Forest Assets Act 1989 (CFAA). This statutory duty follows upon our decision to return the CFL land to Māori ownership. Under the statute, our task is to decide the proportion of compensation under clause 3 of Schedule 1 that is to accompany the returned CFL land. First, we set out the rationale for our approach. The legislation has given us broad discretion to do what we think is fair and just.[1] In exercising that discretion, we consider the following questions:

(a) What are the issues the Tribunal must address in considering and making the necessary determinations about compensation? In this section, we summarise the statutory scheme and set out its requirements.

(b) What is the purpose of awarding statutory compensation? Schedule 1 compensation is an additional calibration point for the suite of remedies available under the legislative scheme to address prejudice associated with Crown Treaty breaches related to the CFL land. However, compensation is also a specific feature of the 'commercial bargain' reached between the Treaty parties in the 1989 Forests Agreement. We summarise the parties' submissions on the purpose of Schedule 1 compensation before setting out our own view.

(c) Should the 'real value' period (see definintion in chapter 1) be extended? Schedule 1 requires that we answer this question only if a recipient of the returned land wishes the accompanying compensation to be calculated using the 'net proceeds' method under clause 3(c) of Schedule 1 of the CFAA. Again, we summarise the parties' submissions before setting out our conclusion.

(d) How much compensation should be awarded to the claimants? We first estimate how much is available under clause 3 of Schedule 1. We then review the nature of the claims in this Inquiry, the claimants' losses,

1. *Haronga v Waitangi Tribunal* [2012] 2 NZLR 53 (SC), para 107

and what redress would be required to restore to them a sufficient tribal economic base. Here, we draw on the extensive economic evidence adduced by witnesses called by the parties; and separate evidence called independently by the Tribunal. We conclude by deciding how much compensation should be awarded to accompany the return of the CFL land.

What Issues Must the Tribunal Address When Determining Compensation?

2 The title of the CFAA states that the Act provides for:

> (a) the management of the Crown's forest assets:
> (b) the transfer of those assets while at the same time protecting the claims of Maori under the Treaty of Waitangi Act 1975:
> (c) in the case of successful claims by Maori under that Act, the transfer of Crown forest land to Maori ownership and for payment by the Crown to Maori of compensation:
> (d) other incidental matters.

3 Section 36 of the CFAA provides for the return of CFL land to Māori ownership and payment of compensation. Section 36(1) 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.

4 Schedule 1 of the Act then sets out the mechanism for calculating the compensation that 'shall be payable to the Maori to whom ownership of the land concerned is transferred'.[2] Clause 2 of Schedule 1 states 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]

2. Crown Forest Assets Act 1989, Schedule 1, clause 1
3. Crown Forest Assets Act 1989, Schedule 1, clause 2

5 For the purposes of calculating the specified amount under clause 2, the statute requires that the Māori, or group of Māori, to whom the CFL land is returned nominate one of three methods. This calculation is to be undertaken if the Tribunal's interim recommendation becomes binding (that is, following the 90-day period). The three options for calculation are set out in clause 3 of Schedule 1:

> (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 license 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]

6 Throughout this chapter, we refer to these three calculation methods as: method (a) or the 'market value' method; method (b) or the 'market stumpage' method; and method (c) or the 'net proceeds' method. Thus, under this statutory scheme the Tribunal's responsibility is to award a portion of the available compensation calculated under one of these three methods. This award *must* include five per cent of the available compensation which automatically follows the return of the land, and the remaining portion, unless the Tribunal recommends a lesser amount. In our discussion, we adopt the wording of the statute and refer to the value of the total available compensation as 'the specified amount'.

7 We record that during our hearings, claimant groups made it clear that they would each likely select the 'net proceeds' calculation under clause 3(c) for compensation if CFL land was returned to their ownership.[5] However, their

4. Crown Forest Assets Act 1989, Schedule 1, clause 3
5. Opening submissions for Te Aitanga a Māhaki and the Mangatū Incorporation, 27 August 2018, #2.615, para 54

final selection under clause 3 follows the Tribunal's decision on the extension of the 'real value' period under clause 6. If method (c), the 'net proceeds' method, is to be used to calculate the specified amount, Clause 5 of Schedule 1 states that the return on the proceeds received by the Crown from the transfer of the forestry assets 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) (as extended under clause 6), equivalent to the return on 1 year New Zealand Government stock measured on a rolling annual basis plus an additional margin of 4% per annum.[6]

8 We refer to the four year period set out in clauses 5(a)(i) and 5(a)(ii) above as the 'real value' period (although we note some claimants refer to this period as the 'grace period').[7] After the 'real value' period ends, the additional interest under clause 5(b) increases the amount of compensation that may be available to the claimants to reflect the benefits they could have enjoyed if their claim had been resolved within those four years and they had been able to invest the compensation. In order to establish when the 'real value' period should begin, the statutory scheme requires that the registrar of the Tribunal certify the date on which claims are deemed to have been filed. In a memorandum of the registrar, dated 10 October 2019, the filing dates for the claims in this Inquiry are certified as:

(a) Wai 274 – The Mangatū State Forest Claim (Te Aitanga a Māhaki), 24 February 1992.
(b) Wai 283 – the East Coast Raupatu Claim (being the comprehensive claim filed on behalf of Te Aitanga a Māhaki), 26 March 1992.
(c) Wai 1489 – Alan Haronga and Proprietors of Mangatū Blocks Incorporated Claim, 31 July 2008.
(d) Wai 499 – Mangatū No. 1 Block Claim (Ngāriki Kaipūtahi), 28 March 1995.

6. Crown Forest Assets Act 1989, Schedule 1, clause 5
7. Closing submissions for Te Aitanga a Māhaki and the Mangatū Incorporation, 10 December 2018, #2.682, para 46; memorandum of counsel for the Māhaki Trust and the Mangatū Incorporation, 6 March 2020, #2.800, para 7.2

(e) Wai 874 – Mangatū Block Claim (Ngāriki Kaipūtahi), 21 July 2000.
(f) Wai 507 – Mangatū Block Claim Ngā Ariki Kaipūtahi), 26 April 1995.
(g) Wai 892 – Patutahi, Muhunga and other lands and Resources Claim (Te Whānau a Kai), 7 December 2000.
(h) Wai 995 – Te Whānau a te Rangiwhakataetaea Claim (Ngāti Matepu), 22 February 2002.[8]

9 Under clause 6 of Schedule 1, the Tribunal may extend the 'real value' period for the purposes of calculating compensation if the Tribunal finds:

> (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. [Emphasis added].[9]

10 It is important to note that clause 6(b) is referring to the 1989 Forests Agreement (see chapter 3, paragraph 26), which sets out the parties' relevant joint obligations:

> The Crown and Maori agree that they will jointly use their best endeavours to enable the Waitangi Tribunal to identify and process all claims relating to forestry lands and to make recommendations within the shortest reasonable period.[10]

11 To summarise, under the statutory scheme, once the Tribunal's interim recommendation for the return of the Mangatū CFL land (made under section 8HB of the TOWA) becomes final, the Schedule 1 compensation will include:
(a) 5 per cent of the compensation calculated under the method chosen by the claimant, as set out in Schedule 1; and
(b) further compensation the Tribunal considers appropriate, which may be between 5 and 100 per cent of the specified amount.

12 The statute provides that the Tribunal's interim recommendation becomes final following the 90-day period. Each recipient then nominates their preferred method under clause 3 of Schedule 1 and the calculations are made

8. Memorandum of the Registrar, 10 October 2019, #2.768(b), para 3; On 30 June 2020, counsel for Te Whānau a Kai submitted that the Wai 274 claim date should be used for the purposes of calculating compensation for Te Whānau a Kai under Schedule 1 of the CFAA. However, clause 5 of Schedule 1 requires that 'a claim shall be deemed to be filed on such date as is certified by the registrar'. The statute does not allow for the Tribunal to make adjustments to the claim dates certified by the registrar: memorandum of counsel for Te Whānau a Kai, 30 June 2020, #2.826, paras 77–84
9. Crown Forest Assets Act 1989, Schedule 1, clause 6
10. 'The Forest Agreement 20 July 1989', evidence of Bernard Paul Quinn, 20 April 2012, #126(a), para 6

in accordance with the prescription set out in Schedule 1.[11] It is therefore a requirement that the Tribunal determines what portion of compensation is to accompany the returned CFL land *before* making its interim recommendation. This would also ensure negotiations between the claimants and the Crown are informed by the complete package of redress available pursuant to the Tribunal's section 8HB interim recommendation.

13 Under clause 2(b) of Schedule 1 of the CFAA we thus determine *what proportion*, if any, of the specified amount of available compensation should be awarded to the recipients of our recommendations, in addition to the mandatory five per cent.[12] As mentioned, the Tribunal can award up to 95 per cent of the specified amount, being the remaining available compensation. In addition, for the purposes of calculating compensation under the clause 3(c) 'net proceeds' method, the Tribunal must also determine whether to extend the 'real value' period. If the 'real value' period is not extended, then the value of compensation under clause 3(c) will be adjusted by the equivalent to the yearly return on New Zealand Government stock, plus an additional margin of four per cent per annum.

14 To assist the Tribunal with its determination, the claimant parties and the Crown adduced evidence on the level of compensation available under clause 3 to the claimants to whom the CFL land will be returned. However, the actual value of the compensation to be awarded can only be calculated once the recipients have each chosen which of the three methods under clause 3 is to apply. The Tribunal therefore does not determine the actual dollar value of the compensation the recipients will receive, as this will be affected by the method they select under clause 3.

15 In light of these statutory requirements, we consider that we must address the following questions in order to make the determinations required by the statutory scheme:

(a) What is the purpose of the remaining portion of statutory compensation under Schedule 1?
(b) Should the four year 'real value' period be extended?
(c) What proportion of the available compensation should be awarded?

16 In considering these issues, we are assisted by the submissions claimant parties and the Crown made during our hearings. We discuss their positions, and our conclusions, in the sections below.

What Is the Purpose of Awarding Statutory Compensation under Schedule 1?

17 Because the Tribunal has not previously exercised its power to make binding recommendations for the return of CFL land to Māori ownership, it has

11. Closing submissions for the Crown, 12 February 2019, #2.688(b), paras 182–184
12. The terms of the Crown forestry licence are the encumbrances referred to in Schedule 1.

not until now considered how awarding compensation under clause 2(b) of Schedule 1 is to be undertaken to meet the purpose and requirements of the legislation. The CFAA also provides sparse express direction on how the Tribunal should exercise its discretion to award compensation. The award of Schedule 1 compensation is not explicitly linked in the statute to our general powers to recommend remedies under section 6(3) of the TOWA.

The Courts' directions

18 The Tribunal's approach to Schedule 1 compensation has already been the subject of judicial review proceedings in the Courts (for a full discussion of the judicial review see chapter 3, paragraphs 30–41). The Tribunal has been found to have erred in law when it relied on Crown settlement policy as a relevant measure of proportionate redress. Specifically, the High Court held in *Haronga v Waitangi Tribunal*:

> [I]t is not the Tribunal's role, as I read *Haronga*, to assess whether or not implementing the bargain from the Forestry Lands Agreement meant that a successful claimant would, in effect, receive more than had been indicated by the parameters of a Crown settlement proposal.[13]

19 In *Attorney-General v Haronga*, the Court of Appeal upheld the High Court's decision that the Tribunal erred in taking account of the impact of Schedule 1 compensation on 'what the Tribunal regarded as necessary and appropriate to compensate for or remove the prejudice suffered by the Crown's wrongful act assessed by comparison with the Crown's settlement policies'.[14] Adopting this ruling, we proceed on the basis that the approach to quantum and proportionality developed in the Crown's settlement policy is not relevant to the Tribunal's determination under clause 2(b) of Schedule 1 of the CFAA.

20 The Court of Appeal also directed the Tribunal to determine the portion of the specified amount of compensation to be awarded *after* it had determined that CFL land should be returned to Māori ownership under section 8HB, and to whom it would be returned. The Court held:

> [I]n our judgment, the Tribunal erred in taking into account the downstream consequences of an interim recommendation relative to the Crown's settlement policies. Once the Tribunal was satisfied that the statutory prerequisites were met, an interim recommendation would follow unless return of all or part of the land was more than was necessary to compensate for or remove the prejudice to Mangatū. The consequences of the application of s36 of the CFAA as against other claimants was not relevant.[15]

13. *Haronga v Waitangi Tribunal* [2015] NZHC 1115, para 104
14. *Attorney-General v Haronga* [2017] 2 NZLR 394 (CA), para 61
15. *Attorney-General v Haronga* [2017] 2 NZLR 394 (CA), para 62

21 This sequencing of determinations under the statutory scheme means that the payment of compensation under Schedule 1 may affect our decision on the amount of CFL land to be returned, but not the decision as to whether the land is to be returned. However, we cannot take into account what claimants might receive through the Crown's settlement process in determining the redress to award under section 8HB of the TOWA and section 36 of the CFAA. The Courts also considered that the Tribunal's discretion to award compensation under section 36 is a calibration point for remedies within the statutory scheme. In its *Haronga* decision, the Supreme Court held:

> 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).[16]

22 In *Attorney-General v Haronga*, the Court of Appeal also stated:

> The Tribunal is able to alter Schedule 1 compensation to award as low as 5 per cent of the listed compensation figure, thereby providing the necessary degree of flexibility in order to do what is fair and just.[17]

23 As we have discussed in the previous chapter, the High Court also offered further commentary in *Mercury NZ Limited and Ors v Waitangi Tribunal and Ors* (*Mercury*) on the lawful exercise of the Tribunal's powers to recommend the return of CFL land.[18] The Court did not directly address the purpose of Schedule 1 compensation in that judgment. However, the Court did clarify that the return of CFL land was a specific remedy for claims concerning Crown breaches of Article 2 of the Treaty with respect to those lands and its customary owners. In its decision upon the review of the preliminary determinations of the Wairarapa Remedies Tribunal, the Court held that the Tribunal's function is 'not to conduct an inquiry into the overall impact of all the Treaty breaches on Ngāti Kahungunu peoples'.[19]

24 In accordance with this direction, we defined in chapter 4 the specific claims which relate to the CFL land in this Inquiry. In chapter 5, we assessed, in respect of those claims, the prejudice suffered by the customary owners of the Mangatū CFL land.

16. Haronga v Waitangi Tribunal [2012] 2 NZLR 53 (SC), para 107
17. *Attorney-General v Haronga* [2017] 2 NZLR 394 (CA), para 63
18. *Mercury NZ Ltd and Ors v Waitangi Tribunal and Ors* [2020] NZHC 654
19. *Mercury NZ Ltd and Ors v Waitangi Tribunal and Ors* [2020] NZHC 654, paras 80, 92

The parties' positions

25 Claimant parties and the Crown made helpful submissions on the purpose of Schedule 1 compensation. In summary, the Crown and Te Whānau a Kai submitted that Schedule 1 compensation is to be seen as part of the package of redress, along with the returned CFL land, which is to compensate for or remove prejudice associated with Crown Treaty breaches under section 6(3) of the TOWA. The Māhaki Trust and the Mangatū Incorporation contended that the compensation is part of a 'bespoke scheme' for the return of CFL land, where the value relates to the value of the forestry assets and the Crown's gain from their sale – not the amount or severity of prejudice suffered by claimants.[20] These submissions are set out below.

The Māhaki Trust and the Mangatū Incorporation (Wai 274, Wai 283, Wai 1489)

26 The Māhaki Trust and the Mangatū Incorporation submitted:

(a) The purpose of the statutory compensation is not to compensate for the prejudice caused by the Crown's breaches.[21]

(b) The mandatory five per cent of the specified amount is compensation for the encumbrance of the licence on the returned land, while '[t]he remaining 95% reflects the return that the Crown received from selling the trees in the first place; a return that should have been received by Māori if the land was rightfully theirs all along'.[22]

(c) The compensation should not be awarded on the basis of prejudice incurred by reason of the Crown's breaches; 'it is about paying back the Crown's gain'.[23]

(d) The Māori negotiators of the 1989 Forests Agreement also insisted 'that Māori be entitled to 100% of the compensation – as Māori had to wait for up to 35 years after orders are made for the land to be returned and then have to fund replanting of the land as it is returned'.[24]

(e) The cost of replanting is significant and the compensation schedule is a 'bespoke scheme' designed specifically for these factors associated with the return of forest land.[25]

Ngāriki / Ngā Ariki Kaipūtahi

27 Ngā Ariki Kaipūtahi (Wai 507) submitted:

(a) The Tribunal's decision on Schedule 1 compensation follows its determination on the return of land under section 8HB.[26]

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20. Transcript for hearing week four, 19–21 December, #4.35, p 27
21. Transcript for hearing week four, #4.35, p 28
22. Closing submissions for the Māhaki Trust and Mangatū Incorporation, #2.682, para 124
23. Closing submissions for the Māhaki Trust and Mangatū Incorporation, #2.682, para 5
24. Closing submissions for the Māhaki Trust and Mangatū Incorporation, #2.682, para 100; transcript for hearing week four, #4.35, p 78
25. Transcript for hearing week four, #4.35, p 27
26. Closing submissions for Ngā Ariki Kaipūtahi, #2.684, para 41

(b) Any adjustment to the compensation occurs after the specified amount of compensation is assessed, and the Tribunal may consider reducing the 95 per cent 'whether there is some sort of gross overcompensation in some way of a group.'[27]

(c) Issues of fairness and equity between the claimants are relevant to the Tribunal's assessment, and it should also consider the extent of prejudice suffered by the groups and their relative size.[28]

28 Counsel for Ngāriki Kaipūtahi (Wai 499 and 874) submitted:

(a) The language used in the schedule 'suggests that the presumption of those negotiating the agreement was that the remaining portion of the specified amount would flow with the whenua as a presumption unless a lesser amount is recommended'.[29]

(b) The extent of prejudice suffered by claimants is not relevant to the Tribunal's determination of compensation under Schedule 1.[30]

(c) The size of the specified amount under Schedule 1 is not a reason to reduce the 95 per cent.[31]

Te Whānau a Kai

29 Te Whānau a Kai submitted:

(a) The language in clause 2(b) of Schedule 1 of the CFAA is clear that the 'compensation that flows with the return of land, or the return of ownership interests in land should be 100% of the "specified amount" unless the Tribunal is minded to award otherwise.'[32]

(b) The 1989 Forests Agreement is likewise clear that the 'Crown would pay the balance (the 95 per cent) or "such lesser proportion" as the Tribunal may recommend.'[33]

(c) The return of land 'is a mirror for the prejudice suffered but the 95% [compensation] is not about the prejudice, that's about paying back the Crown's gain, and we agree that there would need to be a very compelling reason for reducing that amount.'[34]

The Crown

30 The Crown submitted:

(a) The Tribunal has 'wide discretion to decide the level of statutory

27. Transcript for hearing week four, #4.35, p 111; closing submissions for Ngā Ariki Kaipūtahi, 11 December 2018, #2.684, paras 219–220
28. Closing submissions for Ngā Ariki Kaipūtahi, #2.684, para 224; transcript for hearing week four, #4.35, p 114
29. Closing submissions for Ngāriki Kaipūtahi, 10 December 2018, #2.681, para 95
30. Transcript for hearing week four, #4.35, p 191
31. Transcript for hearing week four, #4.35, pp 197–198
32. Closing submissions for Te Whānau a Kai, 11 December 2018 #2.683, para 19.8
33. Closing submissions for Te Whānau a Kai, #2.683, para 19.9(a)
34. Transcript for hearing week four, #4.35, para 222

compensation and can adjust that level to fit the extent of the prejudice being removed or compensated for.'[35]

(b) Like the return of CFL land, Schedule 1 compensation is discretionary and awarded under the Tribunal's general power to make recommendations in section 6(3).[36]

(c) 'The initial 5 per cent is expressly intended to address the prevention of the full enjoyment of the land while it is encumbered.'[37]

(d) The remaining 95 per cent 'is available for the Tribunal to use at its discretion to redress grievances, in regard to all the circumstances of the case (s 6(3) and s 8HB(1)(a)(ii)) – having considered the extent of the prejudice being compensated for.'[38]

(e) In *Attorney-General v Haronga*, the Court of Appeal confirmed that the Tribunal has the necessary flexibility to do what is fair and just.[39]

Tribunal analysis

31 The parties' submissions offer two different interpretations of the purpose and scope of the Tribunal's discretion under section 36 and Schedule 1 of the CFAA. Claimant counsel submitted that Schedule 1 compensation is concerned with the financial bargain made in the 1989 Forests Agreement, and not with the prejudice being addressed by the Tribunal's remedies recommendations. But in the Crown's view, the purpose of the Tribunal's discretion to award compensation is precisely that: to ensure the remedy fits the prejudice caused by the Crown's breaches.

32 In order to reach our own view on the purpose of Schedule 1 compensation, we take into account a number of considerations: the statutory context of the CFAA scheme; the directions made by the Courts; the Tribunal's preferred restorative approach to redress; the economists' evidence about the financial compensation; and practical forestry-related considerations. Throughout, our discussion of the CFAA scheme is informed by the Acts Interpretation Act 1924 and the Interpretation Act 1999.[40] Both require that the meaning of an enactment must be ascertained from its text and its purpose.

The statutory context of the CFAA scheme and the 1989 Forests Agreement

33 Chapter 3 sets out the background to the 1989 Forests Agreement in detail; we need not repeat it here. In summary, the High Court described the agreement as 'an essentially commercial bargain'.[41] It was entered into after

35. Closing submissions for the Crown, #2.688(b), p 157
36. Closing submissions for the Crown, #2.688(b), para 188
37. Closing submissions for the Crown, #2.688(b), para 199
38. Closing submissions for the Crown, #2.688(b), para 199
39. Closing submissions for the Crown, #2.688(b), para 211; *Attorney-General v Haronga* [2017] 2 NZLR 394 (CA), para 63
40. Acts Interpretation Act 1924, section 5J; Interpretation Act 1999, section 5(1)
41. *Haronga v Waitangi Tribunal* [2015] NZHC 1115, para 96

the 1989 *Forests* case, where the Court of Appeal upheld the New Zealand Maori Council's appeal that the Crown's proposed disposal of forestry assets through state-owned enterprises was inconsistent with the Court's decision in the *Lands* case (for further detail on the important litigation that formed the context of the statutory scheme see chapter 3, paragraphs 16–29). This decision was one of several important judgments which upheld Māori appeals seeking to ensure that Crown land and resources were reserved as sources of potential redress for Treaty claims.

34 By reaching an agreement with Māori, the Crown was able to proceed with the sale of its forestry assets – particularly the cutting rights to timber. The forestry licenses created by the CFAA meant that CFL land could be cleared of its marketable crop by the licensee before it was returned to Māori ownership. In exchange, financial compensation would be paid to Māori who received the returned CFL land without the forest. The amount of compensation available would be calculated by one of three methods, all associated with the value of the forestry assets sold by the Crown.[42]

35 When legislation was introduced in Parliament to give effect to this agreement, the purpose of the statutory compensation was also addressed in parliamentary debates. When the Crown Forest Assets Bill was moved to its third reading by Stan Rodger, Minister for State-owned Enterprises, he told Parliament that 'the Bill contains many important protections, including the protection of the interests of Maori people'.[43] The member for Hawkes Bay, Dr Bill Sutton, also described the function of the statutory compensation, stating:

> The Bill specifically provides that, when the Waitangi Tribunal determines that forest land should be restored to Maori ownership, 5 percent of the forest value shall also be restored in recognition that the crop stands on that land and prevents Maori use in any other respect until the crop is harvested. In addition, it provides that, if the Waitangi Tribunal states that the return of the land and 5 percent of the forest value is not enough to redress grievances, part or all of the remaining forest value may also be returned. However, there is no requirement for that.[44]

36 Dr Sutton's comments suggest he expected that the Tribunal could award additional compensation if the return of the land and five per cent of the forest value was not enough to redress grievances. That is to say, additional compensation could be awarded if it were necessary to compensate for or remove prejudice caused by Crown breaches. Dr Sutton referred in his comments to the Treaty principle of redress and stated that one of the Government's

42. 'The Forest Agreement 20 July 1989', evidence of Bernard Paul Quinn, #126(a), paras 8–9
43. Hon Stan Rodger, 19 October 1989, *New Zealand Parliamentary Debates*, vol 502
44. Dr Bill Sutton, 19 October 1989, *New Zealand Parliamentary Debates*, vol 502

objectives was 'to provide a process for the resolution of grievances arising from the Treaty'.[45]

37 We also received evidence in this Inquiry from Bernard Paul Quinn. He was one of three Māori appointees who, in 1989, negotiated with the Crown on behalf of the New Zealand Māori Council and the Federation of Māori Authorities. He told us that during these negotiations, 'the Māori negotiators were very unwilling to retreat from the principle reflected in the common law/TOWSE Act that the forest came with the land as of right'.[46] It was Mr Quinn's evidence that Māori would be compensated for the entire economic return on the licensee's use of the forest unless there was 'a very good reason for departing from 100% compensation'.[47]

38 The Crown challenged this evidence, describing it as in the nature of unqualified legal submissions. The Crown submitted that the *travaux preparatoires* (the official records of a negotiation) to the Forests Agreement do not show clear legislative intent by the parties or Parliament.[48] The Crown also referred to the Māori and Crown negotiators' principles, which were annexed to the Māori proposal, and referred to in Mr Quinn's evidence (also set out in chapter 3, see paragraphs 27–28).[49] We agree we cannot allow Mr Quinn's evidence to assist us in our interpretation of the statute. However, we do consider that the principles of the Crown and Māori negotiators are relevant to the purpose of Schedule 1 compensation under the scheme. We are also persuaded in this approach by the Supreme Court's reference to the Crown and Māori negotiators' principles in the *Haronga* decision, where it commented:

> The agreement of 20 July 1989, which preceded the legislation [. . .] identified a principle of significance to Māori as being to 'minimise the alienation of property which rightly belongs to Māori'. The jurisdiction to order resumption in respect of licensed Crown forest land, conferred on the Tribunal by the 1989 Act, was part of the negotiated solution reached between the Crown and Māori in their agreement, under which both parties gained something of value. It must be understood in that context.[50]

39 We accept as correct the Supreme Court's characterisation of the scheme. The Court confirmed that the Tribunal has the discretion to award as much or as little compensation as we consider fair and just. In making this determination, we remain conscious of the 1989 Forests Agreement, and the principles of significance identified by the negotiators. For instance, a further relevant principle for the Māori negotiators was to '[o]ptimise the economic position of Maori'. For the Crown officials in the negotiations, it was important that

45. Dr Bill Sutton, 19 October 1989, *New Zealand Parliamentary Debates*, vol 502
46. Evidence of Bernard Paul Quinn, 20 April 2012, #126, para 63
47. Evidence of Bernard Paul Quinn, #126, paras 60, 74.4
48. Closing submissions for the Crown, #2.688(b), paras 191, 200
49. Evidence of Bernard Paul Quinn, #126, para 56
50. *Haronga v Waitangi Tribunal* [2012] 2 NZLR 53 (SC), para 88

'adequately securing the claimant's position must involve the ability to compensate for loss once the claim is successful'.[51] In our view, these principles complement the Tribunal's own restorative approach to remedies, to which we return briefly below.

The Tribunal's restorative approach to remedies

40 We agree with the Crown that the restorative approach requires us to consider the interests of justice and the principles of fairness, proportionality relative to the seriousness of the breach, practicality, and the restoration of the Treaty partner prejudiced by the breaches.[52] These are fundamental principles of Treaty jurisprudence (we discuss the Tribunal's restorative approach in chapter 5, see paragraphs 20–31). Here, though, we need to consider how the Tribunal's jurisprudence on restorative redress specifically applies to the determination at hand: awarding monetary compensation under Schedule 1 of the CFAA.

41 In the Muriwhenua Lands Inquiry, the Tribunal expressed some principles for costing remedies under the restorative approach. In its 1989 Determination of Preliminary Issues, the Tribunal suggested that remedies could be 'costed according to that necessary to re-establish the people in the social and economic life of the district and in which data on development opportunities and current socio-economic indicia are relevant.'[53] The level of that economic base should be proportionate to that which had been lost, but should be sufficient to improve a group's social performance.

42 For a restorative approach to be consistent with Treaty principles, the Tribunal in the Muriwhenua Lands Inquiry considered it must include an assessment of socio-economic factors. To exclude such factors would be to overlook 'that a major purpose of the restoration model is the re-establishment of rangatiratanga, that quality of local autonomy that most characterised traditional communities'. Furthermore, the Tribunal emphasised that any redress was for the wider benefit of those who were prejudiced, not solely the group's commercial interests, stating that 'claim settlement funds do not exist in a vacuum, however, benefiting none other than its administrators. The benefit must flow to the people.'[54]

43 The Tribunal identified two factors that would affect the amount of redress: the loss of mana, and the amount of property loss suffered by the claimants. The loss of mana required a consideration of 'the steps necessary to reinstate the mana of the tribe in the local Maori and Pakeha community'.[55] The Tribunal considered these factors were quantifiable, and that socio-economic

51. 'Maori proposal tabled at 21 June 1989 meeting between Crown and Māori', evidence of Bernard Quinn, 20 April 2012, #I26(i), p [5]
52. Further closing submissions for the Crown in response to the economic evidence, 23 September 2019, #2.763, para 10
53. Determination of Preliminary Issues, 14 May 1998, Wai 45 ROI, #2.166, app E, p 10
54. Determination of Preliminary Issues, Wai 45 ROI, #2.166, app E, p 8
55. Determination of Preliminary Issues, Wai 45 ROI, #2.166, app E, p 9

data on the claimants' circumstances could 'inform the assessment of the economic base now required'.[56] The Tribunal was also willing to consider national fiscal constraints and the impact of settlement on national and local communities, but said these issues required further debate and submissions.[57]

44 We have quoted extensively from the Muriwhenua Lands Inquiry's determination because it provides important guidance for how we should approach the same issues in this Inquiry. As it happened, the remedies applications in that Inquiry did not proceed at that time.[58] Since that Inquiry, the Tribunal has not attempted to further or fully quantify the remedial redress required to restore the mana and economic base of claimants. The complex socio-economic issues raised by the restorative approach are thus yet to be extensively considered within the Tribunal's jurisdiction.

Forestry-related considerations arising when CFL land is returned

45 In chapter 6, we detailed the evidence we heard from forestry experts about the obligations and costs the return of the Mangatū CFL land will impose upon the owners (see paragraphs 30–44). Overall, the experts emphasised the importance of taking a broad and long-term view where any forestry enterprise is concerned.[59] One reason is that forestry profits derive from crop rotations of up to 35 years. Throughout this period, there will be ongoing costs associated with maintaining the forest. Consequently, once Mangatū CFL land is returned to Māori ownership, it is likely that many years' management of forestry operations will be required before the claimants will receive any significant commercial benefits from the returned land. Furthermore, changes in the National Standards of Plantation Forestry and other regulatory regimes may further constrain conventional plantation forestry operations in the future (see chapter 6, paragraphs 41–44).

46 This evidence strongly suggests that a binding recommendation for the return Mangatū CFL land would be unlikely to go very far towards remedying or compensating for the prejudice suffered by successful Māori claimants *unless* it was accompanied by significant monetary compensation. In the case of the Mangatū forest, the land was originally afforested for soil protection purposes (although the Crown also had intentions for a commercial forest – see chapter 4, paragraph 184) and the whole of the CFL land is now registered under a protective covenant that restricts its use to forestry.[60] Erosion control

56. Determination of Preliminary Issues, Wai 45 ROI, #2.166, app E, p 7
57. Determination of Preliminary Issues, #2.166, app E, p 10; this was an area where we did not receive any evidence from the Crown.
58. Ngāti Kahu have since filed further remedies applications with the Tribunal.
59. Transcript for hearing week three, 27–28 November 2018, #4.34, pp 58, 147
60. Protective Covenant No 2 set out appendix A to the Crown forestry licence for Mangatū Forest states that 12,509.01 hectares, the entire CFL land, are under a water and soil covenant that replanting be undertaken immediately following the felling of trees, and that they are replanted in a manner which will minimise soil erosion: 'Crown Forestry Licence: Mangatū Forest', Crown document bank, March 2002, #F33, vol 5, pp 1760–1761

and concerns about climate change have once again emerged as dominant considerations regarding this land. Were the land to be returned to Māori ownership, most of the land would be returned cleared, after the licensee had harvested the tree crop. The new occupiers would then have obligations to replant the forest – as was surely contemplated by the parties to the 1989 Forests Agreement. If the new proprietors undertook this planting themselves, they would be unlikely to obtain economic benefit from the land until that cycle could be harvested after a period of at least 25 years.

47 If we are to take account of what is required now in order to provide redress for the Crown's past breaches, then we must factor in such costs and liabilities associated with the protective covenants and resource management obligations that accompany forestry land. The restorative approach to remedies obliges the Tribunal to do precisely that, as do the Treaty principles of active protection and redress. In order to provide a better future for whānau, hapū, and iwi, the Tribunal must ensure that the statutory financial compensation can be used effectively to compensate for or remove the prejudice suffered by the claimants.

Conclusion: the purpose of compensation under Schedule 1

48 The Courts' directions confirm that principles of fairness and justice should guide us in awarding compensation; indeed, these principles are central to our jurisdiction to recommend remedies to address prejudice under section 6(3) of the TOWA. However, making a determination under Schedule 1 of the CFAA is also different from exercising our general power to recommend remedies under section 6(3). For instance, compensation may only be adjusted *after* the Tribunal has made its determination on the return of CFL land under section 8HB. Schedule 1 compensation is specific to the scheme agreed in the 1989 Forests Agreement and enacted in the CFAA. There is no comparable feature in the SOE scheme under section 8A of the TOWA, or in the Tribunal's general remedial jurisdiction under section 6(3). It is therefore appropriate to consider the specific role of the statutory compensation that follows the return of CFL land, with particular regard to the additional protections intended to be afforded to Māori by the 1989 Forests Agreement.

49 In the 1987 *Lands* decision, the Court of Appeal forcefully expressed the view that many areas of New Zealand were no longer in Māori ownership because of Crown Treaty breaches. It stated that '[a]ll too clearly there have been breaches in the past', and pointed to raupatu (confiscation) following war in Taranaki as just one example.[61] The Court of Appeal also recognised that Māori should have been able to benefit from ownership of their lands and resources, holding that 'the [fiduciary] duty of the Crown is not merely passive but extends to active protection of Maori people in the use of their land and waters to the fullest extent practicable.[62] As the principles expressed

61. *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 (CA), p 667
62. *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 (CA), p 664

in the *Lands* decision were applied to other resources in the *Forests* and *Coal* decisions, the Court found that the Crown could not dispose of its assets without consultation with Māori.[63]

50 So, it is in the context of the Court of Appeal's decisions in the late 1980s that the Crown and Māori entered into negotiations in 1989 over the Crown's preferred policy of commercialising Crown forestry. Both parties to the negotiated agreement recognised the principle that Māori claimants should have access to effective redress to compensate for and remove prejudice caused by Crown Treaty breaches. The Court of Appeal had not prescribed what protections were required over forestry assets before such a policy could proceed.[64] However, the Crown and Māori negotiators expressed principles that reflected their commitment to creating adequate protections for Māori claimants, including access to forestry assets as redress for their Treaty claims.

51 As we discussed above, the principles adopted by the Māori negotiators included minimising property loss and optimising the economic position of Māori. The Crown negotiators' principles included a Crown commitment to '[h]onour the principles of the Treaty of Waitangi by adequately securing the position of claimants relying on the Treaty'.[65] The negotiated solution was an undertaking by Māori and the Crown that allowed the Government to pursue its intention to monetise Crown forests by disposing of cutting rights to commercial operators. In exchange, Māori claimants would be able to seek binding recommendations from the Tribunal for the return of CFL land, and the Tribunal would also be empowered to award compensation calculated with reference to the value of the forestry assets sold by the Crown.[66]

52 We agree with counsel for the Mangatū Incorporation that Schedule 1 compensation is a bespoke feature of the statutory scheme under the CFAA and section 8HB of the TOWA. The compensation under Schedule 1 accounts for the fact that the Crown proceeded to sell cutting rights to its forestry assets on land that could subsequently be returned to Māori ownership, if the Tribunal exercised its discretion to recommend such a return. Schedule 1 compensation also distinguishes the section 8HB scheme for CFL land from the scheme for the resumption of SOE land under section 8A of the TOWA. Under that latter scheme, the improvements are returned with the land and section 8A(3) requires the Tribunal to disregard any changes to the condition of SOE land, or any improvements, when considering applications for the return of SOE land. As we set out in chapter 3, the Government of the time entered the 1989 Forests Agreement with Māori to resolve the risks that the resumption scheme for SOE land posed to the sale value of the Crown's forestry assets.

63. *New Zealand Maori Council v Attorney-General* [1989] 2 NZLR 142 (CA); *Tainui Maori Trust Board v Attorney-General*, [1989] 2 NZLR 513 (CA)
64. *New Zealand Maori Council v Attorney-General* [1989] 2 NZLR 142 (CA), p 152
65. 'Maori proposal tabled at 21 June 1989 meeting between Crown and Māori', evidence of Bernard Paul Quinn, 20 April 2012, #126(i), p [5]; *Haronga v Waitangi Tribunal* [2012] 2 NZLR 53 (SC), para 88
66. The forestry assets denotes the forest itself and the harvestable tree crop.

The 1989 Forests Agreement and the separate section 8HB scheme enabled the sale of the Crown's forestry assets, and gave the Tribunal the discretion to award part or all of the value of those assets as compensation to accompany the return of CFL land.

53 Schedule 1 compensation is an essential part of the remedies package under section 8HB of the TOWA and section 36 of the CFAA. This is evidenced by the mandatory five per cent of the specified amount that accompanies the return of CFL land. As we have discussed, this proportion of the available compensation is in recognition that returned land will be encumbered with a forestry licence that will prevent the Māori owners from using the land until it is progressively returned by the licensee – a process that can take up to 35 years (see chapter 6, paragraph 31). Without additional financial compensation above the five per cent, the Māori owners would not receive the benefit of the forestry assets they would have also received had the land been returned prior to the 1989 Forests Agreement.

54 Clause 3(c) of Schedule 1, the 'net proceeds' method, accounts for any delay that might occur in settling Māori claims. During the initial four-year period under clause 5(a)(i), the 'real value' of the Crown's proceeds would be maintained. However, the 'net proceeds' method provides claimants with the opportunity to adjust the value of the Crown's proceeds with a rate of return calculated as the benefit they could have received, had the CFL land and its improvements been returned four years after the filing of their claim or the transfer of the CFL land, whichever came later.[67] In our view, this provision reflects the principle that had Māori been restored as owners of the CFL land at the time of the 1989 Forests Agreement (or before), they would have also expected to benefit from owning the asset – as the Crown did.

55 As noted, we consider these features of the statutory scheme under Schedule 1 of the CFAA and the terms of the 1989 Forests Agreement are compatible with the Tribunal's restorative approach. The parties to the 1989 Forests Agreement and Parliament endorsed the Tribunal as the appropriate forum to carry into effect the purpose of the CFAA amendments to the principal Act and the Forests Agreement: providing for the transfer of Crown forest land to Māori ownership, and payment by the Crown to Māori of financial compensation in the event of successful claims.[68] The Tribunal would reasonably have been expected to carry out this task in compliance with its general function and purpose set out in the long title of the TOWA: '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'.

56 In our view, the Schedule 1 compensation provides for financial redress for the purpose of remedying the prejudice caused by Crown Treaty breaches,

67. Crown Forest Assets Act 1989, Schedule 1, clause 5
68. *Attorney-General v Haronga* [2017] 2 NZLR 394 (CA), para 74

and is calculated with reference to 'the Crown's gain'.[69] Both considerations relate to the practical application of the Treaty in the context of the 1989 Forests Agreement, a commercial bargain that created further protections for Māori Treaty claims. It follows that we should take both matters into consideration to ensure Schedule 1 compensation is awarded consistently with the purpose of the 1989 Forests Agreement.[70]

57 The scheme also allows us, where necessary, to make non-binding recommendations for further redress, including other recommendations reserved under section 8HB(3).[71] In discussing the options open to the Tribunal, the Court of Appeal held:

> [T]he Tribunal could under s 6(3) make a non-binding recommendation of compensation subject to a condition subsequent that the binding recommendation and prescribed compensation come into effect after 90 days. The Forest Lands Agreement expressly contemplated such adjustments.[72]

58 The Tribunal has discretion as to how much or how little of the available monetary compensation to award over and above the mandatory 5 per cent. We are not constrained to award the available compensation in its entirety as an attempted 'return of the Crown's profit'– that is quite clear from the wording of the statute. If the compensation available under Schedule 1 exceeds what is required to compensate for or remove the prejudice flowing from Crown breaches, and to restore the rangatiratanga and economic base of each of the claimant groups, then we are able to award a lesser portion. However, alternatively, we may consider awarding all or any proportion of the compensation, if we determine that outcome to be required in the interests of justice.

Should the 'Real Value' Period be Extended?

59 In this section, we determine whether the 'real value' period under clause 5 of Schedule 1 should be extended. As we noted earlier, under clause 6 of Schedule 1, the Tribunal *may* extend the 'real value' period of 4 years under only two circumstances:

(a) if it is satisfied that a claimant with adequate resources has wilfully delayed proceedings in respect of a claim; or
(b) if the Crown is prevented by reasons beyond its control, from carrying out any relevant obligation under the [forests] agreement.[73]

69. Closing submissions for the Māhaki Trust and Mangatū Incorporation, #2.682, para 5
70. *Attorney-General v Haronga* [2017] 2 NZLR 394 (CA), para 74
71. *Haronga v Waitangi Tribunal* [2012] 2 NZLR 53 (SC), para 79
72. *Attorney-General v Haronga* [2017] 2 NZLR 394 (CA), para 63
73. Crown Forest Assets Act 1989, Schedule 1, clause 6

60 If the 'real value' period is not extended, then the value of compensation under clause 3(c) is adjusted by the equivalent to the yearly return on the New Zealand Government stock plus an additional margin of four per cent per annum after the four year 'real value' period. In circumstances such as this where many years have passed since not only the original 1989 Forests Agreement, but also since the original claims were filed, the Tribunal's determination on whether to extend the 'real value' period may significantly affect the amount of compensation available to successful claimants under clause 3(c).

61 We received no submissions suggesting wilful delay by claimants under 6(a) above, and are satisfied that is not at issue. In the discussion below, we focus on clause 6(b).

The High Court's decision in *Mercury*

62 In *Mercury*, the High Court reviewed the Tribunal's approach in the Wairarapa Remedies Inquiry to determine whether to extend the 'real value' period. The Court stated that the Tribunal's task requires a chronological analysis of events relating to the claims concerned, and that the relevant standard to be applied to the Crown's conduct, under clause 6(b) of Schedule 1 of the CFAA, is 'that it use its best endeavours to have . . . claims in relation to forestry land determined promptly by the Tribunal'. In addition, the Court observed that clause 6(b) also 'adds a gloss to the application of the "best endeavours" standard. What has prevented the Crown from carrying out the relevant obligations (ie within the shortest reasonable period) must arise from factors beyond the Crown's control.'[74]

63 The Court found that in order to extend the 'real value' period, 'what the Crown would need to demonstrate is that notwithstanding its best endeavours and for reasons beyond its control . . . claims before the Tribunal concerning this land were not progressed within the shortest reasonable period'.[75] A further consideration is that 'the relevant obligations need to concern the Tribunal's decisions on . . . claims to the land in question'. The Court stated that 'the policies applied to Treaty settlement processes are not themselves relevant unless they relate to the determinations of the claims by the Tribunal, and the delay to such determinations'.[76]

Parties' positions

64 Claimant parties and the Crown disagreed as to whether the 'real value' period should be extended.

65 In closing submissions, the claimants argued that there was no basis for extending the 'real value' period as they had not willingly delayed resolution of their claims, and delay had not occurred due to the Crown being prevented

74. *Mercury NZ Ltd and Ors v Waitangi Tribunal and Ors* [2020] NZHC 654, para 132(b)
75. *Mercury NZ Ltd and Ors v Waitangi Tribunal and Ors* [2020] NZHC 654, para 133
76. *Mercury NZ Ltd and Ors v Waitangi Tribunal and Ors* [2020] NZHC 654, para 132(c)

from meeting its obligations under the scheme.[77] Claimants contended that the principal reason the Crown did not carry out its obligations under the 1989 Forests Agreement was that it had elected to develop an alternative approach in the form of direct settlement negotiations.[78] The Crown disagreed. It submitted that the preoccupation of the Tribunal's inquiry process with other Treaty claims, and litigation brought by the Mangatū Incorporation, had prevented the Crown from contributing to the resolution of the claims that relate to the Mangatū CFL land in the manner provided for by the CFAA. The Crown's position was that the Tribunal had good reason to extend the period up to the point of its section 8HB interim recommendations.

66 Following the release of the *Mercury* decision, claimants responded by both reiterating points made in their 2018 closing submissions, and refining these previous positions. Counsel for the Māhaki Trust and the Mangatū Incorporation submitted:

(a) In *Mercury*, 'the Court was clear that it was for the Crown to bear the burden of showing that it had been prevented from carrying out its obligations'. The Crown is required to demonstrate that it has fulfilled its obligations and that it has exercised its 'best endeavours' as per the 1989 agreement.[79]

(b) The Crown had ample opportunity to carry out its obligations and to expedite the payment of Schedule 1 compensation 'but opted not to do so'.[80] In the 1995 Waikato-Tainui settlement, and the 1997 Ngāi Tahu settlement, the Crown 'returned CFL land on the basis that it is "deemed to be a final recommendation from the Waitangi Tribunal that it be returned to Māori" but, expressly, without section 36(1)(b) – ie the statutory compensation applying'.[81]

(c) The Crown could have expedited the payment of Schedule 1 compensation at several points: at the start of the Māhaki negotiations in 2002, when an agreement in principle was offered in June 2008, when the *Haronga* decision was released in May 2011, [and] when the Tribunal's remedies report urged all of the parties to negotiate.[82]

(d) There have been 'multiple junctures at which the Crown could have intervened to carry out its 1989 agreement obligations when it observed that Tribunal processes were delaying determination of the claims'.

77. Closing submissions for Ngāriki Kaipūtahi, #2.681, para 145; closing submissions for Te Aitanga a Māhaki and the Mangatū Incorporation, #2.682, paras 147–148; closing submissions for Ngā Ariki Kaipūtahi, #2.684, para 210; counsel for Te Whānau a Kai submitted on this issue in: transcript for hearing week four, #4.35, p 223; closing submission for Ngā Ariki Kaipūtahi, #2.684, para 207
78. Closing submissions for the Māhaki Trust and Mangatū Incorporation, #2.682, paras 146–148
79. Memorandum of counsel for the Māhaki Trust and Mangatū Incorporation, 18 May 2021, #2.929, paras 27, 28
80. Memorandum of counsel for the Māhaki Trust and Mangatū Incorporation, 15 June 2021, #2.936, paras 28–32
81. Memorandum of counsel for the Māhaki Trust and Mangatū Incorporation, #2.936, para 29
82. Memorandum of counsel for the Māhaki Trust and Mangatū Incorporation, #2.936, para 32

These junctures occurred when the Tribunal committed itself to district inquiries instead of CFL land-specific inquiries; recommended in its 2004 Tūranga report that parties were urged to negotiate 'even though Māhaki had sought resumptions in its 2002 closing submissions'; refused 'to (urgently) apply its resumption powers when Mangatū asked it to do so in July 2008 and September 2009'; paused the processing of claims after releasing the Tūranga report; and, 'declined in the Mangatū Remedies Report to finally decide whether to make resumption recommendations.'[83]

(e) The Crown argued that the litigation the Mangatū Incorporation had pursued caused delays beyond the Crown's control. But 'the very reason for the litigation was to enforce compliance with the 1989 agreement. The Crown opposed the litigation strenuously at every step along the way – to the Supreme Court, back to the Tribunal and back up to the Court of Appeal'.[84]

67 Ngāriki/Ngā Ariki Kaipūtahi submitted that:

(a) 'Following *Mercury*, it is for the Crown to show that notwithstanding its best endeavours, and for reasons beyond its control, the claims concerning Mangatū were not progressed within the shortest reasonable period'.[85]

(b) The judgment had failed to consider whether the level of funding provided to the Tribunal would have affected its ability to hear claims within the shortest reasonable period.[86]

(c) The Crown also 'point[s] to litigation delays, without acknowledging the significant delay that its unsuccessful appeal occasioned'. If the Crown is correct and the 'real value' period is extended, 'then it is the claimants who are effectively penalised for delays occasioned by the Tribunal. That cannot be a fair outcome'.[87]

(d) 'What goes unmentioned in the judgment is whether the levels of funding provided to the Tribunal has been sufficient to allow it to proceed without delay. As an entity reliant on Crown funding for its existence and operation, a chronically underfunded Tribunal would not be able to process the claims within the shortest reasonable period'.[88]

68 The Crown submitted that:

(a) 'An extension of the CPI-only period is appropriate when the Tribunal is satisfied "the Crown is prevented, by reasons beyond its control from carrying out any relevant obligation under the [1989 Forests Agreement]"'.[89]

83. Memorandum of counsel for the Māhaki Trust and Mangatū Incorporation, #2.936, para 33
84. Memorandum of counsel for the Māhaki Trust and Mangatū Incorporation, #2.936, para 34
85. Memorandum of counsel for Ngā Uri o Tamanui, 17 May 2021, #2.928, paras 46–47
86. Memorandum of counsel for Ngā Uri o Tamanui #2.928, para 65
87. Memorandum of counsel for Ngā Uri o Tamanui, 15 June 2021, #2.937, paras 11(b)–(c)
88. Memorandum of counsel for Ngā Uri o Tamanui, #2.928, para 65
89. Memorandum of counsel for the Crown, 31 May 2021, #2.933, para 18

(b) The 'real value' period should be extended for two reasons: first, because 'the Crown has engaged in the district inquiry and all subsequent Tribunal hearings and processes to consider remedies using best endeavours to assist the Tribunal to promptly determine claims to the licensed land'; and second, because 'the Tribunal decided, having inquired into claims relating to licensed land, to not determine those claims under s 8HB'.[90]

(c) Considerable time has passed between 2008, when the Tribunal decided to decline the Mangatū Incorporation's two applications for resumption (which the Supreme Court found to be in error); and the Tribunal's decision to adjourn one claim and dismiss the other claims in the Mangatū Remedies Inquiry (which the Court of Appeal found to be in error).[91]

(d) The Crown has produced evidence 'that, from the time the claims were filed until the present time, the Crown has used its best endeavours to identify and process all claims and participate in relevant Tribunal processes to date for claims made about the licensed lands'.[92]

Tribunal analysis: Extending the 'real value' period

69 Under clause 6 of Schedule 1 of the CFAA, the Tribunal 'may' extend the four year 'real value' period only if it is 'satisfied' that at least one of the two statutory grounds is made out. The only one applicable here is under clause 6(b), that the Crown 'is prevented, by reasons beyond its control, from carrying out any relevant obligation' under the 1989 Forests Agreement. The provision authorises the exercise of this discretion by the Tribunal if the statutory criteria are met.

70 The applicable statutory criteria here are:

(a) That the Crown has not fulfilled its 'relevant obligation' to 'jointly with Māori use their best endeavours to enable the Waitangi Tribunal to identify and process all claims relating to forestry lands, and to make recommendations within the shortest reasonable period'.[93]

(b) That the Crown was 'prevented' from fulfilling this obligation by reasons beyond its control.

71 If the Tribunal is not satisfied that these criteria have been met, then it has no discretion to extend the 'real value' period. In the sections below, we will consider the evidence presented in this Inquiry concerning the period between the filing of the Treaty claims and the present. We set out a chronology of the claims in question and consider any delays which may have arisen. We do so in order to explain how our Inquiry processes have developed. We have divided this chronology into four periods (with some overlap): the filing and hearing of claims (1992–2002), settlement negotiations (2002–2011),

90. Memorandum of counsel for the Crown, #2.933, paras 26–27
91. Memorandum of counsel for the Crown, #2.933, para 27
92. Memorandum of counsel for the Crown, #2.933, para 28
93. 'The Forest Agreement 20 July 1989', evidence of Bernard Paul Quinn, #126(a), para 6

litigation and paused negotiations (2008–2017), and the reconvening of the Mangatū remedies inquiry (2017–2021). We conclude by deciding whether the 'real value' period should be extended.

1992–2002: The claims are filed and heard

72 In 2000, at the outset of the Tūranga District Inquiry, the then-presiding officer and acting chairperson of the Tribunal, Judge Joe Williams (as he then was) reflected on the development of the Tribunal's approach to historical claims when setting out the interlocutory steps for inquiry. He noted that in 1985, the Tribunal had been empowered to hear historical claims and 'had sought to do this in as orderly a fashion as possible – in the early days according to the urgency of each case in the first instance and then, if resources permitted, by the order in which the claims were filed'.[94] In 1996, the Tribunal introduced its district and casebook approach to inquiries where 'all claims within a nominated district would be heard together and as far as possible all major historical research for the inquiry district would be undertaken prior to the commencement of hearing'.[95] By 2000, the casebook approach had been applied in the Tauranga, Mohaka ki Ahuriri, Kaipara, and Hauraki District Inquiries.[96]

73 The presiding officer observed that the district and casebook approach 'has helped bring a sense of certainty to an otherwise highly uncertain and often uneven process'.[97] However, he also observed that a weakness of the Tribunal's process 'has been the time which it has taken to hear claims'.[98] The transition from claim-specific inquiries to a strategy of grouping claims in district-wide inquiries had led to claims proliferating and the emeregence of issues of mandate and representation. The presiding officer noted that this was partly the result of 'the failure of the Tribunal to address matters of mandate at an early stage in the process'.[99] The larger district inquiries required more intensive case management, and a need for more extensive pre-hearing direction.[100]

74 In 2000, the presiding officer concluded that innovation was required to avoid delays to the hearing of claims in the Tūranga District Inquiry. The 'new approach' proposed by the Tribunal on 20 March 2000 also aimed to expedite the hearing process by inquiring into mandate and boundary disputes among claimants ahead of hearings.[101] The relevant issues needed to be identified at an early stage, and parties to be provided with all major historical research and reports well in advance of the hearing in order to achieve

94. Memorandum–directions of the Tribunal, 5 July 2000, #2.21, p 10
95. Memorandum–directions of the Tribunal, 20 March 2000, #2.2, p 2
96. Memorandum–directions of the Tribunal, #2.2, p 2
97. Memorandum–directions of the Tribunal, #2.2, p 2
98. Memorandum–directions of the Tribunal, #2.21, p 11
99. Memorandum–directions of the Tribunal, #2.21, p 11
100. Memorandum–directions of the Tribunal, #2.21, p 9
101. Waitangi Tribunal, *Turanga Tangata, Turanga Whenua: Report on the Tūranganui a Kiwa Claims*, 2 vols (Wellington: Legislation Direct, 2004), vol 1, pp 2, 5

certainty and consistency in the hearing process, the presiding officer said.[102] Another feature of this approach was the introduction of formal pleadings, particularised statements of claim and detailed Crown responses, and more pre-hearing conferences.[103]

75 A number of the claims in Tūranga had been filed with the Tribunal some years before the Tūranga District Inquiry began in 2000. For instance, John Ruru's claim on behalf of Te Aitanga a Māhaki, and Tanya Rogers and Owen Lloyd's claims on behalf of Ngāriki/Ngā Ariki Kaipūtahi were registered with the Tribunal between 1992 and 1995. David Brown subsequently filed a further claim on behalf of Ngāriki Kaipūtahi in 1999. David Hawea's claim on behalf of Te Whānau a Kai was registered with the Tribunal in December 2000.[104]

76 One reason for the delay between the filing of these claims and the begining of the Tribunal's Inquiry was the need for research to be completed. When Te Aitanga a Māhaki's claims were first filed in 1992, the claimants requested that the Tribunal commission research into the allegations they raised before the claims were heard.[105] Tanya Rogers and Owen Lloyd also requested that the Tribunal commission research into Ngāriki/Ngā Ariki Kaipūtahi's claims in 1995.[106] In response to these requests, the Tribunal directed claimants to submit an application for funding through the Tribunal or to inquire into funding available through the Crown Forestry Rental Trust.[107]

77 The research for these claims took several years to complete. By March 2000, four major research reports had been completed, with a further four in draft form.[108] Then in July 2000, following the first judicial conference held in Tūranga, the then-presiding officer issued memorandum–directions stating that six research reports specific to Te Aitanga a Māhaki were underway, and two reports that were specific to Ngāriki/Ngā Ariki Kaipūtahi.[109] Te Whānau a Kai, whose claim was only registered in 2000, informed the Tribunal at an October 2000 judicial conference that they also sought to have further research completed regarding their claim to the Patutahi block. The Tribunal did not agree that further research was required on this block, but noted that a traditional history report 'may well be necessary'.[110] In December 2000, the

102. Memorandum–directions of the Tribunal, #2.2, p 2
103. Waitangi Tribunal, *Turanga Tangata*, vol 1, pp 2–7
104. Memorandum of the Registrar, 24 October 2019, #2.768(b)
105. Statement of claim, 21 February 1992, Wai 814, #1.1; statement of claim, 13 March 1992, #1.2
106. Statement of claim, 28 March 1995, #1.6, p 3; statement of claim, 5 September 1995, Wai 507 RO1, #1.1(a)
107. Memorandum–directions of Tribunal, Wai 814, 13 March 1992, #2.25; memorandum–directions of Tribunal, 15 May 1992, #2.27; memorandum–directions of Tribunal, 19 April 1995, #2.35; memorandum–directions of Tribunal, #2.36;
108. A number of these research reports were commissioned by the Waitangi Tribunal as well as the Crown Forestry Rental Trust: memorandum–directions of the Tribunal, #2.2, pp 4–5
109. Memorandum–directions of the Tribunal, #2.21, app 2
110. Memorandum–directions of the Tribunal, 12 December 2000, #2.72, p 3

Tribunal set the deadline for casebook evidence at 15 January 2001.[111] The Crown expressed support for any necessary extensions to the casebook deadline, and emphasised the benefits of refraining from certifying the casebook until all evidence was filed with the Tribunal, as this would provide certainty for all parties.[112]

78 Procedurally, the Crown took issue with a number of the processes proposed by the Tribunal, including the need for a fully particularised statement of response. The Crown expressed a strong objection to sharing its position on issues early in the process.[113] The Crown upheld this position throughout 2000 and 2001, maintaining that 'until the Crown's own research is completed and the evidence before the Tribunal is tested, it will be unlikely that the Crown could acknowledge breaches of the Treaty of Waitangi.'[114]

79 In memorandum–directions dated 5 July 2021, the Tribunal did not accept the Crown's submission that it could not disclose its position until the end of the hearing process, stating 'that approach has contributed to the delay in reaching Treaty settlements in the past. It cannot be further supported.'[115] In compliance with the Tribunal's direction, the Crown filed a particularised statement of response for the Tūranga Inquiry on 24 July 2001.[116] Following the completion of research, and the filing of the claimants' particularised statements of claim and the Crown's statement of response, hearings commenced on 19 November 2001 and continued until 28 June 2002.[117]

80 The Tribunal's decision to inquire into the Tūranga claims on a district-wide basis meant that the claims relating to the Mangatū CFL land would be heard alongside other claims in the district. By this Tribunal process, all parties, including the Crown, committed to a full inquiry: a thorough investigation of all of the issues, including those relating to the Mangatū CFL land. We have found that the Tribunal' Tūranga District Inquiry and Tūranga report have been of immense assistance to us, and necessary, in order to understand the all of the relevant Crown Treaty breaches and prejudice that relate to the CFL land.

81 The Crown provided no evidence that prior to, or during the Tūranga hearings, it had promoted a process for swift identification and processing of the claims that relate to the CFL land, other than as part of the Tribunal's district inquiry programme. The Crown has not pointed to any evidence that it advocated to the Tribunal that these claims should be dealt with as a matter of priority, or that it assisted the Tribunal or claimants to complete

111. Memorandum and directions by deputy chairperson, #2.72, p 2
112. Memorandum of Crown counsel, 8 May 2000, #2.11, paras 4–5; memorandum of Crown counsel, #2.68, para 6
113. Memorandum and directions of the Tribunal, #2.21, para 3, pp 9–12
114. Memorandum of Crown counsel, #2.109, para 3, p 1
115. Memorandum–directions of the Tribunal, #2.21, p 13
116. Second statement of response by the Crown to the claims in the Gisborne Regional Inquiry, 24 July 2001, #2.182
117. Waitangi Tribunal, *Turanga Tangata*, vol 1, p 3

the necessary research for these claims as soon as possible. Notwithstanding the absence of this evidence, the Crown is asking us to conclude that it 'has engaged in Tribunal inquiries using best endeavours to assist the Tribunal to promptly determine claims to CFL land'. The implication of the Crown's argument is that the delay in processing the claims that relate to the CFL land was by reason of the Tribunal's processes, and was therefore beyond the Crown's control. On the basis of that argument, the Crown says that the statutory requirement under clause 6(b) of Schedule 1 is met and the 'real value' period should be extended for this time period.

82 We do not accept this argument. We have no basis on which to conclude that the Crown has carried out its relevant obligation using its best endeavours. In addition, the legislation does not place an obligation on the Tribunal to take steps to hasten the completion of these claims. While the Tribunal processes of setting the district boundary and inquiring into the mandate of various claimant groups took time, these are all necessary steps in order to thoroughly inquire into and adjudicate on the claims that relate to the CFL land. Similarly, the Tribunal's requirement that claimants produce particularised statements of claim, and the Crown produce a particularised statement of response, are the ordinary incidents of these inquiry processes.

83 These procedural requirements cannot be said to have prevented the Crown from carrying out its relevant obligation. In fact, the processes adopted in the Tūranga District Inquiry were intended to complete the inquiry into the claims in a timely yet comprehensive manner. In our view, it is not a correct interpretation of the 1989 Forests Agreement or the legislation that the rigorous processes adopted by the Tribunal in the Tūranga Inquiry are a reason for extending the 'real value' period. When Parliament referred the adjudication of claims for the return of CFL land to the Tribunal, it must have intended that the Tribunal's inquiry process would take such time as necessary to arrive at a proper and just result. In our view, this would also have been the reasonable expectation of the Crown and Māori claimants.

84 In all the circumstances of the Tūranga District Inquiry, where the Tribunal was dealing with a complex history and multiple claimants, we consider that with the resources to hand, the time taken to complete the Tūranga hearings was 'the shortest reasonable period'.[118] We conclude that there is no basis to exercise our discretion to extend the 'real value' period for the period between the filing of the claims until the conclusion of the Tūranga hearings in 2002.

2002–11: The settlement negotiation period

85 After hearings in the Tūranga Inquiry ended in 2002, the overall focus of both the Crown and claimants shifted to negotiations. During a series of hui between April and September 2002, the claimants formed a working group to deal with matters of mandate and settlement negotiations. Lilian Anderson, who was the director of the Office of Treaty Settlements during our 2018

118. 'The Forest Agreement 20 July 1989', evidence of Bernard Paul Quinn, #126(a), para 6

hearings (but had also previously served as a senior official involved in these negotiations), gave evidence before us that in 2002 'the claimants formed a working party to consider how they would approach mandate and settlement negotiations.'[119] Ms Anderson also told us that the Crown worked with Te Aitanga a Māhaki to develop a mandate during 2003 and 2004.[120]

86 In the 2004 Tūranga report, the Tribunal expressed its preference that claimants and the Crown participate in a collective approach to settlement at a 'single district-wide table.'[121] The Tribunal also observed that this approach to negotiations would not produce a single settlement package. On the contrary, it stated, 'we would fully expect a single negotiation to result in the creation of several settlement packages in accordance with the wishes of the claimants.'[122] Regarding Te Aitanga a Māhaki, Ngāriki/Ngā Ariki Kaipūtahi, and Te Whānau a Kai, the Tribunal recommended that 'the Mahaki cluster (our phrase for want of a better one) should negotiate a single settlement, though we do not discount the possibility that the result would include separate packages for each of Te Whānau a Kai and Ngariki Kaiputahi.'[123] After the Tribunal issued its 2004 report, the Tūranga claimants worked with the Crown to develop a negotiating framework.[124]

87 In August 2005, the Crown recognised the mandate of Te Pou a Haokai to represent Te Aitanga a Māhaki, Ngāriki/Ngā Ariki Kaipūtahi, and Te Whānau a Kai in settlement negotiations.[125] Ms Anderson told us that the Crown had welcomed the Tribunal suggestions for district-wide negotiations, and began working with Te Pou a Haokai alongside Ngāi Tamanuhiri, and Rongowhakaata. On 29 May 2007, the parties entered into Terms of Negotiation, followed by an agreement in principle, signed on 29 August 2008.[126] In 2009, collective negotiations collapsed, and the parties expressed a desire to adopt individual deeds of settlement. The Crown agreed to work towards three separate deeds with Rongowhakaata, Te Whakarau (a successor of Te Pou a Haokai), and Ngai Tāmanuhiri, contracting a facilitator to assist with the internal conflict and issues of representation.[127] Ms Anderson noted that when the Supreme Court directed the Tribunal to hold an urgent remedies hearing to hear Alan Haronga's claim in May 2011, the Crown subsequently paused negotiations.[128]

119. Evidence of Lilian Marie Anderson, 31 July 2018, #P29, para 86
120. Evidence of Lilian Marie Anderson, #P29, para 86
121. Waitangi Tribunal, *Turanga Tangata*, vol 2, p 741
122. Waitangi Tribunal, *Turanga Tangata*, vol 2, p 742
123. Waitangi Tribunal, *Turanga Tangata*, vol 2, p 742
124. Evidence of Lilian Marie Anderson, Wai 814, #P29, para 90
125. Waitangi Tribunal, *Turanga Tangata*, vol 2, p 741
126. Synopsis of Crown submissions opposing application for an urgent remedies hearing, 31 July 2008, Wai 1489 ROI, #3.1.10, para 6
127. Evidence of Lilian Marie Anderson, #P29, paras 96–97
128. Evidence of Lilian Marie Anderson, #P29, paras 102–103

88 The Crown has argued that following the conclusion of the 2002 hearings, 'iwi and claimants agreed to engage in settlement discussion with the Crown instead of pursuing resumption recommendations'.[129] While that may be so, it is not clear to us how these steps towards the settlement of the wider Tūranga claims, including those of Ngāi Tāmanuhiri and Rongowhakaata, could have prevented the Crown from meeting its obligations under the 1989 Forests Agreement to assist the Tribunal to progress the resolution of the claims. We agree with counsel for the Māhaki Trust and the Mangatū Incorporation that, on its own, the fact that claimants entered into direct negotiations with the Crown does not mean the Crown was prevented from carrying out its obligations under the 1989 Forests Agreement.[130] We consider that, by 2002, the Crown must have been aware that Te Aitanga a Māhaki and Ngāriki/Ngā Ariki Kaipūtahi had already sought the return of the Mangatū CFL land as a remedy prior to the Tūranga hearings.[131] By the time hearings ended, the Crown would have been fully apprised of the evidence, including its own evidence, about the details of the claims and the likelihood that the Tribunal would find them to be well-founded. There was nothing beyond the Crown's control which prevented it from resolving claims at that point, even though the Tribunal had not yet reported. By way of comparison, counsel for the Māhaki Trust highlighted that the Crown returned the Onewhero forest land to Māori ownership as part of the Waikato Tainui settlement, even though the Tribunal had not heard the claim or made findings.[132]

89 In our view, it was open to the Crown to fast-track the resolution of the well-founded claims that relate to the CFL land, ahead of the wider tribal claims. For instance, the Crown could have settled the specific claims relating to the forest land in the manner provided for in the Ngāi Tahu settlement: where Crown land was returned to Māori and deemed to be 'subject to a final recommendation from the Waitangi Tribunal'.[133] Alternatively, after evidence on the claims had been heard and tested, the Crown was in a position to assist the Tribunal to identify the claims relating to the Mangatū CFL land and to progress those claims through the Tribunal process, or through its separate settlement process, jointly, with Māori, as the Forests Agreement envisaged. The Tribunal's recommendation that parties enter district-wide negotiations did not prevent the Crown from working jointly with Māori to pursue one or more of these pathways in order to settle the claims to the CFL land.

90 Accordingly, we consider that the Crown was not prevented from using its best endeavours to carry out its obligations under the 1989 Forests Agreement following the 2002 hearings, and during the subsequent negotiations with

129. Memorandum of counsel for the Crown, #2.933, p 15
130. Evidence of Lilian Marie Anderson, #P29, para 86
131. Second amended statement of claim for Te Aitanga a Māhaki, not dated, Wai 814 ROI, SOC #1, para 157; amended statement of claim for Ngāriki Kaipūtahi, 18 April 2001, SOC #3, para 93
132. Memorandum of counsel for the Māhaki Trust and Mangatū Incorporation, #2.936, para 31
133. 'Deed of Settlement', appendix to memorandum of counsel for the Māhaki Trust and Mangatū Incorporation, #2.936(a), secion 4

claimants. We therefore do not extend the 'real value' period from the end of hearings in 2002 to 2008.

2008–17: The litigation continues and negotiations are paused

91 On 31 July 2008, Mr Haronga submitted his application to the Waitangi Tribunal for an urgent remedies hearing on behalf of the Mangatū Incorporation, seeking binding recommendations under section 8HB(1)(a) of the TOWA.[134] The Crown opposed the application on the basis that it had already established robust mandates with Te Pou a Haokai, the Ngāi Tāmanuhiri Trust, and the Rongowhakaata Trust – collectively named Tūranga Manuwhiriwhiri – and settlement negotiations had reached an advanced stage.[135] The Tribunal rejected the application for an urgent hearing on the grounds that it failed to meet the qualifying standards required, with insufficient evidence to suggest that without the Tribunal's intervention, the applicant would 'suffer significant and irreversible prejudice'.[136] As an alternative remedy for Mr Haronga's application, the Tribunal also urged Tūranga Manuwhiriwhiri claimants to enter into dialogue with the Mangatū Incorporation, to encourage both internal resolution and inclusion of the Incorporation in the settlement process.

92 These discussions were unsuccessful. The Mangatū Incorporation filed a second urgent remedies application on 17 September 2009.[137] Once again, the Crown opposed a remedies hearing, maintaining that all claims concerning Mangatū should be settled through a single district-wide negotiation, as suggested by the Tribunal in its 2004 report.[138] This second application for urgency was also declined by the Tribunal on 21 October 2009, on the grounds (as was argued by the Crown) that there was a potential alternative remedy and that the position of the Mangatū Incorporation shareholders did not warrant Tribunal intervention.[139]

93 Following this decision, on 10 November 2009 Mr Haronga sought judicial review in the High Court on behalf of the Mangatū Incorporation, challenging the lawfulness of the Tribunal's refusal to grant an urgent hearing.[140] On 23 December 2009, the High Court declined the application for judicial review on the basis that the applicant 'ha[d] not established that the decision of the Tribunal . . . was made in error of law'.[141] Mr Haronga then appealed

134. Application for resumption of licensed land, Wai 1489 ROI, #3.1.1
135. Memorandum of counsel for the Crown, Wai 1489 ROI, #3.1.4, para 16
136. Memorandum and directions of the judicial officer, 28 August 2008, Wai 1489, #2.5.4, para 7
137. Amended application for resumption of licensed land pursuant to s8HB of the Treaty of Waitangi Act 1975, 17 September 2009, Wai 1489, #3.1.14(a), p1
138. Crown memorandum opposing application for a remedies hearing, 30 September 2009, Wai 1489, #3.1.17, paras 54–56
139. Judge Stephen Clark, memorandum declining application for urgent remedies hearing, 21 October 2009, Wai 1489, #2.5.10, para 62
140. *Haronga v Waitangi Tribunal* High Court Wellington CIV2009–485–2277, 23 December 2009, para 103
141. Brief of evidence of Lilian Marie Anderson, #P29, para 98

the High Court's decision; however the appeal was dismissed by the Court of Appeal on the basis that 'the Judge was entitled to reach the conclusions that he did'.[142] On 11 and 12 October 2010, the matter was heard by the Supreme Court. On 19 May 2011, the Supreme Court directed the Tribunal to hear the Mangatū Incorporation's application for urgency in respect of its claim seeking the return of CFL land.[143] The Crown opposed Mr Haronga's application at each step through the Courts.[144]

94 In response to the Supreme Court's decision, settlement negotiations between the Crown and the claimant groups – Te Aitanga a Māhaki, Mangatū Incorporation, Te Whānau a Kai, and Ngāriki/Ngā Ariki Kaipūtahi – were paused in June 2011.[145] In November 2011, the parties filed amended statements of claim with the Tribunal.[146] On 18 November 2011, the Crown filed a statement of response, expressing the Crown's willingness to enter into negotiations and its intention to 'assist the Tribunal in identifying where issues remain in contention'.[147] As stated elsewhere, the Tribunal held hearings between June and November 2012 and in December 2013 released the Mangatū Remedies Report, adjourning Te Aitanga a Māhaki's application, and dismissing the applications of Mangatū Incorporation, Ngāriki/Ngā Ariki.[148]

95 In early 2014, Te Aitanga a Māhaki Trust submitted a mandate strategy to the Crown, and a draft deed of mandate. Following a mandate hui, Te Aitangi a Māhaki Trust agreed that Te Whānau a Kai and Ngāriki/Ngā Ariki Kaipūtahi should seek separate mandates to negotiate with the Crown.[149] However, in May 2014, David Brown applied to the High Court for judicial review of the Tribunal's Mangatū Remedies Report.[150] Soon after, the Mangatū Incorporation and Te Aitanga a Māhaki also filed applications for judicial review.[151]

96 In August 2014, the Crown once again paused settlement negotiations in order to await the outcome of the High Court's decision on the applications for judicial review.[152] The High Court quashed the 2014 Mangatū Remedies Report and directed the Tribunal to reconsider all the applications for bind-

142. *Haronga v Waitangi Tribunal and Ors*, CA73/2010, 19 May 2010, para 48
143. *Haronga v Waitangi Tribunal* [2012] 2 NZLR 53 (SC), para 108
144. *Haronga v Waitangi Tribunal*, High Court, Wellington CIV2009–485–2277, 23 December 2009, para 36; *Haronga v Waitangi Tribunal and Ors*, CA73/2010, 19 May 2010, para 33; *Haronga v Waitangi Tribunal* [2012] 2 NZLR 53 (SC), para 36
145. Brief of evidence of Lilian Marie Anderson, #P29, para 103
146. Amended statement of claims for TAMA, 9 November 2011, SOC #1(a); amended statement of claims for Ngā Ariki Kaipūtahi, 4 November 2011, SOC 3(a); amended statement of claims for Te Whānau a Kai, 4 November 2011, SOC #8(a)
147. Crown statement of response, 18 November 2011, #2.357, paras 5–6
148. Brief of evidence of Lilian Marie Anderson, #P29, para 104
149. Brief of evidence of Lilian Marie Anderson, #P29, para 105
150. Brief of evidence of Lilian Marie Anderson, #P29, para 105
151. Brief of evidence of Lilian Marie Anderson, #P29, paras 106, 109
152. Brief of evidence of Lilian Marie Anderson, #P29, para 107

ing recommendations 'in terms of this judgment'.[153] On 22 June 2015, the Crown appealed the High Court decision.[154] The Court of Appeal upheld the High Court's decision, dismissing the Crown's appeal on 19 December 2016. The Tribunal was accordingly directed to reconvene the Mangatū Remedies Inquiry.[155]

97 The Crown argued that throughout this period 'the Tribunal has adopted practices deferring prompt determination of resumption claims following its inquiries'.[156] We understand this to mean that, during the inquiry process itself, the Tribunal's decisions have prevented the Crown from carrying out its obligations. We do not agree. In our assessment, following Mr Haronga's application for an urgent remedies hearing, it was open to the Crown to assist the Tribunal to process the well-founded claims in the manner the 1989 Forests Agreement expressly intended. When Mr Haronga sought this very outcome in 2008 and 2009, the Crown still opposed his application for an urgent remedies hearing.[157] We do not think it would be consistent with the terms or spirit of the 1989 Forests Agreement if claimants were penalised for the time needed to pursue litigation to uphold the very rights provided for in the Forests Agreement. That cannot be a correct interpretation of the legislation.

98 We note that Mr Haronga's application was also opposed by Te Aitanga a Māhaki and Ngāriki/Ngā Kaiputahi. Te Pou a Haokai also opposed Mr Haronga's initial judicial review of the Tribunal's decision in the High Court, the Court of Appeal, and the Supreme Court, although it described itself as 'a reluctant party.' We consider that it is understandable that, having spent six years in preparation and then settlement negotiations, claimant groups might be reluctant to see those negotiations paused while litigation proceeded. However, as it was the Crown's own policy at the time not to engage in settlement negotiations while litigation was ongoing, that is clearly not a matter beyond the Crown's control.[158] Instead of opposing Mr Haronga's applications, the Crown could have supported them. It was open to the Crown to continue with settlement negotiations with the additional prospect of an agreed settlement under section 8HB as part of the negotiations. The Crown might not have wished to complicate its relationships with those claimant groups who wanted to continue with settlement negotiations, which is what supporting Mr Haronga in his applications to the Tribunal under section 8HB might have done. But that again was the Crown's choice, not a matter beyond its control. When the Tribunal began its remedies inquiry in 2011, the Crown opposed

153. *Haronga v Waitangi Tribunal* [2015] NZHC 1115, para 114
154. Memorandum of counsel for the Crown, #2.933, p 2, para 31
155. *Attorney-General v Haronga* [2017] 2 NZLR 2 (CA)
156. Memorandum of counsel for the Crown, #2.933, p 17
157. Judge Stephen Clark, memorandum declining application for urgent remedies hearing, 28 August 2008, Wai 1489 ROI, #2.5.10, para 19; Judge Stephen Clark, memorandum declining application for urgent remedies hearing, 28 August 2008, Wai 1489 ROI, #2.5.4, para 17
158. Evidence of Lilian Anderson, Wai 814, #P29, para 103

the remedies sought by the claimants, preferring instead a negotiated settlement. It stated:

> Since the conclusion of the Tribunal's hearings into the Turanganui a Kiwa district claims in 2002 the Crown has wanted to negotiate a settlement of the historical grievances of Turanga iwi. In relation to the Mahaki cluster, negotiations were held over a number of years. The parties came close to a settlement. Now that the Mahaki cluster and the Crown are before the Tribunal once again the Crown wishes to emphasise that the Crown wants to negotiate a settlement of claims and wants to transfer the whole of the Mangatu forest (along with accumulated rentals) to a body representative of those whose grievances relate to that land.[159]

99 However, the Crown's offer to transfer of the Mangatū CFL land to the claimants, along with the accumulated rentals, did not include the compensation available under section 36 and Schedule 1 of the CFAA. The land would instead would have to be purchased out of the settlement quantum offered to Te Pou a Haokai.[160] The Crown's offer of commercial redress to the claimanants was silent on compensation under the CFAA.

100 We turn now to consider the import of the *Mercury* decision. Despite the Crown's preference for a wider settlement of Te Aitanga a Māhaki, Ngāriki/Ngā Ariki Kaipūtahi, and Te Whānau a Kai's claims, after the *Mercury* was released, the Crown submitted that during the first round of remedies hearings it 'assist[ed] the Tribunal in making the determinations it was directed to make as a result of the Supreme Court's judgment'. It said it did so through filing of submissions, engaging with claimants, and participating in hearings.[161] We agree that the Crown was able to participate in the process, but it was the Crown's choice during the first round of remedies hearings to argue that the Tribunal should not make binding recommendations under section 8HB, and instead argue for a single negotiated settlement for all of Te Aitanga a Māhaki, Ngāriki/Ngā Ariki Kaipūtahi and Te Whānau a Kai claims.[162] The Crown did not have to oppose the remedies sought by the Mangatū Incorporation, or the other claimant groups (who all sought binding recommendations from the Tribunal under section 8HB following the Supreme Court's *Haronga* decision.)

101 Notably, the Crown supported many of the Tribunal's decisions that it now argues contributed to unnecessary delays, including the decision not to make binding recommendations in the 2014 Report. In the litigation that followed the Tribunal's 2014 report, the Crown opposed the claimants' judicial review.

159. Crown amended statement of response, 6 December 2011, #2.368, para 7
160. Evidence of Andrew McConnell, 31 May 2012, #I30, paras 28–31
161. Crown submissions of the implications of the Mercury decision on this inquiry and additional matters, #2.933, p 17, para 31
162. See closing submissions for the Crown, 26 November 2012, #M10, paras 27–28

Crown counsel argued before the High Court and Court of Appeal that the Tribunal had lawfully and reasonably exercised its discretion in not making binding recommendations under section 8HB.[163] We agree with counsel for the Māhaki Trust that the Crown did not have to oppose Mr Haronga's litigation; and further, that this very litigation clarified the nature of the protections to be lawfully afforded to claimants under the Forests Agreement.[164] Again, this was the Crown's choice.

102 This commentary is not intended as any criticism or judgement of the position taken by the Crown. That is not part of our task under clause 6 of Schedule 1 of the CFAA. However, in our view the Crown cannot justifiably argue that the Tribunal has deferred the processing of the claims through its remedies inquiries, when the Crown has consistently opposed the resolution of the specific well-founded claims that relate to the CFL land in favour of wider settlement. Under the 1989 Forests Agreement, the Crown accepted it was obliged to assist the Tribunal in identifying and processing the relevant claims jointly with Māori, within the shortest reasonable period. This obligation existed throughout, and since the filing of the claims. As a party to the first round of litigation initiated by Alan Haronga, the Tribunal's first round of remedies hearings, and the judicial review of the 2014 report, the Crown was not prevented from working jointly with the claimants to resolve the specific claims relating to Mangatū, as it was obliged to do. Instead, it consistently advocated for a wider negotiated settlement of all Te Aitanga a Māhaki, Ngāriki/Ngā Ariki Kaipūtahi and Te Whānau a Kai claims. Accordingly, we conclude it is inappropriate to extend the 'real value' only period between 2008 and 2017.

2017–21: The Mangatū Remedies Inquiry reconvenes

103 The reconvened Mangatū Remedies Inquiry got underway following the Court of Appeal's 2017 decision, with the Tribunal inviting parties to make submissions on their views on next steps for the reconvened inquiry.[165] Memoranda were filed with proposed timetables regarding a reconvened hearing. In June 2017, parties filed amended remedies applications detailing their grounds for return of the CFL land.[166] The Crown filed submissions opposing the remedies sought by claimant parties, although it did recognise that the return of some of the CFL land to Māori ownership 'might' be an

163. *Haronga v Waitangi Tribunal* [2015] NZHC 1115, paras 56–60; *Attorney-General v Haronga* [2017] 2 NZLR 2 (CA), para 54
164. Memorandum of counsel for the Māhaki Trust and the Mangatū Incorporation, #2.936, para 34
165. Memorandum–directions of the presiding officer calling for submissions on reconvened inquiry, Wai 814, #2.505, para 3
166. Amended remedies application for Te Aitanga a Māhaki and the Mangatū Incorporation, 26 June 2017, #2.522; amended remedies application for Te Whānau a Kai, 15 September 2017, #2.537; amended remedies application for Ngā Ariki Kaipūtahi, 15 September 2017, #2.539; amended remedies application for Ngāriki Kaipūtahi, 15 September 2017, #2.540;

appropriate remedy for the well-founded claims that relate to the CFL land.[167] Hearings were held between August and November 2018, concluding with closing submissions from 19 to 21 December.[168]

104 The Tribunal held a further hearing in July 2019 to consider additional economic evidence on compensation.[169] Shortly after, the Tribunal issued memorandum–directions outlining the proposed iterative process that would precede the release of any recommendations from the Tribunal.[170] This proposed process had been supported by claimants and the Crown (see chapter 6, paragraph 56). From October 2019 through to January 2020, parties participated in the iterative process and attended the ultimately unsuccessful Tribunal-led mediation process.[171] Parties then undertook their separate ratification processes from March 2020 to February 2021.[172] Then came the independent audit of the ratification process, undertaken to ensure the polling results were accurate: the audit took place between February and July 2021 (see chapter 6, paragraphs 112–125).[173] Following the *Mercury* decision, the Tribunal sought further submissions from claimants and the Crown.[174] Meanwhile, the *Mercury* decision has been appealed by the Ngāti Kahungunu Settlement Trust, the Wairarapa Moana ki Pouākani Incorporation, and Mercury Energy Ltd. At the time of this report, the outcome of this appeal remains unknown.

105 Throughout the second round of remedies proceedings just summarised, the Crown has not been prevented from carrying out its relevant obligation. It has been free to assist the Tribunal to identify and process the claims that relate to forestry lands and make recommendations in the shortest reasonable period. The adjudication of these claims by the Tribunal is the very purpose of these proceedings. Throughout, the Crown has supported the Tribunal's wish to take the time required to properly prepare the claimants to receive its recommendations through the iterative process.[175] The Tribunal has made no decisions that have prevented the Crown from meeting its obligations. We therefore conclude that it would be inappropriate to extend the 'real value' period between 2017 and 2021, with a single exception.

167. Opening submissions for the Crown, 7 November 2018, #2.657; closing submissions for the Crown, #2.688(b).
168. Transcript for hearing week one, 27–31 August 2018, #4.30; transcript for hearing week two, 12–15 November 2018, #4.33; transcript for hearing week three, #4.34; transcript for hearing week four, #4.35
169. Transcript for joint remedies hearing, 22–24 July 2019, #4.38; memorandum–directions, 6 June 2019, #2.711
170. Memorandum–directions of the panel, 3 July 2019, #2.721
171. Mediator's interim report, 19 November 2019, #2.775(a); mediator's second interim report, 21 January 2020, #2.780(a); mediator's third interim report, 27 February 2020, #2.799(a)
172. Memorandum–directions of the presiding officer, 21 January 2020, #2.780,
173. Memorandum–directions of the presiding officer, 10 February 2021, #2.914, paras 6–9
174. Memorandum–directions of the presiding offier, 27 April 2021, #2.926, para 17
175. Memorandum of counsel for the Crown, 24 February 2020, #2.796, para 15

106 We do consider it appropriate to extend the 'real value' only period for the 2020 nationwide lockdowns in response to the Covid-19 pandemic. New Zealand moved to Alert Level 4 on 26 March 2020, with the entire nation entering self-isolation. On 14 May 2020, New Zealand moved back to Alert Level 2.[176] The whole of New Zealand again went into Level 4 lockdown from 18 August 2021. We consider that it is appropriate to extend the 'real value' period to take account of the period from the 18 August 2021 to the issue of this report, due to the restrictions arising under the Covid-19 Alert Levels. Over these periods, both the Crown and claimant parties faced significant obstacles to progressing work in the Tribunal's iterative process, which are beyond the Crown's control.

Tribunal conclusion

107 In summary, we have concluded that the 'real value' only period should be extended to account for the obstacles created by the nation-wide Covid 19 lockdowns between 26 March 2020 and 14 May 2020 and from 18 August 2021 to the issue of this report.

108 Following the conclusion of the Tūranga hearings, the Crown was not prevented from carrying out its obligation under the 1989 Forests Agreement to use its best endeavours 'to enable the Waitangi Tribunal to identify and process all claims relating to forestry lands and to make recommendations in the shortest possible period'.[177] The Crown entered negotiations with the claimants, and its preference was for a single settlement of all of Te Aitanga a Māhaki, Ngāriki/Ngā Ariki Kaipūtahi and Te Whānau a Kai's claims. The Crown opposed Mr Haronga's application for an urgent remedies hearing, and opposed his appeal of the Tribunal's decision not to grant an urgent hearing. During the first round of remedies proceedings, the Crown opposed the remedies sought by the claimants, arguing that all of Te Aitanga a Māhaki, Ngāriki/Ngā Ariki Kaipūtahi and Te Whānau a Kai's claims should be settled through direct negotiations. The Crown again opposed the claimants' judicial review of the Tribunal's decision not to make binding recommendations, and remains opposed to the remedies sought by the claimants in this reconvened Inquiry. Throughout these years, it was open to the Crown to seek to resolve the claims that relate to the Mangatū CFL land ahead of its preferred wider settlement.

109 We make no comment on the merits of the Crown's decisions following the Tūranga hearings. However, the Crown's obligations under the 1989 Forests Agreement existed throughout this period, and, based on the evidence adduced in this Inquiry, it was not prevented from carrying them out by the Tribunal's scheduling, process, or findings in the Tūranga report; nor by the

176. New Zealand Government, 'History of the COVID-19 Alert System', Unite Against COVID-19 https://covid19.govt.nz/alert-levels-and-updates/history-of-the-covid-19-alert-system (last updated 2 July 2021)

177. *Mercury NZ Ltd and Ors v Waitangi Tribunal and Ors* [2021] NZHC 654, para 123

litigation that clarified the protections given to Māori under the statutory scheme; nor by the Tribunal's Remedies Inquiry convened in response to the Courts' directions. The Crown was not, therefore, prevented from carrying out its obligations under the 1989 Forests Agreement by matters beyond its control.

What Proportion of the Available Compensation Should be Awarded?

110 In this section, we determine what proportion of the available Schedule 1 compensation should be awarded to the claimant groups. The Tribunal has the discretion to award as much or as little compensation under Schedule 1 as we determine is fair and just. We are not required to award the full remaining portion of the specified amount to repay the Crown's gain, but we may take into account the commercial bargain made in the 1989 Forests Agreement.

111 To reach this decision, we first establish the approximate level of compensation available to each claimant group under clause 3 of Schedule 1. Next, we set out the parties' submissions on how much of the specified amount they consider should be awarded. Finally, we consider both the prejudice suffered by Te Aitanga a Māhaki, Ngāriki/Ngā Ariki Kaipūtahi, and Te Whānau a Kai, and the level of redress required to restore their mana and economic base (for our discussion of the claims in this Inquiry and summary of the Tribunal's findings on Treaty breach in the Tūranga report see chapter 4. For our further claim specific findings on the prejudice suffered by the claimants, see chapter 5). Here, we draw on the economic evidence provided by the expert witnesses, which we have already referred to elsewhere in this report; for clarity, we note again their respective areas of expertise here:

- Gareth Kiernan, economist for Infometrics, who gave evidence for Ngā Ariki Kaipūtahi (Wai 507).
- Michael Marren, registered forestry consultant, who gave evidence for the Crown on the amount of available compensation for each party under Schedule 1 of the CFAA.
- Dr Richard Meade, senior research fellow in economics at Auckland University of Technology, who gave evidence for Te Aitanga a Māhaki and the Mangatū Incorporation.
- Dr Ganesh Nana, then chief economist and economic director at Business Economic Research Limited (susbequently, in 2020, appointed by the Government as the Chair of the New Zealand Productivity Commission) who gave evidence for Ngāriki Kaipūtahi (Wai 499 and Wai 874).
- Dr John Yeabsley, senior fellow at the New Zealand Institute of Economic Research, who gave evidence for the Crown.

112 As we have noted already, in 2019, the Tribunal also commissioned Dr Andrew Coleman, then a Senior Lecturer in the Department of Economics at the University of Otago, to provide independent economic evidence

in response to the evidence adduced by the parties. Tribunal panels in the Wairarapa Remedies Inquiry and this Mangatū Remedies Inquiry held a joint hearing in July 2019 to hear Dr Coleman's evidence. Mr Kiernan, Dr Meade, Dr Nana, and Dr Yeabsley also produced further briefs of evidence in reply to Dr Coleman's evidence.[178]

What compensation is available to each of the claimants under clause 3 of Schedule 1?

113 Before the 2018 hearings, Gareth Kiernan, Dr Meade, and Michael Marren convened a meeting for the purposes of establishing whether they could reach consensus on the methodology and results of the Schedule 1 compensation calculations. This is an established process allowing experts to caucus together on a 'without prejudice' basis to find common ground, as well as identify issues of contention arising out of their evidence. At this meeting, the experts agreed:

(a) The net proceeds received by the Crown from the sale of the cutting rights in May 1992 were $10.8 million for the Mangatū 1 block, and a total of $23.8 million for the Mangatū 1 and 2 blocks.[179]

(b) the appropriate Consumer Price Index series to maintain the 'real value' of the proceeds is the Statistics New Zealand CPI series as rebased in June 2017.[180]

114 Mr Marren and Dr Meade did not agree on the interpretation of the 'rolling annual' basis under clause 5(b) of Schedule 1, but we do not consider that the difference arising from their interpretations is significant; nor did Mr Marren or Dr Meade.[181] Counsel for the Māhaki Trust and the Crown both submitted that agreement was not required on this matter and the Tribunal did not have to determine the meaning of this provision.[182]

115 Mr Marren provided the Tribunal with comprehensive calculations for all the claimants, including the varying amounts of compensation they could receive under clauses 3(a), 3(b), and 3(c). Under clause 3(a), Mr Marren found that the maximum compensation available to the claimants under 'the market value' method was $59.354 million, and under 3(b) ('the market stumpage' method), the maximum would be approximately $124.762 million.[183] Mr Marren's figures were supported by John Schrider, a valuation professional who gave evidence for Te Whānau a Kai. Mr Schrider's calculations of the

178. Evidence of Richard Meade, 5 July 2019, #P60; evidence of John Yeabsley, 5 July 2019, #P61; evidence of Ganesh Nana, 3 July 2019, #P62; evidence of Gareth Kiernan, 5 July 2019, #P63
179. Joint statement of expert witness conference, 21 August 2018, #P2(d), para 8
180. There are multiple CPI series available from the Reserve Bank, statistics New Zealand, or the Treasury: Joint statement of expert witness conference, #P2(d), para 10(a)
181. Joint statement of expert witness conference, #P2(d), para 19
182. Closing submissions for the Māhaki Trust and Mangatū Incorporation, #2.682, para 151.1; closing submissions for the Crown, #2.688(b), para 253
183. Evidence of Michael Marren, 23 November 2018, #P32(c), para 23

forest value and the market stumpage were sufficiently close to Mr Marren's to satisfy the Tribunal that each expert's approach was reliable.[184]

116 Both Dr Meade and Mr Kiernan calculated the specified amount under clause 3(c), the 'net proceeds' method, relative to the claims and claim dates of Te Aitanga a Māhaki and Ngā Ariki Kaipūtahi (Wai 507).[185] Mr Marren also provided the Tribunal with calculations of the maximum compensation for each party under clause 3(c), relative to their claim date.[186] These figures are indicative of the available compensation under clause 3(c) of Schedule 1. The calculations of all three experts were sufficiently similar to make us confident of the relative level of compensation available to each group under 3(c) indicated in the figures below, as at 30 June 2018:

(a) Te Aitanga a Māhaki and the Mangatū Incorporation – $173.8 million (using Dr Meade's figures).[187]
(b) Ngā Ariki Kaipūtahi (Wai 507) – $128.298 million (using Mr Marren's figures).
(c) Ngāriki Kaipūtahi (Wai 499 and Wai 874) – $127.855 million (using Mr Marren's figures).
(d) Te Whānau a Kai – $86.857 million (using Mr Marren's figures).[188]

117 The final specified amount of compensation available under clause 3(c) may be larger than the figures given above, as more time has passed since the calculations were done. However, these figures do not account for the extension of the 'real value' period for the Covid-19 nationwide lockdowns between March and May 2020 and in 2021 (see paragraph 107).[189] The parties will make a final calculation if the Tribunal's recommendations become final following the 90-day period – the Waitangi Tribunal does not make this calculation. The level of compensation each group receives will also be determined by their selection of a calculation method under clause 3 of Schedule 1.

The parties' positions on how much of the specified amount, above the automatic five per cent, should be awarded

118 During our 2018 remedies hearings, parties submitted on the proportion of available Schedule 1 compensation that should accompany the returned CFL land. Because the claimants argued that the purpose of Schedule 1 compensation is to repay the Crown's gain, they considered the Tribunal should award all the available compensation unless there was very good reason to

184. Evidence of John Schrider, 28 May 2018, #P 8, p 2
185. Evidence of Richard Meade, 29 May 2018, #P 2, para 47; evidence of Gareth Kiernan, 28 May 2018, #P11, p 9
186. Evidence of Michael Marren, 31 July 2018, #P32
187. Evidence of Richard Meade, 29 May 2018, #P2, para 47.1
188. Evidence of Michael Marren, #P32(c), p 23
189. However, we note that the specified amount of compensation available to Te Whānau a Kai under the 'net proceeds' method will be less affected by the extension of the 'real value' period because their claim was filed shortly before the Tūranga District Inquiry hearings: memorandum of the registrar, 24 October 2019, #2.768(b), para 3

do otherwise. In contrast, the Crown viewed Schedule 1 compensation as directed at addressing prejudice resulting from specific and limited Treaty breaches, and submitted that the Tribunal should only award five per cent of the available Schedule 1 compensation. The Crown's position was that the prejudice associated with well-founded claims that relate to CFL land was limited. The claimant parties, and the Crown's submissions are summarised below.

The Māhaki Trust and the Mangatū Incorporation, Ngāriki Kaipūtahi (Wai 499, Wai 874), and Te Whānau a Kai

119 Counsel for the Māhaki Trust and the Mangatū Incorporation, Ngāriki Kaipūtahi, and Te Whānau a Kai all made similar submissions on this question. They submitted:

(a) The Tribunal should award the full specified amount of compensation available under clause 3.[190]

(b) The compensation schedule requires that the Tribunal start at the default point of 100 per cent, and there would have to be a good reason to depart from the full award.[191]

(c) The claimants' losses are so great that there is no reason to make any award less than the full specified amount of compensation.[192]

120 Counsel for the Māhaki Trust and the Mangatū Incorporation submitted that: '[t]he only tenable deduction from the 100% compensation is the present-day value of the proceeds received by Mangatū Inc for the sale of the 1961 land'.[193]

Ngā Ariki Kaipūtahi (Wai 507)

121 Ngāriki Kaipūtahi (Wai 507) submitted:

(a) Issues of fairness and equity between claimants are relevant to the Tribunal's task.

(b) The Tribunal should consider the following questions:

- Whether there would be overcompensation of the groups?
- What is the distinct relationship of each claim to the particular land?

190. Closing submissions for Ngāriki Kaipūtahi, #2.681, para 96; closing submisions for Te Aitanga a Māhaki and the Mangatū Incorporation, #2.862, para 129; closing submissions for Te Whānau a Kai, #2.683, para 19.8

191. Closing submissions for Ngāriki Kaipūtahi, #2.681, para 95; closing submisions for Te Aitanga a Māhaki and the Mangatū Incorporation, #2.862, para 125; closing submissions for Te Whānau a Kai, #2.683, para 19.8

192. Closing submissions for Ngāriki Kaipūtahi, #2.681, para 98; closing submissions for the Māhaki Trust and Mangatū Incorporation, #2.682, para 129; closing submissions for Te Whānau a Kai, #2.683, para 19.8

193. Closing submissions for the Māhaki Trust and Mangatū Incorporation, #2.682, para129

- How long the prejudice has been endured, and if it has been reinforced at any stage?
- What the group requires to maintain itself?[194]

The Crown

122 The Crown submitted:

(a) It is not in a position to submit on what percentage of the available statutory compensation, beyond the statutory minimum, the Tribunal should use to address further prejudice it assesses.[195]

(b) In general terms, 'some only of the land should be returned along with an associated percentage of statutory compensation beyond the statutory minimum that is sufficient to compensate for the remaining prejudice (after return of the associated land) and consistent with the Tribunal's restorative approach to remedies'.[196]

Tribunal analysis

How should we value the prejudice suffered by Te Aitanga a Māhaki, Ngāriki/Ngā Ariki Kaipūtahi and Te Whānau a Kai?

123 In chapters 4 and 5 of this report, we considered in detail the claims that relate to the Mangatū CFL land. In chapter 4, we discussed the Tribunal's findings in the Tūranga report and the prejudicial impact of the Crown's breaches of the Treaty rights of the customary owners of Mangatū. We rejected the Crown's interpretation of the threshold required by the 'relates to' CFL land prerequisite, and found that a range of Crown Treaty breaches impacted the claimants' ability to retain their ownership of the Mangatū CFL lands, and to exercise tino rangatiratanga there. In chapter 5, we made further specific findings on prejudice. Given that our task in this remedies phase is to determine whether to recommend the return of the Mangatū CFL land, we focused on the prejudice associated with Te Aitanga a Māhaki, Ngāriki/Ngā Ariki Kaipūtahi and Te Whānau a Kai's loss of autonomy and the loss of the Mangatū CFL lands that followed, as well as the impact of interrelated Crown Treaty breaches on the claimants. The findings we reached in those chapters are summarised in chapter 6, where we determine the allocation of redress between claimants. We do not repeat them here.

124 We have also had the benefit of expert economists' evidence in this Inquiry, which has revealed different approaches and understandings of terms such as loss and prejudice. The economists' evidence was extensive and highly detailed – here, we provide a summary only. For the most part, the parties brought this evidence expressly to assist the Tribunal in its task of awarding

194. Closing submissions for Ngā Ariki Kaipūtahi, #2.684, para 224
195. Closing submissions for the Crown, #2.688(b), para 254
196. Closing submissions for the Crown, #2.688(b), para 254

Schedule 1 compensation. In particular, they have provided quantitative models of claimants' losses for this purpose. Counsel for the Māhaki Trust submitted that, by valuing the historical losses caused by the Crown's Treaty breaches, Dr Meade's evidence 'serves as a cross-check to show that the Tribunal is justified in awarding the maximum available compensation.'[197] Meanwhile, the Crown submitted that the purpose of Dr Yeabsley's evidence was:

> To assist the Tribunal to identify and deal with the restoration of relationships and communities affected by prejudice resulting from past events, some at a considerable distance and many incapable of being remedied by economic remedies or economic remedies alone.[198]

125 Below, we briefly summarise the evidence presented by the various economists before moving to consider its application to the task of awarding compensation under Schedule 1 of the CFAA.

Dr Richard Meade

126 Dr Meade gave detailed evidence on behalf of Te Aitanga a Māhaki about the present-day value of their historical losses.[199] According to counsel, the purpose of Dr Meade's evidence was not to augment the Tribunal's findings on the prejudice suffered by the claimants. Instead, it was presented:

> for the sole purpose of reassuring the Tribunal that the statutory compensation was appropriate because even if – although not part of the statutory scheme – one was to look at Māhaki's losses from a range of different angles one would see that the sums required to compensate loss, or alternatively to restore an economic base, will always exceed the compensation payable under Schedule 1.[200]

127 Dr Meade examined the diverse areas of loss, both land-based and non-land-based, that Te Aitanga a Māhaki suffered. For the most part, his methodology involved posing a counterfactual scenario in which the Crown's breach had not occurred. He then forecast the benefit Te Aitanga a Māhaki would have enjoyed up to the present, had they not suffered those losses. To arrive at the present-day value of Te Aitanga a Māhaki's losses, Dr Meade adjusted the historical value of the losses, using a series of different compounding rates, including a post-tax risk-free rate (PTRF) and a discounted nominal gross

197. Memorandum of counsel for the Māhaki Trust and Mangatū Incorporation, 12 September 2019, #2.761, para 5.2
198. Closing submissions for the Crown, #2.688(b), para 78
199. The scope of his evidence also included many of Ngāriki/Ngā Ariki Kaipūtahi and Te Whānau a Kai's losses. Dr Meade's evidence was extensive over 900 pages across multiple briefs of evidence which also included highly detailed and technical calculations, see documents: #P2, P2(a)–(e), #P6, #P42, #P60
200. Closing submissions for the Māhaki Trust and Mangatū Incorporation, #2.682, para 132

domestic product (GDP) growth rate.[201] Dr Meade applied the discounted GDP rate for the nineteenth and early twentieth century losses, for which data on return rates was not available.[202]

128 By using multiple approaches, Dr Meade sought to account for uncertainties associated with evaluating historical losses and the difficulty of forming robust counterfactuals.[203] He also emphasised the compounding rates he used were below the usual standard investment rates, and that this conservatism was another way in which his evidence was robust and could withstand critical scrutiny.[204] Dr Meade explained that it was regular practice for economists to do forward-looking valuations; in such cases, considerable uncertainty typically surrounded the assumptions posed in the model.[205] However, when valuing events in the past, economists could be more confident, he told us: 'Looking at the future we have no foresight knowledge. We can't know the future at all, whereas in my situation it's actually a less challenging problem, we're looking at history that we do know.'[206]

129 Dr Meade's evidence drew heavily on the Tūranga report as the primary basis upon which losses could be identified and scoped for valuation.[207] Dr Meade separated Te Aitanga a Māhaki's land-based losses into several categories. These included losses related to the Mangatū CFL lands, including the losses related to the 1961 sale of land in Mangatū 1. Dr Meade also calculated Te Aitanga a Māhaki's 'losses assuming the CFL regime is a specific compensatory scheme'; his calculations were based on the assumption 'that Māhaki should have enjoyed freehold ownership of the land – and any improvements to that land – as at the date the CFL [Crown Forest Licence] was sold'.[208] Dr Meade's calculations also included Te Aitanga a Māhaki's net losses caused by the Crown retaining land after the deed of cession; losses caused by excessive land purchases at unduly low prices following the arrival of the Native Land Court; and the present-day value of the land *not* owned by Te Aitanga a Māhaki within their customary rohe as a proxy for their overall land loss.[209] For Te Aitanga a Māhaki's non-land-based losses, Dr Meade measured the present value of the loss of life suffered at Waerenga a Hika and Ngātapa, the wrongful detention of the Whakarau on Wharekauri, and the pain and suffering caused by the Crown's breaches.[210]

130 Despite the emphasis Dr Meade placed on the conservatism of his approach, his counterfactual measures of loss produced enormous figures. For example,

201. Evidence of Richard Meade, 28 May 2018, #P6, para 121.1.2
202. Evidence of Richard Meade, #P6, para 147.2.2
203. Evidence of Richard Meade, #P6, para 121.1.7
204. Evidence of Richard Meade, #P6, para 31.1.2
205. Transcript for joint remedies hearing, 22–24 July 2019, #4.38, p 298
206. Transcript for hearing week one, 27–31 August 2018, #4.30, p 334
207. Evidence of Richard Meade, #P6, para 13.2.1
208. Evidence of Richard Meade, #P6, para 321
209. Evidence of Richard Meade, #P6, pp 220–262
210. Evidence of Richard Meade, #P6, pp 262–313

he told us that, depending on what factor was used to adjust the value of the losses, as at 30 June 2018:

(a) The adjusted value of the Mangatū Incorporation's net losses suffered from the 1961 sale (assuming they would have received the same benefits from freehold ownership of the land that have accrued to the Crown through the sale of the forestry assets) was $72.4 million for Mangatū 1 alone.[211]

(b) The adjusted value of Te Aitanga a Māhaki's losses from confiscations was between $42.4 million and $100.7 million.[212]

(c) The adjusted value of Te Aitanga a Māhaki's losses from excessive land purchases at unduly low prices and with excessive costs was between $1,669 million and $1,964 million.[213]

(d) The land lost by Te Aitanga a Māhaki has an unimproved market value of between $77 and $582 million depending on which valuation method is used, and an improved land market value of $1,544 million. Dr Meade did not adjust these values for an investment return.[214]

(e) Losses due to excessive loss of life: the adjusted value of the foregone wages lost by Te Aitanga a Māhaki as at least $683 million.[215] Dr Meade estimated that what society should have been willing to pay to avoid the loss of life, using the 'value of statistical life' measure, had an adjusted value of at least $1,248 million. The gross domestic product lost by Te Aitanga a Māhaki due to loss of life had an adjusted value of at least $175 million as at 30 June 2018.[216]

(d) Losses due to wrongful detention of the Whakarau: Dr Meade estimated that the adjusted value of what society should have been willing to pay in order to avoid the wrongful detention was at least $236 million.[217]

131 Dr Meade concluded that the present value of Te Aitanga a Māhaki's losses would account for the available compensation under Schedule 1 many times over.[218] Dr Meade's evidence provided multiple ways to reach that conclusion.

211. This figure is reached using the Mangatū Incorporation's 'actual post-tax' returns to adjust the value of the loss: evidence of Richard Meade, #P6, para 335
212. Evidence of Richard Meade, #P6, para 598
213. These figures are reached using the PTRF compounding rates: evidence of Richard Meade, #P6, para 666
214. We note there that this valuation included lands where Ngāriki/Ngā Ariki Kaipūtahi and Te Whānau a Kai have interests: evidence of Richard Meade, #P6, paras 611, 707, 717
215. Evidence of Richard Meade, #P6, para 770
216. Dr Meade explainedthat the 'value of statistical life' is a concept often used in transport studies, or other social cost-benefit analyses 'in which lives lost or saved are relevant considerations': evidence of Richard Meade, #P6, paras 734, 773, 805–806
217. Evidence of Richard Meade, #P6, para 826
218. Evidence of Richard Meade, #P6, para 934.3.1

Gareth Kiernan

132 Mr Kiernan's evidence included estimates of the total value of the opportunity loss suffered by Ngāriki/Ngā Ariki Kaipūtahi as a result of their reduced interests following the 1881 Native Land Court title determination in Mangatū 1.[219] Mr Kiernan used the dividends paid by the Mangatū Incorporation as a proxy for the potential returns that Ngā Ariki Kaipūtahi would have received if their interests had been appropriately recognised by the Court. In his evidence, the forgone returns were divided between the periods 1881–1949 and 1950–2018. This division reflected the fact that the Mangatū lands were administered by the East Coast Commissioner until 1948, and no dividends were paid to the Māori owners during this period.

133 The Tribunal found in the Tūranga report that Ngā Ariki Kaipūtahi's interests were reduced through the process of determining the individualised interests. However, it was not able to make findings on what their relative interests should have been following the original Native Land Court decision in 1881.[220] For this reason, Mr Kiernan was only able to provide the Tribunal with a range of figures that allowed for the different percentages of ownership that Ngā Ariki Kaipūtahi might have received if their interests were appropriately recognised. Mr Kiernan also accounted for the 6,000 shares awarded to Ngāriki/Ngā Ariki Kaipūtahi in the Mangatū blocks by subtracting six per cent from each percentage ownership in the second row of his table. His findings are set out in the table below:[221]

	Percentage ownership					
	10	**20**	**40**	**60**	**80**	**100**
Given above ownership level	8.2	16.3	32.6	48.9	65.2	81.5
Less 6 per cent shareholding	3.3	11.4	27.7	44.0	60.3	76.6

Value in millions of dollars of historical lost opportunities suffered by Ngā Ariki Kaipūtahi between 1950 and 2017, assuming various levels of ownership

Source: #P11, p 5

134 For the pre-1950 period, Mr Kiernan noted that the range of possible returns would be very wide for Ngā Ariki Kaipūtahi. He said he could conclude only that the value of the lost opportunities was 'unlikely to have been zero'.[222] We note that this evidence does not take into account the value of the land. Mr Kiernan's evidence was strictly a measure of the financial value of the

219. Evidence of Mr Gareth Kiernan, #P11
220. Waitangi Tribunal, *Turanga Tangata*, vol 2, p 694
221. Evidence of Gareth Kiernan, #P11, p 5
222. Evidence of Gareth Kiernan, #P11, p 6

dividends foregone by Ngā Ariki Kaipūtahi following the 1881 title determination for Mangatū 1. Mr Kiernan did not attempt to place a further value on the negative impact that these losses may have had on Ngā Ariki Kaipūtahi mana or their political, economic, social, cultural, or spiritual welfare.

Dr Ganesh Nana

135 Dr Nana gave evidence on behalf of Ngāriki Kaipūtahi (Wai 499 and Wai 874), exploring the gaps between the income of Tūranga Māori, and both the mean and median incomes in Gisborne and nationally. Dr Nana proposed that the income gap could 'be viewed as a proxy for the economic loss currently endured by Gisborne Māori'.[223] Counsel for Ngāriki Kaipūtahi (Wai 499 and Wai 874) submitted that this evidence was provided 'to give the Tribunal assurance that the quantum involved in this hearing is not out of line with the prejudice suffered, and the funds required to remedy it'.[224]

136 Dr Nana found that, taking account of the distribution of all household incomes in Gisborne, Māori households were heavily represented in the lower income groups, while non-Māori were more heavily represented in the higher income groups.[225] Using 2017 income survey data, he found that, at $29,650 per annum, the mean personal income for Māori in Gisborne remained 25 per cent lower than the mean for the total Gisborne population, of $37,170 per annum.[226] Similarly, his evidence showed that while the 2017 median household income for Māori in Gisborne was $67,564 per annum, it was $85,206 per annum for non-Māori.[227] Dr Nana found that the median household income for Gisborne Māori was also below that of Māori nationally ($78,614 per annum in 2017) and even further below the median for household income of non-Māori nationally ($96,663 per annum in 2017).[228] He concluded that the income gap between Tūranga Māori and the overall Gisborne population, after suitable adjustment for the different age composition of the populations, totalled $92 million in 2017.[229]

Dr John Yeabsley

137 Dr Yeabsley drew heavily on international academic literature to support the Tribunal taking a reconciliatory justice approach to compensation for

223. Evience of Ganesh Nana, 28 May, #P10, para 3.3
224. Closing submissions for Ngāriki Kaipūtahi, #2.681, para 148(c)
225. Evidence of Ganesh Nana, #P10, para 9.1
226. Evidence of Ganesh Nana, #P10, para 11.2; We also received similar evidence from Dr Richard Meade, who used 2013 census data to find that the mean income for Te Aitanga a Māhaki individuals was $23,800, where it was $28,500 for all New Zealanders and $30,900 for Pākehā New Zealanders: evidence of Richard Meade, #P 6, para 866
227. Evidence of Richard Meade, #P6, para 9.4
228. Evidence of Ganesh Nana, #P10, para 9.4
229. Evidence of Ganesh Nana, #P10, para 3.2

breaches of the Treaty.[230] A significant element of this approach is a sincere apology for the wrongs done and establishing a better relationship between the parties for the future.[231] Dr Yeabsley's evidence for the Crown did not include estimates of the claimants' losses, and he emphasised the difficulty of compensating for economic prejudice with 'Treaty settlement investment funds'.[232] The Tribunal was therefore not assisted by his evidence in its assessment of the monetary value of losses the claimants suffered from the specific Treaty breaches we are dealing with.

138 Instead, Dr Yeabsley was broadly critical of the economic evidence summarised above. For instance, he argued that Dr Meade's counterfactuals did not adequately account for consumption, and 'risks and pitfalls of investing'.[233] As a result, said Dr Yeabsley, Dr Meade had simplified the subsequent choices that would have arisen from his adopted starting point. In particular, Dr Yeabsley challenged Dr Meade's characterisation of the PTRF adjustment rate as a conservative compounding rate, suggesting that 'if you're working in a social world they're highly optimistic'.[234] Dr Yeabsley also suggested that the evidence of Dr Nana and Dr Kiernan included assumptions that might not be supported in reality.[235] For instance, he asserted that '[c]orrelation between qualification levels and income does not prove causality between qualification levels and income'.[236]

Dr Andrew Coleman

139 Dr Coleman's initial position was that it is inappropriate to apply financial measures of value to non-monetary losses suffered by individuals. He was critical of Dr Meade's use of compounding interest rates for non-monetary losses, observing that one consequence is that events in the past would be valued at 'increasingly high rates the more distantly they occurred'.[237] For instance, when referring specifically to Dr Meade's evaluation of Te Aitanga a Māhaki's losses due to wrongful detention of the Whakarau, Dr Coleman noted 'it seems difficult to believe that the non-monetary value of losses caused by wrongful imprisonment at different points in time should depend

230. Dr Yeabsley relied on Native American scholar Torivo Fodder's definition of reconciliatory justice: T Fodder 'Lessons from Aotearoa-New Zealand: Reconciliatory Justice and Federal Indian Law', *Waikato Law Review*, vol 22 (2014); evidence of John Yeabsley, 31 July 208, #P36, para 39
231. Evidence of John Yeabsley, #P36, para 42
232. Evidence of John Yeabsley, #P36, paras 45–46
233. Evidence of John Yeabsley, #P36, pp 4–5
234. Transcript for hearing week three, #4.34, p 198.5
235. Evidence of John Yeabsley, #P36, para 24.12 & para 30
236. Evidence of John Yeabsley, #P36, para 24.12 & para 30
237. Evidence of Andrew Coleman, 8 May 2019, #P59, para 16

so much on when they happened'.[238] Dr Coleman explained the distinction between monetary values and the value of welfare associated with past losses:

> If you were paid some money or not paid some money in the past, it affects the amount you could consume and that directly affects your living standards. You may be hungrier than otherwise, you may be less happy because you have less money to spend on your children than otherwise. Okay, and so that's the welfare or utility that we want to value, which is quite different than the actual monetary sum.[239]

140 Dr Coleman contended that a different approach was needed to model the value that members of a group might place on the welfare of other members of that group at different points in time. Dr Coleman explained that welfare losses can be 'caused by a lack of money, which leads to low consumption or death or other issues'.[240] He compared welfare to the term 'utility, which is how we consider the actual living standards of people in the future or the past'.[241] One of his suggestions was that the welfare loss resulting from the Crown's breaches could also be valued using a time-utility approach, which 'asks how much an event (such as the consumption of a good, or wrongful imprisonment, or injury) that occurs at a different date is valued, and offers answers that differ as to whether the event occurs to the same person, a different person, or a linked set of people'.[242] In this case, Dr Coleman observed that the value placed on a non-monetary loss would be determined by the connection felt by the person or group in question, and their relationship to those in the past who suffered the welfare loss.[243]

141 During the hearing, Dr Coleman clearly recognised that the prejudice suffered by Māori in Tūranga was not suffered only by individuals; it also represented the losses of 'indefinitely lived entities' (such as hapū and iwi), which he defined as 'a collective group of people who are all related in one way and often times its related by blood'.[244] That is, while members of a Māori incorporation such as the Mangatū Incorporation, or an iwi like Te Aitanga a Māhaki, suffered losses as individuals, they also did so as members of a group that could value losses differently. Dr Coleman also qualified his criticisms of Dr Meade's evidence, observing that he disagreed with specific loss estimates, not the whole of his evidence. He expressed particular concern about Dr Meade's use of financial adjustment rates to determine the present value of the welfare losses suffered by the Whakarau when they were detained on

238. Evidence of Andrew Coleman, #P59, para 45
239. Transcript for joint remedies hearing, 22 July 2019, #4.36, p 16
240. Transcript for joint remedies hearing, #4.36, p 13
241. Transcript for joint remedies hearing, #4.36, p 16
242. Evidence of Andrew Coleman, #P59, para 20
243. Transcript for joint remedies hearing, #4.36, pp 47–48
244. Transcript for joint remedies hearing, #4.36, pp 17–20

Wharekauri. However he stated, that 'does not mean that there are [not] others which I think are fully sound and which actually may be the determining ones'.[245]

142 In particular, Dr Coleman accepted that some of Dr Meade's calculations of Te Aitanga a Māhaki's land-based losses were consistent with the concept of 'stewardship', which he defined as when: '[a] group may perceive value in bequeathing to subsequent generations what it received from previous generations and obtain value not from maximising its current consumption but by passing on to subsequent generations a set of natural and cultural "resources"'.[246]

143 Dr Coleman provided the example of land confiscation from indigenous groups who value land for non-financial reasons. He posed the question: 'If you have long-lived entities that place a very high value on land and the stewardship of land, how do we value losses in the past where the land was taken?'[247] He argued that valuation metrics based on financial concepts would be irrelevant, because 'it is difficult to see how the losses suffered by these tribal groups can be fully redressed unless the land is returned'.[248] However, Dr Coleman suggested that if the lands themselves were not available as redress, then the current value of the lands lost by a group with stewardship values would be an appropriate measure of the loss. During the hearing Dr Coleman elaborated:

> The current members of the iwi have been deprived of the use of the land that they could reasonably have expected to have had because of an illegal event in the past. So, the value of that deprivation to the current people, just to themselves, is the value of the land. Now I am not saying that, as a political solution, they should have their land bought out. That's a political solution. I'm saying the value that they may put on that deprivation is the current value of the land.[249]

144 Dr Coleman also accepted that, for members of an indefinitely lived entity with stewardship values, it was plausible that the loss of land would have caused a welfare loss for those from whom the land was taken. In response to Tribunal questions, he agreed that if there was a legitimate basis on which to assume a group would have used their assets to grow commercially, then one could assume that their consumption opportunities would also be able to grow over time.[250] Dr Coleman noted that the relevant losses in such a case

245. Transcript for joint remedies hearing, #4.36, p 215
246. Evidence of Andrew Coleman, #P59, para 51
247. Transcript for joint remedies hearing, #4.36, p 54
248. Evidence of Andrew Coleman, #P59, para 68
249. We understand that Dr Coleman was not advocating the purchase of privately held land, that was ancestral land, for the purposes of returning it to Māori ownership: transcript for joint remedies hearing, 22 July 2019, #4.38, p 59
250. Transcript for joint remedies hearing, #4.36, pp 197, 213–214

would be 'the losses of each intervening generation from not having the flow of benefits.'[251]

Tribunal discussion

145 While the expert economists' evidence coalesced in some key areas, Dr Coleman's evidence confirmed for us that placing a monetary value on losses in the past remains a developing and largely untested area of economics. There are clearly many ways to approach the value that individuals and communities place on past losses. For instance, during our hearings, the economists were able to agree that in some circumstances it is appropriate to apply an adjustment rate to measure how losses compound over time. But there was little agreement on the methodology required to produce an appropriate adjustment rate.

146 The economists also had differering approaches on how to account for consumption or spending in the period between when the loss occurred and the present. Dr Meade contended that consumption opportunities should naturally increase in conjunction with general growth rates in the economy and the investment possibilities available. He described an 'optimal consumption path', where decisions about the use of resources are informed by the utility that a person or group receives from consuming or investing those resources.[252] For instance, a group could invest in education or health initiatives; this kind of investment is still accounted for as consumption. Because the claimants lost the opportunity to make those kinds of investments, Dr Meade did not deduct the value of what was spent or consumed in his valuations of Te Aitanga a Māhaki's losses. The Crown's economist, Dr Yeabsley, was critical of this aspect of Dr Meade's evidence, which he described as 'an unrealistic approach, for instance in the application of the investment model without deductions for consumption.'[253]

147 Dr Coleman largely agreed with Dr Meade that forgone consumption was part of the loss, and did need to be accounted for when valuing a monetary loss.[254] However, he explained that 'if someone suffers a monetary loss, economists typically value this loss in terms of the non-monetary utility loss they suffer because they have lower consumption or less leisure'.[255] He further explained that 'conceptually, person A is valuing the loss caused by the

251. Transcript for joint remedies hearing, #4.36, p 194
252. Transcript for hearing week one, #4.30, pp 250–251
253. Transcript for hearing week three, #4.34, p 169
254. Dr Coleman explained, 'Whether person B would have spent the money immediately or invested it and spent it at a later point, or left it as an inheritance to be spent by their children, the utility value of these options to person B are similar, This is because if person B had received the money they will have adjusted their saving to ensure the time-discounted marginal utilities of their consumption at different stages of their life were equalised': evidence of Andrew Coleman, #P59, para 62
255. Evidence of Andrew Coleman, #P59, para 60

reduced consumption levels experienced by person B'.[256] For that reason, Dr Coleman did not agree with Dr Meade that the loss of consumption opportunities justified the adjustment of the value of a welfare loss using financial interest rates. .[257]

148 We found Dr Coleman's evidence on the concept of stewardship helpful. In terms of land loss, this method would not apply an adjustment rate to the value of the loss, as Dr Coleman explained the value of the land has remained consistent to the members of the group throughout the post-loss period. Accordingly, he suggested that compensating a group who hold stewardship values would require the return of land, or the payment of equivalent compensation 'sufficient to enable the group to purchase land in alternative places'.[258] In cross-examination, Dr Coleman further stated:

> If a group has had its land taken and the group is one of these indefinitely lived entities which specialises or which has an attitude towards land, which is towards stewardship . . . the value placed on that compensation should be the value of the land. That's what they have been deprived of. This is an asset, which has meaning to the group.[259]

149 The Crown's witness, Dr Yeabsley, also supported an approach to valuing the claimants' losses that applied stewardship principles and agreed that it could be appropriate in some cases to return either what was lost or the equivalent value as redress in the case of land loss.[260]

150 We have already determined that the Mangatū CFL land should be returned to Māori ownership (see chapter 5, paragraphs 203–204). It is not then necessary to consider further compensation for prejudice associated with the *value* of the land lost. However (as we discussed in chapter 5), Te Aitanga a Māhaki, Ngāriki/Ngā Ariki Kaipūtahi, and Te Whānau a Kai also suffered consequential economic losses resulting from the Crown's native land regime. These included short-term losses; for instance, costs associated with attending the Court. The high price of the surveys required by the Court led to further loss of land when it was alienated to meet the costs – such as happened in Mangatū 5 and 6 (see chapter 4, paragraphs 173–176). The medium- and longer-term impacts included disruption to iwi and hapū economic production cycles, the loss of access to a range of resources, and the resultant socio-economic prejudice we outlined in chapter 5. The economists broadly agreed that the return of land would not fully account for what Dr Coleman defined as welfare losses resulting from the claimants having lost control over their land and other resources. As Dr Coleman's evidence observed: 'The current

256. Evidence of Andrew Coleman, #P59, para 60
257. Evidence of Andrew Coleman, #P59, para 63
258. Evidence of Andrew Coleman, #P 59, para 77
259. Transcript for joint remedies hearing, #4.36, p 55
260. Evidence of John Yeabsley, 5 July 2019, #P61, paras 54, 56; Transcript for joint remedies hearing, #4.36, p 312

value of the land would be full recompense for the removal of the land at a prior date but not necessarily full recompense if you include restoration of past sufferings or compensations for past sufferings as well.'[261]

151 Dr Yeabsley did not consider the economic losses associated with the Crown's Treaty breaches. He did, however, agree that a measure of compensation should be added to the value of what was lost – in this case, land – to recognise that the claimants have not been able to enjoy the use of the land for a period of time.[262] Dr Meade described this point of coalescence as the 'land plus argument', suggesting:

> If you've got some sort of stewardship focused body, and it's probably fair to say that Māori collectives tend to be fairly stewardship focused bodies, that a return of the land that had been lost is a minimum requirement, you need to do that. Where does the plus bit come in? It's like you've got to do something as well for the fact that you've been out of the land for 153 years, you've not been able to enjoy any of the fruits of the land over that period.[263]

152 While the economists did not agree on the value of these welfare losses, Dr Meade and Dr Coleman were able to reach a level of agreement that the value of welfare losses suffered from foregone consumption would increase over time, on the basis that groups would have made a concerted effort to develop their economic base, and grow commercially if they had not lost their lands.[264] The presumption is that Māori would have been able to increase their level of consumption over time – in terms of improved ability to obtain the essentials of life, education opportunities, improved housing, and the like – as they received an overall return on their investments. Dr Meade supported this evidence with factual examples, including those of the Mangatū Incorporation and the Māhaki Trust. Both entities receive a return on their assets, and also contribute to important community expenses such as tangi or marae grants.[265] During cross-examination, Dr Coleman accepted that a tribal group with stewardship principles could plausibly receive a return on its investments, consume part of that return, and reinvest the remainder – thus increasing its consumption opportunities in the future.[266]

153 Dr Meade's evidence included valuations of some benefits the Mangatū owners might have received had the CFL land remained in Māori ownership. He argued that the compensation available under Schedule 1 is a 'specific compensatory scheme', that provides for Māori owners to be compensated for the benefits they would have received had they 'enjoyed freehold ownership of the land – and any improvements to that land – as at the date the CFL [Crown

261. Transcript for joint remedies hearing, #4.36, p 118
262. Evidence of John Yeabsley #P61, para 11.3
263. Transcript for joint remedies hearing, #4.36, p 254
264. Transcript for joint remedies hearing, #4.36, pp 194–196, 274
265. Transcript for joint remedies hearing, #4.36, p 272
266. Transcript for joint remedies hearing, #4.36, p 180

Forestry Licence] was sold'.[267] In Dr Meade's assessment, the value of this loss included the value of the land, compensation for the fact that it was now encumbered by a Crown Forestry Licence, and the licence fees received up to the date that the ownership of the land is returned.[268] In addition, Dr Meade argued that the loss also included not having access to the trees during the licence period, and the reduced value of the NZUs allocated to the land under the emissions trading scheme.[269] Using the Mangatū Incorporation's actual post-tax returns to adjust these values, Dr Meade valued this loss as $178.3 million as at 30 June 2018.[270] We note that Dr Meade's evidence is reflected in the submissions of the Māhaki Trust and the Mangatū Incorporation: that Schedule 1 compensation is directed at repaying 'the Crown's gain'.[271] As Dr Meade and claimant counsel observed, the value of the compensation is directly tied to the value of the trees, and the proceeds received by the Crown.

154 Dr Meade's counterfactual does not account for the Crown's investment in afforesting the Mangatū CFL lands. However, as we noted in chapter 4, the actual cost of the afforestation remains uncertain. But, the primary purpose of the scheme was erosion control and flood mitigation. The financial benefits were directed downstream in the intensification of land use on the Gisborne flood plains, as well as the social and environmental benefits accruing from flood protection. It is not clear to us that it would be appropriate to impose the costs of afforestation on the Mangatū owners, who, as we discussed, were not the primary recipients of these benefits (see chapter 4, paragraph 189–192).

155 The foregone income associated with the CFL land is one example of the economic benefits the claimants could have enjoyed had it not been for the Crown's breaches. The Mangatū Incorporation has succeeded in retaining tribal land and receiving a return on its investments. However, as we discussed in chapter 5 (see paragraph 67), as a Māori entity, even the Incorporation faced significant barriers in using and developing the land economically throughout much of the twentieth century. In our view, the example of the Incorporation indicates that Te Aitanga a Māhaki, Ngāriki/Ngā Ariki Kaipūtahi, and Te Whānau a Kai would have had opportunities to profit from their assets. If the claimants' tīpuna had been given the opportunity to develop their land and participate in the colonial economy, other than through land alienations and sales at low prices, there is no reason to think they would not have achieved a return for their efforts. We consider that this is another indicator that the claimants have suffered economic prejudice, over and above the loss of the land itself.

267. Evidence of Richard Meade, #P6, paras 320–322
268. Evidence of Richard Meade, #P6, paras 328
269. Evidence of Richard Meade, #P6, paras 331–332
270. Dr Meade stated that 'it is highly reasonable to place greater weight on my estimates using Mangatū Incorporation actual post-tax returns as compounding rates than the more conceptually based PTRF compounding rates': evidence of Richard Meade, #P6, para 66.1.
271. Closing submissions for the Māhaki Trust and Mangatū Incorporation, #2.682, para 5

156 The claimants had a right to expect to benefit from the settlement and development of Tūranga. Under Article 3, the Treaty guaranteed that Māori would have a fair chance to participate in the benefits of settlement, and assured them of equal treatment and opportunity. The claimants were not given this opportunity, and the severity of the prejudice they suffered as a result should be taken into account in considering what portion of compensation should accompany the return of land.

157 In chapter 5, we emphasised the seriousness and magnitude of the prejudice suffered by the customary owners of the Mangatū CFL land. Outside of the alienations they suffered in Mangatū specifically, we found that, by 1995, Te Aitanga a Māhaki only retained ownership of 156,414 acres of a 700,000-acre rohe. We referred to the Tribunal's findings in the Tūranga report that the treatment of the Tūranga Māori was 'significantly worse' than in other areas of the country where widespread confiscation had occurred.[272] Dr Meade's evidence on the current value of the claimants' land losses included his unadjusted estimate of the unimproved value of the land lying within the claimants' rohe but which is not in Māori ownership. This evaluation of their losses produced an immense range for this evaluation of loss: between $77 and $582 million as at 30 June 2018.[273]

158 We found Dr Meade's evidence on the unimproved land values convincing. It makes sense that the current unimproved value of these hundreds of thousands of acres should be in the hundreds of millions of dollars, even if the claimants' losses cannot be precisely defined. This valuation was undertaken for Dr Meade by specialist property valuers and advisors Morice Ltd, with support from land valuation consultant Lewis Wright. The methodology was accepted by the other economists.[274] In chapter 5, when we introduced this evidence, we explained Dr Meade's position that the higher end of the estimated range would be more realistic, because much of the land development since 1885 was relatively unrestricted (see paragraph 132). He concluded:

> The indicative current cost of acquiring and returning Mahaki claimed lands to Mahaki (supposing that were a possibility) – conservatively assuming those lands remained in their assumed unimproved state as at c. 1885, and allowing for

272. Waitangi Tribunal, *Turanga Tangata*, vol 2, p 750

273. Evidence of Richard Meade, #P6, paras 707, 717; while Dr Meade's evidence was produced solely for Te Aitanga a Māhaki, we agree with the claimant counsel's submission that Te Whānau a Kai and Ngā Ariki Kaipūtahi losses are also included in the current land values Dr Meade provides: closing submissions for Te Whānau a Kai, #2.683, para 19.14; closing submissions for Ngā Ariki Kaipūtahi, #2.684, para 91.

274. Evidence of Richard Meade, #P6, paras 47.1–47.2; 'Appendix Y', evidence of Richard Meade, #P6(b), p 160; transcript for joint remedies hearing, #4.36, p 121; written responses to questions of Donn Armstrong, 4 December 2018, #P31(b), para 13

the value of past consideration received – would likely cost several hundreds of millions of dollars.[275]

159 As we have discussed, the return of the Mangatū CFL land and associated compensation cannot provide a remedy for the claimants' wider land losses. However, the welfare losses suffered by the Mangatū owners is relevant to the compensation award under Schedule 1. As we saw in chapter 5, the general exclusion of Te Aitanga a Māhaki, Ngāriki/Ngā Ariki Kaipūtahi, and Te Whānau a Kai from economic opportunities by the Crown's native land regime resulted in the underdevelopment of their communities, and poverty for many whānau living in Mangatū and the surrounding communities.

160 For the purposes of awarding Schedule 1 compensation, the modelling done by the economists adds further weight to our findings on the severity of the prejudice suffered by Te Aitanga a Māhaki, Ngāriki/Ngā Ariki Kaipūtahi, and Te Whānau a Kai. It supports our conclusion, set out in chapter 5, that a strong connection exists between the prejudice arising from the Crown's Treaty breaches relating to the CFL land and the deprivation suffered by the claimants throughout subsequent generations, and that this prejudice requires significant redress.

What compensation is required to restore the claimants' economic base?

161 In deciding the amount of compensation that should be awarded, another relevant question we must consider is: what redress is required to restore a sufficient economic base for the claimants? This requires a different focus from that in chapter 5, where we asked whether the action taken under section 6(3) to compensate for and remove the prejudice suffered by the claimants should include the return of the Mangatū CFL land. Answering the question before us now requires a much broader consideration of complex socio-economic issues related to the long-term impacts of prejudicial Crown actions affecting the Mangatū CFL and its Māori owners. We must also consider how the prejudice associated with those actions may be effectively removed.

162 The economists all took different approaches to the question, and some were hesitant to offer definitive solutions. For instance, the Crown's economist, Dr Yeabsley, emphasised the non-financial aspects of reconciliation such as the return of valued non-economic assets, or support for iwi to act collectively and create new institutions.[276] In contrast, both Dr Nana and Dr Meade focused on the amount of capital required to restore the claimants' economic base. Dr Coleman commented on their evidence. We summarise the views of all these experts below, and then consider what assistance it offers in determining the percentage of the available compensation to award.

275. Evidence of Richard Meade, #P6, para 708
276. Evidence of John Yeabsley, #P36, para 50

Dr Richard Meade

163 Dr Meade said that a considerable capital transfer would be required to remove inequities existing between the members of Te Aitanga a Māhaki and the median wages and average net worth of the New Zealand population generally.[277] Dr Meade proposed three alternative ways to approach valuing 'the financial sum sufficient to remove deficits between Mahaki and other reference groups'.[278] Notably, this evidence was restricted to purely financial considerations, and did not account for non-economic factors. Dr Meade's conclusions were:

(a) The compensation required to remove the present-day value of Te Aitanga a Māhaki's median wage deficit would be at least $389 million and could range up to $1,130 million as at 30 June 2018.[279]

(b) The compensation required to remove Te Aitanga a Māhaki's net worth deficit compared to the general New Zealand population ranged between $285 and $588 million as at 30 June 2018.[280]

(c) The compensation required to remove Te Aitanga a Māhaki's individual socio-economic deprivation disadvantage relative to the general New Zealand population was $16,700 million as at 30 June 2018.[281]

164 Dr Meade explained that these large figures reflected the fact that Te Aitanga a Māhaki's disadvantages 'are borne of generations of deprivation'.[282] When populations are exposed to extended and unaddressed prejudice, he said, their socio-economic development becomes subject to inertia and path-dependencies (when decisions in the past influence the range of decisions available in the future). As a consequence, substantial additional resources 'are likely to be required to enable Mahaki to jump from a disadvantaged development path to the same path as those not suffering those disadvantages'.[283]

Dr Ganesh Nana

165 Dr Nana also considered a large capital transfer would be required to remove the socio-economic disparities between Tūranga Māori and other New Zealand population groups. However, instead of modelling the figures required to remove those disparities, Dr Nana proposed a one-off investment in education to boost future Māori incomes.[284] In his view, education was an area in which targeted action could be taken that could bring 'more and more people closer to that same start line'.[285]

277. Evidence of Richard Meade, #P6, para 849
278. Evidence of Richard Meade, #P6, para 171
279. Evidence of Richard Meade, #P6, p 301
280. Evidence of Richard Meade, #P6, p 304
281. Evidence of Richard Meade, #P6, p 311
282. Evidence of Richard Meade, #P6, para 849.1
283. Evidence of Richard Meade, #P6, para 849.1.1
284. Evidence of Ganesh Nana, #P10, para 3.6
285. Transcript for joint remedies hearing, #4.38, p 241

166 In this case, Dr Nana thought a $60 million investment would be required to lift the qualification rate of Māori living in Tūranga. This fund would be part of a larger package addressing other barriers that would otherwise diminish the effectiveness of more education opportunities being made available. In contrast to Dr Meade, Dr Nana did not frame his evidence solely in monetary terms, but highlighted the importance of capital as providing for opportunities and increased access to services. Other work would be required in areas such as 'compensation or return of the land along with support structures, whether it be health or whether it be family services, and everything helps.'[286]

Dr John Yeabsley

167 Dr Yeabsley considered it was impossible to model the impact of economic redress with any certainty. Dr Yeabsley told us that '[n]o one has a definitive model of a formula that leads to economic success for individuals or groups.'[287] For this reason, he said that 'settlement should include a range of items beyond money'.[288] Dr Yeabsley's suggestions included:

(a) Any valued non-economic assets that would especially suit the iwi that can be provided – this might include land, forestry or landscape features, such as river beds or mountains.
(b) Assistance for the young to follow their aspirations – including non-economic support like coaching or other efforts like counselling to overcome barriers to their goals.
(c) Support for the iwi to do collective things such as create new institutions or enter into partnerships with Crown bodies or agencies.
(d) An investible fund or guaranteed cash flow, to provide a form of 'insurance' for the group's welfare in the future.[289]

168 As we noted in chapter 5, while sharing some principles, the reconciliatory justice approach supported by Dr Yeabsly is distinct from the Tribunal's restorative approach (see paragraph 21). For instance, Dr Yeabsley gave evidence that reconciliatory justice 'focuses on the way ahead, not on looking at the grievance that has happened previously through some form of modern day compensation lens'.[290] In addition to restoring the Treaty relationship between the Crown and Māori, the Tribunal's restorative approach has regard to the socio-economic consequences of Crown Treaty breaches, and seeks to compensate for or remove prejudice by providing a sufficient economic base for the present and future needs of iwi and hapū.[291]

169 Dr Yeabsley recognised that redress could include 'an investible fund or guaranteed cash flow, to provide a form of insurance for the group's welfare

286. Evidence of Ganesh Nana, #P10, para 15.1–15.2; transcript for hearing week two, 4 December 2018, #4.33, p 89
287. Evidence of John Yeabsley, #36, para 45
288. Evidence of John Yeabsley, #P36, paras 50
289. Evidence of John Yeabsley, #P36, paras 50.1–50.4
290. Evidence of John Yeabsley, #P36, para 40
291. Waitangi Tribunal, *Muriwhenua Land Report* (Wellington: GP Publications, 1997), p 406

in the future.'[292] However, he did not provide any evidence of how such a fund should be appropriately valued. As we noted above, Dr Yeabsley also supported the provision of temporal compensation 'to recognise the elapse of time since the wrong.'[293] However, he explained that this would be assessed differently from the value of the loss – it would be recompense for 'the elapse of time and the fact that the damage was done.'[294]

Dr Andrew Coleman

170 Dr Coleman was critical of Dr Meade's evidence on the compensation required to establish an economic base for Te Aitanga a Māhaki. He observed that by modelling the money required to offset inequities in the group's socio-economic status, Dr Meade placed a monetary equivalent on the 'non-monetary aspects of a person's well-being or utility.'[295] Dr Coleman considered that because 'wealth is a poor way of dealing with social deprivation or well-being, it proves to be a very expensive way of dealing with it.'[296]

171 Dr Coleman argued that there were more effective ways to achieve economic development for disadvantaged populations. He referred us to international research that emphasised the importance of legal and political self-determination, as well as what Dr Coleman called 'culturally appropriate rules and institutions.'[297] Dr Coleman summarised the findings reached by the Harvard Project on American Indian Economic Development, a leading proponent of this view:

> [It was] argued that economic improvement most often starts with legal and political self-determination – that the legal and political institutions need to bend to match traditional and evolving cultural norms, not that indigenous culture should bend to match externally imposed political and legal norms. Once self-determination occurs, and culturally appropriate institutions are developed, it is observed that the social and economic performance of many American Indian groups significantly improves.[298]

172 For Dr Coleman, trust in economic institutions is an important feature of the various theories of redress that can be usefully applied in regard to Māori or other indigenous populations. In his view, without respect for formal institutions and a level of trust that past wrongs will not be repeated, 'it may be difficult to encourage participation in the economy or society, or the accumulation of human or physical capital.'[299] He suggested that restor-

292. Evidence of John Yeabsley, #P36, para 50.4
293. Evidence of John Yeabsley #P61, para 21
294. Transcript for joint remedies hearing, #4.36, p 312
295. Evidence of Andrew Coleman, #P59, para 109
296. Evidence of Andrew Coleman, #P59, para 112
297. Transcript for joint remedies hearing, #4.38, p 71
298. Evidence of Andrew Coleman, #P59, para 139
299. Evidence of Andrew Coleman, #P59, para 140

ing this confidence in the fairness of the system could require an apology 'or a serious sign of a government's determination to wrong no more'.[300] Dr Coleman concluded that '[n]one of these theories are inconsistent with the payment of sizable compensation to members of New Zealand iwi and hapū for past wrongs.' Instead, they suggest that 'payments by themselves are insufficient, particularly if they do not lead to a subsequent improvement in the opportunities available to members of the iwi'.[301]

Tribunal discussion

173 There was no clear consensus among the experts about a single correct approach to restoring the claimants' economic base. The issues raised by the Tribunal's restorative approach to redress are complex, and they remain the subject of ongoing debate among experts and academics. The claimants are contending with complex intergenerational issues of inequity, the origins of which lie in the Crown's Treaty breaches. The economists' evidence highlighted the difficulty of removing these disparities through a single monetary payment or transfer of capital.

174 Dr Meade, Dr Yeabsley, and Dr Coleman agreed that a capital transfer alone is an inefficient way to achieve economic development. Dr Nana contended that a single cash payment might be effective in raising some of the primary determinants of income, such as education. However, he made some important qualifications. In particular, he said that such an expense would only bring Māori up to the starting line on one single determinant of income – assuming the current education system was appropriate for Māori which, he suggested, is a significant assumption.[302]

175 Even in perfect conditions, Dr Nana considered that the impact of this one-off payment would be 'unlikely to fully repair the gap in income between Māori and the overall Gisborne population'.[303] The utility of the investment would also rely on the availability of higher-paying jobs and other well-functioning social and community infrastructure to support Māori in seeking better education outcomes.[304] To ensure that such opportunities were available, he told us that further investment in economic development was needed 'to ensure that the regions not just have agriculture, forestry and fishing jobs, but have ongoing processes as well as the support, professional services, consulting, management, those sorts of jobs in there as well'.[305] We agree with these comments. It is clear to us that tackling the socio-economic inequities experienced by the claimants will require something more than a one-off payment of financial compensation.

300. Evidence of Andrew Coleman, #P59, para 140
301. Evidence of Andrew Coleman, #P59, para 143
302. Transcript for hearing week two, #4.33, pp 91–92
303. Evidence of Ganesh Nana, #P10, para 15.1
304. Transcript for hearing week two, #4.33, pp 82–87
305. Transcript for hearing week two, #4.33, p 89

176 We found Dr Coleman's evidence concerning the importance of culturally appropriate economic rules and institutions to be compelling. In our view, the Harvard Project's findings regarding the economic performance of Native American communities are consistent with the Tribunal's finding in the Tūranga report that:

> The impoverishment of Maori communities occurs when they become excluded from decisions in respect of their entitlements. 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, for example, this occurred long before the land was alienated, and the modest proceeds were dissipated by individualised right-holders. The importance of fostering the autonomy of Maori communities as promised in the Treaty cannot be overstated.[306]

177 The Tūranga report's findings, and the economists' evidence, point to the need for significant investment in social, cultural, and commercial infrastructure to re-establish the claimants in the social and economic life of the district. As is clear from the Harvard Project's conclusions, transformation of political, governmental, and decision-making structures is also required to restore iwi and hapū tino rangatiratanga. In our view, Dr Nana's figure of $60 million to improve the educational qualification rates of Māori living in Tūranga represents but a portion of what is required to improve the claimants' overall socio-economic circumstances. Dr Nana cautioned against looking at that kind of investment as a one-off and saw it as part of a larger package of regional economic development.

178 Dr Meade's calculations indicated that billions of dollars would be required to remove the socio-economic inequities currently experienced by the claimants. While other economists raised questions about these aspects of Dr Meade's evidence, in general terms it reinforces Dr Nana's contention that a large financial redress package is part of what is required to eliminate discrepancies in the median annual income, or the individual socio-economic deprivation disadvantage suffered by iwi and hapū. Dr Meade made the point that the Tribunal's jurisdiction in this Inquiry is limited to the return of land and the payment of compensation. For this reason, he focused on the amount of capital needed as a single measure illustrating the extent of claimants' need.[307]

179 The economists did not reach any clear consensus on the nature, or extent, of the redress required to restore the claimants's position in the social and economic life of the district. However, it is not necessary for us to precisely cost such a comprehensive remedy. We are tasked with determining whether there is good reason to award a *lesser* amount than the full specified amount

306. Waitangi Tribunal, *Turanga Tangata*, vol 1, p 739
307. Transcript for joint remedies hearing, #4.36, p 281

of available compensation. To this end, the economists' evidence suggests that significant and sustained political, social *and* economic investment is needed to advance the economic development of the claimants and to provide social services that enable them to take advantage of the opportunities and benefits created by adequate redress. Furthermore, the claimants require resources to exercise their right to self-determination, to establish their own appropriate governance and management institutions, to engage effectively with local and national Government, and to have control over their own future.

Tribunal Decision: the Proportion of the Compensation that Should be Awarded to Accompany the Return of the CFL Land

180 Under clause 2(b) of Schedule 1, we are required to determine what portion above five per cent of the specified amount of available compensation should be awarded to accompany the Mangatū CFL land when returned to Māori ownership. As we established above, two considerations inform our decision. The first is the commercial bargain in the 1989 Forests Agreement and 'the Crown's gain' as a result of the sale of its forestry assets.[308] As a feature of the 1989 Forests Agreement, Schedule 1 compensation ensures that Māori claimants can access the value of Crown forestry assets that were to be sold, as redress for their Treaty claims. The second consideration is the prejudice suffered by the claimants. As we stated above, the Tribunal may award the whole of the remaining 95 per cent portion of the available compensation if we determine that outcome to be fair and just. If, however, we consider that the available compensation exceeds the redress necessary to restore the claimants' tino rangatiratanga, and their tribal economic base, then we may award a lesser amount.

181 In terms of the commercial bargain made between the Crown and Māori in the 1989 Forests Agreement, the Crown's gain from the sale of its forestry assets – both at Mangatū and nationally – was significant. From selling the Mangatū forest specifically, Dr Meade, Mr Marren, and Mr Kiernan agreed that as at May 1992, the Crown's net proceeds from the sale of Mangatū 1 and 2 blocks were $23.8 million for the purposes of Schedule 1 of the CFAA.[309] In considering the Crown's gain more broadly, the benefit it received from the Mangatū sale cannot be entirely severed from the larger context of the Crown's privatisation process of the early 1990s. For instance, the Mangatū licence was sold in 1992, along with two other large East Coast forests in Ruatoria and Tokomaru.[310] As Dr McEwen told us, 'from a practical forestry point of view, the bigger the area a forest manager has got, the easier it is.'[311] Nationally, the Mangatū Crown forestry licence was just one of 99 Crown

308. Closing submissions for the Māhaki Trust and Mangatū Incorporation, #2.682, para 5
309. Joint statement of expert witness conference, #P2(d), para 8(a)
310. Transcript for remedies hearings, 8–11 October 2012, #4.29, p 243
311. Transcript for hearing week three, #4.34, p 93

forestry licences granted during the forest sales of 1990 and 1992.[312] Dr McEwen told us that the sale process under the CFAA included approximately 680,000 hectares of land across New Zealand, which was half of the country's plantation forest estate.[313] The Court of Appeal noted that forestry accounted for over $1 billion in state revenue in 1990 alone.[314]

182 In exchange for gaining the benefit of this revenue, the Crown agreed it would then pay financial compensation when CFL land was returned to Māori ownership. Part of the agreement was that CFL land would likely be returned to Māori ownership without any improvements and cleared of forestry assets. The new Māori owners could be required to undertake replanting of the land – as will be the case in Mangatū (see chapter 6, paragraphs 33–35). Schedule 1 compensation accounts for these features of the scheme and is calculated according to measures of the Crown's gain from the sale of the forestry assets. Under clause 3(c), the 'net proceeds' method accounts for any delay in the return of CFL land to Māori ownership. During our hearing, Dr Coleman gave evidence that the use of compound interest in this case was 'completely appropriate'.[315] For parties to commercial agreements, he told us 'that would be the normal way these things are done'.[316]

183 Over 20 years have passed since most of the claims in this Inquiry were first filed. As a consequence, the specified amount of available compensation under clause 3(c) has increased to large sums for all claimants. The inflationary effect of the compound interest on available compensation under clause 3(c) also results from the 'real value' only period being extended for limited periods. However, as we discussed above, we received no evidence asserting wilful delay by the claimants in respect of their claims. Outside the periods we have specified, we are not satisfied that there is any basis pursuant to clause 6(b) of Schedule 1 of the CFAA to exercise our discretion to extend the 'real value' period further.[317] Accordingly, the 1989 Forests Agreement is clear that compounding interest applies to compensation under clause 3(c) of Schedule 1.

184 For these reasons, we consider that there is no basis relating to the commercial bargain of the 1989 Forests Agreement, or 'the Crown's gain', to award less than the remaining portion of compensation available under Schedule 1. In simple terms, it was part of the agreement that the claimants would have access to the entire specified amount of available compensation, if it was required as redress for their claims.

185 Next, we consider whether the available compensation is disproportionate to the remedy required to address the prejudice associated with the breaches that relate to the Mangatū CFL land. To determine this, we have considered

312. Evidence of Andrew McEwen, 6 August 2012, #K5, paras 17–18
313. Evidence of Andrew McEwen, #K5, para 7.1
314. *Attorney-General v Haronga* [2017] 2 NZLR 394 (CA), para 73
315. Transcript to the joint hearing, #4.36, p 77
316. Transcript to the joint hearing, #4.36, p 77
317. Crown Forest Assets Act 1989, Schedule 1, clause 6

what Te Aitanga a Māhaki, Ngāriki/Ngā Ariki Kaipūtahi and Te Whānau a Kai have lost, as well as the prejudicial impact of Crown's Treaty breaches on the welfare of their communities. We discussed how the ongoing inequities suffered by the claimants were not just the outcome of land loss, but also the result of their political disempowerment which has continued since the arrival of Crown forces in the district and their attack on the pā at Waerenga a Hika. We concluded that the return of the Mangatū CFL land would be an important step towards restoring the claimants economically, culturally, and spiritually. However, we also observed that the return of the CFL land alone would not remedy the significant prejudice caused by the impact of the Crown's Treaty breaches related to the CFL land, which began with the overthrow of Māori autonomy in Tūranga and led, step by step, to the loss of Mangatū lands. The significant prejudice that will not be addressed through the return of the Mangatū CFL land alone therefore includes:

(a) the political disempowerment resulting from the Crown's efforts since the mid-1860s to overthrow Tūranga Māori autonomy, the transformation of title and tenure in the district, and the enormous transfer of other lands and resources from Māori to the settler population;
(b) the loss of opportunities to contribute to the economy of the district, and to manage and develop their lands themselves, including Mangatū for significant periods; and,
(c) the social and economic disadvantages suffered by generations of Tūranga Māori in health, housing, education, and employment, arising from these losses.

186 The statute does not require the Tribunal to precisely quantify the value of the prejudice and losses. Such an exercise would require putting a figure on the cumulative effect of economic losses, the loss of mana and rangatiratanga, and the social, spiritual and cultural impacts of the Crown's Treaty breaches. It is also difficult to isolate precisely the specific socio-economic prejudice the claimants suffered from the loss of the Mangatū CFL lands, from their other losses. Te Aitanga a Māhaki, Ngāriki/Ngā Ariki Kaipūtahi and Te Whānau a Kai suffered devastating prejudice from a wide range of related Crown Treaty breaches. As we discussed in chapter 5, an attempt to calculate, in solely monetary terms, prejudice which involves not only lost economic opportunity over generations, but also political, cultural and spiritual prejudice is to adopt a damages approach to remedies, which is not appropriate for some of the prejudice suffered. It is an important reason why the Tribunal takes a restorative approach in considering the compensation that is required to provide redress for such prejudice.

187 In any case, under the statute, it is not the role of the Tribunal to determine the exact value of the compensation. It is the claimants who elect a method for calculating compensation under clause 3 of Schedule 1. As we have seen, there is a wide variation in the compensation available under the different calculation methods (see paragraphs 115–116 above).

188 All the Tribunal is required to do is to decide whether to award the remaining portion of available compensation or a lesser amount. In doing so, the test we apply is whether the full compensation, in terms of the ballpark figures provided by the economists, is disproportionate to the prejudice suffered by the claimants due to Crown breaches.

189 The economists broadly agreed that, on top of the value of the land, the claimants have also suffered significant welfare losses as a result of the Crown's breaches. Dr Yeabsley's evidence was largely directed at discouraging the Tribunal from putting any weight on the other economists' evidence about the current value of losses occurring in the past when determining an appropriate remedy.[318] In our view, Dr Yeabsley's assessment of the difficulties inherent in valuing potential economic performance is indisputable, but far too general a point to assist us with the specific task we must carry out under Schedule 1 of the CFAA. This Inquiry is fact-specific, and concerns the commercial aspects of the 1989 Forests Agreement and the resulting legislation.[319] Dr Yeabsley did not address the factual circumstances of loss and socio-economic inequity as they arise for the claimants in this Inqiury.

190 The welfare losses Dr Coleman referred to provided another way of understanding some of the socio-economic consequences of the Crown's breaches for Te Aitanga a Māhaki, Ngāriki/Ngā Ariki Kaipūtahi, Te Whānau a Kai, the Mangatū Incorporation and Ngāti Matepu. The Crown's legislation and policies relating to Māori land were deliberately designed so that the claimants' tīpuna and their whānau were unable to participate in the new colonial economy except through land sales and alienations. As a result of the loss of most of their economic base Māori were left to support their whānau and hapū through wage labour. Dr Coleman's evidence broadly supported our findings on the nature of the prejudice we are seeking to redress.

191 The economists substantially agreed that the socio-economic disparities between Māori and Pākehā in the district would be difficult to remove with a single capital payment. However, this evidence only emphasised the claimants' need for economic redress and for a comprehensive effort to improve their socio-economic performance in the district. In the absence of these remedial actions, the disadvantage and prejudice flowing from the Crown's breaches has been and will continue to be perpetuated over generations. Even with a substantial compensation package the different elements of political, social, cultural, and economic prejudice, which are entangled in complex ways, will be a stubborn and ongoing challenge to meet.

192 We recognise that the Tribunal's recommendations under section 8HB for the return of land, and the payment of compensation under section 36 and Schedule 1 of the CFAA, cannot remove all socio-economic disparities

318. Evidence of John Yeabsley, #P36, para 46

319. For instance, the Court of Appeal directed that the Tribunal should not have regard to Crown settlement policy in considering what compensation is necessary to address the prejudice: *Attorney-General v Haronga* [2017] 2 NZLR 394 (CA), para 61

or inequities. A first step to removing that prejudice, which this Tribunal is empowered to take, is the provision of an economic base for the claimants. These remedies may enable them to uplift their communities and go some way to restoring them to the position they would have been in had the Crown fulfilled the promises in the Treaty, rather than breaking them. To this end, Dr Nana's evidence assisted us in understanding the utility of targeted investments in certain areas. He proposed a $60 million one-off investment in education as a small portion of what is needed to re-establish the claimants in the social and economic life of the district, noting that this sum would only be part of the economic and political investment needed. We agree that improving the welfare and socio-economic status of the wider claimant community requires a sustained effort involving multiple services and areas of support, and significant resourcing.

193 The ongoing Treaty relationship between the claimants and the Crown will be important to achieve these outcomes. The terms of the Treaty require that the claimants' tino rangatiratanga is restored. An economic base is part of that restoration and may enable them to participate as an autonomous partner with the Crown in the decision-making affecting their communities. As the Tribunal explained in the Muriwhenua Lands Inquiry:

> [T]he state, and the individual, or the Maori community both have responsibilities in achieving social standards, that the purpose of claim settlements is not to advantage a few in the administration of assets but is ultimately for the benefit of the people, and social goals are more likely to be met if the Maori communities are able to fund and control programmes of their choosing.[320]

194 The economic evidence did not provide the Tribunal with any persuasive reason to award less than the remaining portion of the specified amount of Schedule 1 compensation. In fact, in our view, the evidence of the economists supported our awarding the full compensation available. The one exception we note is that Dr Meade deducted the value of the proceeds received by the Mangatū Incorporation for the 1961 sale from his evidence on their land-based losses.[321] If we were awarding the CFL land to the Incorporation, the sale price might indeed be a relevant factor to consider in terms of reducing the amount of compensation. However, we are recommending that the CFL land be returned to a collective trust, the beneficiaries of which are the Māhaki Forests Settlement Trust, the Ngā Uri o Tamanui Trust, and the Te Whānau a Kai Trust rather than the Mangatū Incorporation. It would therefore be inappropriate to make any deduction in terms of the sale price, particularly in light of the severity of the losses the claimants as a whole have suffered. Notably, the Crown did not provide the Tribunal with alternative calculations on the extent of loss and the redress required in response to those produced

320. Determination of Preliminary Issues, Wai 45 ROI, #2.166, app E, p 8
321. Evidence of Richard Meade, #P6, para 721.2

by the claimants, and did not provide evidence of any specific deductions the Tribunal should make to its award of compensation under Schedule 1.

195 In awarding compensation under Schedule 1 of the CFAA, we bear in mind the Court of Appeal's characterisation of the Tribunal's recommendatory powers provided for in the statutory scheme as 'specific and prescriptive'.[322] Within this specific task, the Crown agreed that 'the Tribunal has wide discretion to decide the level of statutory compensation and can adjust that level to fit the extent of the prejudice being removed or compensated for'.[323] The relative merits of non-economic redress are not relevant to our task under Schedule 1 of the CFAA. Those considerations fall within section 6(3) of the Tribunal's jurisdiction when making non-binding recommendations.

196 Having considered the evidence presented to us, we have reached two conclusions. First, the return of the Mangatū CFL land and the associated Schedule 1 compensation represents a fraction of what has been lost by Te Aitanga a Māhaki, Ngāriki/Ngā Ariki Kaipūtahi, and Te Whānau a Kai – not only the CFL land and other resources, but their autonomy and political authority; and their social, cultural, economic and spiritual well-being. Secondly, the claimants will require significant resources to address the lasting inequities that are the legacy of the long-standing injustices they have endured. Indeed, we find that the Crown Treaty breaches and resulting prejudice suffered by Te Aitanga a Māhaki, Ngāriki/Ngā Ariki Kaipūtahi and Te Whānau a Kai are such that there is no reason to award less than the entire specified amount of compensation available under the scheme. For completeness, we also find that the payment of financial compensation under Schedule 1 of the CFAA will be insufficient to provide full redress to the claimants. The compensation is therefore not disproportionate to their losses. Te Aitanga a Māhaki, Ngāriki/Ngā Ariki Kaipūtahi, and Te Whānau a Kai will require further remedies to compensate for their wider land losses, and the cultural, spiritual, and economic prejudice they suffered.

197 In summary, the 1989 Forests Agreement provided for claimants in this position to access additional statutory compensation to accompany the return of CFL land. The Schedule 1 compensation is derived from the value of the forestry assets sold by the Crown as a result of this agreement. In our view, were it not for the Crown's breaches, the Mangatū owners could also have expected to benefit from the development of commercial plantation forestry on the East Coast during the 1990s, as did the Crown. Furthermore, Te Aitanga a Māhaki, Ngāriki/Ngā Ariki Kaipūtahi, and Te Whānau a Kai suffered significant additional prejudice. They were excluded from economic benefits generated through the settlement and development of Tūranga, including at Mangatū. This had severe socio-economic consequences for all their communities.

322. *Attorney-General v Haronga* [2017] 2 NZLR 394, para 58
323. Closing submissions for the Crown, #2.688(b), p 57

198 For these reasons, we determine that the Māhaki Forestry Settlement Trust, the Ngā Uri o Tamanui Trust, and the Te Whānau a Kai Trust are entitled to receive the entire remaining portion of the specified amount of compensation available under clause 3 Schedule 1 of the CFAA. The Schedule 1 compensation each group will receive is to be calculated according to the methodology they select under clause 3 of Schedule 1, and in proportion to their percentage interest in the CFL land that the Tribunal recommends for return to each group. As we determined in chapter 6, each claimant group is to receive the following percentage interest:

- for the Māhaki Forest Settlement Trust, a 68 per cent interest;
- for the Ngā Uri o Tamanui Trust, an 18 per cent interest; and
- for the Te Whānau a Kai Trust, a 14 per cent interest.

199 Upon the return of the CFL land to Māori ownership, this compensation will assist the claimants to meet their replanting obligations on the land returned from the licensee, and will provide them with a fund to begin the difficult work of optimising their economic position and restoring their communities as intended under the 1989 Forests Agreement.

200 The amounts due to each group will be paid to the Mangatū Forest Collective Trust, and the trustees will be required to transfer the funds to the three governance entities as soon as reasonably possible, retaining only an amount sufficient for the trustees to undertake their duties under the collective trust. The retained funds are to be deducted from each governance entity's share in proportion to their share of the CFL land. These requirements are stated in our terms and conditions for Schedule 1 compensation below. All of our recommendations and terms and conditions under section 8HB of the Treaty of Waitangi Act 1975 and section 36 of the Crown Forest Assets Act 1989 are set out in the next chapter.

Tribunal terms and conditions concerning Schedule 1 compensation

201 The Tribunal's terms and conditions concerning Schedule 1 compensation are:

(1) The Māhaki Forest Settlement Trust, the Ngā Uri o Tamanui Trust, and the Te Whānau a Kai Trust are to elect a calculation method under clause 3 of Schedule 1 of the Crown Forest Assets Act 1989.

After the expiry of the 90-day period, and if no separate agreement is negotiated with the Crown, the Tribunal's interim recommendation will become binding. Each of the claimant groups will then elect the method they wish under clause 3 to calculate the specified amount of compensation available to them. Parties, including the Crown, are then directed to appoint valuers to meet and agree on the amount of compensation payable to each governance entity, pursuant to the calculation they select under clause 3 of Schedule 1 of the Crown Forest Assets Act 1989, and in proportion to their percentage interest in the CFL land.

(2) The Crown is to pay to the Mangatū Forest Collective Trust 100 per cent of the specified amount of Schedule 1 compensation.

Pursuant to section 36(1)(b) of the Crown Forest Assets Act 1989, the Crown is to pay to the Mangatū Forest Collective Trust 100 per cent of the specified amount of Schedule 1 compensation available for distribution to the Māhaki Forest Settlement Trust, the Ngā Uri o Tamanui Trust, the Te Whānau a Kai Trust. The payment is to be calculated in accordance with their respective elections under clause 3 of Schedule 1, and in proportion to their respective percentage interests in the land.

(3) The Mangatū Forest Collective Trust is to distribute the Schedule 1 compensation to each governance entity.

The Mangatū Forest Collective Trust is to distribute as soon as reasonably practicable to each of the Māhaki Forest Settlement Trust, the Ngā Uri o Tamanui Trust, and the Te Whānau a Kai Trust, the compensation due to them, less a reasonable and appropriate amount sufficient to meet the administration and operational costs of the Mangatū Forest Collective Trust in governing and managing the land, together with trustees' remuneration and expenses. This amount is to be not less than $500,000 a year, unless the trustees agree to a lesser amount at their first meeting. The amount to be retained by the Mangatū Forest Collective Trust is to be deducted from the compensation payable to each of the Māhaki Forest Settlement Trust, Ngā Uri o Tamanui Trust, and the Te Whānau a Kai Trust in proportion to their percentage interest in the land.

WAIATA TŪTOHUNGA

Ka haere te tika mua i a ia hei whakatau i a tātou ki te ara o ōna hikoinga

CHAPTER 8

TRIBUNAL FINDINGS AND REMEDIES RECOMMENDATIONS

Introduction

1 In this chapter, we set out our recommendations to the Crown to compensate for or remove prejudice suffered by Te Aitanga a Māhaki, the Mangatū Incorporation, Ngāriki/Ngā Ariki Kaipūtahi, and Te Whānau a Kai as a result of its Treaty breaches relating to the Mangatū CFL land. The main points of our interim recommendation for the return of the Mangatū CFL land to Māori ownership have already been stated in chapters 5–7 of this report. First, we revisit in broad terms our approach to remedies, and the key findings and decisions, already set out in previous chapters. We then restate our interim recommendation under section 8HB of the TOWA for the return of the Mangatū CFL land to Māori ownership (stated first in chapter 6), followed by our decision on the proportion of the available Schedule 1 compensation that is to accompany the return of the CFL land (stated first in chapter 7). Finally, we consider what other recommendations should be made under section 6(3) to compensate for or remove the prejudice suffered by the claimants.

2 We emphasise that this chapter is summary in nature. While we precis the findings and decisions recorded in earlier chapters, we do not set out again the full reasoning underpinning our recommendations. For that, readers should refer to the relevant chapters (specific chapter and paragraph references are provided in parentheses throughout).

The Tribunal's Approach to Remedies

3 As set out in chapter 3, the Tribunal's power to make binding recommendations under section 8HB is to be exercised pursuant to its formal powers to make recommendations under section 6(3), although as a discrete part of those broader powers. The Supreme Court ruled in *Haronga* that:

> Following a finding that a claim is well-founded s 8HB(1)(a) is the controlling provision. The Tribunal must consider whether its return 'should' be

recommended as part of a recommendation under s 6(3) 'to compensate for or remove the prejudice caused [by the act found to be in Treaty Breach]'.[1]

4 While the Tribunal's discretion is limited, both the High Court and the Court of Appeal reaffirmed the Supreme Court's judgment in *Haronga* that the Tribunal 'has power under s 8HB to arrive at the outcome it thinks right'.[2] The statutory prerequisites for the Tribunal to make binding recommendations for the return of CFL land to Māori ownership are that:

(a) the claim relates to the CFL land;
(b) the claim is well founded;
(c) the action to be taken under section 6(3) to compensate for or remove the prejudice caused by the breach should include the return to Māori ownership of the whole or part of the land; and
(d) some or all of the identified groups are appropriate for that purpose.[3]

5 Our determinations on each of these prerequisites are set out below. First, as explained throughout this report, we note that, in making the determinations required by the statutory scheme, we have had regard to the following four considerations:

- the claims and the relevant history of Crown Treaty breach;
- the 1989 Forests Agreement and the purpose of the statutory scheme;
- the directions provided by the Courts; and
- Tribunal jurisprudence and principles concerning the restorative approach to remedies.

6 In the sections below, we set out the key features of these considerations that have informed our conclusions throughout this report. We then briefly summarise the determinations we have made on each of the statutory prerequisites set out in paragraph 4, before moving on to restate our recommendation under section 8HB of the TOWA.

The claims and the relevant history of Crown Treaty breach

7 We have taken into account the following considerations concerning the claims and the relevant history of Crown Treaty breach:

(a) The Tribunal should have regard to those Treaty principles which it finds the Crown to have breached (see chapter 3, paragraphs 72–83).[4]
(b) In seeking binding recommendations, claimants can rely on the Tribunal's findings of fact, Crown Treaty breach, and prejudice. The Tribunal is to have regard to all of the well-founded claims of Crown

1. *Haronga v Waitangi Tribunal* [2012] 2 NZLR 53 (SC), para 92
2. *Haronga v Waitangi Tribunal* [2012] 2 NZLR 53 (SC), para 107; *Haronga v Waitangi Tribunal* [2015] NZHC 1115, para 97(g); *Attorney-General v Haronga* [2017] 2 NZLR 2 (CA), para 63
3. *Attorney-General v Haronga* [2017] 2 NZLR 394 (CA), para 60
4. Treaty of Waitangi Act 1975, long title; Waitangi Tribunal, *Turangi Township Remedies Report* (Wellington: GP Publications, 1998), p 77

Treaty breaches it has determined relate to the CFL land, the relative seriousness of the various breaches, 'and to their prejudicial effect on the claimants'.[5]

(c) We determined that a claim 'relates to' the Mangatū CFL land if:
- The claim concerns the CFL land in some way.
- The claimant has a relationship to the CFL land (for example through the exercise of tino rangatiratanga, mana whenua, or some other ancestral connection or interest).
- The prejudice suffered by the claimant as a result of the Treaty breach has led to the claimant's relationship with the CFL land being destroyed or damaged.[6]

The 1989 Forests Agreement and the purpose of the statutory scheme

8 We have taken into account the following considerations concerning the 1989 Forests Agreement and the purpose of the statutory scheme:

(a) The statutory scheme provides greater protections for Māori claims to ensure that CFL land, such as Mangatū, will be available for the very purpose of compensating or removing prejudice suffered by Māori in circumstances such as are present in this Inquiry – namely, where claims that relate to the land have been determined to be well-founded (see chapter 4, paragraph 45]).[7]

(b) A key purpose of the Tribunal's powers under section 8HB to recommend the return of land is restoring the claimants' tino rangatiratanga and mana whenua in those lands (see chapter 4, paragraph 9).[8]

(c) Schedule 1 compensation is a bespoke feature of the statutory scheme under the CFAA and section 8HB of the TOWA, and accounts for the fact that the Crown proceeded to sell cutting rights to forestry assets on Crown land that could subsequently be returned to Māori ownership (see chapter 7, paragraphs 52–58).[9]

The directions of the Courts

9 We have taken into account the following considerations arising from the directions of the Courts:

(a) The Courts have directed us to proceed with urgency in adjudicating the remedies applications before us. We have done so, as far as possible in all the circumstances in this Inquiry, and in the interests of justice for the claimants.[10]

5. Waitangi Tribunal, *Turangi Township Remedies Report*, p 77
6. *Mercury NZ Ltd and Ors v Waitangi Tribunal and Ors*, [2020] NZHC 654, para 80
7. *Haronga v Waitangi Tribunal* [2012] 2 NZLR 53 (SC), para 76
8. *Mercury NZ Ltd and Ors v Waitangi Tribunal and Ors*, para 79
9. *Haronga v Waitangi Tribunal* [2015] NZHC 1115, paras 96, 100
10. *Haronga v Waitangi Tribunal* [2012] 2 NZLR 53 (SC), para 110

(b) The Courts have determined that the goal of remedying claims by returning CFL lands under section 8HB is not to be deflected by Crown Treaty settlement policy (see chapter 3, paragraph 45(c)).[11]

(c) The Tribunal may award as low as 5 per cent of the compensation available under Schedule 1; it may also award the remaining 95 per cent if it determines that is fair and just.[12] We are not required to award the full amount to repay the Crown's gain from the sale of its forestry assets, but we may take into account the commercial advantage to the Crown secured by the 1989 Forests Agreement (see chapter 7, paragraph 58).[13]

(d) The sequencing of determinations under the statutory scheme means that the decision whether or not to return all or part of the CFL land must be decided first. That decision may then influence the determination of what proportion of the remaining 95 per cent of the available compensation under Schedule 1 should be awarded (see chapter 7, paragraphs 20–21).[14]

(e) The Tribunal's determination under section 8HB(1)(a)(ii) of the TOWA is an aspect of the statutory scheme that 'should not be interpreted narrowly'. In *Mercury NZ Ltd and Ors v Waitangi Tribunal and Ors* (*Mercury*), the High Court held that 'it would be permissible for the Tribunal to take into account other breaches when deciding at the further stage of the determination whether the land "should" be returned'.[15]

The Tribunal's jurisprudence and principles concerning the restorative approach to remedies

10 We have taken into account the following considerations concerning the Tribunal's jurisprudence and principles concerning the restorative approach to remedies:

(a) The Tribunal should take a restorative approach to remedies, as set out in Tribunal reports including the *Muriwhenua Land Report* and the *Tūrangi Township Report* (see chapter 5, paragraphs 20–31).[16] The purpose of this approach is to compensate for or remove the prejudice suffered by the claimant communities, and to restore their tino rangatiratanga in respect of both their lands and the well-being of their people. This approach requires the Tribunal to consider:

- The seriousness of the case – the extent of property loss and the extent of consideration given to hapū interests;

11. *Haronga v Waitangi Tribunal* [2015] NZHC 1115, para 109; *Attorney-General v Haronga* [2017] 2 NZLR 394 (CA), para 64
12. *Attorney-General v Haronga* [2017] 2 NZLR 394 (CA), paras 63,
13. *Haronga v Waitangi Tribunal* [2012] 2 NZLR 53 (SC), para 72; *Haronga v Waitangi Tribunal* [2015] NZHC 1115, para 96; *Attorney-General v Haronga* [2017] 2 NZLR 394 (CA), para 73
14. *Attorney-General v Haronga* [2017] 2 NZLR 394 (CA), para 61
15. *Mercury NZ Ltd and Ors v Waitangi Tribunal and Ors* [2020] NZHC 654, para 87
16. Waitangi Tribunal, *Turangi Township Remedies Report*, pp 33, 85; Waitangi Tribunal, *The Muriwhenua Land Report* (Wellington: Legislation Direct, 1997), pp 405–406

- the impact of that loss, having regard to the numbers affected and the lands remaining;
- the socio-economic consequences;
- the effect on the status and standing of the people;
- the benefits returned from European settlement;
- the lands necessary to provide a reasonable economic base for the hapu and to secure livelihoods for the affected people; and
- the impact of reparation on the rest of the community (so that local and national economic constraints are also relevant).[17]

(b) Under section 8HB(1)(a), the Tribunal must consider the nature of the Treaty breach and the extent of the prejudice to determine that the action to be taken to compensate for or remove the prejudice 'should include the return of licensed land'. This Inquiry is primarily concerned with applications specifically for the return of the Mangatū CFL land, and thus our focus has been on the claimants' losses in Mangatū, the context in which those losses occurred, and the prejudice associated with those losses and related Crown Treaty breaches (see chapter 5, paragraphs 36).

(c) Land has a spiritual and cultural importance to Māori over and above its economic value, and is 'a repository of cultural meaning'.[18] For claimants who have suffered the severance of this spiritual connection with their land, monetary payments alone are generally insufficient to restore what they have lost.[19]

(d) In taking a restorative approach, the Tribunal should have regard to practical issues concerning the management of the CFL land as it is incrementally returned to Māori control by the current licensee, and the current regulatory scheme. In this Inquiry, claimant parties and the Crown brought evidence from forestry experts to assist the Tribunal with these considerations (see chapter 6, paragraphs 30–44).

(e) While we are not able to resolve the relationship issues created by the overlapping interests in this Inquiry, we have provided parties with an opportunity to work through how any returned land would be held and managed for the benefit of the claimant communities (see chapter 6, paragraphs 50–56).

The Claimants' Well-Founded Claims that Relate to the CFL Land

11 The claimants in this Inquiry are seeking the return of the whole of the Mangatū CFL land and all the available Schedule 1 compensation under the

17. Waitangi Tribunal, *The Muriwhenua Land Report*, p 406
18. Brian Murton, 'Te Aitanga a Māhaki, 1860–1960: The Economic and Social Experience of a People', 2001, #A26, p 663
19. Waitangi Tribunal, *Turangi Township Remedies Report*, pp 77–78

CFAA. They do so on the basis of their comprehensive claims of prejudice caused by the Crown's Treaty breaches in the Tūranganui a Kiwa Inquiry District. As we set out in chapter 4, those claims address a wide range of Crown Treaty breaches: from the Crown's unlawful attack and killings at Waerenga a Hika pā in 1865, and the subsequent unlawful detention of captives on Wharekauri (Chatham Islands), to the imposition of a Crown land tenure and transfer system in Tūranga which consolidated its authority by transferring Māori land and resources to the settler population.

12 In the Tūranga report, the Tribunal traced the close connections between the imposition of the Crown's authority by force, the loss of tino rangatiratanga, and the widespread land alienation and impoverishment that followed.[20] Within this wider story, some claims directly concern the claimants' title, tenure, and alienation of land in the Mangatū blocks. But we have also found that Crown conduct throughout the district had profoundly destructive consequences for Te Aitanga a Māhaki, Ngāriki/Ngā Ariki Kaipūtahi, and Te Whānau a Kai, and the claimants' ability to exercise their authority and rights in the district, including in their Mangatū lands.

13 We explored the connections between these claims and the current status of the Mangatū CFL land in chapter 4. We found that the issues arising from the claims were interconnected, and that individual Crown Treaty breaches had wide-ranging impacts that were difficult to isolate to particular blocks. The Crown's attack on Waerenga a Hika pā in 1865 and the treatment of the Whakarau are central to the history of difficult relations between the Crown and the claimants. The Crown sought to undermine Māori autonomy and impose its authority over them and over the lands in the district, including Mangatū. The conflicts of the 1860s created the conditions for the transformation of the district which followed.

14 Through the imposed deed of cession and the Poverty Bay Commission, the Crown secured control of approximately 1.195 million acres of Tūranga land, effectively confiscating a large area of the most fertile land in the district.[21] The Crown's intention was to establish a military settlement on the 56,141 acres of ceded lands it had retained.[22] The Commission replaced customary governance and land tenure with Crown grants, thereby introducing the Crown's system of individualised interests, which were vulnerable to alienation.[23] Once the Commission had investigated and awarded the valuable Poverty Bay flats, the Commission then returned 1 million acres of the ceded land to Māori, about a half of which belonged to the claimants' iwi and hapū. The Native Land Court would complete the work the Poverty Bay Commission had begun. As the Tribunal explained in the Tūranga report, 'the Native Land

20. Waitangi Tribunal, *Turanga Tangata, Turanga Whenua: Report on the Turanganui a Kiwa Claims*, 2 vols (Wellington: Legislation Direct, 2004), vol 2, pp 738–740
21. Waitangi Tribunal, *Turanga Tangata*, vol 1, pp xx, 328
22. Waitangi Tribunal, *Turanga Tangata*, vol 1, p 339
23. Kathryn Rose, 'Te Aitanga-a-Mahaki Land and Autonomy, 1873–1890', 1999, #A17, p 32

Court moved in to transform land tenure in the remaining one million acres of the district ceded in 1868 – that is, to normalise Crown-Maori relationships on the basis of the Crown's newly acquired ascendancy'.[24]

15 The claimant communities' ability to protect and manage their lands was destroyed by the Crown's imposition of the native land regime, the individualisation of Māori title, and its policies governing Crown and private purchasing. Together, these Crown Treaty breaches led to the alienation of the majority of the claimants' tribal estate by the end of the nineteenth century. This was the intended consequence of the Crown's actions, legislation and policies. The lands lost included Mangatū 2, where private purchasers acquired almost all the individual interests in the entire block following its subdivision in 1888. In the twentieth century, the claimants' lands shrank even further, as titles were fractionated as a result of imposed succession rules. Maori land was further fragmented, partitioned into ever smaller subdivisions through the administration of the Crown's native land legislation (see chapter 4, paragraph 123, 128).

16 Wi Pere and his lawyer William Rees sought to retain land in Māori collective control through a number of creative ventures known as the Tūranga trusts (see chapter 4, paragraphs 154–178). However, these efforts to slow alienation had only limited success. Their first initiative, the Rees-Pere trusts lacked the political support and legal infrastructure, for Māori community land management, and were therefore doomed to failure. The Rees-Pere trusts' successor was the New Zealand Land Settlement Company, which collapsed during the depression of the late 1880s. Following the company's failure, the Company's remaining lands were transferred to the Carroll Pere Trust.[25]

17 After years of escalating debt in the Carroll Pere Trust, the Crown finally intervened in 1902 to establish the East Coast Native Lands Trust Board and then the East Coast Commissioner to administer the Trust lands.[26] Mangatū 5 and 6, which were originally vested in the New Zealand Land Settlement Company to pay for outstanding survey liens, would be sold under the administration of the East Coast Trust as part of 'a long and weary tale of debt'.[27] Mangatū 1, 3, and 4, which Wi Pere and Rees had saved from the Native Land Court and from alienation by the ground-breaking means of statutory incorporation, were also swept up in the story of the Tūranga trusts. They were placed under the administration of the East Coast Commissioner between 1917 and 1947, and the same policies applied to them as to the wider East Coast Trust lands (see chapter 5, paragraph 72).

18 Only 14 years later, the Crown acquired 8,522 acres in Mangatū 1 for afforestation, erosion control and conservation purposes. This followed negotiations

24. Waitangi Tribunal, *Turanga Tangata*, vol 2, p 397
25. These blocks were Whataupoko G (1,520 acres), Motu (2,000 acres), Okahuatiu 2 (15,190 acres), Mangatū 5 and 6 (40,150 acres), Whataupoko 5 (125 acres), Matawhero 5 (34 acres), and Matawhero 1 (185 acres): Waitangi Tribunal, *Turanga Tangata*, vol 2, p 581
26. Waitangi Tribunal, *Turanga Tangata*, vol 2, pp 547–548
27. Jacquiline Haapu, 'Te Ripoata o Mangatu: The Mangatu Report', 2000, #A27, p 84

during which the owners were given no alternative but to sell, and the Crown failed to disclose its intentions that the forest should be commercial as well as protective. The Crown failed to act reasonably and with the utmost good faith when it acquired the Mangatū 1 lands from the Māori owners, offending against those Treaty obligations.[28]

19 The present status of the Mangatū CFL land, and the claimants' interests there, are the result of this long turbulent history of Crown-Māori relations. In chapter 4, we concluded that Te Aitanga a Māhaki and the Mangatū Incorporation, Ngāriki/Ngā Ariki Kaipūtahi and Te Whānau a Kai all have claims that relate to the Mangatū CFL land. We now re-state our determinations on the well-founded claims that relate to the CFL land, as set out already in chapter 4.

Te Aitanga a Māhaki, Ngāriki/Ngā Ariki Kaipūtahi, and Te Whānau a Kai, on the basis of the following Treaty breaches, all have well-founded claims which relate to the Mangatū CFL land

The Crown's attack on Waerenga a Hika and its treatment of Te Kooti and the Whakarau, 1865–68

(a) The Crown acted unlawfully and fundamentally breached the principles of the Treaty of Waitangi by attacking the pā at Waerenga a Hika, where many Te Aitanga a Māhaki, as well as Ngāriki/Ngā Ariki Kaipūtahi, and Te Whānau a Kai had taken refuge, including women and children. They were defending their Treaty-guaranteed tribal autonomy and exercising their right of self-defence under English constitutional law.

(b) The Crown's deportation of the Whakarau to Wharekauri, along with their families, and their detention there in harsh conditions for over two years without trial, was unlawful. The disruption caused by the exile of a large proportion of the male population compounded the impact of the Crown's Treaty breaches at Waerenga a Hika on the autonomy of Te Aitanga a Māhaki, Ngāriki/Ngā Ariki Kaipūtahi, and Te Whānau a Kai. It also inhibited these groups' ability to exercise customary rights and tino rangatiratanga over their land and resources, including at Mangatū.

(c) The Crown acted unlawfully and in breach of the Treaty in pursuing and harassing Te Kooti and the Whakarau after their return to the East Coast, as they attempted to find sanctuary in the central North Island. Te Kooti's resort to violence by attacking the Tūranga settlements must be seen in this context, although the killing of both Māori and Pākehā in these attacks cannot be justified. The execution without civil or military trial of those taken prisoner by Crown forces at Te Kooti's pā at Ngātapa, and the pursuit and killing of those who had escaped the pā, was illegal and breached the guarantees in Article 3 of the Treaty. Innocent Māori prisoners of Te Kooti were likely to be among those executed. The lawlessness of the Crown's actions in these years would have severely

28. Waitangi Tribunal, *Turanga Tangata*, vol 2, p 733

impacted even those Māori in Tūranga who were not detained on Wharekauri or did not suffer the attacks, including those with customary interests in Mangatū.

(d) In the wake of Ngātapa, the Crown took steps to capitalise on the severe blow it had dealt to the autonomy of Te Aitanga a Māhaki, Ngāriki/Ngā Ariki Kaipūtahi, and Te Whānau a Kai and their ability to resist the Crown's realisation of its goals. The effect of the defeat at Waerenga a Hika and the Crown's treatment of the Whakarau shattered these groups' autonomy and their control over their affairs and lands, including those at Mangatū. From this time onwards Tūranga ceased to be a Māori district as Pākehā settlement transformed the area, and the Crown consolidated its authority in the district.

The deed of cession (1868) and the Crown-retained lands

(a) The 1868 deed of cession was signed by Tūranga Māori under duress. Following Te Kooti's attacks on Patutahi, Matawhero, and Oweta, and the killings of Māori and settlers there in November 1868, the Crown threatened to remove its protection from the district. It did so during a time of considerable turmoil, fear, and panic in Māori and Pākehā communities, and gave Māori no choice but to agree to the cession of 1.195 million acres (including the Mangatū lands). Its actions breached the primary obligation of kāwanatanga and the Treaty principle of active protection.

(b) The legally flawed deed of cession was ineffective in extinguishing the rights of the many Te Aitanga a Māhaki, Ngāriki/Ngā Ariki Kaipūtahi, and Te Whānau a Kai people, including those customary owners of Mangatū who were detained on Wharekauri. They were deemed to be 'rebels' and did not sign the deed. Despite this, the imposition of the cession was a major step in the assertion of the Crown's authority in Tūranga at the expense of iwi and hapū tikanga, and rangatiratanga. These actions breached Article 2 of the Treaty.

The Poverty Bay Commission, 1869–73

(a) Instead of receiving the land and security of tenure promised to 'loyal' Māori by the Crown, the work of the Poverty Bay Commission effectively opened the way for the replacement of customary ownership and interests with land title adjudication by Crown designed processes. The joint tenancies created by the Commission began the process of the individualisation of interests in land in Tūranga. The Crown's failure to ensure that the form of title awarded, following investigation by the Poverty Bay Commission, was not prejudicial to Māori interests was a breach of the principles of the Treaty.[29]

29. Waitangi Tribunal, *Turanga Tangata*, vol 2, p 745

(b) The Crown's further failure to provide for legal tribal ownership when the Poverty Bay Commission 'returned' the larger part of the land in 1873 to Te Aitanga a Māhaki, Ngāriki/Ngā Ariki Kaipūtahi, and Te Whānau a Kai (as well as other Tūranga groups) breached the tino rangatiratanga guarantee under Article 2, and the Treaty principles of active protection and autonomy.[30] This gave the Mangatū owners no alternative but to engage in the Crown's native land regime, including the Crown-designed Court processes, in order to ensure their title to their lands was recognised.

The Crown's native land regime and the new native title

(a) The Crown's introduction of the native land regime and its operation in Tūranga, without the consent of Te Aitanga a Māhaki, Ngāriki/Ngā Ariki Kaipūtahi, and Te Whānau a Kai, expropriated their community rights to make their own title decisions – including in respect of their Mangatū lands. The Crown's native land legislation also removed community land management rights and individualised the alienation process against the strongly expressed wishes of Tūranga Maori, and breached both the title and tino rangatiratanga guarantees in the Treaty. The Mangatū 2 block was progressively acquired by private purchasers as a result of these Crown policies.

(b) The complex and inefficient native land title and transfer system imposed by the Crown was deliberately inimical to the collective control of land by Te Aitanga a Māhaki, Ngāriki/Ngā Ariki Kaipūtahi, and Te Whānau a Kai landowners, including those of the Mangatū lands. This breached the tino rangatiratanga guarantee under Article 2 of the Treaty, and the Crown's obligation of active protection of Māori title. It was also a breach of Article 3 in that titles given to settlers allowed them to borrow and develop their land, whereas the flawed titles awarded to Māori provided only for alienation. Even the Mangatū 1 owners faced difficulties, despite the remarkable provision they were able to achieve for their incorporation. Soon after the Mangatū Incorporation was established in 1893, the owners were forced to vest Mangatū 1, 3, and 4 blocks in three trustees in order to access funds to develop their lands. The owners faced successive barriers to developing the block, so that the only option open to them was to lease large areas of land to settlers for two generations. The owners were effectively prevented from exercising tino rangatiratanga over their lands.

(c) Tūranga Māori landowners, including the tīpuna of those with claims that relate to the Mangatū CFL lands, were subjected to unbearable systemic pressure to sell that was inconsistent with the Crown's fiduciary obligation to Māori and the Treaty principle of active protection. The loss of Mangatū 2, which settlers purchased from Ngāi Tamatea

30. Poverty Bay Lands Titles Act, 1874

individual owners over a period of 10 years, is a classic example of how the system worked to constrain the choices of Māori landowners and to force sales.

The Tūranga trusts, 1878–1955

(a) The Tūranga trusts were first set up by Wi Pere and William Rees in the late 1870s to maintain control of Māori land in the hands of the Māori owners. The Rees–Pere trusts and the later Carroll Pere trust struggled against legislative and legal barriers created by the Crown's native land regime and policies, and were ultimately unsuccessful. The Crown's failure to provide support and legal infrastructure for Māori community management, and to prevent the erosion of Māori community land interests, breached the tino rangatiratanga guarantee under Article 2, and the Treaty principle of active protection.

(b) These breaches affected the Mangatū lands when they became swept up in the sad story of the Tūranga trusts. The Mangatū 1 owners lost control of their lands for many years when they were under the administration of the East Coast Commissioner, despite Wi Pere and William Rees's success in establishing the Mangatū Incorporation. The Mangatū 5 and 6 blocks, which had the same owners as Mangatū 1, were also permanently alienated by the East Coast Commissioner, despite Rees's efforts to secure their return to Māori ownership.

(c) The Crown's inefficient and contradictory system of individual title transfer destabilised the Carroll Pere Trust titles including those of the Mangatū 5 and 6 blocks. It exposed the Trust to exceptionally high legal costs and unprecedented levels of litigation. This breached the tino rangatiratanga guarantee under Article 2 and the principle of active protection.

(d) The Crown's failure to intervene prior to 1902 in the rising debts incurred by the Carroll Pere Trust, when it was aware much earlier of the nature of the problem and of the consequences of its own title system, represented a breach of the principle of active protection. The debts incurred over this period would lead to the alienation of further lands under the East Coast Trust, including the Mangatū 5 and 6 blocks.

(e) The Crown intervened in 1902 to establish the East Coast Native Trust Lands Board, and then the East Coast Commissioner in 1906 to manage the remaining trust lands. Once it became evident that the East Coast Trust was not going to be a short-term solution, the Crown did not ensure that Te Aitanga a Māhaki, Ngāriki/Ngā Ariki Kaipūtahi, and Te Whānau a Kai were included in the development of policy for the administration of their land. This was in breach of the Treaty principle of active protection.[31] The Mangatū owners suffered the loss of Mangatū 5 and 6 which were sold during this period. They were also prevented

31. Waitangi Tribunal, *Turanga Tangata*, vol 2, p 567

from exercising their tino rangatiratanga with respect to their lands in Mangatū 1 until 1947.

Te Aitanga a Māhaki, the Mangatū Incorporation, and Ngāriki/Ngā Ariki Kaipūtahi, on the basis of the following Crown Treaty breaches, all have a well-founded claim which relates to Mangatū CFL land

The Mangatū afforestation and the Crown's 1961 acquisition

(a) The Crown's failure to act reasonably and with the utmost good faith during negotiations for the acquisition of approximately 8,500 acres in Mangatū 1 in 1961 for afforestation purposes breached the principle of partnership. This affected all the owners, including members of Te Aitanga a Māhaki hapū Ngāti Wāhia, Ngāriki, and Te Whānau a Taupara, and Ngāriki/Ngā Ariki Kaipūtahi. Members of Te Whānau a Kai who had interests in Mangatū 1 were also affected.

(b) The Crown's failure to give serious consideration to the available alternatives to sale or compulsory acquisition led to the separation of the Mangatū owners from their ancestral land, and breached the tino rangatiratanga guarantee under Article 2 of the Treaty.

Ngāriki/Ngā Ariki Kaipūtahi, on the basis of the following Crown Treaty breaches, have a well-founded claim which relates to Mangatū CFL land

The Native Land Court's Mangatū title determination

(a) The Crown's failure to recognise the flaws in the 1881 Native Land Court decision, and to ensure that Ngāriki/Ngā Ariki Kaipūtahi were able to reargue their interests in the Mangatū 1 block in the Native Land Court when legislation was introduced to allow Te Whānau a Taupara to do so in 1917, breached the principles of the Treaty of Waitangi.

(b) The Crown's imposition of the native land regime that removed control of Māori land from hapū and their rangatira, and imposed a system of adjudication of titles which failed to recognise tikanga or give effect to tino rangatiratanga breached Article 2 of the Treaty. This created increasingly acrimonious and lasting disputes in relation to the Mangatū 1 block among Te Aitanga a Māhaki, Ngāriki/Ngā Ariki Kaipūtahi, and their uri.

Should the Mangatū CFL Land be Returned to Māori Ownership?

20 Having determined in chapter 4 that the claimants in this Inquiry have claims that relate to the CFL land and are well-founded, the next step was to decide whether the remedies required to address the prejudice arising from these claims should include the return of land to Māori ownership. To make this determination, we considered the prejudice shared by Te Aitanga a Māhaki and the Mangatū Incorporation, Ngāriki/Ngā Ariki Kaipūtahi, and Te Whānau a Kai. We also differentiated between these claimant groups, having

regard to their specific losses in the Mangatū CFL lands and the prejudice they suffered as a result of other Crown Treaty breaches related to their interests in Mangatū. Our findings are summarised in the sections below in the order they are presented in chapter 5, followed by our determination.

Prejudice associated with the Crown's overthrow of the autonomy of Te Aitanga a Māhaki, Ngāriki/Ngā Ariki Kaipūtahi, and Te Whānau a Kai

21 We found that Te Aitanga a Māhaki, Ngāriki/Ngā Ariki Kaipūtahi, and Te Whānau a Kai communities all experienced severe prejudice resulting from the Crown's actions at Waerenga a Hika and then against the Whakarau (see chapter 5, paragraphs 37–45). Between 1840 and 1865, the Tribunal found that Tūranga Māori 'decided how and when contact with colonists would occur – if at all'.[32] The Crown's attack at Waerenga a Hika on Tūranga Māori – who were not in rebellion – was motivated by its determination to overthrow Māori autonomy and impose its authority over the district and its lands, including Mangatū.

22 Following Waerenga a Hika, the Crown labelled many Te Aitanga a Māhaki, Ngāriki/Ngā Ariki Kaipūtahi, and Te Whānau a Kai as 'rebels', thus justifying (in the Crown's view) their illegal detention on Wharekauri for over two years, and the effective confiscation of their interests in the lands returned by the Poverty Bay Commission. The stigma created by these events was lasting, and contributed to the claimants' almost complete exclusion from political power and the economic development of the district. The social and psychological consequences of the bloodshed of Waerenga a Hika and Ngātapa created an environment of distrust and fear between the settler population, the Whakarau and their descendants, and those who suffered at the hands of the Whakarau.[33]

23 The Crown's efforts to overthrow their autonomy and tino rangatiratanga was intended to undermine the ownership and control of the lands and resources of Te Aitanga a Māhaki, Ngāriki/Ngā Ariki Kaipūtahi, and Te Whānau a Kai. Large numbers of their men were killed or detained on Wharekauri during this period. Their loss left the claimants badly placed to resist the Crown's efforts to break community control over their lands.[34] A number of women and children who had travelled to Wharekauri to join their men were also absent from the district.[35] The Crown's actions at Waerenga a Hika and its treatment of the Whakarau also had economic consequences for the claimants, as agricultural production slowed and people moved to a smaller number of locations with fewer resources available to them.[36]

32. Waitangi Tribunal, *Turanga Tangata*, vol 1, p 39
33. Murton, 'Te Aitanga a Māhaki 1860–1960', #A26, pp 78–79
34. Waitangi Tribunal, *Turanga Tangata*, vol 2, pp 512, 749–750
35. Waitangi Tribunal, *Turanga Tangata*, vol 1, pp 174–175
36. Murton, 'Te Aitanga a Māhaki 1860–1960', #A26, pp 70–71

24 Following the conflicts of the 1860s, the formal consolidation of Crown authority in the district began with the imposed deed of cession and the work of the Poverty Bay Commission. The transformation of customary title was completed by the Native Land Court. Te Aitanga a Māhaki, Ngāriki/Ngā Ariki Kaipūtahi, and Te Whānau a Kai were prejudiced by the Crown's native land regime and land transfer system. It denied them a legal community title and therefore prevented them from exercising community control over their lands. The immediate and longer-term prejudice they suffered included the complete loss of their ability to control the pace of settlement within their rohe, with devastating consequences for their mana whenua and tino rangatiratanga in their own lands.

Prejudice associated with the loss of the Mangatū lands

25 The Ngāi Tamatea hapū of Te Aitanga a Māhaki were primarily affected by the alienation of the Mangatū 2 block through private purchase in the late nineteenth century (see chapter 5, paragraphs 48–50).[37] Most of the land in Mangatū 2 was purchased by a handful of settlers who manipulated the Crown's native land regime and purchasing policies to secure interests from individual owners in multiple transactions at artificially low prices. The purchase of individual interests led to further subdivisions, increasing the pressure on the remaining Māori owners to sell their interests. By 1900, the entire block, excepting the Mangatū 20 subdivision, had been purchased by settlers.[38]

26 The prejudice suffered by the Mangatū 2 owners included the loss of almost the whole block against their intentions and over the objections of some owners. The owners also suffered the cultural, and spiritual consequences of that loss. The economic prejudice they suffered flowed from the loss of an important capital asset at depressed prices, and the loss of the ability to support themselves on that land. This was not the outcome the Ngāi Tamatea community would have wanted.

27 We found that the prejudice associated with the losses in Mangatū 1, Mangatū 5, and Mangatū 6 primarily affected the Ngāti Wāhia, Ngāriki, and Te Whānau a Taupara hapū of Te Aitanga a Māhaki and Ngāriki/Ngā Ariki Kaipūtahi. Te Whānau a Kai people who had interests in Mangatū 1 through their Ngāriki whakapapa connections were also affected. The Mangatū 1, 3, and 4 blocks had been under the control of three trustees from 1899, and large areas of the owners' land had been leased to settlers for terms of up to 42 years.[39] Under the Crown's native land regime, this was the only way the owners could receive a return from their land. But long-term leases resulted in their being prejudicially alienated from their land for up to two

37. Haapu, 'Te Ripoata o Mangatu', #A27, p 53
38. Haapu, 'Te Ripoata o Mangatu', #A27, p 79
39. Murton, 'Te Aitanga a Māhaki, 1860–1960', #A26, pp 159; Haapu, *Te Ripoata o Mangatu*, #A27, p 111; Rose, 'Te Aitanga a Māhaki', #A18, pp 157, 263

generations. In 1917, the administration of the block was taken over by the East Coast Commissioner, effectively a receivership, until 1947. When the land was returned, the owners were still at the mercy of lessees who, in some cases, returned the land in poor condition (see chapter 5, paragraph 82). This period of temporary alienation and loss of control over their lands meant the claimant groups suffered cultural, spiritual, and economic prejudice.

28 The prejudice suffered by the Mangatū 1 owners as a result of being denied control of the block while it was under the administration of the East Coast Commissioner was exacerbated in 1961, when they were given no option but to allow the Crown to acquire 8,522 acres of land for afforestation purposes. The owners of the Mangatū 1 block, as shareholders of the Mangatū Incorporation, therefore suffered significant cultural and spiritual prejudice from the Crown's acquisition of their land in Mangatū 1 in 1961. This loss came only 14 years after Mangatū 1 was returned from the control of the East Coast Commissioner.[40]

29 Ngāriki/Ngā Ariki Kaipūtahi's losses also included the reduction of their interests in Mangatū 1, and damage to their mana on the land. The shares they were awarded through the Crown process of determining relative interests reflected an 'unsafe' Native Land Court judgment. They suffered a further reduction of their interests when the Crown intervened in favour of Te Whānau a Taupara (see chapter 5, paragraph 56). We did not make specific findings on what the relative interest of Ngāriki/Ngā Ariki Kaipūtahi should have been. However, Mangatū 1 is the core of Ngāriki/Ngā Ariki Kaipūtahi's rohe and, as a smaller group, any reduction of interests would have had a profoundly detrimental impact. The prejudice they suffered as a result was typical of the widespread poverty caused by the operation of the Native Land Court. Over time, they lost access to their home and papakāinga, and Ngāriki/Ngā Ariki Kaipūtahi continue to face barriers in exercising their tino rangatiratanga in their traditional lands.

Prejudice arising from related Crown Treaty breaches

30 We found the prejudice the claimants suffered as a result of their losses in the Mangatū blocks could only be understood in light of the wider land loss they suffered (see chapter 5, paragraph 95–98). Following the 1868 deed of cession, the Crown retained 56,141 acres of Tūranga land where Te Aitanga a Māhaki and Te Whānau a Kai had interests – including some of the best land in the district. These losses displaced Te Whānau a Kai from an important traditional economic base.

31 The Poverty Bay Commission and the Native Land Court subsequently began the work of determining titles and replacing customary ownership with individually tradeable interests in land.[41] Roughly 60,000 acres of Te Aitanga a Māhaki land, whose titles had been determined by the Commission, were

40. Haapu, 'Te Ripoata o Mangatu', #A27, pp 125–128
41. Rose, 'Te Aitanga a Māhaki', #A17, p 21

leased to settlers who, unlike the owners, saw this as a preliminary step to purchase.[42] Private purchases of individual interests would be processed through the Native Land Court, which arrived in Tūranga in 1873. The dual effect of Crown and private purchasing was starkly apparent by the start of the twentieth century, when Te Aitanga a Māhaki, Ngāriki/Ngā Ariki Kaipūtahi, and Te Whānau a Kai retained only 256,243 acres out of the 700,000-acre land base they held in 1865.[43]

32 In the late nineteenth century, a large amount of the claimants' land was vested in the Tūranga trusts. We summarised this complicated history above, and need not repeat it here (readers should refer to chapters 4 and 5 for a more detailed account). It is enough to record that Te Aitanga a Māhaki, Ngāriki/Ngā Ariki Kaipūtahi and Te Whānau a Kai all suffered significant land losses as a result of the Crown's regime that inevitably led to the failure of the Tūranga trusts. Our findings on their losses include that:

- During the nineteenth century, a large amount of the claimants' land was vested in the Rees-Pere trusts and subsequently the New Zealand Land Settlement Company. By 1883, the amount of Te Aitanga a Māhaki land held by the company was 115,000 acres (including Ngāriki/Ngā Ariki Kaipūtahi and Te Whānau a Kai lands).[44]
- Approximately 39,330 acres of Te Aitanga a Māhaki land was sold by the Company during the 1880s.[45]
- In 1891, the Bank of New Zealand Estates Company held a mortgagee sale in 1891 to recoup the debt owed by the Land Settlement Company. 12,280 acres of Te Aitanga a Māhaki land was sold, some of it outside the inquiry district.[46]
- The remaining lands were vested in the Carroll Pere Trust, which was burdened by high legal fees and saw its debts double during the 1890s.[47]
- Following Crown intervention in 1902, and its establishment of the East Coast Trust to administer the Carroll Pere lands, further tracts of land were alienated to meet the Bank of New Zealand debt between 1902 and 1906, including 17,406 acres of the claimants' land.[48]
- When the East Coast Trust was wound up in 1955, only 26,479 acres was returned.[49]

42. Rose, 'Te Aitanga a Māhaki', #A17, pp 20–21
43. Rose, 'Te Aitanga a Māhaki', #A18, pp 11, 183; Murton, 'Te Aitanga a Māhaki 1860–1960', p 15
44. Te Whānau a Kai have interests in the Okahuatiu and Tanihanga blocks which were vested in the company, and Ngāriki/Ngā Ariki Kaipūtahi had interests in the Mangatū 5 and Mangatū 6 blocks which were also vested in the company: Rose, 'Te Aitanga a Māhaki', #A17, pp 71, 200–201, 296, 417
45. The Tribunal noted that these figures included the sale of 25,160 acres of Te Aitanga a Māhaki land in Okahuatiu 1; 5,000 acres in Okahuatiu 2; and 2,500 acres in Tangihanga 1C: Waitangi Tribunal, *Turanga Tangata*, vol 2, p 580
46. Waitangi Tribunal, *Turanga Tangata*, vol 2, p 581
47. Waitangi Tribunal, *Turanga Tangata*, vol 2, p 492
48. Waitangi Tribunal, *Turanga Tangata*, vol 2, p 581; Rose, 'Te Aitanga-a-Mahaki', A18, p 178
49. Waitangi Tribunal, *Turanga Tangata*, vol 2, pp 549, 582

33 In addition to these losses, Te Aitanga a Māhaki, Ngāriki/Ngā Kaipūtahi and Te Whānau a Kai were unable to rely on the Tūranga trusts lands for economic support. They would have suffered the distress of watching the continuous accrual of debt and sale of their lands under the New Zealand Settlement Company and the Carroll Pere Trust. This was followed by the complete loss of control under the East Coast Trust for half a century. The return of Mangatū 1 to Māori control in 1947, eight years ahead of the rest of the East Coast Trust lands, and without any large permanent alienations, would have been momentous for the owners. In this context the loss of the 1961 lands so soon afterwards, was all the more painful. Accordingly, we find that Crown's failure to provide systems to support the claimant communities to manage or develop their other lands compounded the prejudice Te Aitanga a Māhaki, Ngāriki Kaipūtahi and Te Whānau a Kai suffered from the loss of their Mangatū lands.

Socio-economic prejudice

34 We concluded that a strong connection existed between the widespread loss of land and resources, and the ongoing socio-economic inequities experienced by Te Aitanga a Māhaki, Ngāriki/Ngā Ariki Kaipūtahi, and Te Whānau a Kai (see chapter 5, paragraph 146–171). We pointed to the Tribunal's finding in the Tūranga report that the Crown's native land and purchase regime was 'capable of producing only landlessness and poverty'.[50] We examined the important evidence of Professor Brian Murton which demonstrated the imbalance of power between the Crown and Te Aitanga a Māhaki, Ngāriki/Ngā Ariki Kaipūtahi, and Te Whānau a Kai, and the underdevelopment of their communities. The Crown used its political and coercive powers to impose a property regime on the claimants' tīpuna that limited their economic capability and made them dependent on wage labour and subsistence farming by the end of the nineteenth century.[51] This economic transformation of the district impacted the living conditions of those residing in Mangatū, and Dr Murton's evidence highlighted the health impacts and high incidence of disease that resulted from poor housing and sanitation.[52]

35 We saw how economic disparities between the claimants and other New Zealanders continued throughout the twentieth century. The evidence of expert economists during our 2018 and 2019 hearings demonstrated that such problems persist today, with Tūranga Māori generally experiencing lower incomes, lower rates of home ownership, and poorer health outcomes than Pākehā in the district, and New Zealanders generally.[53] The statistics

50. Waitangi Tribunal, *Turanga Tangata*, vol 2, p 521
51. Murton, 'Te Aitanga a Māhaki 1860–1960', #A26, pp 507–508 639
52. Murton, 'Te Aitanga a Māhaki 1860–1960', #A26, pp 535–536, 601
53. Evidence of Owen Lloyd, 27 July 2018, Wai 2575 ROI, #A45, para 3; evidence of Ganesh Nana, 28 May 2018, Wai 814 ROI, #P10, paras 6.2, 11.6; evidence of Richard Meade, 28 May 2018, #P6, para 866

paint a grim picture of the impacts of generations of economic and social marginalisation, which remains largely unaddressed.

The Tribunal's determination on whether the Mangatū CFL land should be returned to Māori ownership

36 We determine that the Mangatū CFL land must be returned in order that Te Aitanga a Māhaki, Ngāriki/Ngā Ariki Kaipūtahi, and Te Whānau a Kai receive an appropriate remedy for their well-founded claims that relate to the CFL land. The claimants have all suffered multiple Crown Treaty breaches in respect of their Mangatū lands, and multiple forms of prejudice. The Crown's Treaty breaches directly resulted in the loss of the Mangatū 2 block, and the diminution of Ngāriki/Ngā Ariki Kaipūtahi's interests in Mangatū 1, the loss of control over Mangatū 1 from 1917 to 1947, and the loss of the 1961 lands in Mangatū 1. The prejudice they have suffered as a result of the severance of their connection with the land cannot be compensated for or remedied by a monetary payment alone.

37 In our view, it is important that the land is returned to the customary owners. In chapter 4 (see paragraphs 52–61), we discussed the well-recognised interests that the Te Aitanga a Māhaki hapū Ngāti Wahia, Ngāriki, Te Whānau a Taupara, Ngāi Tamatea, and Ngāti Matepu have in Mangatū. Ngāriki/Ngā Ariki Kaipūtahi's customary interests in Mangatū 1 are well-established; it is their core rohe. Te Whānau a Kai people were also included as Mangatū owners in the original title determination through their Ngāriki whakapapa. As we noted in chapter 5, shareholders of the Mangatū Incorporation will also benefit from the return of the CFL land to these groups, as they affiliate to Ngāti Wahia, Ngāriki, and Te Whānau a Taupara hapū of Te Aitanga a Māhaki, Ngāriki/Ngā Ariki Kaipūtahi, and Te Whānau a Kai.

38 Ultimately, the return of some land to each group will enable the expression of their tino rangatiratanga and autonomy with respect to their community rights, so that their mana whenua over that land is recognised and their tūrangawaewae restored. Land will contribute to the establishment of an economic base, from which they can develop initiatives for the well-being of their communities. That will be the case even if the commercial viability of forestry at Mangatū is uncertain (see chapter 5, paragraph 202).

39 For completeness, we find that the return of the CFL land cannot fully compensate for the prejudice suffered by the claimants. In chapter 5 we found that the prejudice that cannot be remedied solely through the return of the CFL land includes:

(a) the political disempowerment resulting from the Crown's efforts since the mid-1860s to overthrow Tūranga Māori autonomy, the transformation of title and tenure in the district, and the enormous transfer of other lands and resources from Māori to the settler population;

(b) the loss of opportunities to contribute to the economy of the district, and to manage and develop their lands themselves, including Mangatū for significant periods; and,

(c) the social and economic disadvantages suffered by generations of Tūranga Māori in health, housing, education, and employment, arising from these losses.

40 Further Crown action will be required to provide redress for this remaining prejudice and the claimants' wider land losses. We offer general recommendations for appropriate Crown redress in these areas below.

Who Is to Receive the Tribunal's Section 8HB Recommendations?

41 At the outset of this Inquiry, each claimant group filed amended applications for the return of all the Mangatū CFL land on behalf of an entity or entities representing their claimant group.[54] However, these entities were constituted for purposes other than receiving the benefit of the Tribunal's recommendation under section 8HB (see chapter 6, paragraph 46). Following the completion of hearings, the Tribunal therefore began an iterative process to assist parties to prepare to receive the Tribunal's recommendations (see paragraph 57). Through this process, the Te Aitanga a Māhaki claimants ratified the Māhaki Forest Settlement Trust to represent their interests, as well as those of the Ngāti Matepu interested party, and to receive any returned CFL land and compensation on their behalf. The Ngāriki/Ngā Ariki Kaipūtahi claimants ratified the Ngā Uri o Tamanui Trust, and the Te Whānau a Kai claimants ratified the Te Whānau a Kai Trust.

42 Following completion of these ratification processes, the Tribunal determined the allocation each group should receive in the returned CFL land. We determined that each claimant group should receive the following interest:

- For the Māhaki Forest Settlement Trust, a 68 per cent interest.
- For the Ngā Uri o Tamanui Trust, an 18 per cent interest.
- For the Te Whānau a Kai Trust, a 14 per cent interest.

43 The Mangatū CFL land will be returned to a collective trust called the Mangatū Forest Collective Trust. The governance entities established by the claimants will be the beneficiaries of that Trust, with respective equitable interests as listed above. For the reasons we set out in chapter 6, we consider the Mangatū Forest Collective Trust to be the most appropriate vehicle for the return of the Mangatū CFL land. The Tribunal's terms and conditions attaching to our recommendation are stated below.

54. Amended remedies application for Te Aitanga a Māhaki and the Mangatū Incorporation, 26 June 2017, #2.522; amended remedies application for Ngā Ariki Kaipūtahi, 15 September 2017, #2.539; amended remedies application for Ngāriki Kaipūtahi, 15 September 2017, #2.540; amended remedies application for Te Whānau a Kai, 15 September 2017, #2.537; application for resumption for Te Rangiwhakataetaea–Wi Haronga–Ngāti Matepu, 12 July 2017, #2.720

Tribunal Recommendations

44 We have foreshadowed the nature of our interim recommendation under section 8HB. Our section 8HB recommendation is stated below and accompanied by a list of terms and conditions. We then address Schedule 1 compensation matters. Finally, we consider what other remedies are required to compensate for or remove the prejudice associated with the claims and make further recommendations under section 6(3).

Tribunal interim recommendation under section 8HB(1)(a)

45 The Tribunal makes a recommendation that the Crown return the whole of the Mangatū CFL land within the Tūranganui a Kiwa Inquiry District comprising some 7,676.8 hectares, being previously described as part Mangatū 1 and Mangatū 2 blocks comprised and described in GS6A/15, and being part Lots 1–27, DP 8162, to a collective trust to be called the *Mangatū Forest Collective Trust*, which is to hold the land on behalf of Te Aitanga a Māhaki, Ngāriki/Ngā Ariki Kaipūtahi, and Te Whānau a Kai whose equitable interests in the land we determine as follows:

- For the Māhaki Forest Settlement Trust on behalf of all the hapū of Te Aitanga a Māhaki, a 68 per cent interest.
- For the Ngā Uri o Tamanui Trust on behalf of Ngāriki/Ngā Ariki Kaipūtahi, an 18 per cent interest.
- For the Te Whānau a Kai Trust on behalf of Te Whānau a Kai, a 14 per cent interest.

Terms and conditions under section 8HB(1)(a)

46 Section 8HB(1)(a) gives the Tribunal the discretion to attach the terms and conditions we consider appropriate to our interim recommendations. As we discussed in chapter 6, terms and conditions are an important feature of the statutory scheme to enable the purposes of the legislation and the 1989 Forests Agreement to be carried out.[55] They are also necessary to ensure our remedies recommendations are consistent with 'the practical application of the Treaty'.[56] We already stated our terms and conditions in chapter 6. We restate them below (the Tribunal's terms and conditions concerning Schedule 1 compensation under section 36 of the CFAA, are listed separately in the next section):

(1) The Mangatū Forest Collective Trust is to have the terms set out in the trust deed filed with the Tribunal on 18 August 2020 having document number #2.855(a) on the Tribunal's Wai 814 Record of Inquiry.[57] The terms contained in that trust deed are to be amended to include the following provisions:

55. *Attorney-General v Haronga* [2017] 2 NZLR 394 (CA), para 74
56. Treaty of Waitangi Act 1975, long title
57. 'Mangatū Forest Collective Trust Deed Draft', appendix to memorandum of counsel for the Māhaki Trust and the Mangatū Incorporation, 18 August 2020, #2.855(a)

a) The duration of the trust will be for a period of five years from the date that all trustees are appointed, unless the trustees by majority determine that the trust shall terminate at a different time.
b) On termination of the trust, the trustees shall distribute the returned CFL land and trust assets to the beneficiaries in accordance with the beneficial interests listed at paragraph 45 above, and subject to the provisions of 1(c) below.
c) In making the distribution in 1(b) above, the trustees shall ensure that some part of the 1961 land is transferred to the Māhaki Forest Settlement Trust, and some part of the 1961 land is transferred to the Ngā Uri o Tamanui Trust.
d) The trust deed is to be updated where appropriate to ensure that references are to the Trusts Act 2019.
e) The trust deed is to make provision for reasonable remuneration of trustees, together with their reasonable expenses incurred in the discharge of their duties as trustees.
f) The trustees may by majority make any alteration, modification, variation, or addition to provisions of the trust deed in any of the cases provided for under clause 18(a)–(d) of the draft trust deed #2.855(a).

The parties, including the claimant groups and the Crown, may agree to amend the terms of the trust deed during the 90-day period, provided that such amendments are consistent with the Tribunal's terms and conditions. We expect that those definitions in the trust deed which still await completion will be provided for by the terms of the recommendation and directions of the Waitangi Tribunal, effective from the date of the appointment of the trustees. We also acknowledge that some amendment may be required in the trust deeds provided to the Tribunal for each of the Māhaki Forest Settlement Trust, the Ngā Uri o Tamanui Trust, and the Whānau a Kai Trust to take account of the Tribunal's recommendation and terms and conditions.

(2) The Māhaki Forest Settlement Trust, the Ngā Uri o Tamanui Trust, and the Te Whānau a Kai Trust will each appoint two trustees to the Mangatū Forest Collective Trust, and these six trustees will appoint a further independent trustee.

The three governance entities are each to appoint two trustees to the Trust *within two weeks* of the Waitangi Tribunal's recommendation under section 8HB of the TOWA becoming final. Each governance entity is to notify the other governance entities of their nominated trustees as soon as they are appointed. The appointed trustees will have their first meeting *within seven days* from the date that all three governance entities have notified the appointment of their trustees, and the first order of business will be to appoint by majority agreement a suitably qualified and experienced independent (seventh) trustee who will be the chairperson of the trustees. If the trustees fail, at their first meeting, to agree

on the appointment of the seventh trustee, they must forthwith notify Te Hunga Rōia Māori o Aotearoa Law Society, who will, in consultation with the New Zealand Law Society, appoint the independent trustee and chairperson *within one month* of the first meeting of the trustees.

(3) Pursuant to section 8HB (1)(a) of the TOWA, the Crown is to create a separate title for the returned Mangatū land.

The Crown shall take all necessary steps, obtain all necessary consents, and provide all necessary easements, covenants, and other instruments in order to create a separate full fee simple title for the CFL land being returned; and will indemnify the Māori owners as necessary.[58]

The Crown shall also:

a) ensure, that in creating a separate title, reasonable access to the CFL land is provided to the Māori owners; and,

b) facilitate the initial engagement between the licensee and the trustees of the Mangatū Forest Collective Trust for all purposes consistent with the terms of the licence.

Within 12 months of the date of the Tribunal's section 8HB recommendation for return of the CFL land becoming final, the Crown is to provide the Mangatū Forest Collective Trust with a registerable memorandum of transfer for the land being returned.

(4) Crown warranty and indemnity.

The Crown must warrant that the terms of the Crown forest licence have been complied with by both the Crown and the licensee as at the date the transfer of title to the Māori owners is effected. The Crown will indemnify the Māori owners for any breach of the licence, or any relevant statute or law, or notice given by a relevant authority in relation to the CFL land requiring action or imposing liability on the part of the Crown prior to the transfer of title being effected.

(5) Notice to the Crown Forestry Rental Trust.

The Crown is to give notice to the Crown Forestry Rental Trust of the Tribunal's final recommendation under section 8HB of the TOWA so that it will make payment of the accumulated rentals to the Mangatū Forest Collective Trust.

(6) Notice to the Forestry Emission Unit Trust.

The Crown is to give notice to the Forestry Emission Unit Trust of the Tribunal's recommendation under section 8HB of the TOWA so that it will transfer the New Zealand Units to the Mangatū Forest Collective Trust.

58. This is required because the CFL land extends beyond the Tūranganui a Kiwa Inquiry District, and the Tribunal can only return the CFL land as a remedy for well-founded claims within the district. Therefore, the CFL land to be returned to Māori ownership must be separated from the CFL land outside the Inquiry District and a full and proper Land Information New Zealand registered title created.

Schedule 1 compensation

47 As noted, under clause 2(b) of Schedule 1, we must determine what proportion, above five per cent, of the specified amount of available compensation should be awarded. As we explained in chapter 7, the Tribunal has the discretion to award as much or as little compensation under Schedule 1 as we determine to be fair and just. In order to make the determinations required by the statutory scheme we addressed the following questions in chapter 7:

(a) What is the purpose of the remaining portion of statutory compensation under Schedule 1?
(b) Should the four year 'real value' period be extended?
(c) What proportion of the available compensation should be awarded?

48 The conclusions we reached on each of these questions are summarised below.

What is the purpose of awarding statutory compensation under schedule 1?

49 Schedule 1 compensation is a bespoke feature of the statutory scheme under the CFAA and section 8HB of the TOWA. It recognises the fact that the Crown proceeded to sell cutting rights to its forestry assets on land that could subsequently be returned to Māori ownership. In chapter 7, we stated that the Tribunal has discretion as to how much or how little of the available monetary compensation is to be awarded above the mandatory 5 per cent. In our view, the financial compensation available under Schedule 1 of the CFAA provides financial redress to compensate for or remove prejudice, and is also calculated with reference to the 'Crown's gain'. We note the evidence of economist Dr Andrew Coleman that the use of compound interest under clause 3(c) of Schedule 1 of the CFAA to calculate return on the 'net proceeds' the Crown received from the sale of its forestry assets 'was completely appropriate' (see chapter 7, paragraph 182).[59]

50 If the compensation available under Schedule 1 exceeds what is required to compensate for or remove the prejudice flowing from Crown breaches, and to restore the rangatiratanga and economic base of each of the claimant groups, then we are able to award a lesser portion. However, we may consider awarding all or any portion of the compensation, if we determine that outcome to be required in the interests of justice.

Should the 'real value' period be extended?

51 In summary, we concluded that the 'real value' only period should be extended over the following periods:

(a) The period between 26 March 2020 and 14 May 2020 to account for the nationwide Covid-19 lockdown.
(b) The period between 18 August 2021 and date of the issue of this report to account for a second nationwide Covid-19 lockdown.

59. Transcript for joint hearing, 22 July 2019, #4.36, p 77

52 During these periods, the Crown was prevented by reasons beyond its control from meeting its obligations under the 1989 Forests Agreement (for our full analysis, see chapter 7, paragraphs 69–109).

What proportion of the available compensation should be awarded?

53 In order to make this determination, the Tribunal heard extensive and complex economic evidence concerning the present-day value of the claimants' losses, and the redress required to restore their tribal economic base – this is discussed at length in chapter 7. While there were clear limitations to the conclusions we could draw from this evidence, it demonstrated that the value of what was lost by Te Aitanga a Māhaki, Ngāriki/Ngā Ariki Kaipūtahi, and Te Whānau a Kai was immense. We concluded that the claimants require significant resources to address the lasting inequities that are the legacy of the long-standing prejudice they have suffered (see chapter 7, paragraphs 186–191). In that context, awarding the full remaining portion of Schedule 1 compensation is appropriate.

54 Accordingly, we determine that 100 per cent of the specified amount of available Schedule 1 compensation should be paid, each group receiving the share proportionate to their interest in the returned land and calculated in accordance with the method they choose under clause 3. The following terms and conditions apply; these are also set out in chapter 7.

Tribunal terms and conditions concerning Schedule 1 compensation

55 The Tribunal's terms and conditions concerning Schedule 1 compensation are:

(1) The Māhaki Forest Settlement Trust, the Ngā Uri o Tamanui Trust, and the Te Whānau a Kai Trust are to elect a calculation method under clause 3 of Schedule 1 of the Crown Forest Assets Act 1989
After the expiry of the 90-day period, and if no separate agreement is negotiated with the Crown, the Tribunal's interim recommendation will become binding. Each of the claimant groups will then elect the method they wish under clause 3 to calculate the specified amount of compensation available to them. Parties, including the Crown, are then directed to appoint valuers to meet and agree on the amount of compensation payable to each governance entity, pursuant to the calculation they select under clause 3 of Schedule 1 of the Crown Forest Assets Act 1989, and in proportion to their percentage interest in the CFL land.

(2) The Crown is to pay to the Mangatū Forest Collective Trust 100 per cent of the specified amount of Schedule 1 compensation
Pursuant to section 36(1)(b) of the Crown Forest Assets Act 1989, the Crown is to pay to the Mangatū Forest Collective Trust 100 per cent of the specified amount of Schedule 1 compensation available for distribution to the Māhaki Forest Settlement Trust, the Ngā Uri o Tamanui Trust, the Te Whānau a Kai Trust. The payment is to be calculated in

accordance with their respective elections under clause 3 of Schedule 1, and in proportion to their respective percentage interests in the land.

(3) The Mangatū Forest Collective Trust is to distribute the Schedule 1 compensation to each governance entity

The Mangatū Forest Collective Trust is to distribute as soon as reasonably practicable to each of the Māhaki Forest Settlement Trust, the Ngā Uri o Tamanui Trust, and the Te Whānau a Kai Trust, the compensation due to them, less a reasonable and appropriate amount sufficient to meet the administration and operational costs of the Mangatū Forest Collective Trust in governing and managing the land, together with trustees' remuneration and expenses. This amount is to be not less than $500,000 a year, unless the trustees agree to a lesser amount at their first meeting. The amount to be retained by the Mangatū Forest Collective Trust is to be deducted from the compensation payable to each of the Māhaki Forest Settlement Trust, Ngā Uri o Tamanui Trust, and the Te Whānau a Kai Trust in proportion to their percentage interest in the land.

What other remedies are required to compensate for or remove the prejudice?

56 In this Inquiry, the Tribunal's principal task has been to decide whether the Mangatū CFL land should be returned to Māori ownership under section 8HB of the TOWA, and if so, how much of the CFL land should be returned and to whom.[60] The Tribunal has not substantially considered other remedies, nor have we received sufficient evidence or submissions to make additional specific or comprehensive remedies recommendations. We have already identified the areas of prejudice that cannot be fully remedied through the return of the Mangatū CFL land to Māori ownership (see paragraph 39, above). In addition, we have emphasised that the return of the Mangatū CFL land cannot provide a remedy for the wider tribal claims of Te Aitanga a Māhaki, Ngāriki/Ngā Ariki Kaipūtahi, and Te Whānau a Kai.[61] While we have referred to the whole context of the land loss suffered by the claimants, in order to understand the prejudice they suffered from the loss of the Mangatū CFL land, the Crown's related Treaty breaches that led to such widespread loss of land and resources produced significant grievances that will require further action by the Crown. These areas of Crown Treaty breach include the Crown's attack on Waerenga a Hika in 1865, its treatment of the Whakarau, the 1868 deed of cession, the work of the Poverty Bay Commission and the Native Land Court, and the failure to support Wi Pere and William Rees's initiatives to promote community trust structures to facilitate the development of Tūranga Māori land by Māori. All these breaches are also the subject of wider

60. *Haronga v Waitangi Tribunal* [2012] 2 NZLR 53 (SC), para 108
61. *Mercury NZ Ltd and Ors v Waitangi Tribunal and Ors* [2020] NZHC 654, para 88

claims that require additional redress. We now offer some general recommendations for appropriate Crown redress in these areas, so that a resolution of the claims can be achieved.

57 The Treaty settlement package for Te Aitanga a Māhaki should reflect the extent of what the iwi has lost. They are the largest group in this Inquiry, with an extensive rohe that had been substantially alienated to Crown or private purchasers by the end of the nineteenth century. Their remaining lands have suffered from fragmentation and fractionation of title resulting from Crown policies. Accordingly, additional commercial redress, including the return of land and other resources, will be required to restore the claimants' economic base and standing in the district, and to settle their claims.

58 For Te Whānau a Kai, a substantial settlement package is required to resolve their wider claims, including their raupatu claim concerning the Patutahi block and their Tahora 2C claims. In our view, the Crown should work with Te Whānau a Kai to negotiate the settlement of all their claims, recognising the wide geographical spread of their interests which extend into the Te Urewera, East Coast, and North Eastern Bay of Plenty Inquiry Districts.

59 For Ngā Uri o Tamanui, the return of Mangatū CFL land and associated compensation will provide substantial redress for their Mangatū claims. However, further steps should be taken to recognise their mana and status in the district as an autonomous iwi. We note the Tribunal's comments in the Tūranga report 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.'[62]

60 These wider claims will not be remedied unless the Crown takes steps, in partnership with Te Aitanga a Māhaki, Ngā Uri o Tamanui, and Te Whānau a Kai, to restore their tino rangatiratanga and standing as Treaty partners within the district. Here we reiterate the imperative stated in the 2004 Tūranga report:

> The importance of fostering the autonomy of Maori communities as promised in the Treaty cannot be overstated. It is the single most important building block upon which to re-establish positive relations between the Crown and Maori.[63]

61 In order to compensate for or remove the prejudice associated with the claimants' loss of autonomy, we recommend under section 6(3) of the TOWA that the Crown negotiate with the claimants over redress concerning:

(a) Recognition of the traditional relationships of Te Aitanga a Māhaki, Ngāriki/Ngā Ariki Kaipūtahi, and Te Whānau a Kai with the natural environment, including but not limited to, rivers, lakes, mountains, forests, and wetlands.

62. Waitangi Tribunal, *Turanga Tangata*, vol 2, p 748
63. Waitangi Tribunal, *Turanga Tangata*, vol 2, p 739

(b) Visible and tangible recognition of Te Aitanga a Māhaki, Ngāriki/Ngā Ariki Kaipūtahi, and Te Whānau a Kai as mana whenua within their rohe.

(c) Mechanisms for Te Aitanga a Māhaki, Ngāriki/Ngā Ariki Kaipūtahi, and Te Whānau a Kai to participate effectively in the governance and management of all things important to the well-being of their communities in the district, including but not limited to:

- care for natural resources, control of erosion, and mitigation of the effects of climate change;
- welfare, health, and disability services;
- initiatives for whānau, hapū, and iwi well-being, including security of and accessibility to adequate housing, papakāinga, marae support and development, public infrastructure, and other needs associated with community safety;
- culturally appropriate childcare, education, and tertiary education;
- support for Te Reo Māori, Māori media, and Māori cultural expression;
- sustainable employment opportunities;
- regional development of the district, and decision-making that impacts their economic base; and
- the justice system, corrections, and rehabilitation.

62 Finally, the Crown must take further action to recognise the unlawful acts it perpetrated against the claimants – namely, its use of force at Waerenga a Hika, and its treatment of Te Kooti and the Whakarau – and the significant grievances their uri have endured as a result.[64] Again, we repeat the Tribunal's observations in the Tūranga report:

> These actions were not just arbitrary or capricious. They were brutal, lawless, and manipulative, and they were committed in the name of the Crown in New Zealand . . . [T]he moral authority of the Crown to require its subjects to comply with a standard of conduct prescribed by law depends on the Crown itself adhering to that standard. The Crown had to be above revenge. How else could it claim to govern in the name of all New Zealanders? If we are truly a country respectful of the rule of law, these matters must be acknowledged and put right.[65]

63 This redress should include an agreed historical account and a full Crown apology as essential steps to resolve these grievances. However, we also feel that additional effort is required to improve the public awareness of this history – especially in Tūranga. We repeat the Tribunal's reflections, expressed in the Tūranga report:

64. Waitangi Tribunal, *Turanga Tangata*, vol 2, pp 736–737
65. Waitangi Tribunal, *Turanga Tangata*, vol 2, p 737

> We cannot help but think that the unsettled state of relations between Maori and Pakeha in this country is in part due to the fact that these stories are remembered only by tangata whenua and a few historians who specialise in New Zealand history. While only one side remembers the sufferings of the past, dialogue will always be difficult. One side commences the dialogue with anger and the other side has no idea why. Reconciliation cannot be achieved by this means.[66]

Final comments

64 To conclude, we acknowledge the long and arduous claims process led by the rangatira of Te Aitanga a Māhaki, Ngā Uri o Tamanui, Te Whānau a Kai, and Ngāti Matepu. They sought redress, though it was long withheld, for their deeply held and significant grievances. For the claimants, this burden has been carried by their kaumātua over several generations. Sadly, some of those who worked tirelessly for their claims have not lived to see their resolution.

65 We appreciate the contributions of counsel for all parties who materially assisted our consideration of the complex issues that arose in this Inquiry. We are also deeply indebted to the work of the Tūranga Tribunal in its original inquiry into these claims. We have only been able to give a brief summary of the compelling human story told in the Tribunal's 2004 report. We strongly recommend that those who wish to have a deeper understanding of Tūranga and the prejudice suffered by the claimants should read the Tūranga report.

66 Following our Inquiry, we hope that the claimants will finally be able to turn their attention to the future, and the potential benefits to be gained from settlement. We wish the claimants and the Crown well in the years to come, and for the next challenge of negotiating the settlement of the remaining claims.

66. Waitangi Tribunal, *Turanga Tangata*, vol 2, p 740

Dated at Wellington this 29th day of September 2021

S T A Milroy, presiding officer

T Castle, member

T Roa, member

A Parsonson, member

THE SEAL OF THE WAITANGI TRIBUNAL

APPENDIX I

SECTIONS 8HA TO 8HD OF THE TREATY OF WAITANGI ACT 1975

Recommendations in relation to Crown forest land

Heading: inserted, on 25 October 1989, by section 40 of the Crown Forest Assets Act 1989 (1989 No 99).

8HA Interpretation of certain terms

For the purposes of sections 8HB to 8HI, the expressions Crown forestry assets, Crown forest land, Crown forestry licence, and licensed land shall have the same meanings as they have in section 2 of the Crown Forest Assets Act 1989.

Section 8HA: inserted, on 25 October 1989, by section 40 of the Crown Forest Assets Act 1989 (1989 No 99).

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 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.

(2) In deciding whether to recommend the return to Maori ownership of any licensed land, the Tribunal shall not have regard to any changes that have taken place in—

(a) the condition of the land and any improvements to it; or
(b) its ownership or possession or any other interests in it—

that have occurred after or by virtue of the granting of any Crown forestry licence in respect of that land.

(3) Nothing in subsection (1) prevents the Tribunal making in respect of any claim that relates in whole or in part to licensed land any other recommendation under subsection (3) or subsection (4) of section 6; except that in making any other recommendation the Tribunal may take into account payments made, or to be made, by the Crown by way of compensation in relation to the land pursuant to section 36 and Schedule 1 of the Crown Forest Assets Act 1989.

(4) On the making of a recommendation for the return of any land to Maori ownership under subsection (1), sections 40 to 42 of the Public Works Act 1981 shall cease to apply in relation to that land.

Section 8HB: inserted, on 25 October 1989, by section 40 of the Crown Forest Assets Act 1989 (1989 No 99).
Section 8HB(1)(b): amended, on 1 June 2002, pursuant to section 68(2) of the Cadastral Survey Act 2002 (2002 No 12).
Section 8HB(1)(b): amended, on 1 July 1996, by section 5 of the Survey Amendment Act 1996 (1996 No 55).
Section 8HB(1)(c): amended, on 1 June 2002, pursuant to section 68(2) of the Cadastral Survey Act 2002 (2002 No 12).
Section 8HB(1)(c): amended, on 1 July 1996, by section 5 of the Survey Amendment Act 1996 (1996 No 55).

8HC Interim recommendations in respect of Crown forest land

(1) Where the recommendations made by the Tribunal include a recommendation made under section 8HB(1)(a) or section 8HB(1)(b), all of those recommendations shall be in the first instance interim recommendations.

(2) The Tribunal shall cause copies of its interim findings and interim recommendations to be served on the parties to the inquiry.

(3) Subject to subsection (5), the Tribunal shall not, without the written consent of the parties, confirm any interim recommendations that include a recommendation made under section 8HB(1)(a) or section 8HB(1)(b), until at least 90 days after the date of the making of the interim recommendations.

(4) Where any party to the inquiry is served with a copy of any interim recommendations that include a recommendation made under section 8HB(1)(a) or section 8HB(1)(b), that party—
  (a) may, within 90 days after the date of the making of the interim recommendations, offer to enter into negotiations with the other party for the settlement of the claim; and
  (b) shall, within 90 days after the date of the making of the interim recommendations, inform the Tribunal—
    (i) whether the party accepts or has implemented the interim recommendations; and
    (ii) if the party has made an offer under paragraph (a), the result of that offer.

(5) If, before the confirmation of any interim recommendations that include a recommendation made under section 8HB(1)(a) or section 8HB(1)(b), the claimant and the Minister of Maori Affairs settle the claim, the Tribunal shall, as the case may require, cancel or modify the interim recommendations and may make, if necessary, a final recommendation under section 8HB(1)(a) or section 8HB(1)(b).

(6) If subsection (5) does not apply in relation to any interim recommendations that include a recommendation made under section 8HB(1)(a) or section 8HB(1)(b), upon

the expiration of the 90th day after the date of the making of the interim recommendations, the interim recommendations shall become final recommendations.

(7) Notwithstanding anything in subsections (1) to (6), if any interim recommendations contain a clerical mistake or an error arising from any accidental slip or omission, whether the mistake, error, slip, or omission was made by an officer of the Tribunal or not, or if any interim recommendations are so drawn up as not to express what was actually decided and intended, the interim recommendations may be corrected by the Tribunal, either of its own motion or on the application of any party.

(8) Where the interim recommendations are corrected under subsection (7),—

(a) the Tribunal shall cause copies of the corrected interim recommendations to be served on the parties to the inquiry as soon as practicable; and

(b) the period that applies for the purposes of subsections (3), (4), and (6) shall expire on the 90th day after the date of the making of the corrected interim recommendations.

Section 8hc: inserted, on 25 October 1989, by section 40 of the Crown Forest Assets Act 1989 (1989 No 99).

8hd Right to be heard on question in relation to Crown forest land

(1) Where, in the course of any inquiry into a claim submitted to the Tribunal under section 6 any question arises in relation to licensed land, the only persons entitled to appear and be heard on that question shall be—

(a) the claimant:

(b) the Minister of Maori Affairs:

(c) any other Minister of the Crown who notifies the Tribunal in writing that he or she wishes to appear and be heard:

(d) any Maori who satisfies the Tribunal that he or she, or any group of Maori of which he or she is a member, has an interest in the inquiry apart from any interest in common with the public.

(2) Notwithstanding anything in clause 7 of Schedule 2 or in section 4a of the Commissions of Inquiry Act 1908 (as applied by clause 8 of Schedule 2), no person other than a person designated in any of paragraphs (a) to (d) of subsection (1) shall be entitled to appear and be heard on a question to which subsection (1) applies.

(3) Nothing in subsection (2) affects the right of any person designated in any of paragraphs (a) to (d) of subsection (1) to appear, with the leave of the Tribunal, by—

(a) a barrister or solicitor of the High Court; or

(b) any other agent or representative authorised in writing.

Section 8hd: inserted, on 25 October 1989, by section 40 of the Crown Forest Assets Act 1989 (1989 No 99).

APPENDIX II

EXCERPTS FROM THE CROWN FORESTS ASSETS ACT 1989

Part 3
Return of Crown forest land to Maori ownership and compensation

35 Restrictions on sale of Crown forest land

(1) The Crown shall not sell or otherwise dispose of any Crown forest land that is subject to a Crown forestry licence except in accordance with section 8.

(2) The Crown shall not sell, assign, or otherwise dispose of, or deal with, any rights or interests in any Crown forestry licence unless the Waitangi Tribunal has made, in relation to the licensed land, a recommendation under section 8HB(1)(b) or section 8HB(1)(c) or section 8HE of the Treaty of Waitangi Act 1975.

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.

(2) Except as otherwise provided in this Act or any relevant Crown forestry licence, the return of any land to Maori ownership shall not affect any Crown forestry licence or the rights of the licensee or any other person under the licence.

(3) Any money required to be paid as compensation pursuant to this section may be paid without further appropriation than this section.

37 Recommendation by Waitangi Tribunal that Crown forest land not liable to return to Maori ownership

(1) Where the Waitangi Tribunal makes a recommendation in relation to Crown forest land under section 8HB(1)(b) or section 8HB(1)(c) or section 8HE of the Treaty of Waitangi Act 1975 no person shall be entitled to make any claim under section 6 of that Act in respect of the return of that land.

(2) The responsible Ministers may, by notice in the Gazette, declare that Crown forest land to which subsection (1) applies, and which is not licensed land, shall cease to be Crown forest land and on the publication of the notice the land shall be Crown land subject to the Land Act 1948.

Schedule 1

Compensation payable to Maori

s 36

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.

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) (as extended under clause 6), equivalent to the return 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.

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).

APPENDIX III

THE FORESTS AGREEMENT 1989

This Agreement is made on	20 July 1989
Between	Her Majesty the Queen in right of New Zealand acting by and through the Minister of Finance of New Zealand and the Minister for State Owned Enterprises of New Zealand
And	New Zealand Maori Council and Federation of Maori Authorities Incorporated.

The parties agree:

1. The Crown will sell
—the existing tree crop, other improvements required to manage and protect the forest and other related assets such as wood supply contracts and forest records.
The Crown will grant a right to the purchaser:
—to use the land for a defined period comprising a term which is evergreen in the sense that it is automatically extended annually by one year until notice of termination is given. In special cases, to be advised by Crown and agreed by Maori representatives, there will also be an initial fixed term of up to ten years prior to the start of the evergreen period. The evergreen term and the termination period will be of sufficient length to permit any tree crop purchased by or established by the purchaser to reach maturity and be harvested, in accordance with accepted forestry business practice.

2. The consideration will comprise:
   a) an initial capital payment for the tree crop and other assets paid to the Crown; and
   b) an annual market based rental for use of the land paid in advance.

3. The right to use the land will prescribe fully all material terms including the covenants and requirements associated with recreation and public access, protection of historic places and Wahi Tapu, soil and water conservation, reservation of rights to minerals, protection of reserve areas and forest management requirements, and will include a termination provision which, at no cost to the successful claimant, will automatically be triggered on resumption. The continued right to use the land during the termination period will entitle the purchaser to protect and manage the tree crop established

at the time of resumption, and harvest the tree crop in accordance with accepted forestry business practice.

The contract entered into at the outset between the Crown and the purchaser will specify the rights of each and the incidence of costs of access, protection and other relevant matters, over the termination period.

4. The provisions of the pro forma legal agreement to be entered into between the Crown and the successful purchaser relating to land use rights will be approved by representatives of Maori interests before they are finalised. Maori will not participate in a negotiation with individual purchasers. The Crown will give an assurance that the final agreements will conform with the provisions of the pro forma document.

5. The Crown reserves the power, in the granting of rights to use the land for a defined period, to confer on the purchaser a right to freehold the land subject to the Waitangi Tribunal recommending that the land is no longer liable to resumption, in accordance with the Treaty of Waitangi (State Enterprises) Act or other legislation having the same effect.

6. The Crown and Maori agree that they will jointly use their best endeavours to enable the Waitangi Tribunal to identify and process all claims relating to forestry lands and to make recommendations within the shortest reasonable period.

7. If the Waitangi Tribunal recommends that land is no longer subject to resumption, the Crown's ownership and related rights are confirmed.

8. If the Waitangi Tribunal recommends the return of land to Maori ownership the Crown will transfer the land to the successful claimant together with the Crown's rights and obligations in respect of the land and in addition:
   a) compensate the successful claimant for the fact that the land being returned is subject to encumbrances, by payment of 5% of the sum calculated by one of the methods (at the option of the successful claimant) referred to in paragraph 9 and,
   b) further compensate the successful claimant by paying the balance of the total sum calculated in paragraph 8(a) above or such lesser proportion as the Tribunal may recommend.

   In none of the above will the purchaser be involved in compensation or payment to the successful claimant (ie the purchaser's rights and obligations would be those specified in the original contract).

   All payments made pursuant to paragraph 8 may be taken into account by the Waitangi Tribunal in making any recommendation under sections 6(3) and 6(4) of the Treaty of Waitangi Act 1975.

   Payments made to successful claimants under paragraph 8 (other than stumpage) will be tax free in the hands of the recipients.

9. The methods of calculating the total sum on which compensation payable under paragraph 8 is based, are

   EITHER

   a) (i) the market value of the tree crop and associated assets assessed at the time resumption is recommended. The value is to be determined on the basis of a

willing buyer/willing seller, based on the projected harvesting pattern that a prudent forest owner would be expected to follow or;

(ii) the market stumpage of wood harvested each year over the termination period. Market stumpage to be determined in accordance with normal forestry business practice;

OR

b) the sales proceeds received by the Crown, plus a return on those proceeds for the period between sale and resumption. The return shall be limited to maintaining the real value of the sale proceeds during a period of grace of four years from the time of sale where a claim has been filed prior to the sale occurring, or from the time a claim is filed if after the sale. The period of grace may be extended beyond four years where the Tribunal is satisfied that an adequately resourced claimant is wilfully delaying proceedings or that for reasons beyond its control, the Crown is prevented from carrying out a relevant obligation under this agreement. Where the period of grace has expired then the subsequent return shall be based on one year government stock rate measured on a rolling annual basis plus an additional margin of 4% to reflect a commercial return.

The payment per hectare of land resumed shall not be less than an amount equal to the average price per hectare of the exotic forest lot as specified in the selling process as one forest lot for bidding purposes. However,

(i) where a bid is accepted for a number of lots as one parcel the average price reflects the total parcel; and

(ii) where the lot concerned has an average age distribution of less than five years, the average price applied is that of the same NZ Forestry Corporation Administrative District existing at the time of sale.

A claim shall be deemed to be filed when the Registrar of the Waitangi Tribunal notifies the claimant that the claim in appropriate form is filed.

10. The following provisions will operate upon a recommendation for return of land by the Waitangi Tribunal under paragraph 8:

(i) rental payments for the use of the land following resumption will be paid by the purchaser to the successful claimant;

(ii) the successful claimant will have the right during the termination period to progressively resume occupancy of the land as clearfelling of the tree crop takes place;

(iii) the successful claimant will be entitled to payment from the Rental Trust (see paragraph 11 below) of an amount equal to all the rental payments for the land resumed covering the period from the time of the sale to the time of resumption.

11. i) The annual rental payments from the land are to be set aside in a fund administered by a trust (to be known as the Rental Trust). The final beneficiaries of the Rental Trust will be the successful claimants and the Crown. Both Maori and Crown interests will appoint trustees to the trust.

ii) The interest earned by the fund will be made available to assist Maori in the preparation, presentation and negotiation of claims before the Waitangi Tribunal which are involved with, or could involve, forests lands covered by this agreement. The trustees will be responsible for setting appropriate criteria for, and

allocating funds to, claimants in a timely fashion and for ensuring confidentiality of all information supplied by claimants.

iii) the expenses associated with the administration of the Rental Trust will be a charge against the interest earned by the fund. The trustees will be responsible for the production of a set of audited annual accounts.

iv) When any land covered by this agreement is recommended for resumption by the Waitangi Tribunal, the accumulated capital in the Rental Trust relevant to that piece of land will be paid to the successful claimant. Whenever the Tribunal recommends that land is no longer subject to resumption, the accumulated capital in the Rental Trust relevant to that piece of land will be paid to the Crown.

v) Upon completion of this agreement and arrangements for the trust the Crown will pay into the Trust for the purposes specified in 11(i) above the sum of $3 million by way of an advance against interest to be derived from rent received by the Trust. The Crown will advance a further sum of up to $2 million to the Trustees on their review in July 1990 or such later date as the Trustees recommend in the light of the utilisation of the initial payment and the continuing needs of Maori claimants. Such advances will be repayable only out of interest derived from actual rental receipts, subject to receipt of which, interest repayments will commence one year after the first $5 million in rental interest payments has accrued, such repayments to be in amounts to be agreed between the Crown and the Trustees.

Any monies remaining over from this account after all claims over forest lands have been settled will be refunded to the Crown.

12. In recognition of the costs already incurred, or to be incurred by Maori in reaching and fulfilling this agreement the Crown will pay to the New Zealand Maori Council a sum of $1 milllon to be paid to people representing Maori interests generally, including the Council, for the following purposes:

a) the costs of the Court action concerning the Crown's intention to sell its commercial forestry assets taken by the Council in early 1989;

b) the obtaining of legal, financial and technical advice required to facilitate discussions, negotiations and the drawing up of contracts, legislation and consent orders concerned with and arising from this agreement;

c) the obtaining of advice required to facilitate discussion and negotiations and drawing up of appropriate agreements associated with the Rental Trust;

d) associated travel and ancillary costs concerned with the above and associated consultations with iwi representatives;

e) any other purpose agreed with the Crown.

The funds may not be used for future Court actions which the Council or other Maori interests might wish to pursue against the Crown, or any other party, in connection with this agreement.

The sum will be paid as follows:

$500,000 within 10 business days following execution of this agreement, and $250,000 per quarter thereafter.

The New Zealand Maori Council will annually supply to the Government an audited set of accounts detailing the manner in which the funds have been used.

13. The Crown may advertise the sale and continue with the sales process but will not call for bids for the forest (being the point at which the pro forma legal agreement will be delivered to interested parties) prior to agreement being reached between the parties on the format of the draft legislation, the consent order to be sought from the Court of Appeal and the pro forma legal agreement for sale (described in paragraph 4 above) as may be required to fulfil this agreement.

14. This document covers the State commercial exotic plantation forests. No discussions have taken place on the indigenous production forests or the two State sawmills.

15. The attached annex lists the main principles of the two parties within under which this Agreement has been negotiated.

16. The provisions of this agreement are to be reflected and embodied where appropriate in draft legislation and in any event in a trust deed and consent order, the terms of each of which are to be agreed by the parties, in accordance with this agreement.

Executed as an agreement

Signed by
as Minister of Finance for New Zealand

and

as Minister for State-Owned Enterprises of New Zealand
in the presence of:

Signed by
as the duly authorised representative
of the New Zealand Maori Council
in the presence of:

Signed by
as the duly authorised representative
of the Federation of Maori Authorities Incorporated
in the presence of:

APPENDIX IV

TRUST DEED FOR COLLECTIVE RECIPIENT ENTITY

[Mangatū Forest] Collective Trust Trust Deed

[*Nominal individual settlors' (1 nominated by each Governance entity) names to be inserted*]

[*Initial trustees' (prescribed numbers nominated by each Governance Entity) names to be inserted*]

TABLE OF CONTENTS

Date:

Parties

[*Nominal settlors names to be inserted*] (Settlors)
[*Trustees' names to be inserted*] (Trustees)

Background

A The Settlors wish to establish a trust to receive, hold and distribute certain assets, to be provided by the Crown and Crown-related trusts under the terms of recommendations made by the Waitangi Tribunal under section 8HB of the Treaty of Waitangi Act 1975, for the benefit of the Beneficiaries on the terms and conditions set out in this Deed.

B The Settlors and the Trustees wish to record the terms and conditions under which the Trust is constituted and is to be administered.

Operative Part

1 Interpretation

1.1 ***Defined terms – generally***

In this Deed, unless the context otherwise requires:

Accumulated Rentals means accumulated rentals relating to the held, prior to settlement on this Trust, under the terms of the forestry rental trust referred to in section 34 of the Crown Forest Assets Act 1989.

Asset means each Resumption Asset and any other security, money, property (whether tangible or intangible), right or income of the Trust.

Auditor means the Person for the time being holding the office of auditor of the Trust.

Beneficial Interest means a percentage share in total beneficial entitlement of all Beneficiaries oi the Trust, being:

(a) in the case of the Māhaki Governance Entity, [ ]%; and
(b) in the case of the TWAK Governance Entity, [ ]%; and
(c) in the case of the NUOT Governance Entity, [ ]%.

Beneficiary means:

(a) the Māhaki Governance Entity; and
(b) the TWAK Governance Entity; and
(c) the NUOT Governance Entity,

as to their respective Beneficial Interests as set out in this Deed.

Borrow means borrow money, or to raise money by way of the drawing, acceptance, discount or sale of bills of exchange or promissory notes or other financial instruments or otherwise howsoever in any currency, and **Borrowing** and **Borrowed** have a corresponding meaning.

Business Day means a day on which registered banks are open for general banking business in Gisborne.
Crown means Her Majesty the Queen in right of New Zealand.
Crown Forestry Rental Trust means the trust of that name established by the Crown by deed dated 30 April 1990.
Date of Termination means the date of termination of the Trust determined in accordance with clause 19.
Deed means this Trust Deed.
Distribution means, in relation to a Beneficiary, the distribution of an Asset from the Trust Fund to that Beneficiary in accordance with this Deed.
Forestry Emission Unit Trust means the trust of that name established by the Crown by deed dated 19 April 2011.
Governance Entity means any of—
(d) the Māhaki Governance Entity; and
(e) the TWAK Governance Entity; and
(f) the NUOT Governance Entity.
Māhaki Governance Entity means the trustees of the trust known as [to be inserted] established by deed dated [to be inserted] to represent Te Aitanga a Māhaki.
Mangatū Forest means that part of the Mangatū Crown forest that is either:
(g) formerly part of the Mangatū 1 Block; or
(h) formerly part of the Mangatū 2 Block,—
within the Waitangi Tribunal's Turanganui a Kiwa Inquiry District (and is not part of the Waipaoa Block), being 7,668 hectares approximately and Lots 5, 6, 7, 8, 10, 11, 12, 13, 15, 19, 20, 21, 22, 23, 24, 25, 26 and part Lot 9, DP 8162, Gisborne Land District (Part record of title GS6A/15 and subject to survey).
Ngā Uri o Tamanui means the descendants of Rawiri Tamanui.
NUOT Governance Entity means the trustees of the trust known as [*to be inserted*] established by deed dated [*to be inserted*] to represent Ngā Uri o Tamanui.
NZU means a New Zealand unit as defined in section 4(1) of the Climate Change Response Act 2002 relating to the Mangatū Forest.
Person includes a natural person, a company, a corporation, a corporation sole, a firm, a unit trust, a government or a body of persons (whether corporate or unincorporate).
Resumption Asset means each of:
(i) the Mangatū Forest; and
(j) the Accumulated Rentals; and
(k) the NZUS; and
(l) the Specified Amount.
Specified Amount means the amount calculated in accordance with clause 3(c) of Schedule 1 of the Crown Forests Assets Act 1989 in respect of the Mangatū Forest.
Te Atianga a Māhaki means the descendants of Māhaki, including the hapū Ngāriki (other than the descendants of Rawiri Tamanui), Ngāti Wāhia (including Ngāti Kohuru of Waihirere), Ngāi Tuketenui, Ngāi Tamatea, Te Whānau a Iwi, Te Whānau a Taupara, Ngā Potiki, Te Whānau a Wi Pere and Te Whānau a Te Rangiwhakataetaea, but excluding Te Whānau a Kai and Ngā Uri o Tamanui.
Te Whānau a Kai means the descendants of Kaikoreaunei and his wives Te Haaki and Whareana.

Trust means the trusts created by this Deed, which will bear the name Mangatū Forest Collective Trust or such other name as is chosen by the Trustees.

Trust Fund means the property for the time being held by the Trustees under the Trust and includes, for the time being following their receipt, the Resumption Assets.

Trustee means a trustee for the time being of this Trust and, at the date of this Deed, means:

(m) [insert names of trustee(s) appointed by the Māhaki Governance Entity]; and

(n) [insert names of trustee(s) appointed by the TWAK Governance Entity]; and

(o) [insert names of trustee(s) appointed by the NUOT Governance Entity].

TWAK Governance Entity means the trustees of the trust known as [to be inserted] established by deed dated [to be inserted] to represent Te Whānau a Kai.

Waipaoa Block is an area of the Mangatū Crown forest that is outside the Waitangi Tribunal's Turanganui a Kiwa Inquiry District.

Waitangi Tribunal Orders means the final recommendations made by the Waitangi Tribunal under sections 8HB to 8HC of the Treaty of Waitangi Act in the Mangatū Remedies Inquiry (including any modifications to those final recommendations required to be made by the Waitangi Tribunal following judicial review).

1.2 ***Interpretation***

In this Deed, unless the context otherwise requires, references to:

(a) clauses, sub-clauses, paragraphs and schedules are to clauses, sub-clauses, paragraphs and schedules to this Deed;

(b) any legislation includes a modification and re-enactment of, legislation enacted in substitution for and a regulation, order-in-council and other instrument from time to time issued or made under, that legislation;

(c) the singular includes the plural and vice versa;

(d) a person that comprises the trustees of a trust or members of another single collective body means those trustees or members acting jointly and treated as if a single person; and

(e) parties to this Deed includes their successors and permitted assigns.

The Table of Contents to and headings in this Deed are used for convenience only and do not affect its interpretation in any way.

2 Waitangi Tribunal Orders

2.1 ***Interpretation of this Deed***

The provisions of this Deed must be interpreted having regard to the detail contained in the Waitangi Tribunal Orders.

2.2 ***Conflict resolution***

In the event of any conflict between the wording of this Deed and the detail of the Waitangi Tribunal Orders, the Waitangi Tribunal Orders prevail.

3 Trust

3.1 ***Appointment of Trustees***

The Trustees are appointed as the trustee of the Trust and agree to act as trustees for the Beneficiaries to acquire and hold the Resumption Assets in trust for the Beneficiaries upon and subject to the terms and conditions contained in this Deed.

3.2 ***Settlement of Mangatū Forest and Specified Amount***

In accordance with the Waitangi Tribunal Orders, the Crown will transfer to the Trustees on the terms of the Trust:

(a) the Mangatū Forest; and

(b) the Specified Amount.

3.3 ***Settlement of Accumulated Rentals***

As a result of the Waitangi Tribunal Orders, the trustees of the Crown Forestry Rental Trust will transfer to the Trustees on the terms of the Trust the Accumulated Rentals.

3.4 ***Settlement of NZUs***

As a result of the Waitangi Tribunal Orders, the trustees of the Forestry Emission Unit Trust will transfer to the Trustees on the terms of the Trust the NZUs.

4 Investment of Resumption Assets

4.1 ***Cash Resumption Assets***

The Trustees must place the Accumulated Rentals and Specified Amount, upon receipt, in a deposit account with a registered bank and withdraw the deposit only to make Distributions.

4.2 ***Investments for Beneficiaries' benefit***

All investments made on behalf of the Trust will be held by the Trustees as the exclusive property of the Trust, and held exclusively for the benefit of Beneficiaries of the Trust, in accordance with the terms of this Deed.

4.3 ***Trustees not holding special skill***

Section 13C of the Trustee Act 1956 does not apply to the exercise by the Trustees of their powers of investment under this Deed.

5 Distributions

5.1 ***Generally***

(a) Subject to the following provisions of this clause 5 and other terms of this Deed, the Trustees will determine the amount of each Distribution (whether capital or income).

(b) Distributions of amounts to Beneficiaries (whether capital or income) will be made in accordance with their respective percentage Beneficial Interests.

5.2 ***Taxation status of Distributions***

(a) The Trustees will determine:

(i) the extent to which any Distribution is or is not a taxable distribution; and

(ii) the extent to which tax credits are attached to ay distributions.

(b) The Trustees, in exercising their powers under paragraph (a), must endeavour to achieve a fair allocation, between Beneficiaries, of taxable and non-taxable amounts and of credits, reflecting the extent to which each Distribution is sourced from taxable income of the Trust.

5.3 ***Disclosure of information to tax authorities***

The Trustees are authorised to make such disclosure as may be required by the Inland Revenue Department of the details of Beneficiaries, any Distributions to Beneficiaries or any other details or information arising out of the Trust.

6 Management of Trust

6.1 ***Trustees' general duties***

Subject to the provisions of this Deed (including in particular clause 2), the Trust is to be managed and administered by the Trustees and, without limiting the generality of the foregoing, the Trustees must:

(a) manage the Trust Fund and make all decisions relating to the Assets of the Trust including the Distribution of any Asset of the Trust;
(b) manage the Mangatū Forest for so long as held by the Trustees;
(c) determine the terms of all contracts, rights and other matters relating to Assets or Liabilities of the Trust;
(d) undertake any activities reasonably necessary to allow Distribution of Resumption Assets or other Trust Assets to the Beneficiaries in accordance with this Deed, including subdivision processes;
(e) appoint and engage solicitors and other consultants and advisers on such terms as the Trustees determine;
(f) use their best endeavours and skill to ensure that the affairs of the Trust are conducted in a proper and efficient manner;
(g) use due diligence and vigilance in the exercise and performance of their functions, powers, and duties as Trustees;
(h) account to the Beneficiaries for all money that the Trustees receive on behalf of the Trust;
(i) not pay out, invest, or apply any money belonging to the Trust for any purpose that is not directed by, or authorised in, this Deed; and
(j) comply with all tax rules applying to the Trust.

6.2 ***Delegation by Trustees***

Notwithstanding clause 6.1, all or any of the powers, authorities, functions and discretions exercisable by the Trustees under this Deed may be delegated to any other Person nominated by the Trustees but the Trustees remain liable for the acts and omissions of any such Person whether or not the delegate is acting within the terms of its delegated authority.

6.3 ***Assets in Trustees' names***

The Trustees will cause the Assets of the Trust to be vested in the Trustees and to be registered in the names of the Trustees as soon as reasonably practicable after receipt of the necessary documents and must deliver all certificates or other documents of title for safe custody as directed by the Trustees.

6.4 Trustees' right to limit liability

The Trustees may, before entering into any transaction, security or liability of the Trust require that their liability is restricted or limited to their satisfaction to the Assets of the Trust for the time being.

6.5 Trustees' settlement powers

The Trustees will have the power to settle and complete all transactions in respect of the Trust. Subject to the provisions in this Deed and the powers, rights and discretions given to the Trustee under this Deed, the Trustees will have all powers, authorities, and discretions which they could exercise if they were the absolute and beneficial owners of the Trust and all the powers, authorities, and discretions necessary to enable them to carry out the purposes of the Trust or otherwise to perform and comply with the obligations and duties under this Deed.

6.6 *Extent of Trustees' powers*

The Trustees will have all powers, authorities, and discretions necessary to enable them to carry out the purposes of the Trust or otherwise to perform and comply with the obligations and duties under this Deed.

6.7 *Trustees' covenants*

Without limiting any duty or obligation of the Trustees elsewhere in this Deed, the Trustees covenant with the Settlors and for the benefit of the Beneficiaries that:

(a) the Trustees will ensure that the Trust is carried on in a proper and efficient manner and in accordance with the provisions of this Deed and will exercise the degree of diligence in carrying out their functions and duties hereunder as may be required under relevant law; and

(b) the Trustees will prepare or cause to be prepared all Distributions, cheques, payment instructions or authorities and notices which are to be paid, issued or given pursuant to this Deed.

6.8 *Advisers*

(a) The Trustees may, by resolution in writing, appoint any person as an advisory trustee of the Trust. The advisory trustee shall have the status and powers conferred on advisory trustees by the Trustee Act 1956. The advisory trustee may be removed by the Trustees, by resolution in writing, without needing to give a reason.

(b) In relation to the purchase, sale and other dealings with any Trust investments by the Trustees, the Trustees may determine the time and mode and the consultants, agents, brokers and professional advisers (if any) for the purchase, sale and other dealing.

(c) Any fee payable to an advisory trustee or other adviser will be determined by the Trustees.

6.9 *Custodians*

(a) The Trustees may, by resolution in writing, employ a custodian, (including a custodian trustee) or nominee to hold any Asset on such terms as the Trustees may determine provided that no such appointment will absolve the Trustees from any of their obligations relating to the Assets of the Trust under this Deed or at law.

(b) The Trustees shall cause any such custodian or nominee to comply with all the relevant covenants and obligations on the part of the Trustees expressed or implied in this Deed.

(c) Any fees payable to the custodian or nominee will be determined by the Trustees.

(d) The Trustees may remove any custodian or nominee by resolution in writing, without needing to give any reason.

(e) The provisions of the Trustee Act 1956 applying to custodian trustees will apply to the custodian or nominee as if the custodian or nominee were a custodian trustee, except as modified or extended as follows:

(i) all or any of the Trust Fund may be vested in the custodian or nominee as if the custodian or nominee were sole trustee; and

(ii) the portion of that Trust Fund that is from time to time vested in the custodian or nominee is the custodial trust fund, and the provisions of section 50 of the Trustee Act 1956 shall apply as if references in it to the trust property were references to the custodial trust fund.

7 Borrowing

(a) The Trustees may at any time, and from time to time, if the Trustees consider it necessary or desirable to do so, Borrow on behalf of the Trust and to secure such Borrowing upon all or any part or parts of the Trust in such manner as the Trustees think fit.

(b) The Trustees may at any time, and from time to time, if the Trustees consider it desirable, enter into guarantees on behalf of the Trust and to secure such guarantees upon all or any part or parts of the Trust in such manner as the Trustees think fit.

8 Appointment and Removal of Trustees

8.1 ***Appointment and removal***

Each Governance Entity may, by deed sent to the other Governance Entities –

(a) appoint the following numbers of Trustees:

(i) in the case of the Māhaki Governance Entity, [5 (or a number that is in more precise proportion to the respective % Beneficial Interest)] Trustees; and

(ii) in the case of the NUOT Governance Entity, [2 (or a number that is in more precise proportion to the respective % Beneficial Interest)] Trustees; and

(iii) in the case of the TWAK Governance Entity, [1 (or a number that is in more precise proportion to the respective % Beneficial Interest)] Trustee; and

(b) remove and replace any of their appointed Trustees; and

(c) appoint a Trustee if any of their Trustees cease to hold office.

8.2 ***Initial Trustees***

For the purposes of clause 8.1, as at the date of this Deed, the following persons are deemed to have been appointed by deed by the Governance Entity recorded after their name below:

(a) [*insert names*] by the Māhaki Governance Entity; and

(b) [*insert names*] by the NUOT Governance Entity; and

(c) [*insert names*] by the TWAK Governance Entity.

8.3 ***Exclusions to eligibility as Trustee***

A person may not be appointed or hold office as a Trustee who:

(a) is mentally disordered within the meaning of the Mental Health (Compulsory Assessment and Treatment) Act 1992;

(b) commits an act of bankruptcy or is an undischarged bankrupt;

(c) becomes of unsound mind, becomes a person in respect of whose affairs an order under the Protection of Personal and Property Rights Act 1988 is made or otherwise becomes unfit or unable to act as a Trustee;
(d) ceases to qualify as an officer of a charitable entity under section 16 of the Charities Act 2005; or
(e) would, if a director of a company subject to the Companies Act 1993, cease to be eligible to be a director.

8.4 ***Period of office of Trustees***
Each Trustee will hold office until they cease to hold office in accordance with clause 8.5

8.5 ***Cessation of office of Trustee***
A person will cease to be a Trustee if he or she:
(a) is removed by their appointing Governance Entity under clause 8.1;
(b) resigns as a Trustee by giving notice in accordance with clause 8.7;
(c) fails or neglects to attend three consecutive meetings of the Trustees without leave of absence, unless it appears to the other Trustees at their first meeting after the last of such absences that there is a proper reason in each instance for such non-attendance;
(d) satisfies one or more of the criteria in clause 8.3; or
(e) dies.

8.6 ***Date of cessation***
The Trustee concerned will cease to hold office:
(a) in the case where clause 8.5(a) applies, on the date of the Governance Entity's deed removing them;
(b) in the case where clause 8.5(b) applies, on the date the notice of resignation is received;
(c) in a case where clause 8.5(c) applies, from the end of the first meeting of Trustees after that Trustee's third consecutive absence without leave; and
(d) in all other cases, from the date on which the other Trustees were notified in writing of the relevant fact together with such evidence as the Trustees may reasonably require.

8.7 ***Resignation of Trustee***
A Trustee may resign by giving notice in writing to the other Trustees. Upon the receipt of such notice, the Trustee so resigning will cease to be a Trustee of the Trust, except as to the acts and deeds necessary for the proper vesting of the Trust Fund in the continuing or new Trustees, which acts and deeds will be done and executed at the expense of the Trust.

8.8 ***Effect of removal of Trustee***
Upon the removal of a Trustee from office, that person so removed will cease to be a Trustee of the Trust, except as to the acts and deeds necessary for the proper vesting of the Trust Fund in the remaining Trustees which acts and deeds will be done and executed at the expense of the Trust.

9 Meetings of Trustees

9.1 ***Meetings generally***

(a) The Trustees will meet to conduct business at such intervals as the Trustees may decide.

(b) A meeting of Trustees may be convened at any time by any Trustee by giving at least five Business Days' notice to the other Trustees.

Such notice will be given by email, personal delivery or post to each Trustee and will state the time and place of the meeting and, in sufficient terms, the nature of the business to be transacted.

9.2 ***Can invite others***

The Trustees may invite to a meeting whatever other person or persons as the Trustees may decide will assist with their deliberations.

9.3 ***Decision-making by majority vote***

Except as expressly provided otherwise by this Deed, any matter requiring decision at a meeting of the Trustees will be decided by a majority vote of the Trustees.

9.4 ***Voting***

Should a vote be called for at a meeting of Trustees, each Trustee will have one vote.

9.5 ***Written resolution***

Except as expressly provided otherwise by this Deed, a resolution may be passed in relation to any matter by Trustees confirming their agreement in writing, by email or by other equivalent means. Any such resolution will be as valid and effectual as if it had been passed at a meeting of the Trustees duly convened and constituted.

9.6 ***Quorum***

The quorum for a meeting of Trustees will be a majority of the Trustees appointed by each

Governance Entity and then holding office.

9.7 ***Teleconference meetings***

The contemporaneous linking together of the Trustees by telephone or other electronic means of communication will constitute a meeting of the Trustees and the provisions of this clause as to meetings of the Trustees will apply to such meetings provided the following conditions are met:

(a) each Trustee will be entitled to notice of such a meeting and to be linked by electronic means for the purposes of the meeting;

(b) each of the Trustees taking part in the meeting must be able to hear each of the other Trustees taking part during the whole of the meeting;

(c) at the commencement and conclusion of such meeting each Trustee to acknowledge their attendance; and

(d) a Trustee may not withdraw from such a meeting.

9.8 ***Minute book***
Minutes of the proceedings of all meetings of the Trustees will be recorded in a minute book to be kept for that purpose and signed by all Trustees. Every such minute purporting to be signed will be prima facie evidence of the matters recorded.

10 Bank Accounts
A bank account or accounts must be opened and maintained for the Trust. All moneys belonging to the Trust and coming into the hands of the Trustees must be paid to the credit of such bank account. The Trustees will determine the Persons authorised to operate such bank accounts.

11 Records
The Trustees must keep complete, accurate and separate records of all decisions of the Trustees and of all Assets of the Trust.

12 Reimbursement of Fee and Expenses
The Trustees are entitled to be reimbursed out of the Trust Fund (whether from income or capital or both but including in particularly any Crown forest licence rental received in respect of the Mangatū Forest while held by the Trustees) for their fees in acting as Trustees and in respect of the following items if properly incurred:

(a) all costs, charges and expenses (including legal and valuation fees) incurred in connection with the formation of the Trust, the preparation and registration of any acquisition, registration, custody, disposal of or other dealing with Assets of the Trust, including bank charges, and the expenses of any agents or custodian of the Trustees;
(b) all taxes, duties and imposts charged to or payable by the Trustees (whether by any taxing authority or any other Person) in connection with the Trust or the Assets of the Trust on any account whatsoever;
(c) the fees and expenses of any solicitor, barrister, valuer, accountant or other Person from time to time engaged by the Trustees in the discharge of their duties under this Deed; or
(d) any other expenses properly and reasonably incurred by the Trustees in connection with carrying out their duties under this Deed.

13 Trustees' Discretion and Authority
Except as far as is otherwise expressly provided in this Deed (and without limiting the need for compliance with clause 6.6), the Trustees have the absolute and uncontrolled discretion regarding the exercise (and the timing, mode, and manner of exercise) of the powers, authorities and discretions, as regards the Trust, vested in them by this Deed.

14 Beneficiaries Benefit from and Bound by this Deed
The terms and conditions of this Deed are for the benefit of and binding on the Trustees and each Beneficiary and all Persons claiming through them respectively and as if each Beneficiary had been party to and had executed this Deed.

15 Accounts and Reports

15.1 ***Accounting records***

The Trustees must:

(a) keep or cause to be kept proper records of or relating to the Trust including records of all Distributions and other transactions relating to the Resumption Assets and the liabilities of the Trust; and

(b) keep or cause to be kept true accounts of all sums of money received and expended by or on behalf of the Trust.

15.2 ***Regular reporting***

The Trustees must:

(a) provide to the Beneficiaries at least annually a report relating to the affairs of the Trust, and

(b) ensure that each quarterly and annual report is sufficiently detailed to keep the Beneficiaries adequately informed in relation to the affairs of the Trust.

16 Auditor

16.1 ***Appointment and remuneration***

A Person or firm of chartered accountants selected by the Trustees must be appointed Auditor of the Trust. The Trustees must determine the services to be performed by the Auditor and their scope. The remuneration of the Auditor shall be determined by the Trustees on an arm's length basis.

16.2 ***Removal/retirement***

The Auditor may at any time and from time to time be removed by the Trustees. The Auditor may retire upon giving the Trustees 6 months' notice in writing.

16.3 ***New appointment***

Any vacancy in the office of Auditor must be filled by the Trustees appointing a Person or firm of chartered accountants to be Auditor qualified under section 461E of the Financial Markets Conduct Act 2013.

16.4 ***Inspection by the Auditor***

The accounting and other records of the Trustees in respect of the Trust are open to the inspection of the Auditor. The Auditor is entitled to require from the Trustees such information, accounts and explanations as may be necessary for the performance of the duties of the Auditor.

17 Dispute Resolution

17.1 ***Separate agreement***

This clause sets out a separate and severable agreement to this Deed. Accordingly, if the Deed is void or voidable for any reason, the dispute resolution agreement set out in this clause will be unaffected and will survive any determination that the Deed is void or has been avoided.

17.2 ***Disputes generally***

Any dispute, controversy or claim between the Trustees or Beneficiaries arising out of or relating to this Deed, the breach, termination or claimed invalidity of this Deed or the administration of the Trust (*Dispute*) must be dealt with in the following manner:

(a) first, the party claiming the Dispute must:
  (i) give a written notice of the Dispute to the Trustees and Beneficiaries; and
  (ii) seek to convene a meeting of senior representatives of the Beneficiaries to discuss the Dispute with the aim of resolving it;

(b) if such meeting does not take place or fails to resolve the Dispute within 10 Business Days of the written notice of the Dispute having been received, the Beneficiaries must attempt to resolve the Dispute by negotiation between the senior representatives of each Beneficiary, who will be authorised to resolve the Dispute;

(c) if such negotiations do not take place or fail to resolve the Dispute within 20 Business Days of the written notice of the Dispute having been received, any Beneficiary may refer the Dispute to mediation; and

(d) once a Dispute has been referred to mediation in accordance with clause 17.2(c), no Trustee or Beneficiary will be entitled to commence any court proceedings in respect of the Dispute, except that this sub-clause will not prevent a Trustee or Beneficiary from applying for or obtaining urgent interlocutory relief in a court of competent jurisdiction.

17.3 ***Selection of mediator***

Where any Dispute is referred to mediation, a mediation will be effected as follows:

(a) by a single mediator agreed upon between the Beneficiaries; or

(b) in default of agreement upon a mediator within 10 Business Days after the Dispute was referred to mediation, then by a mediator selected by the President for the time being of LEADR New Zealand Incorporated or his or her duly authorised representative.

17.4 ***Venue for mediation***

Where any Dispute is referred to mediation, the mediation will take place at a place and time to be agreed between the Beneficiaries and the mediator, or failing agreement by all within 2 Business Days of the mediator's appointment, at such place and time as the mediator nominates.

17.5 ***Application of relationship principles***

When undertaking any Dispute resolution procedure, the parties will apply the following principles:

(a) the establishment of a relationship based on mutual trust;

(b) wherever possible and practical, mana ki te mana (equivalent relationship) engagement;

(c) the shared intention to achieve, by constructively working together, the maximising of benefit to the Beneficiaries;

(d) openness, promptness, consistency and fairness in all dealings and communications between the Beneficiaries;

(e) non-adversarial dealings between the Beneficiaries and constructive mutual steps both to avoid differences and to identify solutions; and

(f) open, prompt and fair notification and resolution between the Beneficiaries of any differences or disputes which may arise.

17.6 ***Power imbalance***
The parties acknowledge that there may be a power imbalance between the Beneficiaries and will endeavour to ensure that this imbalance does not result in a Beneficiary being treated in a manner that is oppressive, unfairly discriminatory or unfairly prejudicial.

17.7 ***Mana-enhancing outcomes***
The outcomes sought in relation to the administration of the Trust should aim to create benefits for the Beneficiaries that enhance the mana of the people, natural resources and other taonga involved.

17.8 ***Costs of Dispute resolution***
Each Beneficiary will bear its own costs in relation to any negotiation or mediation under this clause.

17.9 ***Continuing obligations***
Whilst any Dispute is continuing, the Trustees will continue to perform their obligations under this Deed.

17.10 ***Announcements***
Pending final resolution of any Dispute, none of the parties will make any press release, public announcement or statement concerning the subject matter of the Dispute to any person (except as required by law or as expressly or by implication authorised in this Deed).

18 Amendment to Deed
The Trustees may, with the written approval of the Settlors, at any time make any alteration, modification, variation or addition to the provisions of this Deed (by means of a deed executed by the Trustee) in any of the following cases:

(a) if in the opinion of the Trustees the change is made to correct a manifest error or is of a formal or technical nature; or

(b) if in the opinion of the Trustees the change:

  (i) is necessary or desirable for the more convenient, economical or advantageous working, management or administration of the Trust or for safeguarding or enhancing the interests of the Trust or Beneficiaries; and

  (ii) is not or not likely to become materially prejudicial to the general interests of all Beneficiaries of the Trust; or

(c) the change is authorised by a unanimous written resolution of the Beneficiaries; or

(d) if, after a change in any law affecting trusts, a change to this Deed is necessary to make any provision of this Deed consistent with such law.

19 Period of the Trust

(a) The Trust commences on the date of its creation and will continue until whichever of the following occurs first (the Date of Termination):

(i) the date on which all the Resumption Assets have been Distributed under clause 5;
(ii) the date on which the Beneficiaries determine to terminate the Trust by unanimous resolution; and
(iii) seventy-eight years from the date of this Deed less one day.

(b) The period of eighty years from the date of this Deed is the perpetuity period for the purpose of section 6 of the Perpetuities Act 1964.

20 Procedure on Winding Up

20.1 ***Realisation of Assets***

From and after the Date of Termination, the Trustees must realise the Assets of the Trust as soon as practicable, provided however that the Trustees may postpone realisation of all of the Assets of the Trust if they reasonably consider it is in the interests of Beneficiaries to do so. In this circumstance, until such realisation of the Assets of the Trust, the terms of the Trust will continue to apply with such changes as the context may require.

20.2 ***Retentions by Trustees***

The Trustees are entitled to retain out of the Trust such amount that the Trustees consider necessary or appropriate to meet all claims and liabilities (including for this purpose contingent liabilities) in connection with the Trust or arising out of the liquidation of the Trust including the fees of any agents, solicitors, bankers, accountants, auditors or other Persons whom the Trustees may employ in connection with the winding up of the Trust. The Trustees are entitled to be indemnified in respect of the foregoing from the moneys or assets retained by the Trustees.

20.3 ***Application of realisation***

Subject to the retention of any moneys as provided in clause 20.2, the net proceeds of realisation of the Assets of the Trust shall be applied by the Trustees as follows:

(a) first, in payment or retention of all costs, charges, expenses and liabilities incurred and payments made by or on behalf of the Trustees and payable from the Trust; and
(b) secondly, in payment to the Beneficiaries pro rata to the Beneficial Interests held by them in the Trust.

20.4 ***Interim distributions***

If in the opinion of the Trustees it is expedient to do so, the Trustees may make interim payments on account of the moneys to be distributed in accordance with clause 20.3.

20.5 ***Receipts***

Each payment can be made only against delivery to the Trustees of such form of receipt and discharge as may be required by the Trustees.

20.6 ***In specie distributions***

(a) Notwithstanding the preceding subclauses of this clause 20, the Trustees may, instead of realising an Asset, transfer the Asset, or shares in the Asset, in specie to one or more of the Beneficiaries (whether separately or as tenants in common in specified shares).

(b) In particular, the Trustees may distribute Assets in specie to the Beneficiaries in accordance with their Beneficial Interests but on the basis that the Beneficiaries by deed will collectively settle the Assets on a replacement trust to this Trust or transfer the assets to a company the shareholding in which is held by the Beneficiaries in proportion to their respective holdings of Beneficial Interests.

(c) Each reference in this clause 20 to payment will be interpreted as including reference to such transfer.

21 Withholding Taxes

If the Trustees are obliged by law to make any deduction or withholding on account of taxes from any payment to be made to a Beneficiary, the Trustees will make such deduction or withholding and pay such amount to the Commissioner of Inland Revenue or other taxing authority. On payment of the net amount to the relevant Beneficiary and the amount deducted or withheld to the tax authorities, the full amount payable to the relevant Beneficiary will be deemed to have been duly paid and satisfied.

22 Law Applicable

This Deed is governed by the law of New Zealand.

23 Execution and Effective Date

23.1 ***Counterparts***

This Deed may be executed in any number of counterparts each of which will be deemed an original, but all of which together will constitute one and the same instrument. A party may enter into this Deed by signing any counterpart.

23.2 ***Effective date***

This Deed will come into effect on the date it is executed by each of the Settlors and the Trustees.

Execution

Signed by [*Nominal settlor name to be inserted*] .....
in the presence of:

Witness signature .....

Full name (please print) .....

Occupation (please print) .....

Address (please print) .....

Signed by [*Nominal settlor name to be inserted*] .....
in the presence of:

Witness signature .....

Full name (please print) .....

Occupation (please print) .....

Address (please print) .....

Signed by [*Nominal settlor name to be inserted*] .....
in the presence of:

Witness signature .....

Full name (please print) .....

Occupation (please print) .....

Address (please print) .....

Signed by [*Initial trustee name to be inserted*] .....
Trustee

in the presence of:

Witness signature .....

Full name (please print) .....

Occupation (please print) .....

Address (please print) .....

Signed by [*Initial trustee name to be inserted*] .....
Trustee

in the presence of:

Witness signature .....

Full name (please print) .....

Occupation (please print) .....

Address (please print) .....

Signed by [*Initial trustee name to be inserted*] .....
Trustee

in the presence of:

Witness signature .....

Full name (please print) .....

Occupation (please print) .....

Address (please print) .....

Signed by [*Initial trustee name to be inserted*] .....
Trustee

in the presence of

Witness signature .....

Full name (please print) .....

Occupation (please print) .....

Address (please print) .....

Signed by [*Initial trustee name to be inserted*] .....
Trustee

in the presence of:

Witness signature .....

Full name (please print) .....

Occupation (please print) .....

Address (please print) .....

Signed by [*Initial trustee name to be inserted*] .....
Trustee

in the presence of:

Witness signature .....

Full name (please print) .....

Occupation (please print) .....

Address (please print) .....

Signed by [*Initial trustee name to be inserted*] .....
Trustee

in the presence of:

Witness signature .....

Full name (please print) .....

Occupation (please print) .....

Address (please print) .....

Signed by [*Initial trustee name to be inserted*] .....
Trustee

in the presence of:

Witness signature .....

Full name (please print) .....

Occupation (please print) .....

Address (please print) .....