IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

I TE KŌTI MATUA O AOTEAROA
TE WHANGANUI-A-TARA ROHE

CIV-2021-485-000720
[2023] NZHC 132

BETWEEN	ATTORNEY GENERAL Applicant
AND	WAITANGI TRIBUNAL First Respondent
AND	ESTATE OF ERIC JOHN TUPAI RURU Second Respondent
AND	TANYA ROGERS AND DAVID BROWN Third Respondent
AND	OWEN LLOYD Fourth Respondent
AND	DAVID THOMAS HAWEA Fifth Respondent
AND	ALAN PAREKURA TOROHINA HARONGA Sixth Respondent
AND	ANTHONY TAPP Seventh Respondent

Hearing: 20 – 22 June 2022 and 3 February 2023

Appearances: C D Tyson, C R W Linkhorn and H P Graham for the Applicant
B R Arapere (both hearings) and R Lawrie & W Gucake (on 3 February 2023) for the First Respondent
P J Radich KC, K S Feint KC and T Haradasa (both hearings) and R Drummond (on 3 February 2023) for the Second and Sixth Respondents
B R Lyall for the Third Respondent
T H Bennion for the Fourth Respondent
D C F Naden and C B Hirschfield (for June 2022 hearings) and no appearance by leave on 3 February 2023 for the Fifth Respondent
J P Kahukiwa by VMR (for June 2022 hearing) and no appearance by leave on 3 February 2023 for the Seventh Respondent

Judgment: 17 February 2023

JUDGMENT OF GRICE J (JUDICIAL REVIEW)

Contents

Introduction

[1] In its *Mangatū Remedies Report 2021* (the *Remedies Report 2021*), Te Rōpu Whakamana i te Tiriti o Waitangi | the Waitangi Tribunal (the Tribunal) recommended the transfer or "resumption" to three Māori claimant groups of 7,676.8 hectares of the Mangatū Crown Forest licensed (CFL) lands.[1] The Tribunal also recommended the payment of associated compensation.[2] These recommendations were the result of a series of inquiries in relation to the Tūranga district by the Tribunal beginning in 2000.

[2] The Crown seeks judicial review of the Tribunal's recommendations, which may, subject to further negotiations between the Crown and the claimants, become final adjudicatory determinations. The Crown says the Tribunal has acted outside its adjudicatory jurisdiction and materially erred in law. It says given the serious nature of these errors and the significant financial (and other) implications for all parties the decisions cannot stand.

[3] The Tribunal is the first respondent and abides the decision of the Court.

[4] The second, third, fourth and sixth respondents represent two of the Māori groups of claimants for resumption and oppose the Crown's application.[3] They had asked the Tribunal to exercise its statutory power to make a binding recommendation requiring the Crown to return the CFL land to Māori ownership under s 8HB of the Treaty of Waitangi Act 1975 (the TOWA).[4] The Tribunal did so.

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1 Te Rōpu Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *The Mangatū Remedies Report 2021* (Wai 814, 2021) [*Remedies Report 2021*]. The Mangatū CFL land at issue in this case is located in the north of the Tribunal's Tūranganui-a-Kiwa inquiry district. The total area of the CFL land is 12,474.5802 ha. The land subject to these proceedings is 7,676.8 ha of the total area.

2 "Resumption" is the term used to describe the Waitangi Tribunal's power to, effectively, direct the return of certain categories of land subject to Treaty of Waitangi claims. Those categories are current or former state-owned enterprise land, Crown forest land and land belonging to tertiary education institutions: *Wairarapa Moana Ki Pouākani Inc v Mercury NZ Ltd* [2022] NZSC 142 [*Wairarapa Moana*] at n 1.

3 The groupings and names adopted by the applicants have changed from time to time through the course of the Tribunal inquiries but that is not material for present purposes: *Remedies Report 2021*, above n 1, at [1]–[4].

4 The complex procedural history is set out at [1]–[8] of the *Remedies Report 2021*, above n 1.

[5] The second and sixth respondents represent the interests of Te Aitanga a Māhaki and the Mangatū Incorporation respectively. They support the findings of the Tribunal.

[6] The third and fourth respondents represent three claimant groups who established a common trust called Ngā Uri o Tamanui Trust (NUOT) to receive and manage the settlement offers.[5] These respondents support the findings of and the remedies recommended by the Tribunal in relation to the historical claims and compensation but abide the decision of the Court in relation to the terms and conditions imposed by the Tribunal.

[7] The fifth respondent, Te Whānau a Kai, is a counterclaim applicant. It seeks judicial review of the Tribunal's recommendations, alleging that the Tribunal failed to properly take into account the evidence and did not properly recognise the rights and interests of Te Whānau a Kai. It says the Tribunal acted unreasonably and failed to give reasons for providing significantly less redress allocation to it than to the other claimant entities.[6] Te Whānau a Kai says that the Tribunal erred by failing to properly ascertain customary interests in the Mangatū CFL land in the manner required. Te Whānau a Kai says in particular that the Tribunal failed to deal with its mana whenua concerns. It says the Tribunal in the Remedies Inquiry relied on mana whenua findings it had made in relation to historical Treaty claims concerning the district in its 2004 report *Tūranga Tangata Tūranga Whenua* (the Principal Report) which were inadequate.[7]

[8] The seventh respondent represents an interested party referred to by the Tribunal as Ngāti Matepu.[8] The seventh respondent did not take an active part in argument but supported the second and sixth respondents' submissions.

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5 The *Remedies Report 2021* referred to those claimants as Ngāriki/Ngā Ariki Kaipūtahi. However, counsel in his submissions referred to the claimants as Ngā Uri o Tamanui (NUOT).

6 Te Whānau a Kai was allocated 14 per cent, while the third and fourth respondents would receive 18 per cent, and the second and sixth respondents would receive 68 per cent.

7 Te Rōpu Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *Turanga Tangata Turanga Whenua: The Report on the Turanganui a Kiwa Claims* (Wai 814, 2004) [Principal Report].

8 *Remedies Report 2021*, above n 1, at [31].

[9] Since the hearing of this matter, the Supreme Court has delivered its decision in *Wairarapa Moana Ki Pouākani Inc v Mercury NZ Ltd* (*Wairarapa Moana*), which gave guidance on the approach to be taken in applications for resumption and compensation.[9] For the purpose of making submissions on the effect of that decision on the issues under consideration the parties were invited to make further submissions by written memoranda and at a resumed hearing on 3 February 2023.

Background

[10] The Crown purchased the land at issue in the 1950s and 1960s for the purposes of erosion control. Part of the land described as part of Mangatū No 1 block was acquired from Māori in 1961. It was purchased from the proprietors of the Mangatū Incorporation. The greater part of the land was purchased from non-Māori owners, but that land had earlier been sold privately by the Māori owners of parts of the Mangatū No 2 block.

[11] The Tribunal's Principal Report and the first Mangatū Remedies Report in 2014 (the *Remedies Report 2014*) were silent on whether a fair price had been paid to the Māori owners at the time but identified breaches of te Tiriti o Waitangi | the Treaty of Waitangi (the Treaty) by the Crown in the purchase process.[10]

[12] Some of the claims in the inquiry involved the Mangatū lands directly, including the Ngāriki/Ngā Ariki Kaipūtahi claim concerning the Native Land Court's determination of title for Mangatū 1 in 1881 and the Crown's acquisition of 8,522 acres (3,448.7 ha) of land from Mangatū Incorporation for erosion purposes in 1961, when it had failed to disclose its intention to also use the land for commercial forestry.[11]

[13] In the 2004 Principal Report the Tribunal made factual findings on a wide range of historical issues arising from Crown conduct in the Tūranga district. The

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9 *Wairarapa Moana*, above n 2.

10 Principal Report, above n 7, at 733; and Te Rōpu Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *Mangatū Remedies Report* (Wai 814, 2014) [*Remedies Report 2014*] at 52, concerning the acquisition and afforestation of the Mangatū No 1 land. The *Remedies Report 2014* was subsequently set aside following a successful judicial review application.

11 *Remedies Report 2021*, above n 1, at [12].

Remedies Report 2021 summarised the Tribunal's earlier findings in the Principal Report and referred to but did not repeat the full account of the Crown's Treaty breaches in the district. The Tribunal had found 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 Maōri."[12] The Crown's conduct gave rise to some of the most serious Treaty breaches in New Zealand.[13]

[14] The Tribunal in the Principal Report did not make specific recommendations to remedy the prejudice suffered as a result of all the Crown's breaches, including those related to the Mangatū CFL lands. The recommendation was that the Crown and claimants enter into settlement negotiations for that purpose.[14] This ultimately led to litigation in the High Court, Court of Appeal and Supreme Court. As a result the Tribunal needed to hold a further series of hearings, commencing in 2017 and culminating in the present *Remedies Report 2021*.[15]

[15] The Tribunal adopted an "iterative" process to resolve some of the technical and logistical issues likely to arise if it made binding recommendations for the return of CFL land to Māori ownership.[16] One of the key issues on which the claimants were asked to engage through this iterative process was the establishment of suitable entities as recipients for any binding Tribunal recommendations requiring return of CFL land and payment of compensation.[17] The Tribunal had hoped that the iterative process, including mediation, would lead to agreement among the claimants for the return of

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12 At [10], citing the Principal Report, above n 7, at 38.

13 At [10], citing the Principal Report, above n 7, at 38.

14 Principal Report, above n 7, at 741–742.

15 *Haronga v Waitangi Tribunal* HC Wellington CIV 2009–485–2277, 23 December 2009 [*Haronga* (HC) (2009)]; *Haronga v Waitangi Tribunal* [2010] NZCA 201 [*Haronga* (CA) (2010)]; *Haronga v Waitangi Tribunal* [2011] NZSC 53, [2012] 2 NZLR 53 (SC) [*Haronga* (SC)]; *Haronga v Waitangi Tribunal* [2015] NZHC 1115 [*Haronga* (HC) (2015)]; and *Attorney-General v Haronga* [2016] NZCA 626, [2017] 2 NZLR 394 [*Haronga* (CA) (2016)], detailed in the *Remedies Report 2021*, above n 1, at [16]–[28].

16 The *Remedies Report 2021*, above n 1, at 4 defined the "iterative process" as:

> 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.

17 *Remedies Report 2021*, above n 1, at [1.25].

the land to them as a community rather than allocations of the land to separate groups. However agreement was not reached.

[16] Once the claimants had completed the required ratification processes to establish the three entities to represent the interests of the various claimants, the Tribunal issued the *Remedies Report 2021*. This determined the groups of Māori (represented by the three entities) to whom the land should be returned. The return was to be to a collective trust held in beneficial interests proportionate to the determined share of each group.

[17] The Tribunal's recommendations about the CFL land, made under ss 6(3) and 8HB of the TOWA, would become final after 90 days if the Crown and parties did not otherwise agree. The 90-day process enables the parties to the inquiry to enter negotiations for the settlement of the claim with the other parties and the Crown. They must within that 90 days inform the Tribunal whether the party accepts or has implemented the interim recommendations or made an offer as a result of negotiations, and the result of that offer.[18] Currently that period is suspended pending the resolution of these proceedings.

Grounds for judicial review

[18] The Crown brings its application for judicial review claiming that the Tribunal erred in its proposal that all of the CFL land be returned and 100 per cent compensation be paid to Māori as generalised compensation for a wide range of claims based on Treaty breaches relating to events from the 1850s onwards. It says those claims did not "relate to" the CFL lands as required by s 8HB(1) and as such did not engage the resumption jurisdiction.[19] It says the Tribunal was in error as it has "essentially funnelled the entire history of Māori-Crown interactions in the district through the 'relates to' threshold". The Crown says the Tribunal has used the CFL land and the maximum available compensation as a response to that history, but that approach is contrary to the statutory text and purpose.

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18 Treaty of Waitangi Act 1975, s 8HC.

19 The Tribunal's "relates to" finding is at [4.23]–[4.62] of the *Remedies Report 2021*, above n 1.

[19] The Crown says that the special mechanism of s 8HB was designed to protect *specific* claims to *specific* land. It submits that as it has been applied by the Tribunal, s 8HB would become a general remedy for a wide range of claims and benefits from the district inquiry findings.

[20] The Crown also says that the Tribunal's decision to award compensation in favour of the relevant entities based on the maximum amount of return available under the statutory provisions was wrong in law. It says this was based on an incorrect construction and application of the statutory provisions.

[21] The Tribunal had found, for the purposes of calculating the amount of statutory compensation to be paid under the Crown Forest Assets Act 1989, that except for two short periods to account for nationwide COVID-19 lockouts, the Crown was not "prevented, by reasons beyond its control, from carrying out any relevant obligation" in relation to the Tribunal inquiries, and therefore declined to extend the "real value" period beyond the statutory four-year period from the date of sale or the date that the claim was made (whichever was the later). The Crown says that in declining to extend the "real value" period and recommending that the Crown pay the maximum return on the proceeds it had received for sale of the timber, the Tribunal erred in its calculation of compensation, which had the effect of increasing the maximum statutory compensation amount by $160 million over the amount which would have preserved the real value of the net proceeds of sale through to the point of determining remedies for the claims.

[22] The Crown also says the Tribunal has stepped outside the purpose of the terms and conditions that it is entitled to impose on the recommended transfer of land and compensation to Māori. The Crown submits the recommended proposed terms and conditions constitute an additional remedy to the claimants.

[23] The Crown says the Tribunal has avoided its statutory function of determining finally to whom the land (or parts thereof) should be returned. In particular it says that in recommending that a collective trust be the recipient of the resumption orders, the Tribunal has failed to identify the final recipients to whom the interests in land will be transferred (and any relevant compensation paid). The Crown submits this approach

leaves this key decision open to further processes and as such the position of the parties is left uncertain. The Crown says this is to some extent a product of the errors of law made by the Tribunal in its failure to identify the specific claims and prejudice concerning the forest lands which would justify the return of part or all of that land to particular claimants for those claims. It points to practical difficulties and uncertainties which result from a failure to direct the transfer of the land to the final proposed recipients and says this is therefore not a definitive resolution of forest claims as is contemplated by the statutory scheme.

[24] In summary, the Crown does not say the respondents' claims are not "well-founded" based on district-wide Treaty breaches, but rather that not all of the claims of the groups are sufficiently proximate to the CFL land. Therefore, the Crown says, it cannot be said that each "relates in whole or in part to… land or an interest in [the] land", in the terms of s 8A(2) of the TOWA. The Crown also says that only part of the land can be said to be susceptible to be *returned* to Māori ownership, because only part of the land was *acquired* from Māori in 1961. The Crown says the balance was acquired from non-Māori to whom Māori had sold earlier and there has been insufficient identification of Māori or the group of Māori to whom that land is to be returned.

Principles of judicial review

[25] This application is based on errors the Crown alleges that the Tribunal has made in the interpretation and application of the statutory scheme for resumption. The Court's task in judicial review was recently reiterated by Cooke J in *Mercury NZ Ltd v Waitangi Tribunal* (*Mercury*) when considering the resumption provisions, as follows:[20]

> … The function of the Court in judicial review is to consider whether decisions are made lawfully. In this context this means the Court considers whether the Tribunal correctly interpreted its statutory powers, that it took into account the considerations Parliament intended and ignored those that are irrelevant. The discretion given to a relevant body may include matters of judgment and evaluation on the proper interpretation of the provisions. Where that is so it is not the function of the Court to question the views properly formed by the

[20] *Mercury NZ Limited v Waitangi Tribunal* [2021] NZHC 654, [2021] 2 NZLR 142 [*Mercury* (HC)] at [67].

> decision maker. Its function is only to review whether the decisions have been lawfully made …

[26] It is necessary therefore to examine in some detail the Tribunal's findings and interim recommendations, as well as the basis for those. Then follows a consideration of whether the Tribunal's approach is in accordance with the statutory provisions, and in particular how they should be applied in accordance with Supreme Court's guidance in *Wairarapa Moana* and other relevant case law.[21]

[27] I first, however, set out the statutory framework under which the Tribunal operates, including the amendments which introduced the resumption jurisdiction.

The statutory framework

[28] The functions of the Tribunal and the jurisdiction to enquire into historical claims and determine whether they are well-founded is set out in the TOWA as follows:

> **5 Functions of Tribunal**
>
> (1) The functions of the Tribunal shall be—
>
> (a) to inquire into and make recommendations upon, in accordance with this Act, any claim submitted to the Tribunal under section 6:
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> …
>
> (2) In exercising any of its functions under this section the Tribunal shall have regard to the 2 texts of the Treaty set out in Schedule 1 and, for the purposes of this Act, shall have exclusive authority to determine the meaning and effect of the Treaty as embodied in the 2 texts and to decide issues raised by the differences between them.
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> **6 Jurisdiction of Tribunal to consider claims**
>
> (1) Where any Maori claims that he or she, or any group of Maoris of which he or she is a member, is or is likely to be prejudicially affected—
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> …
>
> (b) by any regulations, order, proclamation, notice, or other statutory instrument made, issued, or given at any time on or after 6 February 1840 under any ordinance or Act referred to in paragraph (a); or

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21 *Wairarapa Moana*, above n 2.

> (c) by any policy or practice (whether or not still in force) adopted by or on behalf of the Crown, or by any policy or practice proposed to be adopted by or on behalf of the Crown; or
>
> (d) by any act done or omitted at any time on or after 6 February 1840, or proposed to be done or omitted, by or on behalf of the Crown,—
>
> and that … the regulations, order, proclamation, notice, or other statutory instrument, or the policy or practice, or the act or omission, was or is inconsistent with the principles of the Treaty, he or she may submit that claim to the Tribunal under this section.
>
> …
>
> (3) If the Tribunal finds that any claim submitted to it under this section is well-founded it may, if it thinks fit having regard to all the circumstances of the case, recommend to the Crown that action be taken to compensate for or remove the prejudice or to prevent other persons from being similarly affected in the future.
>
> …

[29] The Supreme Court has recently commented that the Tribunal's jurisdiction in relation to historical Treaty claims is "unique in New Zealand's legal and constitutional framework."[22]

[30] The Tribunal takes a district-by-district approach, that is "it consolidates the multiple claims of iwi, hapū, whānau and individuals in a particular district into a single historical inquiry".[23] The Supreme Court noted that the historical claims that come before the Tribunal are complex.[24] They relate to whole districts and cover a century-and-a-half of interaction between Māori and the Crown.[25] The Tribunal must engage with contemporary claimant communities, often at different stages of readiness and recovery.[26] These realities, the Supreme Court said, "call for deep expertise and a willingness to be flexible."[27]

[31] The Tribunal receives evidence and submissions in a staged process over a period of time. It then publishes its report about the history of the engagement between

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22 At [16].
23 At [18].
24 At [17].
25 At [17].
26 At [17].
27 At [17].

iwi and hapū and the Crown and settlers in the district.[28] The process is one of "seeking reconciliation through evidential inquiry supported by expert membership and inquisitorial procedures".[29] The Supreme Court noted this explains why the Tribunal's remedial powers are generally recommendatory.[30]

[32] The partial exceptions to the recommendatory jurisdiction are in relation to Crown forest, tertiary, education and state-owned enterprise land.[31] In relation to those assets, as a result of a direction by the Court of Appeal, an agreement was reached between the Crown and Māori leading to amendments to the powers of the Tribunal to enable it to compel the Crown (by binding recommendation) to resume ownership of such land to Māori.[32] This is the Tribunal's "resumption power", which the Supreme Court has described as "adjudicatory".[33] The background to the extension of the Waitangi Tribunal's "resumption" jurisdiction to CFL lands has been considered in detail in a number of earlier judgments, most recently in *Wairarapa Moana*.[34]

[33] The resumption jurisdiction was effected by way of amendments to the TOWA and in the provisions of the Crown Forest Assets Act. Sections 8HB(2)–(3) of the TOWA inserted the "adjudicatory" jurisdiction and provide the statutory prerequisites and a process allowing for further negotiations before the interim recommendations of the Tribunal become final under s 8HC, as follows:

> **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
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> (ii) that the action to be taken under section 6(3) to compensate for or remove the prejudice caused by the

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28 At [18].
29 At [19].
30 At [19].
31 At [20].
32 At [20]–[22], referring to *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 (CA) [the *Lands* case] at 666 per Cooke P.
33 At [22], citing *Haronga* (SC), above n 15, at [88] per Elias CJ, Blanchard, Tipping and McGrath JJ.
34 At [20]–[23]; and see *Haronga* (SC), above n 15; *Haronga* (CA) (2016), above n 15; and *Mercury* (HC), above n 20.

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 Māori 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 Māori ownership (which recommendation shall be on such terms and conditions as the Tribunal considers appropriate and shall identify the Māori or group of Māori to whom that land or that part of that land is to be returned) …

(2) In deciding whether to recommend the return to Māori 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.

…

[34] Section 8HC, relating to interim recommendations in respect of Crown forest land, provides as follows:

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 Māori 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.

…

[35] The Tribunal may also award additional relief or compensation. The process for the calculation of compensation following a recommendation for the return to Māori ownership of any licensed land is set out in s 36 of the Crown Forest Assets Act, with the options for compensation set out in sch 1 to that Act. Section 36 provides:[35]

36 Return of Crown forest land to Māori ownership and payment of compensation

[35] Section 36(3) was amended in November 2022 but the amendment is not relevant to the issues in this proceeding.

(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 Māori ownership of any licensed land, the Crown shall—

(a) return the land to Māori 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 Māori 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.

[36] Schedule 1 provides:

Compensation payable to Māori

1 Compensation payable under section 36 shall be payable to the Māori 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 Māori 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 Māori ownership from the date that the recommendation of the

Tribunal for the return of the land to Māori 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 Māori ownership.

…

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 willfully 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 Māori Council, and the Federation of Māori Authorities Incorporated.

[37] The Supreme Court noted that in addition to the land itself (which comes subject to the existing Crown forestry licence), the compensation provision allowed for additional relief to be made available to the recipient of the land in the form of the accumulated licence fees (rentals) for the licensed land, held by the Crown Forestry Rental Trust, and the right to any future rental payments.[36] It noted that under cl 2 a successful applicant for resumption would be entitled as of right to five per cent of the sum elected under cl 3, and the Tribunal may order that up to 100 per cent be paid as "further compensation".[37]

[38] In this case the Tribunal concluded that compensation should be paid to the three claimant groups to whom it recommended the Mangatū CFL land should be returned. The compensation was to comprise the full amount of the specified amount under cl 2 of sch 1. The specified amount was to be calculated under cl 2(c), being the net proceeds received by the Crown from the transfer of the relevant Crown forestry assets plus a return on those proceeds. It determined that the return on the proceeds should be calculated from the expiration of the four-year grace period referred to in cl 5(a) at the return specified in cl 5(b).

[39] In order to reach a conclusion that the four-year grace period should not be extended, the Tribunal had to be satisfied in terms of cl 6(b) that the Crown had not been "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 Māori Council, and the Federation of Māori Authorities Incorporated" (the 1989 Forests Agreement).[38] That agreement had set out the agreed provisions subsequently enacted to implement the resumption jurisdiction, including the compensation now set out in sch 1 to the Crown Forest Assets Act.

The *Remedies Report 2021*

[40] The Tribunal heard the broad historical claims in the Tūranga District Inquiry (the Tūranga Inquiry) between 2001 and 2002 and reported on the claims in the 2004 Principal Report. The Tribunal's Remedies Inquiry built on material in the earlier

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36 *Wairarapa Moana*, above n 2, at [127].
37 At [118]. The Court noted in that case the Tribunal had "not got that far yet."
38 Schedule 1 cl 6 of the Crown Forest Assets Act 1989.

report to consider remedies sought by the claimant groups affected by the Crown Treaty breaches.

[41] The Tribunal noted that it had before it four separate and competing applications for return of the CFL land from claimant kin groups "inextricably linked by physical proximity and interwoven whakapapa, yet each with its own independent mana born of distinct whakapapa lines, distinct resource ownership, and strong leadership."[39]

[42] The Tribunal said the claimant groups had brought applications that were broadly based and included allegations set out in the comprehensive statements of claim.[40] It noted that it could only recommend the return of the CFL land "to compensate for or remove prejudice associated with claims that relate to the land."[41]

[43] In addition to its earlier findings in the Principal Report, the Tribunal noted it had the advantage of additional, updated evidence about the impact of the Crown's actions on the claimant groups over time.[42] The additional evidence complemented the findings in the Principal Report and the Tribunal noted that gave it "a fuller understanding of the prejudice – its nature and extent, and who it affected – that must be either removed or compensated for" by its remedies recommendations.[43] It noted these were the foundations upon which it based its recommendations.[44]

[44] The Tribunal noted that the statutory scheme which governed the Tribunal's power to make binding recommendations (s 8HB of the TOWA and sch 1 of the Crown Forest Assets Act) required it to make a carefully sequenced series of determinations that:[45]

(a) the claim relates to the CFL land;

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39 *Remedies Report 2021*, above n 1, at [1.30], citing the Principal Report, above n 7, at 38.
40 At [1.35].
41 At [1.35].
42 At [1.36].
43 At [1.36].
44 At [1.36].
45 At [1.6].

(b) the claim is well-founded;

(c) the action to be taken under s 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 groups to which the land should be returned are identified as appropriate for that purpose.

[45] The Tribunal noted that if it determined that the CFL land should be returned to Māori ownership it must also consider the following questions:[46]

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

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

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

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

[46] The Tribunal structured its report to reflect that sequence and address the necessary determinations to lead it to an overall recommendation.[47]

Structure of the report

[47] In chapter 2 the Tribunal profiled the claimant groups. In chapter 3 it discussed the statutory scheme and the approach to the claims in detail in the context of the statutory prerequisites that must be met before a recommendation under s 8HB could be made. It summarised the approach adopted by the Courts to the statutory scheme to help clarify its task. The Supreme Court's decision in *Wairarapa Moana* was

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46 At [3.59].
47 At [1.37].

delivered only after the Tribunal's report hearing, and consequently the Tribunal did not have the benefit of the guidance set out in that decision.

[48] In chapter 4 the Tribunal considered one of the key threshold questions, namely whether the claimants had well-founded claims that "related to" the CFL land? In assessing this question, the Tribunal drew on how the higher courts had as at that time interpreted the "relates to" requirement, as well as previous Tribunal jurisprudence, the submissions of the parties and the findings of the Principal Report.[48]

[49] Chapter 5 dealt with the determination of 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.[49]

[50] Chapters 6 and 7 addressed consequential matters flowing from the findings. Chapter 6 looked at the identification of the Māori or groups of Māori to whom the land should be returned. This was the last step in the four-step legal test that the Tribunal was required to apply in order to make binding recommendations. It discussed the "iterative process" through which the claimants had prepared themselves and ratified the three legal entities to receive the interim recommendations. Chapter 7 recorded the findings as to the payment of financial compensation to the claimants along with the return of the CFL land. The Tribunal considered the purpose of the financial compensation under sch 1 and reviewed and assessed the economic evidence adduced to assist the Tribunal in awarding compensation.[50]

[51] Chapter 8 summarised the key determinations, setting out the s 8HB interim recommendation in full, including the terms and conditions and the compensation to be awarded.[51] The Tribunal also provided some general recommendations for appropriate Crown redress for prejudice suffered by the claimants that it considered was not remedied by returning the Mangatū CFL land to Māori ownership. Those

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48 At [1.39].
49 At [1.40].
50 At [1.41].
51 At [1.42].

recommendations are non-binding but the Tribunal urged the Crown to respond to them in order to fully resolve these claims.[52]

[52] I now turn to summarise the full *Remedies Report 2021* in greater detail.

The principles of the Treaty

[53] No criticism has been made of the Tribunal's analysis of the applicable Treaty principles. It noted that the tino rangatiratanga guarantee under article 2 of the Treaty had specific relevance to the Tribunal's task in this inquiry. 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."[53] The guarantee included 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."[54]

[54] Under the article 1 right of the Crown to exercise kāwanatanga, Māori autonomy included "the right to retain their own customary law and institutions and the right to determine their own decision makers and land entitlements."[55] Kāwanatanga was neither an exclusive nor ultimate authority. The background to the signing of the Treaty suggested that the Crown's powers related to controlling and making laws for its own subjects were designed principally to protect Māori from the actions of settlers.[56]

[55] The Tribunal also noted that an important Crown obligation arising from the Treaty partnership was the active protection of the article 2 guarantees to Māori, including the right to exercise tino rangatiratanga. An important requirement for this partnership was that each party respected the other party's sphere of authority.[57]

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52 At [1.42].
53 At [3.74].
54 At [3.75].
55 At [3.75].
56 At [3.73].
57 At [3.78].

[56] The Tribunal noted that the Crown had a responsibility to actively protect Māori autonomy and could not unilaterally exercise its kāwanatanga in ways that contravened or undermined article 2 guarantees. On the part of Māori, the partnership required that they act reasonably towards the Crown and participate in any negotiations in good faith.[58]

[57] Relevant also are the Tribunal's observations 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."[59] The Treaty also "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."[60]

[58] The Tribunal noted it was guided by the principle of equity, which guaranteed that Māori would be treated fairly and equitably. This arose from article 3, which guaranteed Māori the same rights as other New Zealanders. The principle of equity was not just concerned with equal treatment for all citizens but required the Crown to make decisions based on the recognition that the needs of Māori may be different:[61]

> 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.

[59] Where redress was required, the Crown had a "clear duty to put matters to right" and that required active measures to restore the balance.[62] To satisfy the principle of redress, the Tribunal said, "the Crown must act to restore the mana and status of Māori, and must provide financial or other redress commensurate with the prejudice suffered."[63]

[60] The Tribunal accordingly summarised the following Treaty principles which it considered were of particular relevance to the claims in the present inquiry:[64]

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58 At [3.78].
59 At [3.79].
60 At [3.81].
61 At [3.80].
62 At [3.82].
63 At [3.82].
64 At [3.83].

(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.

[61] The Tribunal noted that in order to make the decisions required it had regard to the statutory provisions themselves and their history, the courts' directions, and the principles of the Treaty.[65] It then went on to consider in detail whether the well-founded claims *related to* the CFL land.

Do the well-founded claims "relate to" the CFL land?

[62] In addressing the first threshold issue, that is whether the well-founded claim "relates to" the CFL land, the Tribunal rejected the Crown's *narrow* approach to the Tribunal's resumption jurisdiction as a remedy for claims where the Crown saw the jurisdiction limited to where "the land in question was *acquired by the* Crown from Māori in breach of Treaty principles."[66] The Tribunal understood the Crown's position to mean that only claims involving land confiscations or the Crown acquiring the fee simple title over the subject land, in breach of Treaty principles, could be said to *relate to* the CFL land. The Tribunal agreed with the claimants' arguments 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. It would have excluded, in the case of CFL land in the Mangatū block, the land acquired through private purchases in the latter part of the 19th century which was subsequently acquired by the Crown.

[63] The Tribunal noted the purpose of returning Crown land such as Mangatū 2 to Māori ownership was "to restore the rights guaranteed under Article 2, and to allow

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65 At [3.84].
66 At [4.28]–[4.36]. Emphasis added.

'mana whenua over that land to be resumed'."[67] The Tribunal found that the Crown's narrow interpretation regarding the requirement that claims concern "the Crown acquisition of particular lands" was inconsistent with the well-established Treaty rights flowing from the guarantee of tino rangatiratanga.[68] These encompassed more than just land ownership and either customary title or the Crown freehold title, but also guaranteed that Māori would exercise autonomy and control over the way their land and other resources were managed and governed in the future.[69]

[64] The Tribunal noted that 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.[70] These included:[71]

(a) the 1868 deed of cession;

(b) the work of the Poverty Bay Commission; and

(c) the introduction to Tūranga of the Crown's native land laws in 1873.

[65] The Tribunal concluded that Māori communities were excluded from decision-making over their lands by these processes.[72] It said:[73]

> 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 Tribunal went on to say it did not agree that the claims relating to the CFL land had to be restricted to those claims concerning Crown acquisition of title to the Mangatū CFL lands.[74] It was also entitled to consider claims where the Crown had by

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67 At [4.31].
68 At [4.31].
69 At [4.32].
70 At [4.34].
71 At [4.34].
72 At [4.34].
73 At [4.34].
74 At [4.36].

one means or another diminished the Māori owners' tino rangatiratanga or customary interests over the land. It said:[75]

> Importantly, … we do consider there must be 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.

[67] In relation to the tikanga of customary ownership for the claimants in the Inquiry, in summary the Tribunal determined:[76]

(a) "Mana whenua" meant the claimant's customary relationships with the land.[77] These relationships could include ownership but were also connected to their history and identity as communities. The co-existence of different kin groups with shared whakapapa was common.[78]

(b) The customary ownership of Mangatū was better understood as an "overlapping community of kinship groups connected by whakapapa and reciprocal responsibilities."[79]

(c) The tikanga of collective responsibility and action remained important today. The gulf between Māori customary understandings of tino rangatiratanga in respect of their land, and the western concept of fee simple ownership remained.[80]

(d) 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."[81]

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75 At [4.36].
76 At [4.37]–[4.51].
77 At [4.44].
78 At [4.47].
79 At [4.49].
80 At [4.50].
81 At [4.50].

[68] By way of general findings in the Tūranga Inquiry, the Tribunal noted the importance in the Treaty of three important ideals, namely the rule of law, just and fair government, and the protection of Māori autonomy.[82] It recorded those observations from the Principal Report "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."[83]

[69] The Tribunal then narrated in respect of each claimant the relevant Crown actions which led to its determination that the claims were "well-founded" and *related to* the Mangatū CFL land.[84] This was based on the statutory framework, authorities and breaches of Treaty principles as they affected the land, having reviewed the tikanga of customary ownership. It did so under seven areas of Crown Treaty breaches:[85]

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

(b) the deed of cession (1868) and the Crown's retained lands;

(c) the Poverty Bay Commission, 1869–73;

(d) the Crown's native land regime and the new native title;

(e) the Native Land Court's Mangatū title determination (Ngāriki/Ngā Ariki Kaipūtahi's claim);

(f) the Tūranga trusts, 1878–1955; and

(g) the Mangatū afforestation and the Crown's 1961 acquisition.

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82 At [4.65].
83 At [4.65].
84 At [4.63].
85 At [4.63]–[4.197].

[70] The Tribunal then summarised its findings in relation to well-founded claims that *relate to* the CFL land. The Tribunal concluded that Te Aitanga a Māhaki, Ngāriki/Ngā Ariki Kaipūtahi and Te Whānau a Kai all had well-founded claims on the basis of Treaty breaches which *relate to* Mangatū CFL land resulting from each of the Crown Treaty breaches detailed above.[86]

[71] In particular, Te Aitanga a Māhaki, Ngāriki/Ngā Ariki Kaipūtahi and Te Whānau a Kai all had well-founded claims which relate to the Mangatū CFL land in respect of:[87]

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

(i) by attacking the pā at Waerenga a Hika, where many, including women and children, had taken refuge and were defending their Treaty-guaranteed tribal autonomy, the Crown acted unlawfully and fundamentally breached the principles of the Treaty;

(ii) the Crown's deportation of the Whakarau to Wharekauri, along with their families, and their detention there in harsh conditions for over two years, was unlawful, and inhibited the groups' ability to exercise customary rights and tino rangatiratanga over their land and resources, including at Mangatū;

(iii) in pursuing and harassing Te Kooti and the Whakarau the Crown acted unlawfully and in breach of the Treaty, and the execution without trial of those taken prisoner at Te Kooti's pā at Ngātapa was illegal and breached the guarantees in article 3 of the Treaty; and

(iv) the effect of the defeat at Waerenga a Hika and the Crown's treatment of the Whakarau shattered the groups' autonomy and

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86 At [4.203].
87 At [4.203].

their control over their affairs and lands, including those at Mangatū, as Pākehā settlement transformed the area and the Crown consolidated its authority in the district;

(b) the deed of cession (1868) and the Crown-retained lands:

(i) the Crown's actions, in giving Māori no choice but to agree under duress to the cession of 1.195 million acres (including the Mangatū lands) breached the primary obligation of kāwanatanga and the Treaty principle of active protection; and

(ii) the imposition of the cession, though legally flawed and therefore ineffective in extinguishing the rights of the claimant groups' people, was a major step in the assertion of the Crown's authority in Tūranga at the expense of iwi and hapū tikanga and rangatiratanga, and in breach of article 2 of the Treaty;

(c) the Poverty Bay Commission, 1869–73:

(i) 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, and 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; and

(ii) the Crown's failure to provide for legal tribal ownership when the Poverty Bay Commission "returned" the larger part of the land in 1873 breached the guarantee of tino rangatiratanga under article 2 and the Treaty principles of active protection and autonomy;

(d) the Crown's native land regime and the new native title:

(i) the Crown's native land regime and legislation expropriated the groups' community rights to make their own title decisions (including in respect of their Mangatū lands), removed community land management rights and individualised the alienation process, in breach of both the title and tino rangatiratanga guarantees in the Treaty;

(ii) the native land title and transfer system imposed by the Crown was deliberative and inimical to the collective control of land, including the Mangatū lands, in breach of the tino rangatiratanga guarantee under article 2, the Crown's obligation of active protection of Māori title, and rights under article 3, and prevented the owners of the Mangatū lands from exercising tino rangatiratanga; and

(iii) the Crown subjected Tūranga Māori landowners, including the tīpuna of the claimant groups, to unbearable systemic pressure to sell that was inconsistent with the Crown's fiduciary obligation to Māori and the Treaty principle of active protection; and

(e) the Tūranga trusts, 1878–1955:

(i) although the Tūranga trusts were set up to maintain control of Māori land in the hands of the Māori owners, the Crown's failure to provide support and legal infrastructure for Māori community management, and to prevent the erosion of Māori community land interests, against the legislative and legal barriers created by the Crown's native land regime and policies, breached the tino rangatiratanga guarantee under article 2 and the Treaty principle of active protection;

(ii) these breaches affected the Mangatū lands when those lands became swept up in the Tūranga trusts;

(iii) the Crown's inefficient and contradictory system of individual title transfer exposed the Carroll Pere Trust, which held titles in Mangatū lands, to exceptionally high legal costs and unprecedented levels of litigation, in breach of the tino rangatiratanga guarantee under article 2 and the principle of active protection;

(iv) the Crown's failure to intervene in the rising debts incurred by the Carroll Pere Trust, when it was aware of the problem and of the consequences of its own title system, represented a breach of the principle of active protection; and

(v) the Crown, when it did intervene in 1902 and in 1906, failed to ensure the groups were included in the development of policy for the administration of their land, in breach of the Treaty principle of active protection, and the Mangatū owners were prevented from exercising their tino rangatiratanga with respect to their lands in Mangatū 1 until 1947.

[72] Te Aitanga a Māhaki, the Mangatū Incorporation and Ngāriki/Ngā Ariki Kaipūtahi were found to have well-founded claims which related to Mangatū CFL land in respect of the Crown Treaty breach in relation to the Mangatū afforestation and the Crown's 1961 acquisition.[88] The Crown's actions in failing to act reasonably and with the utmost good faith during negotiations for the acquisition of Mangatū 1 land for afforestation breached the principle of partnership, and its failure to give serious consideration to available alternatives to sale or compulsory acquisition, leading to the separation of the Mangatū owners from their ancestral land, breached the guarantee of tino rangatiratanga under article 2 of the Treaty.

[73] Ngāriki/Ngā Ariki Kaipūtahi through the Native Land Court's Mangatū title determination suffered from Treaty breaches by the Crown.[89] The Crown failed to ensure that the hapū were able to reargue their interests in the Mangatū 1 block in the

88 At [4.203].
89 At [4.203].

Native Land Court when it imposed the native land regime. This removed control of Māori land from hapū and their rangatira and failed to recognise the tikanga required to give effect to tino rangatiratanga, in breach of article 2 of the Treaty. The result 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?

[74] The Tribunal next considered whether the Mangatū CFL land should be returned to Māori..[90] It noted that the circumstances of this inquiry were different to those before the Wairarapa Remedies Inquiry Tribunal. The Wairarapa Remedies Inquiry was the subject of the High Court's decision in *Mercury*, which was appealed to the Supreme Court in the *Wairarapa Moana* decision.[91] In that case the Tribunal had not satisfied itself that there were well-founded claims related to, concerning or about the land sought to be returned. In taking this approach the High Court found that the Tribunal had erred.[92]

[75] Here the Tribunal found that 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."[93] The detailed findings by the Tribunal on the relationship of the Treaty breaches to the land are summarised above. These findings establish the threshold eligibility for the resumption claims. The Tribunal then turned to the consideration of the prejudice for the purposes of finding whether or not to recommend the return of the land. It determined that the Tribunal should consider the prejudice suffered by the *customary owners* of the Mangatū CFL land, the Tribunal could then 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 as well as in "other lands within their rohe on which they also depended."[94]

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90 At [5.9].
91 *Mercury* (HC), above n 20; and *Wairarapa Moana*, above n 2.
92 At [5.7]; and *Mercury* (HC), above n 20, at [88].
93 At [5.8].
94 At [5.10].

[76] The Tribunal said it was guided by Treaty principles and the nature and extent of the prejudice suffered by the claimants as a result of Crown's Treaty breaches which related to the CFL land.[95] It noted:[96]

> 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".

[77] The Tribunal stated:[97]

> 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.

[78] The three groups to be included in the return of the Mangatū CFL land were Te Aitanga a Māhaki, Ngāriki/Ngā Ariki Kaipūtahi and Te Whānau a Kai.[98] Because each group had multiple well-founded claims that related to the CFL land, and each required significant redress, the Tribunal considered that the whole of the CFL land should be returned to Māori ownership.[99]

Who is to receive the Tribunal's s 8HB recommendation?

[79] The Tribunal went on to consider who was to receive the Tribunal's s 8HB recommendation. The Tribunal noted that it was performing an adjudicatory function under s 8HB.[100] Once it had determined the statutory prerequisites were fulfilled it was required to make a recommendation under that section, but it noted that the purpose of the scheme was fundamentally remedial.[101]

[80] Having determined that the three claimants represented the groups who had suffered the prejudice and should receive the benefit of the Tribunal's recommendation

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95 At [5.196].
96 At [5.196].
97 At [5.200].
98 At [5.198]–[5.203].
99 At [5.203].
100 At [6.18].
101 At [6.18].

for the return of the land it noted that it was next required to decide on the allocation between those groups.

[81] The Tribunal referred to the Supreme Court's comments in *Haronga v Waitangi Tribunal* to the effect that the language required the Tribunal to identify or to decide between competing claims once it had determined that the claim was well-founded and that the action to be taken to compensate to remove the prejudice "should include the return to Māori ownership" of the land or part of it.[102] In addition, the Tribunal could return part only of the land or specify the groups to whom the Mangatū forest should be returned, and the Tribunal had "ample power to impose terms and conditions and to adjust interests if that seems necessary."[103]

[82] The Tribunal also cited the Court of Appeal's comments in its 2015 decision *Haronga v Waitangi Tribunal* to the effect that a particular challenge the Tribunal faced was not to create a fresh set of grievances.[104] The Tribunal went on to note that it read those observations as supporting its view that the Tribunal's adjudicative function under s 8HB(1) must be exercised in a manner compatible with the principles of the Treaty as developed by the courts and the Tribunal.[105] It must also ensure its recommendations were consistent with the "practical application of the Treaty", as the TOWA required.[106]

[83] The restorative approach to remedies, the Tribunal said, required it to 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."[107] The restorative approach is based on future welfare, but the extent of what was lost was directly relevant to the prejudice suffered and accordingly therefore also the remedy required, especially in regard to land losses.[108]

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102 *Haronga* (SC), above n 15, at [106].
103 At [107].
104 *Haronga* (CA) (2016), above n 15, at [74].
105 *Remedies Report 2021*, above n 1, at [6.24].
106 At [6.24].
107 At [6.23].
108 At [6.23]–[6.24].

[84] The Tribunal noted it had taken into account the submissions made by the parties in relation to the allocations of percentage interests in the Mangatū CFL land, the whole of which it had determined should be returned to Māori ownership.

[85] The allocation to Te Whānau a Kai is relevant to the counterclaim by Te Whānau a Kai because it was smaller than to the other two groups. This allocation recognised that the most important customary lands to Te Whānau a Kai were not Mangatū, but nevertheless the land and resources in Mangatū would have been increasingly important to Te Whānau a Kai as the Tūranga lands were lost as a consequence of the Crown's Treaty breaches affecting those lands.[109] Those matters were the subject of detailed consideration in earlier chapters.[110]

[86] The Tribunal's restorative approach to remedies took into account the forestry experts' evidence as to the risks associated with possible changes to the current forestry regulatory regime, including changes to the Emissions Trading Scheme, and concluded that the Tribunal should not recommend the return of CFL land to claimant groups that lacked an appropriate governance entity for such a purpose. It took the view that the governance entity must not only be representative of its claimant group but would also ultimately be responsible for the sound management of the land and eventually the forestry operation.[111] The forestry evidence had detailed the numerous uncertainties around the future commercial value of the forest land and the complexities of managing it.

[87] In order to ensure those appropriate governance entities were established the Tribunal entered the iterative process which resulted in ratification of three appropriate governance entities to receive the benefit of the Tribunal's recommendations. The entities established and approved by the Tribunal were: the Māhaki Forestry Settlement Trust, the Ngā Uri o Tamanui Trust and Te Whanau a Kai.[112]

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109 At [6.158].
110 At [6.158], referring to chapters 4 and 5.
111 At [6.52].
112 At [6.142].

[88] The Tribunal then determined the allocations of the redress to each of those groups. In doing so the Tribunal took into account:[113]

(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.

[89] The Tribunal noted the damage to relationships within the community of owners by the Native Land Court processes.[114] It said that the ideal outcome of the inquiry would have been the return of the CFL land to the whole community of owners without making separate allocations to each claimant group.[115] This could have been reached by the claimants reaching agreement during mediation on the manner in which the land would be returned to their collective ownership. However, that did not prove possible. Ultimately, all groups requested that the Tribunal make separate allocations to them.[116]

[90] The Tribunal said that as the parties had clarified their positions through discussions between groups, they had reached an outcome that each considered would best provide for the exercise by their group of their tino rangatiratanga. It would therefore be inappropriate in the circumstances for the Tribunal to impose an outcome that did not differentiate between the claimant groups in those circumstances, when the groups had "so strongly expressed their desire for separate allocations of land and compensation."[117]

[91] After a detailed consideration of the factors that went to the allocation the Tribunal allocated a 68 per cent interest in the Mangatū CFL land to the Māhaki Forest

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113 At [6.143].
114 At [6.151].
115 At [6.152].
116 At [6.152].
117 At [6.153].

Settlement Trust, an 18 per cent interest to the Ngā Uri o Tamanui Trust and a 14 per cent interest to the Te Whānau a Kai Trust.[118]

[92] The Tribunal said it did not wish to delay the adjudication any further and therefore the CFL land should be returned undivided.[119] In order to divide the land between the different groups, the Tribunal needed more information, which would take further time. In addition, the forestry experts' evidence was that addressing all the issues involved in a division on the ground, would require significant work and time. The Tribunal noted that it was inevitable that the groups would need to deal with each other even if they were given separate blocks of land. Sooner or later they would have to consider how to collectively manage forestry operations, as the land was incrementally returned by the licensee. It noted the claimant groups had been able to work together from time to time during the Inquiry.

[93] For those reasons the Tribunal determined it should return the CFL land undivided to give the claimants the best opportunity to benefit from the Tribunal's recommendations in a timely manner. The governance entities would 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 would have ample opportunity themselves to pursue the partition of the land in separate parcels after receiving the land, meeting the immediate demands of managing the land and negotiating with the Crown and licensee. Accordingly, the Tribunal decided that the land should be returned undivided, with each claimant group's interests in the land corresponding to their respective percentage interests as it had determined.[120] It proposed to include terms and conditions it considered appropriate in order to protect the claimants' interests as tenants in common.[121]

[94] The Tribunal noted "the tino rangatiratanga of the claimant groups ought to be acknowledged and reflected in how the land is returned to them".[122] To that end it concluded that the most appropriate ownership and governance arrangement for the

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118 At [6.169].
119 At [6.195].
120 At [6.196].
121 At [6.196].
122 At [6.217].

return of the CFL land to Māori ownership was using a collective trust. The Tribunal had rejected the Crown's submissions that the land be returned directly to the governance entities as co-owners as tenants in common. It determined that it would return the land undivided to a collective entity in the form of either a limited liability partnership or a trust. The Tribunal settled on a trust structure as the most appropriate and efficient structure, noting that the Trusts Act 2019 and the common law of equity provided "a substantial body of law to govern the trust and a principled framework for the resolution of any disputes".[123]

[95] The trustees of the Mangatū Forest Collective Trust would be selected by each of the governance entities. The trustees would be responsible for the governance and management of the CFL land on behalf of all the beneficiaries, and were to be appointed in accordance with a process which the Tribunal considered reflected the tikanga required.[124] If the trustees could not reach agreement, the appointment of the independent chairperson was to be made by the Te Hunga Roia Maōri o Aotearoa Law Society, in consultation with the New Zealand Law Society, within one month of the first meeting of the trustees.[125]

Compensation

[96] The Tribunal then dealt with the issue of how much statutory compensation was to accompany the return of the whole of the Mangatū CFL land. It noted that s 36 of the Crown Forest Assets Act provided for the return of CFL land to Māori ownership and the payment of compensation. I have set out the provisions of s 36 and sch 1 of that Act above.

[97] The Tribunal adopted the claimant groups' submissions that the compensation should be based on the "net proceeds" approach under cl 3(c) and that 100 per cent compensation should be paid. The Crown for its part had submitted that the "real value" grace period should be extended beyond the initial four years.

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123 At [6.214].
124 At [6.216]–[6.219].
125 At [6.225].

[98] The Tribunal then considered the matters it should take into account, including the socio-economic factors which contributed to the prejudice to the claimants resulting from the loss of the CFL land. It heard from a number of experts called by the parties, including economists. It also commissioned its own expert evidence on this aspect. I deal with this in more detail under the third ground of review.

Terms and conditions

[99] The Tribunal noted it was entitled to make its recommendation under s 6(3) on "such terms and conditions as the Tribunal considers appropriate".[126] The Tribunal had recommended that the land be transferred to the trustees of the Mangatū Forest Collective Trust as the identified recipient of the land, which is to subsequently distribute the licensed land and statutory compensation to three entities representing the claimant groups. It also set out a number of terms and conditions regarding the structure and operation of the trust and incidental provisions relating to the resumption, which I deal with below.

[100] I have gone into some detail on the findings of the Tribunal, as that is necessary to put the claims into context. The *Remedies Report 2021* predated the Supreme Court's decision in *Wairarapa Moana*. The Court in that decision also went to some detail in relation to the general approach to inquiries and the Tribunal inquiry and recommendations under consideration in that decision. I now turn to consider that decision.

The Supreme Court decision in *Wairarapa Moana*

[101] The Supreme Court's decision in *Wairarapa Moana* dealt with the exercise of the Waitangi Tribunal's "resumption" jurisdiction relating to the Treaty breaches set out in the 2010 Waitangi Tribunal report into the historical claims of Ngāti Kahungunu and Rangatāne.[127] Rangatāne had since settled.

[102] The Kahungunu ki Wairarapa Tāmaki Nui-ā-Rua Settlement Trust claimed a mandate to represent all of Ngāti Kahungunu ki Wairarapa. It had engaged in

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126 Treaty of Waitangi Act, s 8HB(1).
127 *Wairarapa Moana*, above n 2.

negotiations with the Crown and reached a settlement. At the same time, two entities related to Ngāti Kahungunu ki Wairarapa applied to the Tribunal for resumption of certain lands in which they claimed particular interest. Wairarapa Moana ki Pouākani Inc had sought resumption of a block of Waikato land outside the area of mana whenua of Ngāti Kahungunu ki Wairarapa, but in the rohe of Raukawa and Ngāti Tūwharetoa.

[103] The decision under appeal was the High Court decision referred to as *Mercury*.[128] The High Court had found that the Tribunal was in error in making its recommendation that the Waikato land be resumed by Ngāti Kahungunu because such a return of land would breach tikanga due to the claimant not having mana whenua.

[104] The Supreme Court allowed the appeal, indicating that the tikanga of mana whenua needed to be evaluated in the wider context of tikanga at play in the particular circumstances.[129] It said it was dangerous to apply tikanga principles, even important ones, as if they were rules that excluded regard to context.[130] The Tribunal had the necessary expertise and understanding to consider the relevant tikanga principles in play.[131]

[105] The granting of resumption to non-mana whenua would not always breach tikanga and the Treaty.[132] The Supreme Court emphasised that it was for the "Tribunal alone" to decide the outcome of the iterative process in which it was about to engage at the time that the judicial review application had been filed.[133] The iterative process was to assist it in reaching a conclusion as to who were the suitable recipients for resumption of the forest and of the Waikato land.[134]

[106] In addition, the Supreme Court looked at the factors relevant (for the purposes of the Crown's interest liability) when determining whether delay following the statutory four-year "real value" grace period was "entirely attributable to the Crown".

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128 *Mercury* (HC), above n 20.
129 *Wairarapa Moana*, above n 2, at [74].
130 At [74].
131 At [84].
132 At [85].
133 At [91].
134 At [84]–[91].

Tikanga and the "relevant prejudice issue"

[107] By way of background and context the Supreme Court reviewed the Tribunal's approach to historical claims.[135] It noted:[136]

(a) The Tribunal's jurisdiction in relation to historical Treaty claims is unique in New Zealand's legal and constitutional framework.[137] Its yardstick is the "principles" of the Treaty.[138] It must speak relevantly in today's world.[139]

(b) The Tribunal is a commission of inquiry with power to undertake or commission its own research and to adopt "such aspects of te kawa o te marae" in its procedures as it thinks appropriate.[140]

(c) Its composition, being judges of the Māori Land Court and up to 20 other members, is intended to be both knowledgeable in the matters that come before it and reflective of the "partnership between the 2 parties to the Treaty."[141]

(d) Historical claims are complex — they cover whole districts and a century-and-a-half of interaction between Māori and the Crown.[142] Further complexity is the requirement to engage with "contemporary claimant communities, often at different stages of readiness and recovery. These realities call for deep expertise and a willingness to be flexible."[143]

(e) The Tribunal takes a district-by-district approach. It consolidates multiple claims of iwi, hapū, whānau and individuals in a particular district "into a single historical inquiry and receives evidence and

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135 At [14]–[24].
136 At [16].
137 At [16].
138 At [16].
139 At [16].
140 At [16].
141 At [16].
142 At [17].
143 At [17].

submissions from claimants and the Crown in a staged process of hearings over the course of a year or (usually) more."[144]

(f) The remedial powers were generally recommendatory based on a process of seeking reconciliation through evidential inquiry supported by expert membership and inquisitorial processes. Among the exceptions to the recommendatory jurisdiction are the Crown forest provisions, which are adjudicatory.[145]

(g) Tikanga will be a very important consideration of the exercise of the Tribunal's discretion. Tikanga must be protected generally, and particularly mana whenua, "when it must interact with State law, especially that related to Treaty settlements."[146]

(h) In tikanga context is everything and it is dangerous to apply tikanga principles that excluded regard to context.[147] A rigid approach to the priority of mana whenua cannot be justified, because:

(i) Firstly, mana whenua refers to traditional authority (mana) over a landscape (whenua). Customary ownership and mana whenua are not necessarily synonymous. Mana whenua may be held by one community and resource rights within the same area held by another. Customary rights and their restoration as well as other rights including equal rights are protected under the Treaty.[148]

(ii) Secondly, even within its own tikanga framework mana whenua is neither immutable nor incapable of adaption to new circumstances. Tikanga is a principles-based system of law that is "highly sensitive to context and sceptical of unbending

144 At [18].
145 At [20].
146 At [73].
147 At [74].
148 At [75].

rules."[149] As the Tribunal had concluded, mana whenua need not be the controlling tikanga because other tikanga principles were also in play, including hara, utu, ea and mana.[150] Taken together they "reflect the importance of acknowledging wrongdoing and restoring balance in a way that affirms mana."[151]

(iii) Thirdly, tikanga will adapt to new circumstances. It "consistently framed Māori responses to … wholly novel situations."[152] The Court gave examples of such flexibility in modern times, including the way that urban Māori groupings were recognised in the claims to resources.[153] In the litigation and negotiations involving such issues tikanga was "an adaptable framework for resolution."[154] The Court suggested the controversy over mana whenua in relation to the Waikato land the subject of that case "might be viewed as a continuation of this ongoing process of adaptation."[155]

(iv) Fourthly, the transfer of land from mana whenua to non-mana whenua is well known to tikanga.[156]

(v) Also relevant is that a resumption application was the only procedure by which Ngāti Kahungunu (however configured) could seek to obtain redress that does not rely on Crown consent and ratifying legislation.[157]

(i) The Tribunal recognised that resolution often required a good deal of "kōrero between the protagonists".[158]

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149 At [76].
150 At [77].
151 At [77].
152 At [78].
153 At [79].
154 At [79].
155 At [80].
156 At [81].
157 At [81]–[82].
158 At [83].

(j) The Tribunal is "uniquely placed" to undertake the assessment as to what tikanga principles apply.[159] There is no bright line, as tikanga "inhabits the grey area between cultural and legal worlds, requiring understanding and the ability to comprehend nuance."[160] The Tribunal has the necessary expertise to undertake that exercise. The courts must not pre-empt the Tribunal's iterative process and its context will evolve.[161]

(k) The Tribunal was entitled to make recommendations for return of the land on "such terms and conditions as the Tribunal considers appropriate". It has the flexibility to pursue tika process, regulate its procedure "as it sees fit" and "have regard to and adopt such aspects of 'te kawa o te marae' as it thinks appropriate to the case."[162]

(l) The Tribunal's options were not necessarily binary. It was engaged in an iterative process. It was for the Tribunal alone to determine the outcome. Tikanga speaks to process as well as substance, and it is through that process that the apparently irreconcilable may be reconciled.[163]

[108] The Supreme Court then went on to provide guidance on the interpretation of "the relevant prejudice issue".[164] While not an issue that was directly under appeal, the majority said that it was not clear that the High Court in *Mercury* had treated relevant prejudice and mana whenua as strictly separate issues. They were to some extent entwined in the reasons. The majority made it clear that although they were not entirely unrelated, the relevant prejudice and mana whenua are separate issues.[165] In addition, the majority considered the "narrow view" propounded by William Young J in a minority judgment was incorrect and it was necessary to provide guidance for future cases. That minority view adopted a "transaction-based" approach designed

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159 At [84].
160 At [84].
161 At [84]–[85].
162 At [86]–[87].
163 At [95].
164 At [96].
165 At [96].

only to remedy the Treaty-breaching acquisition of specific land. In the majority's opinion, however, this approach "precluded consideration of any wider context."[166]

[109] I outline the Supreme Court's detailed guidance as relevant to this case in more detail in relation to the claims below.

Earlier Supreme Court guidance on the Crown forest land provisions

[110] It is also useful to consider the views of the Supreme Court when it directed the Tribunal to undertake the Mangatū Remedies Inquiry following a decision of the Tribunal not to accept an application for an urgent resumption of the Inquiry by applicants on behalf of the Mangatū Incorporation.

[111] In *Haronga v Waitangi Tribunal* (SC) the applicants sought judicial review of a refusal by the Tribunal to convene an urgent land resumption hearing in relation to the Mangatū Crown Forest Land, and in particular Mangatū 1, which comprised 8,627 acres and had been acquired from Mangatū Incorporation in 1961 for erosion control.[167]

[112] The Waitangi Tribunal in its Principal Report had found the acquisition breached the Treaty.[168] The Principal Report followed the district-wide procedure and presented the findings of the wide-ranging inquiry into breaches in the region.[169] In that report the Tribunal made some general remarks to assist the Crown and the Māori claimants to negotiate a district-wide outcome. An agreement in principle was reached in August 2008. Mangatū Incorporation had been involved in the negotiations but did not agree to the outcome insofar as it was concerned. It sought an urgent remedies hearing before the Waitangi Tribunal in September 2009.[170] This was dismissed by the Tribunal. The factors influencing the Tribunal in rejecting the application for an urgent remedies hearing included that there had been recommendations as to settlement which did not include the recommendation of return of the relevant land to

166 At [101].
167 *Haronga* (SC), above n 15.
168 Principal Report, above n 7, at 733.
169 *Haronga* (SC), above n 15, at [11].
170 At [23].

Mangatū Incorporation so it was unlikely the Tribunal would now change its stance.[171] Secondly, Crown negotiations had not broken down.[172] In addition, the Mangatū Incorporation was entitled to shares for its beneficiaries through the mandated negotiator representing groups including Mangatū Incorporation, Te Whakarau.[173]

[113] The Tribunal's decision to refuse the application for the urgent remedies hearing was upheld in the High Court and Court of Appeal.[174] However, the Supreme Court allowed the appeal.[175] It took the view that a claim for restoration of the very land the loss of which had caused prejudice suffered in breach of the principles of the Treaty when restoration of the land (should the Tribunal recommend it) would remove that prejudice was a factor that meant that if the opportunity to obtain restoration was lost the complainant would suffer "significant and irrevocable prejudice" through the proposed settlement.[176]

[114] The Supreme Court noted the 1961 breach of the Treaty by the Crown and the acquisition of the land had qualified Mangatū Incorporation for redress by return of the land.[177] The overlapping claims which had been identified by the Tribunal, for instance as they related to other breaches of the Treaty affecting groups of Māori other than the Mangatū Incorporation did not support the Tribunal deferring the remedies hearing and it was the Tribunal's obligation to determine what were well-founded claims, then to make determinations as between the competing claims.[178]

[115] The Supreme Court said that could only be completed by the inquiry into remedies being undertaken.[179] It considered an urgent hearing would not give "priority" to Mangatū Incorporation as other claims including those relating to the 1881 Native Land Court Determination of interests could be heard in the resumption

171 At [32].
172 At [33].
173 At [34].
174 *Haronga* (HC) (2009), above n 15; and *Haronga* (CA) (2010), above n 15.
175 *Haronga* (SC), above n 15.
176 At [101].
177 At [104].
178 At [106].
179 At [106].

claims. That may lead to the return of whole or part of the 1961 lands, but the Supreme Court reiterated it was for the Tribunal to make that determination.[180]

[116] The Supreme Court noted that the jurisdiction being exercised by the Tribunal was compulsory, in the nature of an adjudicative jurisdiction.[181] Also important was the fact that the jurisdiction was enacted as part of a bargain in which the Crown gained something of value in 1989.[182] The Supreme Court noted:[183]

> … It was itself a right of real value. The decision not to grant urgency was flawed by the failure to weigh this powerful factor. Properly taken into account, it is close to being determinative in itself.

First ground of review — error of law — Tribunal misconstrued and exceeded its jurisdiction and powers under s 8HB of the TOWA

[117] The Crown says that in exercising its "adjudicative" function in relation to CFL land, the Tribunal misconstrued its jurisdiction and exceeded its powers under s 8HB of the TOWA. In general terms it says that s 8HB was intended for a particular and protective purpose of ensuring licensed lands are available to remedy well-founded claims relating to those lands and where the return of the lands would be a proportionate remedy for such claims.

[118] The Crown says that the Tribunal itself confirmed that only some of the claims on which it made findings and determinations in favour of groups of Māori claimants and designated the proportional beneficial interests were not claims which "directly concerned the claimants' title, tenure, and alienation of land in the Mangatū blocks".

[119] The Crown pleaded that claims about the following events did not "relate to" the licensed land for the purposes of s 8HB:

(a) the Crown attack on the pā at Waerenga a Hika in 1865;

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180 At [107].
181 At [105].
182 That is, the 1989 amendments arising from the 1989 Forests Agreement.
183 At [105].

(b) the Crown's imprisonment of Māori prisoners (the "Whakarau") on Wharekauri (Rekohu/Chatham Islands) and their detention for over two years without trial;

(c) the Crown's subsequent pursuit of Te Kooti and the Whakarau after their escape from Wharekauri, including the events at and after the siege of Ngātapa;

(d) the Crown's consolidation of its authority throughout the Tūranganui-a-Kiwa inquiry district in the period after Waerenga a Hika;

(e) the Crown imposition of the 1868 deed of cession for lands across the inquiry district;

(f) the operation of the Poverty Bay Commission to address land ownership recording on certain lands in the inquiry district;

(g) the Crown's failure in 1873 to provide for tribal ownership of the remaining district lands not adjudicated by the Poverty Bay Commission at the conclusion of the Commission's work, including the CFL land;

(h) the introduction and operation of the native land legislation throughout the district without consent from iwi, which was said to have removed control of Māori land throughout the district from hapū and their rangatira, and imposed a system of adjudication of Māori ownership of land through titles which failed to recognise tikanga or give effect to tino rangatiratanga;

(i) the operation of the native land legislation, including by it removing community land management and collective control and instead empowering alienation by individuals of their interests throughout the district, including over part of the CFL land;

(j) generalised access to finance issues affecting Māori land in the district, including the CFL land, that prevented owners from exercising tino rangatiratanga when land was leased;

(k) systemic pressure on Māori owners of land in the district to sell land, including part of the CFL land;

(l) Crown failure to support sufficiently various Tūranga trusts operating on a number of Māori land blocks throughout and beyond the district between 1878 and 1955, including part of the CFL land;

(m) the Crown's failure to act reasonably and with the utmost good faith during negotiations for the acquisition of approximately 8,500 acres, now part of the CFL land, in Mangatū 1 in 1961 for afforestation purposes as well as the Crown's failure to give serious consideration to available alternatives to sale or compulsory acquisition; and

(n) the Crown's failure to recognise flaws in the 1881 Native Land Court decision determining the Māori who should receive title to Mangatū 1, 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 hapū to do so in 1917.

[120] The Tribunal's function was to focus on the well-founded claims which concern "the land sought to be returned" in "situations where the lands were acquired by the Crown from Māori in breach of Treaty principles".[184]

[121] The Crown says the Tribunal's function in considering resumption, as was stated in *Mercury*:[185]

> … was not to conduct an inquiry into the overall impact of all Treaty breaches on … [the relevant iwi] … and then order the return of lands having a high enough value to potentially assist in remedying the undoubtedly profound

184 *Mercury* (HC), above n 20, at [68].
185 At [92].

> economic, social and cultural damage cause. The jurisdiction in question was intended to be more specific.

[122] The Crown says the Tribunal here has instead looked to a broader range of claims and prejudice. In determining that a claim "relates to" the land in terms of s 8HB, the Tribunal did not confine its inquiry to considering a subset of well-founded claims before it that concerned the land sought to be returned and the manner in which the lands subject to the Crown forestry licence were acquired by the Crown from Māori in breach of Treaty principles. Instead, the Crown says, the Tribunal made recommendations to address socio-economic prejudice from a wide range of events beyond the CFL land. That had the effect of aggregating the prejudice from a wide range of Treaty breaches, leading to the making of recommendations designed to rebuild a tribal economic base of land and pūtea to address that prejudice from the licensed land and associated statutory compensation available.

[123] Mr Linkhorn pointed out that the interpretation of "relates to licensed land" as used in s 8HB of the TOWA was not an issue pursued in the appeal to the Supreme Court. He said the comments of that Court could at best be a "checklist" on the Tribunal's findings. Mr Linkhorn submitted that the majority's approach to "relevant prejudice" did not detract from the High Court's findings in *Mercury*. The correct approach was to interpret the statutory provisions in light of the context. To that end, reference might be had to the 1989 Forests Agreement and surrounding negotiations insofar as they were material. The Tribunal's findings must, however, be based on the interpretation of the legislation. The obiter comments of the Supreme Court on the point cannot derogate from that.

[124] Mr Linkhorn submitted that the Supreme Court majority's comments needed to be treated with caution. The heading of the section in the Supreme Court's majority decision dealing with the interpretation of "relates to" is "relevant prejudice". He said this was a misnomer. The correct issue under s 8HB was whether a "claim submitted to the Tribunal under section 6 relates to licensed land".

[125] The Crown emphasised the requirement for a "nexus" between the claim and the remedy of return. To qualify for resumption, the "well-founded claim" must "concern the land sought to be returned, and … contemplate situations where the lands

were acquired by the Crown from Māori in breach of Treaty principles."[186] Therefore the focus was on the claim and the land acquired in breach of Treaty principles. The resumption land did not form a "land bank". Mr Linkhorn submitted this was not "land in lieu" to be resumed for Treaty breaches at large.[187] Therefore, as the High Court said in *Mercury*, the Tribunal "cannot order that land that has never been owned by Māori should be transferred to Maori under the resumption powers", even if the land was seen to provide "the best remedy for the breach."[188]

[126] Mr Linkhorn noted that regardless of the approach adopted by the Tribunal, which was *thematic* rather than *transaction-based*, the statutory requirements remain the same and it was the obligation of the Tribunal to interpret and apply those statutory provisions. The Supreme Court did not have the benefit of full argument on the statutory context or history of the legislation and the 1989 Forests Agreement negotiations as the point was not on appeal. Similarly, Mr Linkhorn pointed out that since this was a "leapfrog" appeal, the Supreme Court did not have the views of the Court of Appeal. Mr Linkhorn said the "relates to" threshold was correctly identified by the Supreme Court as follows:[189]

> [97] As presaged, the High Court accepted that, in the particular circumstances of this claim, if the land *were otherwise eligible for resumption,* the Tribunal could take into account not just the 1949 taking, but also the history of the acquisition of the lakes and the land exchange that followed. These matters were sufficiently "related to" the loss of the Pouākani land and its loss.

[127] In response to my query as to what claims might engage the phrase "relates to" so as to make the land "eligible" for resumption, Mr Linkhorn pointed out that would be a matter for the Tribunal if sent back for further consideration. Subject to that, however, he pointed out by way of example that the claim by Mr Ruru originally formulated as Wai 274 identified the 1961 acquisition of the Mangatū 2 block as being an eligible claim. The claims became consolidated as the Tribunal process went on. Mr Linkhorn noted that the claims' consolidation led to the formulation of issues by the Tribunal and ultimately the findings were focused on claimants. He submitted this

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186 At [68].
187 At [82] and [88].
188 At [82].
189 *Wairarapa Moana*, above n 2, at [97]. Emphasis added.

was an appropriate approach for the Tribunal to take but it could not obfuscate the obligation of the Tribunal to focus on the requirement to find the nexus between the claim and the resumption land and satisfy itself that the land was "otherwise eligible for resumption". It did not so and its tendency to aggregate claims in the way it did had led it into this error.

[128] The Crown seeks relief here by way of a declaration that the Tribunal's determination is unlawful by reason of error of law and a direction to the Tribunal to reconsider its determination as to which claims relate to the licensed land.

[129] The Māhaki/Mangatū respondents submitted that in interpreting the legislation there was a need for an ao Māori perspective and a broad and generous construction referring to the Supreme Court decision in *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board.*[190] They observed that the Tribunal was a specialist Tribunal with special expertise and its findings should be viewed with that in mind.

[130] Ms Feint KC accepted that the Supreme Court comments in *Wairarapa Moana* were obiter. However, they provided carefully crafted guidance as to the approach to be taken. She noted it was relevant that Williams J, who wrote the majority decision, was a former chair of the Tribunal familiar with the Tūranga claims, as well as being a former Chief Māori Land Court Judge and regarded as the foremost expert on these issues. Therefore, while the comments are not binding they must be accorded due respect. Ms Feint noted the Supreme Court had made it clear that the minority approach set out by William Young J was incorrect.

[131] The NUOT and Māhaki/Mangatū respondents submitted that the Tribunal had correctly applied the "relates to" phrase as well as the appropriate approach to interpretation of the statutory provisions to reflect the remedial purpose of the 1989 Forests Agreement. They said that the purpose of the resumption powers was to give effect to the guarantee in article 2 of the Treaty of tino rangatiratanga over tribal rohe. In addition, the Tribunal decided the CFL lands "should be" returned to remove the prejudice created by the claims, and the manner in which it did so for the collective

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190 *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2021] NZSC 127, [2021] 1 NZLR 801.

benefit of groupings of Māori reflected tikanga and the principles of whanaungatanga and manaakitanga.[191]

[132] Mr Bennion noted that the Supreme Court's comments on considerations to be taken into account by the Tribunal to establish the "relates to" nexus provided "strong obiter". He also pointed out that the guidance was in direct response to the transactional approach suggested by William Young J. Mr Bennion noted a number of the other initiating claims in addition to those pointed to as examples by the Crown had referred to the 1961 acquisition and these had been consolidated with other claims as part of the process.

[133] In essence, those respondents say that facts surrounding the Mangatū claims do not fit neatly into western concepts of land ownership alienation or even simple views of what constitutes "acquisition". They say many of the breaches of the Treaty that relate to what is now the Mangatū CFL lands predate or are concurrent with the Crown's forced cession of the entire district followed by the imposition of native land title system which placed straight lines across the cultural landscape and introduced alien concept of land "blocks". Rights in Māori custom rarely followed those lines on the ground but followed and still follow whakapapa.[192]

Analysis

[134] In my view, if there is any inconsistency between the approach of the High Court in *Mercury* to the interpretation of "relates to" as a threshold for the land being "otherwise eligible for resumption" and that suggested as the appropriate approach by the Supreme Court in *Wairarapa Moana,* the difference would not signify in most inquiries involving resumption claims that are heard by the Tribunal. It does not in this case. The Tribunal's inquiry in every case simply to uncover the facts will involve over 150 years of colonial history and interaction between the Crown and Māori, involving complex relationships between all parties and investigation into strategic interventions by the Crown which would not be apparent without a detailed knowledge and understanding of all the events in question.

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191 *Remedies Report 2021*, above n 1, at [4.50].
192 Principal Report, above n 7, at 5 and 267–268.

[135] The High Court in *Mercury* considered the phrase "relates to" as it applies in the resumption jurisdiction as it applied the facts of the Wairarapa inquiry which were very different to those in the Mangatū inquiry. In particular, the Tribunal in the Wairarapa inquiry had not established whether or how the claims could be said to "relate to" the land.

[136] From *Mercury* the following points of principle emerge which are unaffected by the decision of the Supreme Court in *Wairarapa Moana*:[193]

(a) There are various verbal formulations for "relates to", including "in respect of", "concerning", "over" or even just "about". The phrases have an elastic meaning which depends on the circumstances of their use in light of the other words of the sections and the purpose of the provisions as a whole.[194]

(b) The jurisdiction exists in relation to lands that are no longer in Māori ownership because of a breach of the Treaty and should be returned to Māori to allow the guaranteed rights of rangatiratanga or mana whenua over the land to be resumed.[195] The jurisdiction of the Tribunal is remedial.[196]

(c) The fact that land was formerly in Māori ownership cannot just be a matter of "happenstance".[197] The land must "rightly" belong to Māori.[198]

(d) The land must previously have been in Māori ownership in order that it may be "returned".[199] As Cooke J said, "[t]he Tribunal cannot order that land that has never been owned by Māori should be transferred to Māori under the resumption powers."[200]

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193 *Mercury* (HC), above n 20.
194 At [72].
195 At [80].
196 At [87].
197 At [82] and [85].
198 At [85].
199 At [89].
200 At [82].

(e) Once a breach relating to the land is established other breaches may be taken into account in deciding whether the land should be returned.[201]

(f) The provisions do not establish a "land in lieu" jurisdiction.[202] The lands subject to resumption are not a "'land bank' – a source of land to be used to remedy the Crown's Treaty breaches more generally", and the breaches must "concern" the relevant land.[203]

[137] However the Supreme Court allowed the appeal against the High Court's determination that a claimant who had not held mana whenua over the land in question could not be awarded resumption land. To reach that conclusion the Supreme Court was required to and did reject the proposition that the resumption jurisdiction applied only to Treaty breaches "associated with the loss of the mana whenua over the land in question".[204] The Supreme Court considered that mana whenua was unquestionably important but it must be applied in context.[205] One context was the tikanga framework itself, and an assessment of the effect of the tikanga principles was a matter in each case for consideration by the Tribunal.[206] The Supreme Court further noted that tikanga in relation to whenua is complex, "as the Tribunal [was] well aware."[207] The Supreme Court noted the application of tikanga:[208]

> … inhabits the grey area between cultural and legal worlds, requiring understanding and the ability to comprehend nuance. The Tribunal is uniquely placed to undertake that evaluation because its members include mātanga and because it is required to deal with these matters regularly. As the High Court Judge acknowledged, it has the necessary expertise.

[138] Each inquiry is intensely fact-specific. As the Supreme Court noted, an appreciation of the context in which the complex questions of fact and law arise is required.[209]

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201 At [87].
202 At [82].
203 At [88]. Cooke J observed that resumption could not provide a remedy for Treaty breaches that did not relate to the land.
204 At [88].
205 *Wairarapa Moana*, above n 2, at [95].
206 At [95].
207 At [94]
208 At [84].
209 At [12].

[139] The case before the Supreme Court in *Wairarapa Moana* was "almost unprecedented".[210] It noted "a tikanga-consistent response would require consideration of multiple factors."[211] A determination of the factual question of what claims (and therefore what prejudice) relates to what land is not straightforward.

[140] In this case, on the Crown's approach, only a Treaty-breaching direct acquisition by the Crown of the freehold itself would qualify as a Treaty breach claim which "relates to" the licensed land. This is the paradigm example referred to by the Supreme Court as the "narrow" approach taken by William Young J in his minority judgment.[212] The Tribunal looked at the Treaty breaches, not limited to but including the Treaty-breaching acquisition of the freehold of Mangatū 2 in 1961, and then went on to determine if and where they could be said to relate to the land in question. This was the function required of the Tribunal by s 8HB.

[141] The only other matter on which the Supreme Court's interpretation of "relates to" arguably may be at odds with the comments of the High Court in *Mercury* is the High Court's view that the relevant Treaty breaches must be breaches of article 2 of the Treaty, which guarantees to Māori "te tino rangatiratanga o o ratou wenua". This is referred to as the guarantee of tino rangatiratanga in relation to land.

[142] The High Court's views in *Mercury* in this regard provided the basis for its finding that the restoration of mana whenua was a key purpose of the resumption provisions.[213] As Ngāti Kahungunu had never had mana whenua over the Pouākani lands the subject of the resumption claim, the High Court found that the Tribunal had erred in its preliminary indication they should be returned to Ngāti Kahungunu. The Supreme Court allowed the appeal in relation to that issue, therefore its finding on the mana whenua determination must also therefore dispose of any argument that only an inconsistency with article 2 is relevant to establishing a resumption claim.

[143] The Tribunal is required to inquire into claims where the claimant is "likely to be prejudicially affected" by Crown actions which are "inconsistent with the principles

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210 At [82].
211 At [83].
212 At [101].
213 *Mercury* (HC), above n 20, at [89].

of the Treaty" and determine whether those claims are "well-founded". To establish a resumption claim, those well-founded claims must "relate to" the licensed land. It is likely that most inconsistencies with the Treaty which are related to land will involve breaches of article 2 (that is, of tino rangatiratanga in relation to land), but there is no reason to restrict the qualifying inconsistency with the Treaty solely to breaches of article 2. The inconsistency with the Treaty and whether such inconsistency "relates to" the land is a matter for assessment by the Tribunal.

[144] The Supreme Court made it clear that if the matter should be taken up in subsequent proceedings by other parties, the view it had expressed on the interpretation of "relates to" was not final.[214] It also expressed the view that the Tribunal in the Wairarapa case before it would have no difficulty in complying with the High Court direction, which was binding.[215] However, beyond that the Supreme Court noted that it was clearing up potential misunderstandings as to how Waitangi Tribunal inquiries into historical claims are conducted in terms of the relevant prejudice issue, given the "relevance generally to the resumption regime."[216] As the Crown acknowledged, the Supreme Court's comments cannot be disregarded. Whether they are described as a "cross-check" or as guidance, those comments are relevant to considering whether the Tribunal in this case, given the specific facts and tikanga at play as well as the process it employed, made errors in its approach and determinations on the resumption claims in this inquiry.

[145] I also do not consider an analysis of the initial claims filed with a view to ascertaining which "claims" could be said to relate to the land is helpful. The claims changed and were consolidated over time. Issues and themes were extracted from the claims and moved on by the Tribunal in an iterative manner. This involved time taken in party-to-party negotiations with the assistance of the Tribunal. This claims management process, as the Tribunal said, was a "practical application of the Treaty" consistent with the functions of the Tribunal as set out in the preamble to the TOWA. It is difficult to see how else the Tribunal could have undertaken the inquiry. No party suggested that a transaction-by-transaction inquiry would be feasible. Such an

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214 *Wairarapa Moana*, above n 2, at [106].
215 At [106].
216 At [106].

approach if it were possible at all would not allow the events to be assessed in context and would likely be much more time-consuming and costly than the process adopted.

[146] The Tribunal did make determinations as to whether the claims were "well-founded". As it said, however, the claims were interconnected and the claimants were associated by various relationships to different claims led by different groupings and were difficult to isolate due to the compounding effect of multiple Treaty breaches.[217]

[147] The Crown did identify the 1961 acquisition of Mangatū 2 as one claim that could be said to "relate to" the land. This was a claim based on a direct transaction. A claim of that nature was put forward by William Young J as a qualifying claim but the majority rejected the notion that qualifying claims be limited to that paradigm claim. It said that was too narrow a construction of the "relates to" requirement.[218] The focus on direct transactions was not the approach endorsed by the High Court in *Mercury*. Rather, it adopted an approach requiring the claim of inconsistency with the Treaty to relate to the land to render it eligible for resumption.

[148] The Crown also argued that the claims were based on events that in many instances were not proximate to the land. The example given in submissions was the Crown attack on the pā at Waerenga a Hika in 1865 and the Crown's imprisonment of the Whakarau on Wharekauri and their detention for over two years without trial. These breaches which were relied on the Tribunal in making its findings despite these events taking place far from the Mangatū CFL land.

[149] The places at which the events giving rise to the Treaty breaches relating to the land often did not occur on the land itself. The point the Tribunal was making in relation to those incidents and how they related to the land was that the effect of the defeat at Waerenga a Hika and the Crown's treatment of the Whakarau shattered the groups' autonomy and their control over their affairs and lands, including those at Mangatū, allowing Pākehā settlement to transform the area and the consolidation of Crown authority in the district.

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217 Those determinations are summarised at at [8.13] of the *Remedies Report 2021*, above n 1.
218 *Wairarapa Moana*, above n 2, at [101]–[106].

[150] The Supreme Court said that the Tribunal's power to make recommendations to "compensate for or remove" Treaty-breaching prejudice must be understood "in light of" the nature of historical Treaty claims.[219] This meant that the factual question of what claims (and therefore the prejudice) "relate to what land" is not straightforward because:[220]

(a) Historical Treaty claims were advanced in the Tribunal on a "thematic, rohe-wide basis" and "included land and resource claims as well as claims about the loss of rangatiratanga or tribal autonomy."[221] Themes included matters such as "confiscation, early Crown purchase policies, Native Land Court processes, loss of promised reserves and so on."[222]

(b) Native land legislation and colonial land acquisition policy in the latter half of the 19th and early 20th centuries were systemically inconsistent with Treaty principles. An in-depth analysis of the context is required to assess the relevant prejudice caused. For example, blocks alienated by consent on fair terms with ample reserves excluded from the sale might involve breaches only in terms of the impact of that alienation on overall tribal land retention over time. Specific blocks acquired piecemeal through the purchase of undivided individual interests without tribal oversight or taken for survey costs or public works "often involved more serious land-specific breaches."[223]

(c) Tribal claims challenged Crown action over the entire colonial period and across the whole tribal estate, and therefore most claims also allege the Crown had breached the Treaty principle of "active protection".[224] This allegation is based on the failure of the Crown overall, "through law, policy and practice, to ensure iwi retained sufficient permanent land reserves for their continued sustenance in the new economic and

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219 At [100(e)].
220 At [100].
221 At [100(a)].
222 At [100(a)].
223 At [100(b)].
224 At [100(c)].

political order."[225] This applied to all unretained land within a tribal rohe irrespective of the mode of its loss.[226]

(d) By the time of the 1989 Forests Agreement, historical Treaty claims did not usually involve block-by-block reviews of land sales or takings, but rather a review of the process and effects of colonisation for tribes in a particular district.[227] It would have been "completely impractical" for the Tribunal to adopt a purely transactional approach and would have undermined the important social objective of the TOWA.[228]

[151] The majority rejected the approach preferred by William Young J that the resumption regime was designed only to remedy Treaty-breaching direct acquisition of the specific land. The majority said this was a transaction-based approach which would preclude consideration of any wider context.[229]

[152] The Supreme Court said this narrow view was incorrect, not only due to the Treaty claims' processes outlined earlier but also because of the nature of the Treaty-breaching prejudice. The Court further noted that:[230]

(a) The Tribunal's approach to its recommendatory power was not intended to be radically transformed when dealing with CFL land resumption applications. There was nothing to suggest that the Tribunal's thematic approach to historical claims should be replaced by a more "transaction-based track for resumption claims".[231]

(b) Key phrases including "relates to" should not be interpreted to extract the transactions that extinguished Māori ownership of the land from its surrounding circumstances and historical context.[232] Similarly "return"

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225 At [100(c)].
226 At [100(c)].
227 At [100(d)].
228 At [100(d)].
229 At [101].
230 At [102].
231 At [103].
232 At [104].

does not need to be interpreted as if only former customary owners qualified. Its ordinary meaning was "plainly wider than that."[233]

(c) In light of Treaty principles of active protection, partnership and the remedial approach, the language of the statute relating to resumption should not be read down.[234]

(d) Colonial history idiosyncrasies might mean that "iwi or hapū, through no fault of their own, do not quite fit the expected paradigm."[235] It should be presumed that the TOWA processes are intended to be "capable of accommodating … cases where justice and reconciliation required it", which would be "consistent with the broad and unquibbling approach mandated by the Treaty itself."[236]

(e) The task is to assess what Parliament intended from the words used and the purpose it sought to achieve. That is not lacking clarity. The application in any particular case will depend on a full understanding of the facts of nature of the relevant claims.[237]

[153] The Supreme Court noted that as the "relevant prejudice issue" had not been subject to the appeal its views as expressed were not final. However, the Court emphasised the importance when considering the resumption jurisdiction of an understanding as to how the Tribunal conducts inquiries into historical claims, and the nature of the inquiry required. The jurisdiction called for particular expertise to determine the nuances and interaction of tikanga with common law to consider the relevant prejudice.[238]

[154] The Tribunal found that 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

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233 At [104]
234 At [104].
235 At [104].
236 At [104].
237 At [105].
238 At [106].

Te Whānau a Kai, leading to the loss of their lands."[239] As I noted earlier, this was the threshold eligibility.

[155] The Tribunal then turned to the consideration of the prejudice for the purposes of finding whether or not to recommend the return of the land. It determined that the Tribunal should consider the prejudice suffered by the *customary owners* of the Mangatū CFL land, the Tribunal could then 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 as well as in "other lands within their rohe on which they also depended."[240]

[156] The Tribunal said it was "continually struck by the way in which the many Tūranga claims form part of a single cohesive story".[241] It said 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.[242] It noted in particular the:[243]

> … 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.

[157] The Tribunal concluded that a consideration by it of the prejudice associated with the loss of the land must take place 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".[244]

[158] The Tribunal then considered the prejudice associated with the claimant-specific loss in relation to Mangatū CFL land in the wider context of the Crown's related Treaty breaches 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.

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239 At [5.8].
240 At [5.10].
241 At [4.33].
242 At [4.33].
243 At [4.33].
244 At [5.10].

[159] In considering whether to recommend the return of land the Tribunal said it was 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.[245] It noted:[246]

> … 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".

[160] The Tribunal found that the claimant communities who had customary rights and interests in Mangatū had suffered calamitous losses of land and resources, including losses in the CFL land. Those losses had far-reaching socio-economic consequences and severed the claimant communities' cultural and spiritual connection with the CFL land. The Tribunal said the prejudices caused by the Crown's breaches in this way, together with the claimants' wider related losses, "undermined the claimants' autonomy and tribal identity".[247]

[161] The Tribunal concluded that the economic prejudice flowing from the Crown's Treaty breaches could possibly be compensated for or removed by monetary payment, but that such redress could not account for the spiritual significance of land to Māori as "a repository of cultural meaning" over and above its economic value.[248] The Tribunal in the Principal Report had explained that the control and management of the groups' rohe was expressed through the distribution of finely differentiated rights of access to resources rather than through "ownership".[249]

[162] The Tribunal emphasised that the three claimant groups had suffered due to multiple Crown breaches in respect of their Mangatū lands and multiple forms of prejudice. There was not just a single breach suffered by single claimant community with a single consequence. The consequential prejudice, which had lasted for over 100 years, had been severe.

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245 At [5.196].
246 At [5.196].
247 At [5.196].
248 At [5.197].
249 At [5.197], citing the Principal Report, above n 7, at 17.

[163] The Tribunal took the view that the resumption remedy was required as a necessary part of the "cultural and spiritual redress" to the claimants and could also constitute part of an economic base for the claimants.[250]

[164] In conclusion the Tribunal considered the remedy required to restore the claimants' mana whenua, and the "economic, cultural, and spiritual well-being of their communities", must include the return of the CFL land.[251]

[165] The three groups to be included in the return of the Mangatū CFL land were Te Aitanga a Māhaki, Ngāriki/Ngā Ariki Kaipūtahi and Te Whānau a Kai. The Tribunal noted that the shareholders of the Mangatū Incorporation, who whakapapa to the various hapū of the claimant groups, would benefit accordingly from the return of the CFL land to the claimant groups.[252] The recommendations would return the land to three groups, each with multiple well-founded claims that related to the CFL land, and each requiring significant redress.

[166] The Tribunal therefore considered the whole of the CFL land should be returned to Māori ownership.[253] It also found there were significant elements of prejudice suffered by the claimants that would not be remedied solely through the return of the land and remedying the wider prejudice would require further action by the Crown.[254] The Tribunal next went on to consider who was to receive the Tribunal's s 8HB recommendation.

[167] In my view the Tribunal has undertaken its assessment consistently with the approach suggested by the Supreme Court in *Wairarapa Moana*.

[168] The historical claims involved were complex. They involved over 180 years of interaction between the Crown and Māori. The relationships between some of the claimants inter se were fractious, the cause of which the Tribunal attributed to actions by the Crown that were designed to and did create divisions. An appreciation of the

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250 At [5.199].
251 At [5.200].
252 At [5.202].
253 At [5.203].
254 At [5.196]–[5.204].

nuances of tikanga at play, and its interaction with the common law, was crucial, given the wide-ranging Treaty breaches relating to the CFL land.

[169] As tikanga speaks to process as well as substance, the various inquiries were bound to and ultimately did take a considerable amount of time. The alternative processes directed by the Tribunal illustrate the practical application of tikanga to process. It was inevitable that time would need to be taken to allow for the mandating processes, settlement negotiations and mediation. The iterative process meant that even where agreement could not be reached, accommodations and clarification came out of those processes, which ultimately fed into the final recommendations and made them more robust.

[170] The Tribunal provided a comprehensive and reasoned analysis of why the prejudice caused to the claimant groups by the Treaty breaches were "related to" the loss of the CFL lands. That it concluded the Treaty breaches were wide-ranging and affected the customary rights of the three claimants (or their constituents) is not to say, as the Crown alleged, that it funnelled all prejudice caused by Treaty breaches into the successful CFL resumption claim. In relation to each claimant group (and so the claims associated with the relevant group), the Tribunal clearly isolated the Treaty breaches and their connection to the land.

[171] The tikanga at play was not limited to mana whenua. The historical narrative told of the gradual and inexorable effect on tino rangatiratanga of the layered Treaty breaches over time, contrary to the specific guarantees under the Treaty, and the Crown's failure to engage in active protection at times when that protection should have been the Crown's response.

[172] The analysis of the factors and issues in relation to the complex historical background and the broad prejudicial effects of the layered breaches on hapū and iwi required considerable expertise and detailed knowledge of the history. The relevant prejudice included that of iwi and hapū from whom the land in question was not directly acquired but whose claims otherwise related to the licensed land.

[173] The prejudice flowing from the breaches of the Treaty over time and across the Mangatū area was particularly striking because of the manner in which the breaches compounded the prejudice by cutting across Māori customary rights, tino rangatiratanga and mana whenua as a result of the sequencing and interaction of the breaches.

[174] The Tribunal traced each relevant Treaty breach by reference to the factual background, its relationship with earlier breaches and other Crown activities and the tikanga at play, which led it to its conclusions as to the relevant prejudice. The analysis of the tikanga at play in the context of the Treaty breaches and its effects on the relevant hapū and iwi called for considerable expertise and experience, particularly in view of the competing evidence presented by the claimants.

[175] The Tribunal has applied the correct approach in its report and I am satisfied that the interim recommendations are consistent with the relevant principles set out in *Mercury* and are consistent with the considerations set out by the Supreme Court in *Wairarapa Moana*.

[176] The Tribunal has made no errors of law as alleged by the Crown.

[177] The first ground of review therefore fails.

Second ground of review — declining to extend the four-year CPI-only period for the compensation amount

[178] The Crown alleges that the Tribunal acted unlawfully in declining to extend the four-year CPI-only (real value) period under the Crown Forest Assets Act, except for two brief periods in 2020 and 2021 relating to the COVID-19 pandemic. It pleads that the Tribunal failed to apply the correct legal test and misconstrued the scope of the evaluation required of the Tribunal, failed to take into account relevant considerations and took into account irrelevant considerations.

[179] The Tribunal said the Crown could have settled the claims from 1992 or at any time while the Tribunal adjudicated on the claims. The Crown was not prevented from

doing so, as it did not need to wait for a Tribunal recommendation. The Crown alleges that the Tribunal was incorrect in this finding.

[180] The Crown says the Tribunal reached this conclusion despite the fact that the Tribunal had itself recommended negotiations and did not convene a hearing to adjudicate on whether or not to make any recommendations under s 8HB for the return of the CFL land until 2012, nor did it issue any recommendations until September 2021. In addition, the Crown says that the Tribunal applied an incorrect "best endeavours" standard. Instead, it required steps by the Crown that would be unreasonable when the decision-making body under the 1989 Forests Agreement (that is, the Tribunal) had at all times from 2004 to 2014 recommended negotiations. The Crown said the Tribunal had therefore implied a new obligation into the 1989 Forests Agreement to "resolve or settle the claims outside the Tribunal's processes".

[181] The third and fourth respondents (NUOT) say the Tribunal was correct in its assessment that the Crown was not "prevented, by reasons beyond its control, from carrying out any relevant obligation under the [1989 Forests Agreement]". It says that what was reasonable at the time involved what was possible under the law, including under Treaty principles. In addition, those respondents say that the Tribunal processes themselves do not provide the Crown with an argument that circumstances were beyond its control.

[182] NUOT notes that in the *Mercury* decision the High Court had been critical of the Tribunal because there it had not properly addressed claim-specific factors that were relevant to whether the real value period should be extended. The Court also found that the assessment could not include reference to the Crown's Treaty settlement policies which were not relevant.[255] NUOT says in this case the Tribunal had the benefit of and applied the *Mercury* decision. The Tribunal did record in detail the factors specific to this case that it took into account in reaching its conclusion under this head.

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255 *Mercury* (HC), above n 20, at [148(e)].

[183] NUOT also says that read in context, the decision in *Mercury* appeared to misunderstand the comments of the Supreme Court in its *Haronga* decision, when the Court commented that:[256]

> … The Supreme Court also suggested that the Tribunal had itself potentially adopted practices concerning such applications that had the effect of deferring prompt determination of resumption applications …

[184] NUOT says that all parties and the Crown supported the Tribunal's "new approach" to processing claims. This entailed more intensive case management by the Tribunal and greater reliance on formal pleadings and the statement of issues prepared by the Tribunal. As the Supreme Court had noted in *Haronga*, it was a procedure directed at enabling negotiated outcomes with large iwi groups, which was also the Crown's preference for dealing with Treaty claims of historic breaches.[257]

[185] The second and sixth respondents say that consistent with the task set in *Mercury* the Tribunal set out a chronology of claims divided into four parts: the filing and hearing of the claims (1992–2000); settlement negotiations (2002–2011); litigation and paused negotiations (2008–2017); and the reconvening of the Mangatū Remedies Inquiry (2017–2021).

[186] Mr Radich KC says the Tribunal had the benefit of *Mercury* and accordingly followed the High Court directions set out in that case. The Tribunal considered and analysed for each period the delays which had arisen. He notes that the Tribunal rejected the Crown's essential submission that the delay was beyond its control because it engaged in the various Tribunal inquiries using its best endeavours to assist the Tribunal to determine claims to CFL land. The Crown says it cannot be blamed for what was in effect delay caused by the Tribunal taking a long time to undertake its inquiries. The Tribunal rejected that argument, saying that Parliament must have intended, and the Crown and Māori would have reasonably expected, that the Tribunal's inquiry process would have taken such time as necessary to arrive at a proper and just result.[258]

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256 At [136].
257 *Haronga* (SC), above n 15, at [11].
258 *Remedies Report 2021*, above n 1, at [7.83].

[187] The second and sixth respondents noted that the Tribunal had found that the Crown had "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 related to the CFL land, other than as part of the Tribunal's district inquiry program".[259] The Tribunal went on to say there was no evidence that the Crown had advocated to the Tribunal that those claims should be dealt with as a matter of priority or assisted the Tribunal or claimants to complete the necessary research for these claims as soon as possible.[260]

[188] Te Whānau a Kai (the counterclaim applicant) pleads that it was the Crown, not Māori, which had a relevant obligation to advance resumption applications. Neither was the Crown legally required to regard historical Treaty claims settlement negotiations and the settlement of historical Treaty claims by resumption as mutually exclusive processes.

The Supreme Court's guidance on the Crown's interest liability issue

[189] The Supreme Court in *Wairarapa Moana* considered whether the High Court in *Mercury* was correct in its finding on appeal that the Tribunal had not made proper inquiry into determining the reasons for delay in relation to the resolution of the resumption applications.

[190] The Wairarapa Tribunal had found that the Crown had not, for "reasons beyond its control", been prevented from resolving the claim.[261] The Tribunal found that it was within the Crown's power to secure the earlier resolution of the claim but it had not, and therefore there was no reason to extend the interest holiday beyond the statutory four years.[262]

[191] As the Supreme Court described it, on the High Court's approach the Tribunal was incorrect in addressing at a very high level of generality what it saw as deficiencies in the Crown's approach in identifying and settling claims for the resumption of

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259 At [7.81].
260 At [7.81].
261 *Wairarapa Moana*, above n 2, at [123].
262 At [123].

licensed land.[263] The substantive issue requiring determination by the Tribunal was whether the Crown could avail itself of an extended interest rate holiday on the compensation that must be paid if resumption is awarded.[264]

[192] The Supreme Court noted that a successful applicant for resumption would be entitled as of right to five per cent of the sum selected under cl 3 of sch 1, but the Tribunal could order up to 100 per cent be paid as "further compensation".[265] In that case, the election by the recipients was the option provided in cl 3(c) (net proceeds plus interest). The Supreme Court noted the interaction of cl 5 (four-year interest holiday then penalty premium) with cl 6(b) (effective delay not within the Crown's control).

[193] The choice of option 3(c) and the application of cl 5 of sch 1 without adjustment resulted in an amount to pay by the Crown to Māori of $292 million as at 31 August 2021 (the time of the High Court hearing) or $253.6 million as at September 2018.[266] This compared to a September 2018 market value of the trees of $74.1 million. Adding an adjustment to the $29.6 million received by the Crown in October 1990 for inflation up to 30 September 2018 produced a total figure of $51.2 million.[267]

[194] The Supreme Court noted that on the return of CFL land to Māori ownership the recipient received not only the land subject to the existing Crown forestry licence and the accumulated licence fees (rentals) held by the Crown Forestry Rental Trust but also the right to any future rental payments. In addition was the relief that might be made available to the recipient in relation to the trees.[268]

[195] The Supreme Court said that if the recipient elected the cl 3(c) option, the starting point for the calculation will be the amount paid in the past. Therefore, the

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263 At [134].
264 At [107]
265 At [118].
266 At [121]–[122].
267 At [121]. The market stumpage figure calculated forward over the remaining length of the licence (32 years as at 30 September 2018) was $272.4 million. However, this was not useful for comparison purposes as a discount to present value was required, which had not been carried out: at [120].
268 At [127].

uplift to be applied on the cl 3(c) option appeared to have two purposes, first under cl 5(a) to ensure the uplift covered changes associated with the time value of money, but also under cl 5(b) "to incentivise the prompt resolution of claims by providing an appreciably enhanced uplift" starting after the statutory four years.[269]

[196] The Supreme Court noted that cl 6(b) was unhappily drafted, enabling the extension of the statutory four-year period if "the Crown is prevented, by reasons beyond its control, from carrying out any relevant obligation under the [1989 Forests Agreement]".[270] It pointed out the only relevant obligation under that agreement was that the Crown and Māori agreed 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."[271]

[197] The Supreme Court noted:[272]

> Reasons beyond the control of a party may mean that best endeavours do not produce the desired result. But, as a matter of logic, they do not prevent the deployment of best endeavours. There is thus a disconnect between the language of cl 6(b) of sch 1 which assumes a breach, albeit one excusable as caused by reasons beyond the control of the Crown, and cl 6 of the agreement which imposes an obligation which would not be breached if the failure to process claims promptly was for reasons beyond the control of the Crown.

[198] The Court then noted that it was sensible to construe cl 6(b) as engaged "if the Crown has not been in breach of its best endeavours obligation."[273] That would lead to the real value period being extended. However, if the Crown was in breach the payment would be significantly uplifted. The Court noted that the clause had "at least some of the characteristics of a penalty."[274]

[199] The reasons given by the Court in the *Wairarapa Moana* decision for concluding that the Crown was in breach of its best endeavours largely related firstly to its adoption of a policy under which it would not negotiate with claimants who were litigating against it, and secondly that it should have provided more funding to the

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269 At [129].
270 At [130].
271 At [130].
272 At [130].
273 At [131].
274 At [131].

Tribunal so as to facilitate the earlier resolution of the claims. The Court noted the Tribunal's reasons were at a high level of generality and proceeded on the basis the Crown should have set about identifying all claims "which might result in resumption of Crown forest land and funded the Tribunal to process such claims promptly."[275] The Court noted such an approach would make it likely the Crown would never be able to extend the period of grace in relation to resumption of CFL land.[276]

[200] The Court went on to note that the level of generality meant the Tribunal:[277]

(a) Gave no consideration to the reasonableness or otherwise of the Crown's overall approach to settlements, and the Wairarapa settlements in particular.

(b) Did not factor in the delay (if any) of the Tribunal's own district inquiry procedures, an approach in which claimant community engagement and much of the evidential base was funded by interest on the relevant forest licence rentals. This was in light of the Tribunal's "firm view that it was only Treaty breaches on a district-wide scale that could justify resumption."[278]

(c) Did not turn its mind to the counter-effect of other (reasonable) calls on public funding and focusing on the Crown's failure to fund the Tribunal. These might be "admittedly broad matters of impression", the Court accepted, but this was a "complex field with many moving parts."[279] The Court noted these were "likely to be important considerations when assessing compliance with best endeavours obligations and what was within, or not within, the Crown's control."[280]

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275 At [135].
276 At [135].
277 At [136]–[138].
278 At [136].
279 At [137].
280 At [137].

(d) Did not engage with the fact that the resumption of the relevant forest was not sought, at least by way of formal application until 2018.[281]

(e) Did not turn its mind to the point in time that resumption of the relevant forest became a realistic possibility in light of reasonable capacity expectations of the Crown and Tribunal, "the state of the evidence and the level of claimant community cohesion and capacity."[282]

(f) Did not consider the relevance (if any) of the Ngāti Kahungunu Settlement Trust's apparent preference to negotiate rather than proceed with a resumption application.[283]

(g) Did not consider how its view of claimant capacity in terms of matters contributing to delay not within the Crown's control, might have been affected if, as it had indicated, it was not satisfied that the Trust should be the recipient.[284]

[201] Against that background, the Supreme Court agreed with the High Court that the Tribunal's approach to the calculation of the specified amount was in error. The appeal on that issue was dismissed.

What the Tribunal did in this case

[202] The Tribunal did not have the benefit of the Supreme Court's guidance in *Wairarapa Moana* on this aspect, but as Mr Radich pointed out the High Court in *Mercury* had suggested a chronological analysis of events relating to the claims concerned. The Tribunal identified the relevant standard to apply to the Crown's conduct was "that it use its best endeavours to have … claims in relation to forestry land determined promptly by the Tribunal."[285] It noted that the High Court had added a gloss to the application of the "best endeavours standard", being that "what has

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281 At [138].
282 At [138].
283 At [138].
284 At [138]
285 *Remedies Report 2021*, above n 1, at [7.62].

prevented the Crown from carrying out the relevant obligations (ie within the shortest reasonable period) must arise from factors beyond the Crown's control."[286]

[203] The Tribunal concluded that the Crown was not prevented from carrying out its obligations under the 1989 Forests Agreement by the Tribunal scheduling, process, or the findings in the Principal Report, nor by the litigation that had clarified the protections given to Māori under the statutory scheme, nor by the Tribunal's Remedies Inquiry convened in response to the Court's directions.[287]

[204] The Tribunal also noted that the relevant obligations needed to concern the Tribunal's decisions on the claims to the land in question. However, the policies applied to Treaty settlement processes were not themselves relevant "unless they related to the determination of the claims by the Tribunal, and the delay to such determinations".[288]

[205] The Tribunal set out a detailed chronology of the claims, and the delays and assessed whether the reasons for the delays in each period might amount to matters which could have "prevented" the Crown from using its best endeavours to have the claims determined promptly. It undertook that analysis as follows:

(a) The filing and hearing of the claims (1992–2002):[289]

(i) In 2000 the then-presiding officer and acting chairperson of the Tribunal introduced innovation to avoid the delays to the Tūranga District Inquiry hearings which had beset larger district inquiries. The wide-ranging district inquiries had brought a sense of certainty to an otherwise highly uncertain and often uneven process by grouping claims into district-wide inquiries. The innovations referred to as the "new approach" inquired into mandate and boundary disputes among claimants ahead of hearings. This ultimately led to better and more robust

286 At [7.62], citing *Mercury* (HC), above n 20, at [132(b)].
287 At [7.109].
288 At [7.63], citing *Mercury* (HC), above n 20, at [132(c)].
289 At [7.72]–[7.84].

outcomes but required relevant issues to be identified at an early stage. In addition, the major historical research and reports were required to be supplied well in advance of the hearing in order to achieve certainty and consistency in the hearing process. The Tribunal had also introduced formal pleadings and more pre-hearing conferences.

(ii) The claims in Tūranga had been filed with the Tribunal some years before the Tūranga District Inquiry began in 2000, and one reason for the delay between the filing of those claims and the beginning of the inquiry was the need for the research to be completed. The research took several years.

(iii) In July 2000, following the first judicial conference held on Tūranga, Te Whānau a Kai, who had only recently registered a claim, sought time for further research, which was rejected, although the Tribunal noted a further historical report might be required.

(iv) The Crown took issue with a number of the processes proposed including the need for fully particularised statements for the claims. It preferred to wait until the Crown's research had been completed and the evidence was before the Tribunal and tested before it would acknowledge breaches of the Treaty. It maintained that position through 2000 and 2001.

(v) Following the rejection of that stance the Crown filed a particularised statement of response for the Tūranga Inquiry on 24 July 2001.

(vi) The hearings commenced on 19 November 2001 and continued until 28 June 2002.

(vii) The Tribunal made the following observations in relation to the proceeding:

(1) The Crown had not pointed to any evidence that it advocated to the Tribunal that these claims should be dealt with as a matter of priority nor that it assist the Tribunal claimants to complete the necessary research for these claims as soon as possible.

(2) It had no basis on which to conclude the Crown had carried out its relevant obligations using its best endeavours. It said the legislation did not place an obligation on the Tribunal to take steps to hasten the completion of these claims.

(3) Its decision to inquire into the Tūranga claims on a district-wide basis meant that the claims in relation to the Mangatū CFL land would be heard alongside other claims in the district.

(4) All parties, including the Crown, committed to a full inquiry and thorough investigation of all of the issues, including those relating to the Mangatū CFL land. The Tribunal's Tūranga Inquiry and Principal Report were of immense assistance to the Tribunal in the *Remedies Report 2021*.

(5) The Tribunal's procedural requirements, such as setting the district boundaries and an inquiry into the mandate of the various claimant groups, took time, but they were necessary steps to adjudicate on the claims that related to the land. Similarly, the requirements for statements of claim and other particulars were ordinary incidents of those inquiry processes. The Tribunal said that as

Parliament had referred the adjudication of claims for the return of CFL land to the Tribunal, Parliament "must have intended that the Tribunal's inquiry process would take such time as necessary to arrive at a proper and just result."[290] The Tribunal said, "[i]n our view, this would also have been the reasonable expectation of the Crown and Māori claimants."[291]

(viii) The Tribunal was dealing with a complex history and multiple claimants and it considered that "with the resources to hand, the time taken to complete the Tūranga hearings was 'the shortest reasonable period.'"[292] Therefore it concluded there was no reasonable basis to exercise its discretion to extend the "real value" period from 2000–2002.

(b) Settlement negotiations (2002–2011):[293]

(i) The hearings in the Tūranga Inquiry ended in 2002 and the focus shifted to negotiations. In the Principal Report the Tribunal expressed its preference that claimants and the Crown participate in a collective approach to settlement at a single district-wide table. After the Tribunal issued its Principal Report in 2004, the Tūranga claimants worked with the Crown to develop a negotiating framework. Mandates were recognised.

(ii) Collective negotiations collapsed in 2009 and the Crown agreed to work towards three separate deeds with various groupings.

290 At [7.83].
291 At [7.83].
292 At [7.84].
293 At [7.85]–[7.90].

(iii) The Supreme Court directed the Tribunal to hold an urgent remedies hearing to hear Mr Haronga's claim in May 2011. The Crown subsequently paused negotiations.

(iv) The Tribunal said it was not clear how the agreement between the Crown, iwi and claimants to engage in settlement discussions instead of pursuing resumption recommendations prevented the Crown from meeting its obligation under the 1989 Forests Agreement to assist the Tribunal to progress the resolution of the claims. It said that 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. 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. It was open to the Crown to have fast-tracked the resolution of the well-founded claims that related to the land, ahead of the wider tribal claims.

(v) The Tribunal said the Crown could have settled specific claims relating to forest land in the manner provided for in the Ngāi Tahu settlement, with the Crown's return of land to Māori but deemed to be "subject to a final recommendation from the Waitangi Tribunal".[294] Alternatively, the Crown could have assisted the Tribunal to identify claims relating to the Mangatū CFL land and to progress those claims in the Tribunal process, or pursue separate settlement processes, jointly with Māori, as the 1989 Forests Agreement envisaged.

(vi) The Tribunal said that its recommendations that the parties enter district-wide negotiations did not prevent the Crown from

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294 At [7.89].

working jointly with Māori to pursue one or more of these pathways in order to settle the claims to the CFL land.

(vii) The Tribunal therefore did not extend the "real value" period from the end of hearings in 2002 to 2008.

(c) Litigation and paused negotiations (2008–2017):[295]

(i) In July 2008 Mr Haronga submitted his application to the Waitangi Tribunal for an urgent remedies hearing. This was rejected by the Tribunal. When judicial review of the Tribunal's decision was sought in the High Court, the Court agreed with the Tribunal. The Court of Appeal subsequently agreed with the High Court. The Supreme Court, however, directed that the Tribunal hear the Mangatū Incorporation's application for urgency in respect of its claim seeking the return of the CFL land. The Crown had opposed Mr Haronga's application at each stage in the courts. As a result of the Supreme Court's decision, settlement negotiations between the Crown and the claimant groups (Te Aitanga a Māhaki, Mangatū Incorporation and Ngāriki/Ngā Ariki Kaipūtahi) were paused in June 2011.

(ii) The Tribunal held hearings between June and November 2012 and in December 2013 released its first remedies report, adjourning Te Aitanga a Māhaki's application and dismissing the applications of Mangatū Incorporation and Ngāriki/Ngā Ariki.[296]

(iii) In August 2014 the Crown paused settlement negotiations in order to await the outcome of the High Court's decision on the applications for judicial review filed in relation to the Tribunal's *Remedies Report 2014*.

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295 At [7.91]–[7.102].

296 The *Remedies Report 2014* was released in December 2013 in a pre-publication format.

(iv) The High Court subsequently quashed the *Remedies Report 2014* and directed the Tribunal reconsider the applications for binding recommendations "in terms of this judgment".[297] An appeal against the High Court's decision was unsuccessful and dismissed on 19 December 2016.[298]

(v) The Tribunal rejected the Crown's submission that throughout this period the Tribunal had adopted practices deferring prompt determination of resumption claims following its inquiries. The Tribunal understood that to mean that during the inquiry process the Tribunal's decisions had prevented the Crown from carrying out its obligations. It said that despite 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. It was the Crown's own policy not to engage in settlement negotiations while litigation was ongoing and that was not a matter beyond the Crown's control. Instead of opposing Mr Haronga's applications the Crown could have supported them and it was open to the Crown to continue settlement negotiations with the additional prospect of an agreed settlement under s 8HB as part of the negotiations.

(vi) The Tribunal noted that the Crown "might not have wished to complicate its relationships with those claimant groups who wanted to continue settlement negotiations" but that was the Crown's choice and not a matter beyond its control.

(vii) The Tribunal said that it was the Crown's choice during the first round of remedies hearing to argue that the Tribunal should not make binding recommendations under s 8HB and instead argue for a single negotiated settlement of all Te Aitanga a Māhaki, Ngāriki/Ngā Ariki Kaipūtahi and Te Whānau a Kai claims.

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297 *Haronga* (HC) (2015), above n 15.
298 *Haronga* (CA) (2016), above n 15.

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 *Remedies Report 2014*. The Tribunal did not make any criticism or judgement of the positions taken by the Crown. However, it said that the Crown could not justifiably argue that the Tribunal had deferred the present processing of claims through its remedies' inquiries, as the Crown had "consistently opposed the resolution of the specific well-founded claims that relate to the CFL land in favour of wider settlement."[299]

(viii) The Crown had consistently advocated for a wider negotiated settlement of all the Te Aitanga a Māhaki, Ngāriki/Ngā Ariki Kaipūtahi and Te Whānau a Kai claims. The Tribunal therefore concluded it was inappropriate to extend the "real value" only period between 2008 and 2017.

(d) The reconvening of the Mangatū Remedies Inquiry (2017–2021):[300]

(i) During the reconvened Mangatū remedies inquiry following the Court of Appeal's 2017 decision the Crown filed submissions opposing the remedy sought by the claimant parties, although it did recognise that the return of some of the CFL land to Māori ownership "might" be an appropriate remedy for the well-founded claims that relate to the CFL land. Hearings were held between August and November 2018 and closing submissions heard in December 2018.

(ii) A further hearing was held in July 2019 to consider additional economic evidence on compensation.

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299 *Remedies Report 2021*, above n 1, at [7.102].
300 At [7.103]–[7.106].

(iii) The Tribunal-instigated iterative process was supported by the claimants and the Crown. This ran from October 2019 through to January 2020. The ultimately unsuccessful Tribunal-led mediation process required the parties to then undertake the separate ratification processes from March 2020 to February 2021. An independent audit of the ratification process followed, concluding in July 2021.

(iv) Following the High Court decision in *Mercury*, further submissions were called for by the Tribunal. An appeal followed, which at the time the Tribunal's *Remedies Report 2021* was issued had not been released.

(v) The Tribunal found that during the second round of remedies proceedings the Crown had not been prevented from carrying out its relevant obligation. It had been free to assist the Tribunal to identify and process the claims that related to forestry lands and make recommendations in the shortest reasonable period.

(vi) The adjudication of the claims was the Tribunal's purpose in those proceedings. The Crown supported the Tribunal and its wish to take time to properly prepare the claimants to receive its recommendations through the iterative process. The Tribunal found it had "made no decisions that had prevented the Crown from meeting its obligations."

(vii) The Tribunal concluded that it would be inappropriate to extend the "real value" period between 2017 and 2021, with the single exception of the nationwide lockdowns in response to the COVID-19 pandemic. During those periods the Tribunal acknowledged that the Crown and claimant parties faced "significant obstacles" to progressing work in the Tribunal's iterative process which were beyond the Crown's control.

[206] Ultimately, therefore, the Tribunal concluded that the "real value" period should be extended only to account for the obstacles created by the nationwide COVID-19 lockdowns. Otherwise the Crown was not prevented from carrying out its obligations under the 1989 Forests Agreement to use its "best endeavours" to enable the Tribunal to "identify and process all claims relating to forestry lands and to make recommendations in the shortest possible period".[301]

[207] The Tribunal said the Crown had entered negotiations and its preference was for a single settlement of all the claims. It had opposed Mr Haronga's application for an urgent remedies hearing as well as the appeals. During the first round of hearings, the Crown had opposed the remedies sought by the claimants, saying they should be settled through direct negotiations. The Crown again opposed the claimants' judicial review of the Tribunal's decision not to make binding recommendations. As the Tribunal noted in the *Remedies Report 2021*, the Crown remained opposed to the remedies sought by the claimants in the reconvened inquiry. The Tribunal concluded it was open to the Crown to seek to resolve the claims that relate to Mangatū CFL land ahead of its preferred wider settlement.

Analysis

[208] To recap, where land is to be returned under the resumption provisions the Crown must pay a specified amount as compensation to the Māori to whom ownership of the land concerned is transferred, which comprises in this case five per cent of 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 Māori ownership.

[209] The return on those proceeds is an amount to maintain the real value of those proceeds for a statutory period of four years. Beyond the four years the Crown must pay the equivalent of the return on one-year New Zealand government stock measured on a rolling annual basis, plus an additional margin of four per cent per annum, unless the Tribunal extends the period for the return to be based on maintenance of the real value of those proceeds. The Tribunal may extend the "real value" period if it is

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301 At [7.107]–[7.108].

satisfied in terms of cl 6(b) that "the Crown is prevented, by reasons beyond its control, from carrying out any relevant obligation under the [1989 Forests Agreement]".

[210] The Supreme Court in *Wairarapa Moana* identified the only *relevant obligation* under the 1989 Forests Agreement was that the Crown and Māori would "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."[302] When considering the issue of "best endeavours" the Supreme Court noted that reasons beyond the control of a party may mean that best endeavours do not produce the desired result.[303] It went on to say that it was sensible to construe the provision as being engaged "if the Crown has not been in breach of its best endeavours obligation".[304] The Supreme Court recognised this had some of the characteristics of a penalty. Indeed it described the compensation alternative under cl 5(b) as acting "to incentivise the prompt resolution of claims by providing an appreciably enhanced uplift" starting after the statutory four years.[305] This contrasts with the rationale behind cl 5(a), which ensured the uplift covered changes associated with the time value of money.[306]

[211] The Supreme Court agreed with the High Court that the Tribunal's reasons in that case were at a high level of generality and the Tribunal had proceeded on the basis that the Crown should have set out to identify all claims which might result in resumption of CFL land and to fund the Tribunal to process such claims promptly. The Supreme Court noted that such an approach would make it likely the Crown could never extend the period of grace in relation to resumption of Crown forest land.[307]

[212] In this case the Tribunal said that throughout "these years" it had been open to the Crown to seek to resolve the claims that related to the Mangatū CFL land ahead of its preferred wider settlement.[308] The Tribunal refrained from commenting on the merits of the Crown's decisions following the Tūranga hearings. However, the

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302 *Wairarapa Moana*, above n 2, at [130].
303 At [130].
304 At [131].
305 At [129(b)].
306 At [129(a)].
307 At [135].
308 *Remedies Report 2021*, above n 1, at [7.108].

Tribunal said the Crown's obligations under the 1989 Forests Agreement existed throughout the given period, and that, based on the evidence adduced in the inquiry, the Crown was not prevented from carrying them out by the Tribunal scheduling, process, or findings in the Principal Report.[309] The Tribunal also found that the Crown was not prevented from resolving the claims by the litigation that clarified the protections given to Māori under the statutory scheme or the Tribunal's remedies report 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.[310]

[213] The Tribunal had relied on comments in the High Court's decision in *Mercury* to the effect that the Tribunal was required to undertake a chronological analysis of events relating to the claims concerned, and that the relevant standard to be applied to the Crown's conduct was whether it had used its best endeavours to have the claims in relation to forestry land determined promptly by the Tribunal.[311] It reasoned that what had prevented the Crown from carrying out the relevant obligations (within the shortest reasonable period) must arise from factors beyond its control. The Tribunal also noted that in *Mercury* the Court indicated 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 … [proceedings] before the Tribunal concerning this land were not progressed within the shortest reasonable period".[312] In addition, the relevant obligations needed to concern the Tribunal's decisions on claims to the land in question. The policies applied to Treaty settlement processes were not in themselves relevant unless they related to the determinations of the claims by the Tribunal, and the delay to such determinations.[313]

[214] In summary, the Tribunal said that the following factors supported its findings against the Crown:

(a) preference for a single settlement of all claims;

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309 At [7.109].
310 At [7.107]–[7.109].
311 At [7.62], referring to *Mercury* (HC), above n 20, at [132]–[133].
312 At [7.63], citing *Mercury* (HC), above n 20, at [133].
313 At [7.63], citing *Mercury* (HC), above n 20, at [132(c)].

(b) opposition to Mr Haronga's application for an urgent remedies hearing and opposition to his appeal of the Tribunal's decision not to grant an urgent hearing;

(c) the first round of remedies proceedings, where it opposed the remedy sought by the complainants, arguing that the claim should be settled by direct negotiations;

(d) the Crown's opposition to the claimant's judicial review of the Tribunal's decision not to make binding recommendations; and

(e) the opposition to the remedy sought by the complainants in the reconvened inquiries.

[215] I accept Mr Radich's submission that the Tribunal in this case has provided a greater level of detail in its consideration of the causes of the delays than was the case in *Wairarapa Moana*, as well as setting out a chronology. However, as Mr Tyson for the Crown submitted, the Tribunal has asked the wrong question. The Tribunal appears to have carried out its analysis on the basis that the Crown alone carried the obligation to take *all* steps possible to resolve the claim, without taking into account the context of the claims and the actions of other parties or of the Tribunal directions or of whether those steps would enable the Tribunal to deliver the recommendations in the shortest *reasonable* time.

[216] In relation to the period 1992–2002, at the outset of the Tūranga Inquiry, the Tribunal criticised the Crown for pointing to the district-wide inquiry process and the fact that while it assisted the Tribunal and the parties, the Crown did not do enough in the circumstances to identify and process the claims. For instance, the Tribunal says the Crown should have assisted the Tribunal or claimants "to complete the necessary research for these claims as soon as possible".

[217] However, there is no analysis of how this funding might have been effected and how it would have assisted. As the Supreme Court noted in *Wairarapa Moana*, much of the evidential base for the inquiry was presumably funded by interest on the

relevant forest licence rentals.[314] In any event, even if such funding would have sped up the process, there is no consideration of the interrelated difficulties which the Supreme Court pointed out. The Tribunal does not appear to have turned its mind to the counter-effect of other (reasonable) calls on public funding when it points to the failure of the Crown to fund further research by the claimants and to fund the Tribunal. The Supreme Court noted this was an important consideration when assessing compliance with best endeavours obligations and what was within, or not within, the Crown's control.[315]

[218] Neither did the Tribunal turn its mind to at what point it was that resumption of the relevant land became a realistic possibility in light of reasonable capacity expectations of the Crown and Tribunal, as well as "the state of the evidence and the level of claimant community cohesion and capacity".[316] As the Tribunal in this case noted, the district-wide inquiry was introduced to provide certainty and an even process. In addition, the "new approach" provided for the Tribunal to address matters of mandate at an early stage of the process and expedite the hearing process by inquiry into mandate and boundary disputes among claimants ahead of hearings. These processes provided a sound process that would achieve a robust outcome within a reasonable time.

[219] The Tribunal (in its discussion of the 1992–2002 claims process delays) acknowledged that the Principal Report was of immense assistance to it and "necessary, in order to understand all of the relevant Crown Treaty breaches and prejudice that relate to the CFL land".[317] The Tribunal itself noted that the Tūranga Inquiry presented "a complex history and multiple claimants" and considered that in all the circumstances of that inquiry, and "with the resources to hand, the time taken to complete the Tūranga hearings was 'the shortest reasonable period'."[318]

[220] The Tribunal says that it had no obligation to take steps to hasten the completion of the claims, and that the steps it undertook, including the process of

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314 *Wairarapa Moana*, above n 2, at [136].
315 At [137].
316 At [138].
317 *Remedies Report 2021*, above n 1, at [7.80].
318 At [7.84].

setting the district boundaries and inquiring into mandates, took time and were necessary steps to thoroughly inquire into and adjudicate on the claims that related to the CFL land. It noted the processes were "intended to complete the inquiry into the claims in a timely yet comprehensive manner."[319] It referred to the rigorous processes adopted by the Tribunal and noted that when Parliament referred the adjudication of claims for the return of the 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. It expressed its view that such "would have also been the reasonable expectation of the Crown and Māori claimants."[320]

[221] The Tribunal says the Crown could have taken steps to progress the claims by working with it to identify all claims which might result in resumption of CFL land and funding of the Tribunal to process such claims promptly. The Supreme Court noted such an approach would make it likely the Crown could never extend the grace period in relation to the resumption of CFL land. Even a cursory review of the claims indicates that the process of consolidation was necessary for the claims to be manageable. It is not apparent what the claims to be identified by the Crown could be. The identification of suitable resumption claims, even it could be done, is not likely to lead to a robust outcome within the "shortest *reasonable* time." In addition, no consideration was given to whether the Crown could realistically push the hearings on the CFL land particularly in the period 1992–2002 to "reasonably shorten" the time to recommendation, when it appears that the parties were not ready for the hearings. As the Supreme Court noted, an issue arises as to whether all claimants were in a position to properly state their claims to resumption in light of reasonable capacity expectations of the Crown and Tribunal and "the state of the evidence and the level of claimant community cohesion and capacity".[321]

[222] A case in point is the resumption claim of Te Whanau a Kai, which it seems emerged later than the others. It has counterclaimed in these proceedings based partly on the fact that the Tribunal in the *Remedies Report 2021* relied on findings in the

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319 At [7.83].
320 At [7.83].
321 *Wairarapa Moana*, above n 2, at [138].

Principal Report which it says should be revisited for reasons related to its readiness to progress its claim earlier.

[223] While the requirement on the Crown to use its *best* endeavours may impose a more onerous responsibility on it than if the requirement had been to use *reasonable* endeavours, nevertheless those best endeavours were to be exercised *jointly* with Māori and were to enable the Tribunal to make its recommendations within the shortest *reasonable* period of time. The time by which the process may be shortened is thus qualified by reasonableness. That requires a consideration of the context and the actions of the Crown in the circumstances. Therefore, if some parties wish to negotiate and that is the process stipulated by the Tribunal there needs to be some exploration of whether continuing the hearings would have been effective in achieving the intended result, and what the attitude of Māori might have been as the other party to the joint obligation.

[224] It appears that while the Tribunal says it had no obligation to hasten the completion of the claims, it also says the steps it took which delayed the final *Remedies Report 2021* led to a more rigorous and certain outcome in a "timely yet comprehensive manner" and within the shortest reasonable period. The direction of the process as led by the Tribunal must have some bearing on what the Crown's best endeavours to achieve (robust) recommendations within the "shortest reasonable time" meant. As the Tribunal said, Parliament "must have intended that the Tribunal's inquiry process would take such time as necessary to arrive at a proper and just result."[322] As it said, this would have also been the reasonable expectation of the Crown and Māori claimants. Similarly, Parliament gave the resumption jurisdiction to the Tribunal, so it must have intended the processes adopted by the Tribunal would be similar to those it employed in its recommendatory jurisdiction. What is the "shortest reasonable time" must be seen in that context.

[225] The district-wide process of inquiry and the approach taken by the Tribunal have produced more certain and robust outcomes. In addition, as the Supreme Court has pointed out, tikanga is important to process. For instance, the Tribunal saw the

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322 *Remedies Report 2021*, above n 1, at [7.83].

iterative mandate process as key. At first blush it appears that for the Crown to try and persuade the Tribunal to bypass that iterative process to make its recommendations would not contribute to *reasonably shortening* the period required to make the recommendations. Such intervention by the Crown may have instead cut across the appropriate process dictated by the Tribunal. The Tribunal referred in its report to the historic actions of the Crown breaching the Treaty so fractionating iwi and hapū and engendering distrust, the effect of which has been lasting. That might also be a consideration for the Tribunal in relation to ascertaining whether best endeavours should entail continuing an adjudication process while negotiations are in train.

[226] These are all matters that the Tribunal should consider when dealing with the Crown's actions. It appears from the reasons given that the Tribunal has concluded that the Crown did not use its best endeavours because a resolution of the claims was not reached earlier. The Tribunal has not factored in the readiness of the parties for such resolution, given the requirements of the complex historical investigation, competing factors and the need for ensuring certain outcomes without further prejudice to prospective claimants. In addition, the contribution of the Tribunal's own processes and directions as well as those of the courts involved cannot be dismissed as factors to be taken into account.

[227] In this case, the Tribunal rejected the Crown's preference for a narrow inquiry into relevant prejudice. I have found that the Tribunal's approach in that regard was correct. However, that approach necessitated the broad scope of inquiry adopted by the Tribunal. The obligation on the Crown was to, jointly with Māori, use its best endeavours to enable the Tribunal to identify and process all claims and consequently make its recommendations within the "shortest reasonable time".

[228] The Tribunal has erred in its analysis by failing to consider the context and wider counter-effects of any interventions. That analysis cannot be undertaken without regard to the fact that any "best endeavours" on the part of the Crown were to, jointly with Māori, enable the Tribunal to reach recommendations in the shortest *reasonable* period.

[229] The surrounding circumstances to be taken into account include the views of and positions taken by the other parties and the Tribunal's own processes and directions. The assessment cannot be undertaken without regard to the need for robust outcomes. It also involves an assessment of what might have been *best* endeavours in relation to a particular step. This imports a notion that the Crown had a choice as to what option it should take in relation to any given step. For instance, a choice to negotiate rather than petition the Tribunal to continue the hearings process might have been the *best* endeavour in the circumstances to "reasonably shorten" the time, but the negotiations might not have been successful. That outcome was not within the control of the Crown. To attempt to continue hearings at the same time as attempting to negotiate, particularly when the Crown had been directed by the Tribunal to engage, may not have been using its best endeavours jointly with Māori to enable the Tribunal to achieve a timely outcome as prescribed. Rather, it may have complicated relationships and made the resolution of all claims more difficult.

[230] I am of the view, therefore, that the Tribunal did not undertake the contextual analysis that it was required to complete. It identified the periods of delay by way of chronology but did not explain how those delays were due to the failure of the Crown to exercise its *best* endeavours *jointly* with Māori to enable the Tribunal to deliver in relation to *all* its recommendations "in the shortest *reasonable* period" in the context of the proceedings and with the necessary involvement of the other parties and the Tribunal. As Mr Radich rightly pointed out the expertise of the Tribunal and its function to assess the evidence must be respected, however that is not in issue here. The difficulty is that the Tribunal asked itself the wrong question and carried out an incorrect analysis. .

[231] The Crown and the parties made submissions on whether the clause imposing the uplift was intended to be a penalty or, as the claimants argued, was intended to give a share of the benefit the claimants had forgone in the forestry assets and so to provide them with some funds for maintenance and ultimately remediation or replanting of the CFL land. The Supreme Court took the view that the uplift had elements of a penalty and acted as an incentive on the Crown to expedite the Tribunal

proceedings.[323] The wording of the compensation provisions supports that interpretation. Any further assessment as to the intention of the parties to the agreement beyond that is not necessary. I add that an analogy to a contractual force majeure (or "act of God") clause does not sit easily here. The "best endeavours" requirement as I have outlined it above is not akin in this case to a force majeure clause. In any event, interpretation and application of a force majeure clause is dependent on how it is drafted and the circumstances of the case.

[232] The Crown is entitled to a declaration that the Tribunal's determinations under this head were wrong by reason of the errors set out above. The Tribunal is directed to reconsider its recommendations in relation to declining to extend the four-year CPI-only period for the compensation amount under the Crown Forest Assets Act consistent with this judgment.

Third ground of review — error of law

[233] The third ground of review is that the Tribunal misconstrued the proper purpose and scope of statutory compensation under the Crown Forest Assets Act, took account of irrelevant considerations in its determination of the statutory compensation payable and acted outside its power.

[234] The Crown further alleges that the Tribunal took into account irrelevant considerations in relation to its determinations on the amount of further compensation to award the claimants. It says that the irrelevant considerations were:

(a) prejudice arising from events throughout the district since the 1860s, rather than, as required, the specific prejudice from the claim concerning the acquisition of the licensed land; and

(b) the general socio-economic position of the claimants, rather than, as required, the specific prejudice from the claim concerning the acquisition of the licensed land.

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323 *Wairarapa Moana*, above n 2, at [129]–[131].

[235] The allegation set out at (a) above is based on the same submissions as the Crown made under the first ground of review. In essence the Crown says that the Tribunal made errors in "funnelling" all prejudice occurring as a result of Treaty breaches in the district into its claim for resumption and compensation. I have found that the Tribunal undertook the correct process and made no errors in that respect. For the same reasons as the claim under the first ground failed, this aspect of the third ground must fail. Consequently, I do not propose dealing with the third ground of review insofar as it relies on the claims in the first ground.

[236] I turn to consider the second aspect of this ground set out at (b) above. The Tribunal considered its assessment of compensation in chapter 7 of the *Remedies Report 2021*.

[237] The Tribunal, in light of the statutory requirements, said it must address the following questions in order to make the determinations required by the statutory scheme:[324]

(a) What is the purpose of the remaining portion of statutory compensation under Schedule 1?

(b) Should the four-year "real value" be extended?

(c) What proportion of the available compensation should be awarded?

[238] The Tribunal noted that the Act provided sparse express direction on how the Tribunal should exercise its discretion to award compensation. However, it reviewed the relevant authority, taking direction from the High Court's decision in *Haronga v Waitangi Tribunal*, upheld in the Court of Appeal, that the Crown's settlement policy and its approach to quantum and proportionality was not relevant to the Tribunal's determination under cl 2(b) of sch 1.[325] It noted that the Court of Appeal had also directed it to determine the specified amount of compensation *after* it had determined that CFL land should be returned to Māori ownership under s 8HB and that "the consequences of the application of s 36 of the [Crown Forest Assets Act] as against

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[324] *Remedies Report 2021*, above n 1, at [7.15]

[325] *Haronga* (HC) (2015), above n 15, at [104], upheld on appeal in *Haronga* (CA) (2016), above n 15, at [61].

other claimants was not relevant."[326] The Tribunal also noted that the Court of Appeal had commented on the ability of the Tribunal to award compensation as low as five per cent of the listed compensation figure, "thereby providing the necessary degree of flexibility in order to do what is fair and just."[327]

[239] The Tribunal noted the reference by the Supreme Court in *Haronga* to the 1989 Forests Agreement as identifying a principle of significance to Māori to "minimise the alienation of property which rightly belongs to Māori."[328] It noted that Court had confirmed the Tribunal had the discretion to award as much or as little compensation as it considered *fair and just*. Its own restorative approach to remedies was complementary to that.

[240] The Tribunal said that for the restorative approach to be consistent with Treaty principles it must include an assessment of socio-economic factors. Otherwise, a major purpose of the restoration would be overlooked, that is, the re-establishment of tino rangatiratanga or "the quality of local autonomy that most characterised traditional communities."[329] It noted that the Tribunal in the earlier Muriwhenua lands inquiry had emphasised that any redress was "for the wider benefit of those who are prejudiced, not solely the group's commercial interests", the Tribunal there stating that "claim settlement funds do not exist in a vacuum … benefiting none other than its administrators. The benefit must flow to the people."[330]

[241] The Muriwhenua Inquiry report had identified two factors that would affect the amount of redress. These were 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 and the local Māori and Pākehā community."[331] These factors were quantifiable and socio-economic data on the claimants' circumstances could "inform the assessment of the economic base now required."[332]

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326 *Haronga* (CA) (2016), above n 15, at [62].
327 At [63].
328 *Haronga* (SC), above n 15, at [88].
329 *Remedies Report 2021*, above n 1, at [7.42].
330 At [7.42].
331 At [7.43].
332 At [7.43].

[242] Applying those principles, the Tribunal noted the evidence strongly suggested that a binding recommendation for the return of Mangatū CFL land would be unlikely to go very far towards remedying or compensating for the prejudice suffered by the successful Māori claimants unless it was accompanied by significant monetary compensation.[333] It further noted the imposition of the costs and liabilities that were associated with the protective covenants and resource management obligations that accompany forestry land.

[243] The Tribunal concluded that the "bespoke feature" of compensation under sch 1 accounted for the fact that the Crown was entitled to and did sell cutting rights to its forestry assets on the land that could subsequently be returned to Māori ownership.[334]

[244] The proportion of the available compensation was in recognition that "returned land will be encumbered with the forestry licence that will prevent the Māori owners from using the land until it is progressively returned by the licensee".[335] The process could take up to 35 years. Without additional financial compensation above the five per cent level, Māori owners would not receive the benefit of the forestry they would have received had the land been returned prior to the 1989 Forests Agreement.[336]

[245] The Tribunal reasoned that when Parliament endorsed the Tribunal as the appropriate forum to carry into effect the purpose of the resumption amendments to the principal Act in the 1989 Forests Agreement, Parliament would reasonably have expected the Tribunal "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.'"[337]

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333 At [7.46].
334 At [7.52].
335 At [7.53].
336 At [7.53].
337 At [7.55].

[246] The Tribunal approached the determination of what proportion of the available sch 1 compensation should be awarded to the claimant groups, by assessing what was "fair and just".[338] It noted it was not required to award the full remaining portion of the specified amount to pay the Crown's gain but might take into account the commercial bargain made in the 1989 Forests Agreement.

[247] The Tribunal looked at the approximate level of compensation available to each claimant group under cl 3 of sch 1, considered the parties' submissions on how much of the specified amount they considered they should be awarded and then considered the prejudice suffered by the three claimants and consequently the level of redress required to restore their mana and economic loss.

[248] The Tribunal drew on the economic evidence provided by expert witnesses for each of the claimants and the Crown. It also commissioned an expert economist to provide independent economic evidence.[339]

[249] The Tribunal referred back to the detailed consideration of the claims in relation to the Mangatū CFL land and the prejudicial impact of the Crown's breaches of the Treaty rights of the customary owners of Mangatū. It noted it had rejected the Crown's interpretation of the threshold imposed by the words "relates to" CFL land and found that a large range of Treaty breaches "impacted the claimants' ability to retain their ownership of the Mangatū CFL lands, and to exercise tino rangatiratanga there".[340] It went on to note that it had made specific findings on prejudice and in determining to recommend the return of the Mangatū CFL land. The Tribunal had focused on the prejudice associated with the three successful claimant groups' loss of autonomy and the loss of Mangatū CFL lands that followed, as well as the impact of interrelated Crown Treaty breaches on the claimants.[341] It referred back to its specific findings made in chapter 5 on the prejudice suffered by the claimants.

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338 At [7.110].
339 At [7.112]. The Tribunal commissioned Dr Andrew Coleman, then a senior lecturer in the Department of Economics at Te Whare Wānanga o Ōtākou | the University of Otago.
340 At [7.123].
341 At [7.123].

[250] The Tribunal summarised the expert economists' evidence and noted it revealed different approaches and understandings of terms such as "loss and prejudice", but was extensive and highly detailed.[342]

[251] The Tribunal commented that there was no clear consensus among the experts about a single correct approach to restoring the claimants' economic bases. It noted the issues raised by the restorative approach to redress were complex and remained the subject of ongoing debate among experts and academics. The evidence had highlighted the difficulty of removing the intergenerational inequity the origins of which lay in the Crown's Treaty breaches and of removing the resulting disparities through a single monetary payment or transfer of capital. According to one of the economists, Dr Ganesh Nana, the impact of a one-off payment would be "unlikely to fully repair the gap in income between Māori and the overall Gisborne population".[343] This comment followed his analysis of the income gap between Māori and non-Māori households in Gisborne and nationally as a proxy for the economic loss currently visited upon Gisborne Māori.

[252] The Tribunal noted that the Tūranga report's findings and the economists' evidence pointed to the need for significant investment in social, cultural and commercial infrastructure to re-establish the claimants and the social and economic life of the district. It referred to the findings reached by the Harvard Project on American Indian Economic Development in relation to the economic performance of Native American communities that it said were comparable to the Tribunal's finding in the Principal Report.[344] It said that a similar transformation of "political, governmental, and decision-making structures is also required to restore iwi and hapū tino rangatiratanga."[345]

[253] The economists did not reach any clear consensus on the nature, or extent, of the redress required to restore the claimants' positions in the social and economic life of the district, but the Tribunal indicated it was not necessary for it to precisely cost

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342 At [7.126]–[7.144].
343 At [6.175]. Dr Ganesh Nana, the chief economist and economic director at Business Economic Research Ltd, gave evidence for Ngāriki/Ngā Ariki Kaipūtahi.
344 At [7.176].
345 At [7.177].

such a comprehensive remedy. The Tribunal was tasked with determining whether there was "good reason to award a *lesser* amount" than the full specified amount of available compensation.[346] It determined that, given the economic evidence, 100 per cent of the specified amount of available compensation should be awarded to accompany the Mangatū CFL land return to Māori ownership.

[254] The Tribunal noted that two considerations had informed its decision. The first was the commercial bargain, and the "Crown's gain" as a result the sale of its forestry assets. The compensation provisions ensured that Maōri claimants could access the value of Crown forestry assets that were to be sold as redress for their Treaty claims. The second consideration was the prejudice suffered by the claimants. Therefore it was entitled to award the whole of the remaining 95 per cent portion of the available compensation if it determined that outcome to be fair and just.

[255] The Tribunal noted that in exchange for gaining the benefit of the forestry asset sales, the Crown had agreed to pay financial compensation when the land was returned to Māori ownership. The Crown had promised the land would be returned without any improvements and cleared of forestry assets. Therefore, the new owners would be required to undertake replanting of the land.[347] In addition, the Tribunal noted factors for its decision included: the significant prejudice to Māori caused by the political disempowerment resulting from the Crown's effort since the 1860s to overthrow Tūranga Maōri authority; the enormous transfer of other lands and resources from Māori to the secular population; loss of opportunities to contribute to the economy of the district and manage and develop their lands themselves, including Mangatū, for significant periods; and the social and economic disadvantage suffered by generations of Tūranga Māori in health, housing, education, and employment arising from these losses.[348]

[256] The Tribunal also noted it was difficult to isolate precisely the specific socio-economic prejudice. However, it was not required to precisely quantify the value of the cumulative prejudice and losses resulting from the loss of mana and

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346 Crown Forest Assets Act, sch 1 cl 2(b).
347 *Remedies Report 2021*, above n 1, at [7.182].
348 At [7.185].

rangatiratanga, as well as the social, spiritual and cultural impacts of the Crown's Treaty breaches that the claimants suffered from the loss of the Mangatū CFL lands and from their other losses. This was intergenerational. An attempt to calculate precisely and solely on a monetary basis for that type of prejudice for those sorts of losses would be to adopt a damages approach to remedies, which was not appropriate for some of the prejudice suffered.

[257] The Tribunal said that an important reason why the Tribunal took a restorative approach in considering the compensation was that was required to provide redress for such prejudice. It concluded the full compensation, in terms of the ballpark figures provided by the economists, was not disproportionate to the prejudice suffered by the relevant claimants. It noted the economists broadly agreed that on top of the value of the land, the complainants had also suffered significant welfare losses as a result of the Crown breaches. However, a first step to removing the prejudice which the Tribunal was empowered to take was to make provision for an economic base for the claimants, which would enable them to uplift their communities and go some way toward restoring them to the position they would have been in had the Crown fulfilled the promises in the Treaty, rather than breaking them.[349]

[258] Therefore, based on the economic evidence, the Tribunal concluded there was no persuasive reason to award less than the remaining portion of the specified amount of sch 1 compensation. It noted that would be insufficient to provide full redress to the claimants and therefore was not disproportionate to their losses. It determined that the three claimant groupings each were to receive the same percentage interest in the compensation as they had received for the land. This would assist the claimants to meet their replanting obligations on the land returned and 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.

Analysis

[259] As the Crown indicated, this ground is closely connected to the first ground of review and is another way of putting the argument that the Tribunal made a

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349 At [7.192].

fundamental error as to the purpose and scope of its adjudicatory jurisdiction. The Crown says that the Tribunal was incorrect in deciding the compensation was available to remedy prejudice to restore a tribal economic base "when the compensation is lawfully available only to remedy the prejudice (if any) from the claims concerning acquisition/loss of the CFL land". This is separate to the issue of whether the "real value" period should be extended which is dealt with in ground 2.

[260] The Crown's arguments proceeded on the basis that the Tribunal should have focused on only the Treaty breach concerning the loss of the Mangatū CFL lands, instead of the layers of other claims, prejudice and land losses. It says that the Tribunal looked broadly to events in the district to reach its conclusions that the claimants had a right to expect to benefit from the settlement and development of Tūranga and that under article 3 of the Treaty it was guaranteed that Māori would have a fair chance to participate in the benefits of settlement assuring them of equal treatment and opportunity.

[261] The Crown noted that the Tribunal had expressly taken into account prejudice flowing from the alienation of the land beyond the CFL. The Tribunal rejected the Crown's narrow interpretation of "relevant prejudice" and said in its *Remedies Report 2021*:[350]

> … The claimants were not given … 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 the land.

[262] It is not necessary to repeat the guidance given by the Supreme Court on the assessment of the relevant prejudice, except to say the Court indicated that the relevant prejudice insofar as it could be said to "relate to" the land. Once the threshold for eligibility had been established the prejudice and the effects on claimants of breaches which rippled through the district iwi and hapū leading to their loss of tino rangatiratanga, mana whenua and their customary interests in land suggests a wide, not narrow, reading of the resumption and related compensation provisions. The Supreme Court expressly rejected an interpretation which limited the prejudice to the acquisition of the land in question.

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350 At [7.156].

[263] The same approach applies in relation to the assessment of compensation. The compensation is allowed as relief "for or [to] remove the prejudice caused by the … policy or practice, or the act or omission that was inconsistent with the principles of the Treaty of Waitangi".[351]

[264] The relevant prejudice for which compensation is to be paid relates back to the "well-founded claim". There is no reason to read down the relevant prejudice to be limited to prejudice directly flowing from the loss of the specific Mangatū land.

[265] The Tribunal carefully evaluated the evidence and found that the economic base of the claimants had been eroded or destroyed by the prejudice caused by the Treaty breaches. In addition, the social and cultural position of the tribes was severely prejudiced.

[266] The Tribunal was also entitled to take into account the fact that the recipients of the land would take on obligations in relation to the land which were the result of the use to which the land had been put. As the Supreme Court emphasised, the Crown gained something of value under the 1989 Forests Agreement transaction and in return it agreed to compensate or remove the prejudice.

[267] The Tribunal appropriately assessed the evidence as to the economic value of that prejudice based on the evidence available to it. The approach the Tribunal took to the assessment of the socio-economic evidence as open to it.

[268] In relation to the third ground of review, the Tribunal did not err in making its assessments and reaching its conclusions as to the purpose and scope of statutory compensation nor did it act outside its powers.

[269] Accordingly, the third ground of review is dismissed.

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[351] Treaty of Waitangi Act, s 8HB(1)(a)(ii).

Fourth ground of review — error of law — Tribunal erred in its assessment of terms and conditions under s 8HB of the TOWA for return of licensed land

[270] The Tribunal has recommended that the CFL land be transferred to the trustees of the Mangatū Forest Collective Trust, as the identified recipient of the land. The Collective Trust is to subsequently distribute the licensed land and statutory compensation to three entities representing the claimant groups.

[271] The Tribunal prescribed a list of the terms and conditions which applied to the return of the land. It recorded that it was entitled to make its recommendation under s 6(3) on "such terms and conditions as the Tribunal considers appropriate and shall identify the Māori or group of Māori, to whom that land or that part of that land is to be returned."[352]

[272] The Crown, under the fourth ground, says that the terms and conditions misconstrue the purpose of placing terms and conditions on the return of the land in three respects. The first is that the imposition of terms and conditions is limited to matters ancillary to the transfer of licensed land and cannot constitute an additional remedy. The Crown says the Tribunal is not entitled under the legislation to recommend that the land be returned to a collective trust which is not the final recipient of the land. Secondly, the Crown says the Tribunal has fallen into error in that it has replicated or enhanced matters already provided for in the statutory scheme or has provided additional remedies, such as requiring warranties by the Crown in favour of the recipient of the land and by imposing obligations on the Crown to give notice to the Crown Forestry Rental Trust (CFRT) and the Forestry Emissions Unit Trust (FEUT). Finally, the Crown says the Tribunal has constrained the parties' ability to negotiate an alternative settlement to its recommendations. This restraint, the Crown says, overrides the parties' statutory entitlement to negotiate an alternative outcome regardless of whether it is consistent with the interim recommendations or not.

Terms and conditions recommended by the Tribunal

[273] The Tribunal noted that it had the discretion to impose appropriate terms and conditions to enable the purposes of the legislation and the 1989 Forests Agreement

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352 Section 8HB.

to be carried out.[353] It said the terms and conditions were "necessary" to ensure the remedies recommendations were "consistent with the 'practical application of the Treaty.'"[354]

[274] Those terms and conditions included:

(a) The Crown to return the whole of the Mangatū CFL land to a collective trust to be called the Mangatū Forest Collective Trust, which would hold the land on behalf of the three entities established by the successful claimant groupings.

(b) The duration of the trust would be for a period of five years from the date that all trustees were appointed, unless the trustees by majority determined that the trust should terminate at a different time. A draft trust deed was attached to the report.

(c) Provisions were detailed for the appointment of the Trustees.

(d) The parties could "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".[355]

(e) Various obligations on the Crown, including:

(i) a requirement that the Crown would create a separate title for the returned Mangatū land, taking all necessary steps to create a title and would indemnify the Māori owners as necessary; and

(ii) the Crown would provide the trust with a registrable memorandum of transfer for the land being returned within 12 months.

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353 *Haronga* (CA) (2016), above n 15, at [74].
354 *Remedies Report 2021*, above n 1, at [8.46].
355 At [8.46].

(f) A Crown warranty that the terms of the Crown Forest licence had been complied with as at the date of title transfer to the Māori owners and would indemnify the Māori owners for any breach of the licence requiring action or imposing liability on the part of the Crown prior to the transfer being effected.

(g) The Crown would give notice to the Crown Forestry Rental Trust of the final recommendations so that it would make payment of the accumulated rentals to the Mangatū Forest Collective Trust.

(h) The Crown would give notice to the Forestry Emission Unit Trust of the Tribunal's recommendations so that it would transfer the New Zealand units to the Mangatū Forest Collective Trust.

Recommendation that lands be returned to Māori Collective Trust

[275] The Crown says that under s 8HB(1)(a) the Tribunal may make a recommendation that the land (or part of the land) be returned to Māori ownership, and that recommendation may be on such terms and conditions as the Tribunal considers appropriate. However, the Crown points out that under that section the Tribunal must identify the "Māori or group of Māori to whom that land or part of that land is to be returned."

[276] In this case the Tribunal has devised a scheme whereby the land and associated compensation will be returned to a collective trust, as an interim vehicle, although that holding could be perpetuated by agreement between the trustees following the provisions of the Trusts Act. The trust does not yet exist and the Tribunal's recommendations assume it can and must be established during the 90-day period. On its draft terms the trust will have at least five years to distribute the land to the governance entities of the claimant groups in accordance with their determined interests, and compensation will be paid in those proportions, allowing for the operating expenses of the collective trust. This leaves it to the collective trust to transfer the land to the claimant group beneficiaries. The trust will need to determine which parts of the land are transferred to which group.

[277] The Crown says that only an impermissibly broad reading of "terms and conditions" could empower the Tribunal to dictate the establishment of trust entities and to stipulate how those entities are to function and their obligations, particularly in terms of distributing compensation. It says the details set out in the draft trust deed, including such provisions as when the trustees are to meet and trustee remuneration, go well beyond the stipulations ancillary to a recommendation that land be returned to Māori, and demonstrates that the Tribunal has misunderstood its powers. It says that while the Tribunal may have identified the ultimate beneficiaries it has abdicated its statutory responsibility to determine to whom the land should be returned, leaving that to further processes to be undertaken by the parties. The Crown says this:

(a) generates uncertainty for the licensee, in circumstances where Parliament (and the Māori groups, forestry interests and the Crown) intended the licensee to have certainty as to who the licensee was to work with and consult on matters of mutual interest concerning the forest after a recommendation under s 8HB(1)(a); and

(b) increases the likelihood of recourse to the general courts and protracted litigation if the recipient entities cannot reach a solution agreeable to all involved on decisions about who will get what land, compared with the concern for finality evident in the legislative scheme and the licence itself. In that respect it points to the arbitration clause in the licence, which provides that disputes between the parties touching any matter under the licence are to be arbitrated, with the arbitration award final and binding on the parties.

[278] The NUOT respondents abide the decision of the Court in relation to this ground of review.

[279] The second and sixth respondents say that the Tribunal has reached what it considers to be the right outcome by tailoring the arrangements to the particular circumstances of the iwi/hapū concerned. They say the Tribunal's arrangement is an elegant solution, especially in view of the evidence, which indicated that given the nature of the terrain and the protective nature of the forest it made commercial sense

to manage the forest as one unit. In addition, there is uncertainty over the future replanting requirements due to recent environmental regulatory changes, as a result of which it may be that the forest or part of it will not be able to be harvested at all. This will have implications for the groups in funding the liability for replanting. In addition, two of the three groups wanted the land to be divided, which was partly driven by the belief that it was too difficult to work together. The Tribunal has provided certainty on the key issues — namely percentage division between the three groups, and that Māhaki and NUOT are both entitled to receive some land in the Mangatū No 1 block. Balancing those factors, the Tribunal has therefore set the duration of the collective trust at five years, with the possibility of the trustees changing the term by majority.

[280] Those respondents indicated this gave the groups an opportunity to work together over five years, after which, and in light of that experience, and subject to information and advice concerning management of the forest including replanting, they could then decide whether they wish to continue working together or whether to divide the land and go their separate ways. The second and sixth respondents submitted this was a much more sensible approach than arbitrarily dividing the land now, leaving the groups with smaller pieces of land that are unlikely to be profitable.

[281] Those respondents say the practical difficulties the Crown pointed to did not in reality exist. They say it was the Crown witness, Mr Marron, to whom the Tribunal referred when it said that "a division on the ground would complicate any arrangement between the claimants and the licensee."[356] The respondents say that in any event the licensee has certainty that it will be dealing with the collective trust for at least five years. If disputes arise between the beneficiaries there is provision in the Trusts Act 2019 for resolving those difficulties.

[282] The second and sixth respondents submitted that, as the Tribunal itself pointed out, there is a synergy between the collective trust model and the tikanga-based solution that prominent rangatira Wi Pere (the great-great-grandfather of Mangatū Inc chair Alan Haronga) reached with the Mangatū block when it went through the Native

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356 At [6.186].

Land Court in 1881. At that time, as detailed above, to avoid the land being subject to the vagaries of individualisation, Wi Pere persuaded the Native Land Court to vest the Mangatū No 1 block in 12 rangatira, each chosen to hold the land on trust for the hapū. The Tribunal commented that if a leader like Wi Pere could call on wide-ranging whakapapa connections embodying the mana of all they represented (which spanned the same groups to which the Tribunal has now recommended the land be returned), then, by aligning with a similar customary arrangement, the Tribunal has reached an outcome that promotes the tikanga principles of whanaungatanga and manaakitanga between Te Aitanga a Māhaki and the other iwi/hapū represented in this inquiry.

Analysis

[283] I agree with the arguments of the second and sixth respondents that the transfer of the land to the collective trust represents an elegant solution that is consistent with tikanga as expressed by the Tribunal. A collective trust is a recognised legal vehicle to hold land. The Tribunal has recommended the allocation of particular percentages of the land and compensation which will be held for the three groupings as beneficiaries. Therefore it has identified the Māori or group of Māori to whom the land is to be returned and relief by way of compensation is to be directed, as well as making some specific directions in that regard.

[284] The transfer to a trust does not offend against the wording of the provisions allowing the Tribunal to impose such terms and conditions as it considers appropriate. Nor is it inconsistent with the statutory requirement that the Tribunal must identify the Māori or group of Māori to whom that land or part of that land is to be returned. The legislation requires no more than that identification. It does not prescribe how that is to be effected and it was for the Tribunal to then make a recommendation on the "practical application of the principles of the Treaty."[357]

[285] In view of the fact that some of the Treaty breaches the Tribunal had determined were well-founded related to the fractionation of the ownership of the land, and the Crown's actions pitting closely linked whakapapa groups against each other, it is not surprising that the Tribunal, in devising a solution, looked to incorporate

357 Treaty of Waitangi Act, preamble.

elements of communal ownership. A framework was outlined in the terms and conditions which would encourage the management of the land as a unit and require further kōrero between the claimants. That resolution also had, in its view, the benefit of shortening the Tribunal inquiry process.

[286] The Supreme Court in *Wairarapa Moana* examined the importance of understanding the nuances of the tikanga at play and the ability of tikanga to adapt to changing circumstances. As the Court noted, tikanga will adapt to new circumstances and tikanga consistently "framed Māori responses to … wholly novel situations."[358] Such adaption included coordination by multiple hapū in resolving their disputes outside the Native Land Court before asking the Court to affirm their agreements through consent awards.[359] Another example given involved the claims by urban Māori groupings for allocation of Māori commercial fishing quota, which raised at the time unique debates about distribution. In the litigation and negotiations involving those issues, tikanga was "an adaptable framework for resolution."[360]

[287] In *Wairarapa Moana* the Supreme Court noted that the Tribunal was the body "uniquely placed" to consider the tikanga at play.[361] It noted this required an understanding and ability to comprehend nuances and the courts should not pre-empt the Tribunal's iterative process.[362] It also noted that the Tribunal is entitled to make recommendations for return of the land on such terms and conditions as the Tribunal considers appropriate. The Court commented on the flexibility it had to pursue tika process and adopt such aspects of "te kawa o te marae" as the Tribunal thought fit.[363] It also commented on the fact that the Tribunal's options were not necessarily binary, and it was for the Tribunal alone to determine the outcome. The Court noted that the Tribunal alone was to determine the outcome, and that tikanga speaks to process as well as substance. The Court noted that it is through a tikanga process that the apparently irreconcilable may be reconciled. The Supreme Court also noted that a tikanga-consistent response would require consideration of multiple factors and the

358 *Wairarapa Moana*, above n 2, at [78].
359 At [78].
360 At [79].
361 At [84].
362 At [84]–[85].
363 At [86]–[87].

Tribunal would know that resolution required a good deal "more kōrero between the protagonists."[364]

[288] These comments by the Supreme Court are consistent with those made by the Court of Appeal in *Attorney-General v Haronga* that the 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.[365] Looking to the purpose of the TOWA, the Tribunal also noted that the flexibility in terms and conditions was also necessary to ensure its remedies recommendations were consistent with the "practical application of the Treaty".

[289] There is nothing that indicates that the wording of s 8HB(1)(a) should be narrowly construed. In fact, the Supreme Court has indicated otherwise. While its comments in *Wairarapa Moana* were directed at the iterative process being undertaken in the relevant inquiry, there is no reason why the Tribunal was not entitled to devise a vehicle, the collective trust, which recognises the interests of the three claimant group entities as beneficiaries to the land but requires more kōrero between those groupings through the exercise of whanaungatanga and manaakitanga to ultimately reach a decision as to how the ownership of the land on the ground should be divided.

[290] The decision, as the second and sixth respondents have commented in their submissions, echoes the tikanga solutions of the past and also recognises the complex nature of the historic breaches and the prejudice which has occurred to the Māori groupings — not just by loss of ownership (in the common law sense) but of the layers of interests recognised in Māori customary ownership. It also recognises the rangatiratanga of the affected Māori groups and allows them to control the ultimate title allocations. The solution of the collective trust itself can be seen to be part of the remedy for the relevant prejudice caused by the fractionation of the land and the mistrust engendered between the groups because of the Crown's actions in breach of the Treaty.

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364 At [83].
365 *Haronga* (CA) (2016), above n 15, at [74].

[291] Turning to the more detailed criticisms by the Crown of the Tribunal's draft deed of trust and provisions as to its operations, given my findings that the collective trust was an appropriate vehicle, I also consider it was open to the Tribunal to outline the manner in which the trust should operate. It is open to the trustees to vary those provisions if they wish, either by agreement with the Crown within the 90-day period or, beyond that, by using appropriate trust processes.

[292] There is also no uncertainty for the licensee as alleged. The trust is a legal vehicle with whom the licensee can work and consult with on matters of mutual interest. It is also not unusual in the commercial world for land including forestry blocks and forest assets to be owned by trusts. Any issues between the three beneficiary groupings inter se are not directly relevant to the collective trust's relationship with the licensee.

Crown warranties and indemnities

[293] The Crown says the Tribunal had no power to require warranties from the Crown that the terms of the Crown Forest licence had been complied with by both the Crown and the licensee as at the date of transfer to Māori owners. It says that had Parliament intended the Tribunal to impose on the Crown a potentially onerous and unqualified financial obligation such as this it would have said so expressly. It also said it was unlawful for any person to give guarantees or indemnities on behalf of the Crown unless expressly authorised by an Act.[366]

[294] The Crown also says that the phrase "terms and conditions" connotes mechanical stipulations ancillary to a broader goal, and that using that provision to imply a warranty which could involve significant liability on the Crown reads that phrase too broadly. In addition, the Crown says an open-ended indemnity clause leaves the Crown's obligations undefined beyond the 90-day period.

[295] In addition, the Crown says the Tribunal materially erred in not referring to the clauses of the forest licence which addresses indemnities and guarantees. The statutory limitation on giving guarantees on behalf of the Crown to which the Crown

366 Public Finance Act 1989, s 65ZC.

referred is set out at s 67ZC of the Public Finance Act, which provides that "[e]xcept as expressly authorised by any Act, it is not lawful for any person to give a guarantee or indemnity on behalf of or in the name of the Crown."

[296] The second and sixth respondents said it was appropriate for the Tribunal to impose warranties on the Crown to ensure that all relevant obligations under the Crown Forest licence and environmental regulations had been complied with. This was consistent with the 1989 Forests Agreement. They pointed out the Tribunal had noted that the warranties were consistent with ensuring "that Māori, to whom ownership is being returned, receive what they had bargained for in the 1989 Forests Agreement".[367] The Tribunal had pointed out that the Crown Forest 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."[368]

Analysis

[297] The Tribunal did not directly address the issue of the statutory limitation on giving a guarantee or indemnity on behalf of the Crown. However, I agree with the respondents on this issue. There are obvious practical difficulties for a transferee to enforce compliance or recover damages for breaches of the covenants dating back to prior to transfer. The principle of active protection under the Treaty supports the provision of a warranty and indemnity by the Crown for such compliance.

[298] The value of the CFL land may well be affected by any breach of the licence by the licensees. For instance, the licence provides for the retention of public risk insurance by the licensee, provisions for fencing and other covenants. As the Tribunal indicated, the ownership is being returned to Māori and it is appropriate they receive what they bargained for in the 1989 Forests Agreement. The Supreme Court in *Wairarapa Moana* emphasised the fact that Māori had given the Crown a significant benefit in the 1989 agreement.[369]

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367 *Remedies Report 2021*, above n 1, at [6.241].
368 At [6.241].
369 *Wairarapa Moana*, above n 2, at [105].

[299] It seems that the Tribunal inquiry has proceeded on the basis that the licence terms have been complied with. Māori have been excluded from exercising tino rangatiratanga and kaitiakitanga since the licensee has been on the property. The usual situation in a commercial transaction in relation to the transfer of land on which activities such as the forestry activities have been taking place would include warranties from the transferor as to compliance in relation to the activities on the land. In my view the prescribed terms and conditions may include the usual commercial terms of such a transfer, including warranties.

[300] Section 67ZC of the Public Finance Act does not act as a total prohibition on the granting of a guarantee on behalf of or in the name of the Crown. Under s 65ZC the Act provides for the Minister on behalf of the Crown to give a guarantee or indemnity to any person if it appears to the Minister "to be necessary or expedient in the public interest to do so."[370] It is also open to a department on behalf of or in the name of the Crown to give a guarantee or indemnity of a type specified in regulations under the Act if it appears to the department to be necessary or expedient in the public interest to do so.[371]

[301] It is the Minister for Māori Affairs who is served with the decision, and who has the power to settle the claim in the 90-day interim period before the recommendations become final.[372]

[302] The inclusion of a Crown warranty in the terms and conditions of transfer and indemnity for breach of the licence or any relevant statute or law or other liability in the period prior to the transfer being effected is not an error of law.

Clause restricting ability of parties to settle in the 90-day period

[303] The Crown also alleges that the Tribunal is in error in inserting a provision in the recommended terms and conditions that the parties, including the claimant groups and the Crown, may agree to amend the terms of the trust deed during the 90-day

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370 Public Finance Act, s 65ZD.
371 Section 65ZE.
372 Treaty of Waitangi Act, s 8HC(5).

period "provided that such amendments are consistent with the Tribunal's terms and conditions."

[304] The Crown points out that under s 8HC of the TOWA that if before confirmation in the 90-day period after making the interim recommendations the claimant and the Minister of Māori Affairs settle the claim, the interim recommendations may be cancelled or modified and the Tribunal may, if necessary, make a final recommendation. There is no statutory requirement that the settlement be in line with the terms and conditions prescribed in the recommendation by the Tribunal. Therefore, the Crown says such a provision is unlawful.

[305] The second and sixth respondents say the Tribunal was well aware of the statutory scheme. It points to other comments in the *Remedies Report 2021* in which the Tribunal notes that the Crown and Māori have the opportunity to engage in negotiations under s 8HC which may result in a settlement of the claim "on a different basis than that recommended by the Tribunal before the 90-day period expires."[373] Read in context the Tribunal was not unlawfully constraining the parties' freedom to negotiate contrary to the provisions of s 8HC.

Analysis

[306] On this aspect I agree with the Crown to the extent that a settlement under s 8HC which varies the proposed terms will override the provisions of any prohibition on variation in the terms and conditions.

[307] Clause (1) of the terms and conditions restricting inconsistent variations is limited to the terms and conditions of the trust.[374] At worst, it is a minor drafting error. The correction can be made by the Tribunal under the slip provision in s 8HC(7)–(8). This enables the interim recommendation to be corrected by the Tribunal if the recommendation does not express "what was actually decided and intended." The Crown may refer back to the Tribunal to seek that correction in light of the comments of this Court. That does not appear to require a direction from this Court, but if such

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373 *Remedies Report 2021*, above n 1, at [3.66].
374 At [8.46].

direction is necessary, I direct that the Tribunal reconsider that provision in view of the provisions of s 8HC.

Transfer of title within 12 months

[308] The Crown says that the provision in the recommended terms and conditions that the Crown must provide the collective trust with a registrable memorandum of transfer for the land being returned within 12 months is unlawful. The unlawfulness arises because the imposition of terms and conditions as to creation of title, including the timing of transfer of title and access for the new owners, replicate matters expressly provided for in the Act and licence. The Crown says that in light of the detailed processes legislated for, the fact that Parliament did not expressly provide for when title was to be transferred suggests that it did not intend the Tribunal to have the power to set a time limit in this regard. It says Parliament intended for this to be negotiated between the parties, bearing in mind the practical issues which may arise.

[309] The relevant condition in the Tribunal's recommendations is as follows:

> (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 fee simple title for the CFL land being returned; and will indemnify the Māori owners as necessary.
>
> 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 registrable memorandum of transfer for the land being returned.

[310] The Tribunal in a footnote explained that this was 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.[375] 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 Toitū Te Whenua | Land Information New Zealand registered title created.

[311] The Crown says it is telling that there is a provision for statutory compensation to be paid within two months of the date of the Tribunal's recommendation, or such *later* date as the Tribunal may direct or the parties agree.[376] It says that had Parliament intended there should be a fixed time within which the land would also be transferred it would have specified it, as it did for compensation payments. In addition, as the Act limits the Tribunal's discretion as to timing for compensation to an *extension* rather than contraction of the time period, it strongly suggests Parliament did not envisage the Tribunal being empowered to provide deadlines for the delivery of remedies under the scheme.

[312] The Crown argues that the term requiring the creation of a separate title and provision of it within 12 months is not consistent with the statutory provisions, nor with the provisions of the licence. The Crown suggests the detail of the creation of the title and the timing of the issue of the title should be negotiated between the parties given the practical issues that may arise.

[313] However, I am of the view that the Tribunal was aware of the considerations and practical implications of creating the new title. It was entitled to exercise its broad discretion to do what was "fair and just" between the parties.[377] It has not made a direction which is inconsistent with any legislative provision. The imposition of a time period for the creation of the title is well within the ambit of the Tribunal's discretion as to its ability to impose terms and conditions as it thinks fit.

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375 At [8.46], n 58.
376 Crown Forest Assets Act, s 36 and sch 1 cls 7–8.
377 *Haronga* (SC), above n 15, at [107].

Notice to Crown Forestry Rental Trust (CFRT) and Forest Emission Unit Trust (FEUT)

[314] The Crown also says that the conditions stipulating that the Crown was required to give notice to the Crown Forestry Rental Trust and the Forestry Emission Unit Trust were replicating provisions and not necessary.[378]

[315] The Crown Forest Rental Trust deed provides for the allocation and distribution of trust funds to the persons to the claimants to whom the CFL land is to be returned pursuant to the recommendation of the Tribunal under s 8HB(1)(h). That provision empowers the trust to make the distribution to the entitled Māori groups. There is nothing inconsistent in requiring the Crown to give notice to that trust of the recommendations by the Tribunal.

[316] Similarly, cl 6.1 of the FEUT's deed of trust requires that the trustees of that trust as soon as "reasonably practicable" after the eligible CFL land has been transferred to a beneficiary pursuant to a Treaty settlement take certain actions to transfer the New Zealand units received to the relevant beneficiary. The requirement that the Crown give notice of the recommendations to the trust again is not inconsistent with the provisions in that deed of trust.

[317] Both the Crown forestry rental money and the Forestry Emissions Units are closely related to the relevant land to be transferred. The payment of the rental money and the transfer of the units are incidental to the primary recommendations to transfer the land. The Tribunal was entitled to provide terms and conditions which covered these matters to ensure notice was given in a timely fashion to the trusts and consequently to ensure that a tidy and expeditious transfer of the relevant benefits to the correct recipient takes place.

[318] The Tribunal did not act unlawfully in relation to requiring the Crown to give notice of the recommendations.

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[378] The Crown Forestry Rental Trust was established under s 34(2) of the Crown Forest Assets Act. The Crown says that cl 11.1 of the Crown Forestry Rental Trust deed of trust provided for the payment to the claimants of the rental accumulated in the relevant account. The Forestry Emission Unit Trust was established under s 73 of the Climate Change Response Act 2002 and cl 6.1 of the FEUT's deed of trust.

[319] For the reasons above, I am of the view the fourth ground of review fails. It is dismissed.

The counterclaim by Te Whānau a Kai

[320] Te Whānau a Kai in its counterclaim says that the Tribunal in its Remedies Inquiry leading to the *Remedies Report 2021* failed to observe natural justice by omitting to "take into account, articulate and reflect in writing" the evidence produced by the counterclaim applicant that they were not a "conquered people". In addition, the counterclaim applicant alleges that the Tribunal failed to appropriately take into account and to recognise the counterclaim applicant's customary interest in the CFL land. It says that the Tribunal's failures under this head were that in making adverse findings against the counterclaim applicant: it failed in its duty to act judicially; failed to take into account the counterclaim applicant's tikanga and the assessment of their customary interests; or omitted to give advance notice of an adverse finding against the counterclaim applicant so that the counterclaim applicant might then have had the opportunity to reply to the Tribunal's findings of fact.

[321] In its second ground of review Te Whānau a Kai says that the redress allocation made by the Tribunal was inequitable given "the counterclaim applicant's recommended redress allocation" and the Tribunal failed to give reasons or insufficient reasons for that allocation or placed too little weight or failed to take into account sufficiently the overall evidence in support of the counterclaim applicant's remedies.

[322] In its third ground of review the counterclaim applicant says that the recommendations were unfair and made a finding concerning the counterclaim applicant that was "not based on evidence showing logically the existence of facts consistent with the finding" and that the reasoning was not supportive of the finding.

[323] The fourth ground of review alleges that the Tribunal made errors of fact and law. The particulars under this head outline the claims to whakapapa of Te Whānau a Kai and say that the Tribunal wrongly allocated redress to the second respondent which did not have customary interests in the CFL land, contrary to the findings of the Tribunal.

[324] In its submissions, Te Whānau a Kai elaborates on its claim, saying that the Tribunal in its *Remedies Report 2021* was wrong to rely on its Principal Report findings on customary interests in Mangatū. In particular it says that the Tribunal's findings as to mana whenua were not sufficiently robust, particularly following the High Court decision in *Mercury.* It submitted that the Tribunal's hearing circumstances render its mana whenua findings "inadequate for the rigours of a post-*Mercury* remedies hearing."

[325] It goes on to say that while it did not pursue a separate claim in the Tūranga Inquiry it was not necessary for it to have its customary interests in the land determined during an historical claims' inquiry, and therefore it should have been entitled to a further inquiry into mana whenua at that stage. That would better inform the Tribunal in its remedies inquiry as to the customary interests claim. Te Whānau a Kai says that the failure of the Tribunal at that historical inquiry stage to be more rigorous tainted its later findings in the *Remedies Report 2021*, to the disadvantage of Te Whānau a Kai. It further says that the evidence it called at the Remedies Inquiry, in particular from its senior historian Mr Tony Walzl, was not given sufficient weight, and that the Tribunal failed to engage with the expert historian's evidence. It says that was a failing which constitutes an error of law, particularly in the "post-*Mercury* era".

[326] Te Whānau a Kai also says that the Tribunal was able to avoid saying that it was the tribal entity of Te Whānau a Kai that held the customary interest in Mangatū. The iwi submitted that it should not go unnoticed that the interest is attributed to *"people* who were Te Whānau a Kai" and not to the tribal entity of Te Whānau a Kai. It says the "judicial machinations displayed here are concerning". By accepting that "*people* who were Te Whānau a Kai" were customary owners but with lesser occupational rights established "sufficient interests" in the CFL lands to warrant binding recommendations in favour of Te Whānau a Kai. However, because those interests were few or minimal, according to the Tribunal, the equitable interest in the collective trust prescribed for Te Whānau a Kai is just 14 per cent.

[327] The counterclaim raises a number of allegations of failures by the Tribunal, which may be summarised under the following headings:

(a) Failure to properly take into account the claim by Te Whānau a Kai to mana whenua and its importance in the tikanga evaluation of customary rights, particularly after the decision in *Mercury*.

(b) Failure to robustly inquire into the historical claims by the Tūranga Inquiry Tribunal and failing to allow a reconsideration of those historical claims at that inquiry stage.

(c) Failure to take into account the evidence that Te Whānau a Kai presented as to its historical claims and claims as to customary interests or failing to give specific detailed reasons as to why it did not accept that evidence.

[328] Te Whanau a Kai maintained and elaborated on its position in its submissions following the delivery of the Supreme Court decision in *Wairarapa Moana*. I refer to those below.

[329] The third and fourth respondents submit that Te Whānau a Kai are contesting the facts and the weight applied to the evidence by the Tribunal. In addition they say that the submissions of the counterclaim applicant contain factual inaccuracies and/or oversights. But ultimately the submission is that the issues raised are not matters of law. They are rather a complaint about the determination that the Tribunal made about the nature of the counterclaim applicant's customary interests in the land.

[330] The second and sixth respondents agree. Those respondents say that Te Whānau a Kai is in reality seeking to appeal against the merits of the Tribunal's decision. They say the grounds of review do not raise matters of law.

[331] I now turn to each of the failures alleged.

Historical claims findings in the Principal Report

[332] As M Bennion noted the Tribunal in its Principal Report did consider mana whenua issues and noted that:[379]

> Integral to our approach was the early identification of mandate and boundary disputes among claimants. By "mandate", we meant essentially who had the right to speak for a particular community (usually a kin group) in respect of a particular grievance or grievances. By "boundary disputes", we meant, in respect of land claims, disputes over which kin group "owned" the grievance.

[333] Notably, Te Whānau a Kai was actively involved in that inquiry. It acknowledges that it was involved but its complaint was that it was not on notice that it should have been filing evidence of customary interests in the CFL land and as a result the Te Whānau a Kai mana whenua concerns were not properly dealt with.

[334] The second and sixth respondents say that Te Whānau a Kai did not assert mana whenua interests in the Mangatū lands until resumption was being considered in the Remedies Report Inquiry. Those respondents noted that in the 2012 inquiry Te Whānau a Kai asserted "interests" in the Mangatū lands. By the time of the second remedies inquiry, those had been upgraded to a claim to mana whenua status and Te Whānau a Kai asserted a claim to 90 per cent of the block. Those respondents submit that this assertion did not oblige the Tribunal to go back to the beginning of the historic claims inquiry and start all over again by conducting a fresh inquiry into mana whenua interests.

[335] The Tribunal noted that in its closing submissions Te Whānau a Kai had sought a "fair and appropriate portion of the Mangatū CFL lands", recognising that other groups were entitled (along with Te Whānau a Kai) to the return of some land. The Tribunal further noted that during the iterative process Te Whānau a Kai made further submissions and then sought a 90 per cent interest in the CFL land, along with the associated compensation and accumulated rentals.[380]

[336] In addition, as NUOT submits, the Principal Report cannot be the subject of a challenge in these proceedings. Te Whānau a Kai says that the Principal Report was

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379 Principal Report, above n 7, at 5.
380 *Remedies Report 2021*, above n 1, at [6.148].

defective in that it did not provide sufficient detail to enable the Tribunal and the second remedies inquiry to properly assess the mana whenua. For instance, it criticised the lack of detail of the Tūranga Tribunal's failure to recount in detail the 1881 Native Land Court title investigation of the Mangatū block, instead extracting certain key themes and arguments. In addition, Te Whānau a Kai says the Tribunal's heavy reliance on the customary interests findings made in the Principal Report were based "in large part on a profoundly afflicted Native Land Court judgment", which was not a rigorous enough approach to determining the customary interests in the post-*Mercury* era.

[337] NUOT pointed out that all parties were present at judicial conferences in relation to the Principal Report, in which the process adopted by the Tribunal included tight management to ensure that the claimants' claims were properly recorded in the statement of issues the Tribunal generated. Amendments were made as required by the claimants in the Tribunal-generated statement of issues.[381]

[338] NUOT further submits that the *Mercury* decision did not "shift" the legal ground so that "fresh findings of well-foundedness" of historical actions of the Crown are required, as the counterclaim applicant had submitted.

[339] The submissions of the counterclaim applicant under this heading cannot succeed. The Tribunal was entitled to proceed in the remedies hearing on the basis of the well-founded claims that were identified in the Tribunal's 2004 Principal Report. Nevertheless, the Tribunal in the Remedies Inquiry ensured that it received other evidence relevant to the remedies inquiry and took that into account, including that of Te Whānau a Kai's historian, Mr Walzl.

[340] Te Whānau a Kai had the opportunity of being heard at all the relevant inquiries and was represented at all inquiries. There was no breach of natural justice.

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381 Principal Report, above n 7, at 2–3.

Failure to take into account the evidence of Te Whānau a Kai

[341] Te Whānau a Kai was represented throughout the inquiries, including throughout the historical claims' inquiry. It did not raise a claim relating to the Mangatū CFL land in the original Tūranga Inquiry even though it had the opportunity to do so. Indeed, the Tribunal had allowed the request of Te Whānau a Kai for an extension of four-and-a-half months to enable it to file its evidence. In any event, in the Remedies Inquiry the Tribunal heard evidence from Mr Walzl, the expert witness of Te Whānau a Kai, on the customary rights in the Mangatū lands, as well as the tangata whenua witnesses. It also had regard to their closing submissions and assertions in support of their claim to mana whenua on which their claim to 90 per cent of the Mangatū CFL land was based.

[342] Te Whanau a Kai acknowledges that it provided further evidence which included evidence of its customary links to the land in order to assist in determining more precisely the issue of to whom the land should be returned – but not to re-examine "well-foundedness" claims.[382] Te Whānau a Kai suggests that its evidence was rejected because the Tribunal had a "closed mind". The Tribunal therefore failed to take Te Whānau a Kai's evidence of mana whenua in the Mangatū block into account.

Effect of the Wairarapa Moana *decision*

[343] In submissions on the effect of the Supreme Court decision in *Wairarapa Moana*, Mr Naden for Te Whānau a Kai submitted that the majority decision in the Supreme Court supported the iwi in its prayer for a mana whenua hearing. He pointed to the conclusion of the majority which had noted the importance of mana whenua in the Tribunal's consideration of a resumption application but had rejected mana whenua as the only applicable tikanga principle at play. Mr Naden emphasised in bold type the concluding words at [95] of the Supreme Court judgment as follows:

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[382] The counterclaim applicant quotes in its submissions from the Waitangi Tribunal *Memorandum-Directions of the Presiding Officer Calling for Submissions on Reconvened Inquiry* (8 March 2017) Wai 814 at [3]. In that memorandum the presiding officer noted that the inquiry would require the parties to make that detailed evidence available including as to customary rights and relationships of the respective groups the Mangatū Crown Forest land in accordance with tikanga as well as prejudice suffered over time by each group from the impact of Treaty breaches which the Tribunal had identified.

> [95] In conclusion, therefore, we reiterate the following points. Mana whenua is unquestionably important but it must be applied in context. One context is the tikanga framework itself. Other tikanga principles may also need to be considered. Further, tikanga adapts to circumstances as they arise. That is why it has proved to be so resilient. Finally, it is important to remember that tikanga speaks to process as well as substance. It is through *whaka-ea* as a process that the apparently irreconcilable may be reconciled. It follows that we are unable to agree with the High Court Judge's conclusion that an applicant without mana whenua is likely to fail in an application for resumption. We do not yet know what might result from *whaka-ea* processes. **Nor has there been a full assessment of the effect of other tikanga principles. These are matters for further consideration in the Tribunal's iterative process. It is too soon to predict a likely outcome.**

[344] Te Whānau a Kai submits that it is apparent from the conclusion of the majority in the Supreme Court that due process was not followed by the Tribunal in the present inquiry, as there was no assessment of mana whenua in the CFL land, let alone "a full assessment of the effect of other tikanga principles". It points to the fact that in the Wairarapa inquiry the resumption applications were referred back to the Tribunal by the Supreme Court for it to continue its iterative process but this did not happen because legislation was passed preventing that investigation.

Analysis

[345] There is nothing to indicate that the Tribunal had a "closed mind" on any issues before it in the Remedies Inquiry. It noted that Te Whānau a Kai (and the other claimants) had previously participated in the Tribunal's Tūranga Inquiry, which began in 2000. The Tribunal had found a wide range of Treaty breaches by the Crown, including its acquisition of parts of the land now comprising the Mangatū State Forest.[383] It noted that Te Whānau a Kai was represented by a mandated collective entity for negotiations with the Crown at that stage. That collective in fact signed an agreement in principle with the Crown in August 2008. This was overtaken by the Supreme Court directing that the Tribunal hear the Mangatū Incorporation's application for resumption remedies.

[346] Following that direction Te Whānau a Kai remained represented by the entity known as Te Aitanga a Māhaki and Affiliates (TAMA). The Tribunal did not dismiss TAMA'S application but adjourned it on the basis that there was a reasonable prospect

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383 *Remedies Report 2021*, above n 1, at [1.3].

of TAMA successfully re-entering negotiations with the Crown once the mandate was renewed. The *Remedies Report 2014* was the subject of a successful judicial review and the report was quashed.[384] The Tribunal then reconvened the Mangatū Remedies Inquiry, leading to the *Remedies Report 2021*.

[347] At the reconvened hearing the Tribunal noted that its task was to decide whether the whole or part of the Mangatū CFL land should be returned to Māori ownership under s 8HB of the TOWA. It had already heard the broad historical claims in the Tūranga Inquiry between 2001 and 2002, reporting on them in the Principal Report. The Tribunal said:[385]

> 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. This additional evidence complements the 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.

[348] In its analysis on the determination as to who was to receive the Tribunal's s 8HB recommendation it noted that all the claimants had suffered:[386]

> … 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 … 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).

[349] It noted that the Tūranga people generally were described in the earlier Principal Report as "kin groups inextricably linked by physical proximity and interwoven whakapapa, yet each with its own independent mana born of distinct whakapapa lines, distinct resource ownership, and strong leadership".[387] It noted that was true of the claimant groups in the Remedies Inquiry — closely connected, yet each with their own independent identity.

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384 As detailed at [1.22].
385 At [1.36].
386 At [6.149].
387 At [1.30], citing the Principal Report, above n 7, at 38.

[350] The Tribunal noted that it would have preferred the ideal outcome of the return of the CFL land to the whole community of owners without making separate allocations to each claimant group. However, that could not be achieved through the mediation and therefore it proceeded to make the allocation of the land and the compensation to the trust in the percentage beneficial interest that I have set out above.

[351] In reaching those percentage interests, it said in relation to Te Whānau a Kai, to which it allocated 14 per cent:

(a) The nature of Te Whānau a Kai's customary interests in the Mangatū lands through their Ngāriki whakapapa was clear.[388]

(b) Te Whānau a Kai's allocation was smaller than those of the other two groups. This recognised its most important customary lands were not in Mangatū, although the land and resources in Mangatū would have been increasingly important to Te Whānau a Kai as the Tūranga lands were lost as a consequence of Crown Treaty breaches affecting those lands.

(c) Te Whānau a Kai was deprived of the richest resource in their Tūranga lands following the Crown's confiscation of parts of their lands. It had an ongoing struggle to maintain its autonomy and independent identity. Following other significant losses in the period that the East Coast Commissioner controlled their lands as well as the alienation of blocks of land made Te Whānau a Kai more dependent on its interests in Mangatū 1. It suffered prejudice during extensive periods, when its land was controlled by the East Coast Commissioner, and then again when the Crown acquired land in 1961. While Te Whānau a Kai's most important land losses were outside the Mangatū CFL lands they involved "egregious Crown breaches of Article 2 of the Treaty".[389] Therefore the Tribunal found recognition should be given to Te Whānau a Kai in view of the severity of the Treaty breaches and their impact on

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388 At [6.155].
389 At [6.162].

Te Whānau a Kai.[390] It noted that while Te Whānau a Kai would not have to provide for as large a population as the Māhaki Forest Settlement Trust it would still require a sizeable economic base to meet the costs of operating and to make meaningful investments in their communities' welfare and to grow their resource base.[391]

(d) Finally, the Tribunal said:[392]

> 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.

[352] It appears that Te Whānau a Kai seeks to contest the merits of the factual findings of the Tribunal. There is no evidence of lack of natural justice. Te Whānau a Kai was involved in all the inquiries dating back to at least 2000. It had every opportunity to advance its claims. It was up to them to determine the strategy they used to pursue its interests.

[353] There is no evidence that the Tribunal had a closed mind. It was not required to detail every piece of evidence it heard from every witness and respond to it. The issues before it were complex, as was the historical evidence. The Tribunal was entitled to rely on earlier findings as to "well-founded" claims from an inquiry in which Te Whānau a Kai participated. There was no obligation on the Tribunal to present a draft report indicating the percentage allocations in order to call for a response. All parties were given ample opportunities to make submissions on the percentage allocations and did so. Natural justice does not require any further opportunity to comment on the draft report.

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390 At [6.162].
391 At [6.166].
392 At [6.168].

[354] In any event, the evidence of Te Whānau a Kai as to the customary interests claimed was before the Tribunal. The Tribunal considered that and made its findings as to the Te Whānau a Kai entitlement. It is the degree or significance of its interests and entitlements determined by the Tribunal with which Te Whānau a Kai now takes issue. However, that assessment was a matter for the Tribunal.

[355] Te Whānau a Kai relies on the High Court *Mercury* decision to emphasise its argument that the Tribunal should have identified the "group of Māori" to whom the CFL land should be returned and the importance of "returning" the resumed land to its former owner. It said this required fresh findings of well-foundedness.

[356] First, the *Mercury* decision did not indicate that findings as to well-founded claims in earlier reports had to be revisited. Secondly, the Supreme Court has indicated that any analysis of tikanga must be taken in context and it is for the Tribunal to undertake that analysis. As noted above, mana whenua is not the only matter of tikanga to be considered.

[357] I also do not accept the submission of Te Whānau a Kai that the Supreme Court in *Wairarapa Moana* supported its submission that the Tribunal was required to undertake a separate inquiry into tikanga and in particular mana whenua.

[358] As Ms Feint pointed out, the Mangatū Remedies Inquiry is at an end and so at a different stage to that of the Wairarapa Remedies Inquiry. The Mangatū Tribunal had completed its assessment of tikanga including mana whenua as it relates to the claims based on the events giving rise to the claims and the context. By way of example, Ms Feint pointed to the Tribunal's assessment of Te Whānau a Kai's claim. The Tribunal noted that it understood the claimants' references to "mana whenua" as meaning "their customary relationships with land", which "could include ownership but were also connected to their history and identity as communities."[393] It noted the "tikanga of collective responsibility and action remain[ed] important today" and recognised the "gulf between Māori customary understandings of tino rangatiratanga in respect of their land, and the western concept of fee simple ownership."[394] The

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393 *Remedies Report 2021*, above n 1, at [4.44].
394 At [4.50].

Tribunal went on to note that in its view, customary interests and mana whenua are often "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."[395]

[359] The Tribunal noted that Te Whānau a Kai had claimed to be customary owners in the Mangatū CFL lands, which was resisted by the other claimant groups, who claimed that Te Whānau a Kai did not hold mana whenua in Mangatū "as Te Whānau a Kai".[396] The Tribunal went on to find that it considered Te Whānau a Kai had a sufficient relationship to the CFL land for the reasons it set out, which included reliance on the evidence of Te Whānau a Kai's historian, Mr Walzl.[397] The Tribunal said it did not "wish to overstate the extent of Te Whānau a Kai's interests."[398] Nevertheless, it was satisfied that Crown Treaty breaches "affecting Māori ownership of the Mangatū CFL lands would also have prejudiced Te Whānau a Kai."[399]

Failure to take into account mana whenua

[360] The Supreme Court in *Wairarapa Moana* clarified that it was for the Tribunal to consider the applicable tikanga operating in relation to any resumption application. While mana whenua is an important consideration it must be considered in context with the other tikanga at play.

[361] Finally, Te Whānau a Kai says it was the "owner" given its mana whenua status. The Supreme Court has clearly stated that the Tribunal is not required to limit its inquiry into relevant prejudice under s 8HB to land *directly acquired* from Māori by the Crown, as Te Whānau a Kai seems to contend. Te Whānau a Kai also submitted that the Supreme Court had given a broad meaning to "return" insofar as it related to resumption land, which it said was "puzzling". This is effectively a challenge to the finding of the Supreme Court. It is the final court of appeal and its judgments must be followed by this court. In any event the challenge is one of fact which is a matter for the Tribunal.

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395 At [4.50].
396 At [4.56].
397 At [4.61].
398 At [4.62].
399 At [4.62].

[362] Te Whānau a Kai submits that it had mana whenua, which was not properly recognised by the Tribunal. This submission seeks to contest the merits of the factual findings of the Tribunal and is outside the ambit of this judicial review. The Tribunal made no error in that regard.

Conclusion

[363] In relation to the grounds of review in summary:

(a) In respect of the first ground of review, that the Tribunal erred in law in that it misconstrued and exceeded its jurisdiction and powers under s 8HB of the TOWA, I am satisfied the Tribunal has made no such errors of law. The Tribunal undertook the correct approach, correctly considered the relevant tikanga, and its recommendations are consistent with the approach endorsed by the Supreme Court in *Wairarapa Moana*.

(b) In respect of the second ground of review, that the Tribunal acted unlawfully in declining to extend the four-year "real value" period for compensation, I am of the view the Tribunal did not undertake the contextual analysis that it was required to complete and did not explain how the periods of delay were due to the failure of the Crown to exercise its *best* endeavours *jointly* with Māori to enable the Tribunal to deliver in relation to *all* its recommendations "in the shortest *reasonable* period" in the circumstances.

(c) In respect of the third ground of review, that the Tribunal erred in law in that in misconstrued the proper purpose and scope of statutory compensation under the Crown Forest Assets Act, took account of irrelevant considerations in its determination of the statutory compensation payable and acted outside its power, I am satisfied the Tribunal did not err in any respect. The Tribunal followed the correct approach to compensation, carefully evaluated the evidence, and took into account the relevant material.

[364] In respect of the fourth ground of review, that the Tribunal erred in law in its assessment of the terms and conditions recommended under s 8HB of the TOWA for return of the CFL land, I am satisfied the Tribunal was entitled to propose the terms and conditions that it did. However, the provisions of cl 1 of the terms and conditions, restricting inconsistent variations, fail to express what was actually intended and decided. This may be corrected without intervention from this Court under the slip provision in s 8HC(7)–(8). I therefore do not consider this requires a direction from this Court, but if such direction is necessary, I would direct that the Tribunal reconsider that provision in view of the provisions of s 8HC of the TOWA.

[365] The applicant is successful on the second ground of review. The Crown is entitled to a declaration that the Tribunal's determinations under this head were wrong by reason of the errors set out above. The Tribunal is directed to reconsider its recommendations in relation to declining to extend the four-year CPI-only period for the compensation amount under the Crown Forest Assets Act consistent with this judgment.

[366] The other grounds of review are dismissed, subject to any further directions required in relation to cl 1 of the terms and conditions.

[367] I have not formulated the declaration to which the Crown is entitled and direct the parties to file a joint memorandum if agreement can be reached on that as well as any other matters which may require consequential attention. Otherwise if anything further is needed the parties should file memoranda following the timetable set out for costs below.

[368] The counterclaim fails, and it is dismissed in its entirety.

Costs

[369] If the parties are unable to agree on costs on this matter any application should be made within 14 days the date of this judgment, any response within another 14 days and any reply within a further seven days.

Grice J

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