IN THE HIGH COURT OF NEW ZEALAND
GISBORNE REGISTRY

CIV-2014-416-24
[2015] NZHC 1115

UNDER	the Judicature Amendment Act 1972 and/or Part 30 of the High Court Rules
IN THE MATTER	of an application for judicial review of the Waitangi Tribunal's report, The Mangatū Remedies Report (2013)
BETWEEN	ALAN PAREKURA TOROHINA HARONGA First Applicant
	TE AITANGA A MĀHAKI TRUST Second Applicant
AND	THE WAITANGI TRIBUNAL (TE ROPU WHAKAMANA I TE TIRITI O WAITANGI) First Respondent
	THE ATTORNEY-GENERAL Second Respondent

IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV-2014-485-5266

UNDER	the Judicature Amendment Act 1972
BETWEEN	DAVID DONALD HARRY BROWN Applicant
AND	THE WAITANGI TRIBUNAL First Respondent
	THE ATTORNEY-GENERAL Second Respondent

Hearing:	3-5 November 2014
Counsel:	K Feint, M Smith and R Drummond for the applicants Alan Haronga and the Te Aitanga a Māhaki Trust K Ertel and B Lyall for the applicant David Brown E Devine for the first respondent C Linkhorn and R Hogg for the second respondent L Black for the interveners Owen Lloyd and Ngariki Kaiputahi Whānau Trust L Clark for the intervener Te Whānau a Kai
Judgment:	22 May 2015

JUDGMENT OF CLIFFORD J

Contents

Introduction

[1] In these proceedings Alan Parekura Torohina Haronga, the Te Aitanga a Māhaki Trust and David Donald Harry Brown challenge, as unlawful, decisions of the Treaty of Waitangi Tribunal declining and adjourning applications for the resumption of Crown forest lands.

Background

Overview

[2] Mr Alan Haronga is chairman of The Proprietors of Mangatū Blocks Incorporated (Mangatū). In that capacity Mr Haronga has for some time now pursued a claim before the Treaty of Waitangi Tribunal (the Tribunal) for the return to Mangatū of some 8,626 acres of land acquired by the Crown from Mangatū in 1961 (the 1961 Lands). The 1961 Lands now form a quarter of the Mangatū State Forest. That claim began, for these purposes, in 1992 as Wai 274 filed by Mr Eric Ruru. It formed part of the Tribunal's comprehensive inquiry into the Crown's dealings with Māori in Tūranganui-a-Kiwa. That inquiry resulted in the Tribunal's 2004 report, *Tūranga Tangata Tūranga Whenua*, and the negotiations between the Crown and Māori which followed.

[3] *Tūranga Tangata Tūranga Whenua* considered the claims of the Tūranganui-a-Kiwa hapu/iwi of Te Aitanga a Māhaki (Māhaki) and their close affiliates Te Whānau a Kai and Ngā Ariki Kaipūtahi,[1] of Rongowhakaata and of Ngai Tamanuhiri.[2]

[4] For the purpose of the subsequent negotiations, Māhaki and their affiliates mandated Te Pou a Haokai to represent them. Te Pou a Haokai, with similarly mandated representatives of Rongowhakaata and Ngāi Tāmanuhiri, formed an overarching body – Tūranga Manuwhiriwhiri.

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1 The parties spelled the names of the various Māori groups in different ways. I have adopted the spellings contained in the Mangatū Remedies Report.

2 Having said that, the Mangatū Remedies Report itself used at least two spellings of the name, viz Ngā Ariki Kaipūtahi/Ngariki Kaiputahi. This judgment will use the spelling "Ngā Ariki Kaiputahi" in relation to both the tribal authority and the whānau trust. I also note that the spelling "Ngariki Kaiputahi" was used in *Tūranga Tangata Tūranga Whenua* to refer to the iwi generally.

[5] By August 2008, a district-wide agreement in principle for the settlement of the historical Treaty claims of Tūranganui-a-Kiwa was signed. That agreement in principle gave Te Pou a Haokai the right to purchase the Mangatū State Forest, including the 1961 Lands, out of the settlement proceeds.

[6] For Mr Haronga and Mangatū, that was not an acceptable outcome. Their, and Māhaki's, proposal had been that the 1961 Lands should be returned to Mangatū without any reduction in Māhaki's settlement offer. In late July 2008 Mr Haronga filed a further claim with the Tribunal (Wai 1489) seeking, pursuant to the Tribunal's binding recommendatory powers under s 8HB of the Treaty of Waitangi Act 1975 (the Treaty Act), the return to Mangatū of the 1961 Lands and associated compensation. At or about the same time, Mr Haronga sought an urgent hearing of that claim before the Tribunal.

[7] In October 2009 the Tribunal declined Mr Haronga's application for an urgent hearing.

[8] Mr Haronga challenged that decision unsuccessfully in this Court[3] and the Court of Appeal.[4] Mr Haronga was given leave to appeal to the Supreme Court[5] and on 19 May 2011, the Supreme Court in *Haronga v Waitangi Tribunal* (*Haronga*) ordered the Tribunal to conduct the urgent hearing Mr Haronga had been seeking.[6]

[9] In 2010 the process in which Tūranga Manuwhiriwhiri had participated split into three separate iwi negotiations. Te Pou a Haokai continued to negotiate separately for Māhaki. In 2010 it changed its name to Te Whakarau and in 2011 to Te Aitanga a Māhaki & Affiliates (TAMA). In 2011 the Crown entered into deeds of settlement with Rongowhakaata and Ngāi Tāmanuhiri. Legislation was passed in 2012 to give effect to those settlements.

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3 *Haronga v Waitangi Tribunal* HC Wellington CIV-2009-485-2277, 23 December 2009.
4 *Haronga v Waitangi Tribunal* [2013] NZCA 201.
5 *Haronga v Waitangi Tribunal* [2010] NZSC 98.
6 *Haronga v Waitangi Tribunal* [2011] NZSC 53, [2012] 2 NZLR 53 at [100]-[111].

[10] Negotiations between the Crown and TAMA were suspended after the Supreme Court's 2011 decision in *Haronga*, pending the outcome of the ordered hearing.

[11] The Tribunal heard Mr Haronga's claim from June to November 2012.

[12] At the same time, the Tribunal also heard like applications by TAMA, Ngā Ariki Kaipūtahi and Te Whānau a Kai for the return of the 1961 Lands and that further part of the Mangatū State Forest that is located on the Mangatū No 2 Block (together, the Mangatū Lands).

[13] The Tribunal released its decisions on those claims, the Mangatū Remedies Report, in December 2013.[7] The Tribunal found that each of the applicants had a well-founded claim in respect of the Mangatū Lands. But the Tribunal neither recommended that that land or part of it be returned to Māori ownership,[8] nor that it not be liable to be returned to Māori ownership.[9] Rather the Tribunal:

(a) declined the claims of Mangatū, Ngā Ariki Kaipūtahi and Te Whānau a Kai; and

(b) adjourned the claim of Te Aitanga a Māhaki.

[14] Following the release of that decision, and reflecting the separate appearances of TAMA, Ngā Ariki Kaipūtahi and Te Whānau a Kai at the Mangatū Remedies hearing, the Te Aitangi a Māhaki Trust (the Māhaki Trust) confirmed a mandate to negotiate on behalf of Māhaki (and affiliates), subject to the separate recognition of Te Whānau a Kai and Ngā Ariki Kaipūtahi, settlement of the Māhaki claims.

[15] Reflecting that background, in these consolidated proceedings:

(a) Mr Haronga on behalf of Mangatū;

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7 Waitangi Tribunal The Mangatū Remedies Report (2013, www.Waitangitribunal.govt.nz).
8 Treaty of Waitangi Act 1975, s 8HB(1)(a).
9 Treaty of Waitangi Act 1975, s 8HB(1)(b) and (c).

(b) the Māhaki Trust on behalf of Te Aitanga a Māhaki generally ; and

(c) David Brown, on behalf of Ngā Ariki Kaipūtahi,

seek orders that the Waitangi Tribunal erred in law in failing to recommend that the Mangatū Lands be returned to Māori ownership, and the manner of that return as between them. They ask this Court to quash the Mangatū Remedies Report and order the Waitangi Tribunal to re-hear their claims on the correct basis. Put simply, they say the Tribunal deferred unlawfully to the Crown's now well-known "large natural groupings" settlement policy in reaching those decisions.

[16] As interveners:

(a) Te Whānau a Kai made no submissions and Ms Clark, who appeared at the opening of the hearing, was granted leave to withdraw accordingly; and

(b) Owen Lloyd and Ngā Ariki Kaipūtahi Whānau Trust generally supported Mr Brown's application for review.

[17] These applications raise questions of statutory interpretation. Those questions relate to:

(a) the nature of the Tribunal's role under s 8HB of the Treaty Act to make binding recommendations that Crown Forest lands, and associated financial compensation, be returned to Māori to compensate for well-founded claims for Treaty breaches relating to that land; and

(b) the relationship between that role and the Tribunal's more general role under s 6(3) of the Treaty Act to make non-binding recommendations to the Crown for compensation for well-founded claims of Treaty breaches.

[18] Two narratives form the background to these proceedings. The first comprises the history of the Crown's dealings with Māori in Tūranganui-a-Kiwa, the second the steps taken by Māori in the 1990s to preserve the benefit of Treaty claims in response to the corporatisation and privatisation policies of successive governments.

[19] It is unnecessary for me to record the first narrative in great detail here. But that is not to overlook and underestimate its significance.

[20] This judgment really concerns the second narrative: the history, including the legislative history, of the Tribunal's powers in the Treaty Act to make binding recommendations for the return of land to Māori as compensation for well-founded Crown Treaty breaches. That narrative involves the history of the Treaty Act, the *Lands*[10] and *Forests*[11] cases, the agreements reached between the Crown and the Māori following those cases, the amendments to the Treaty Act enacted by Parliament to give effect to those agreements and, finally, the Supreme Court's decision in *Haronga*.

[21] It is against that background that the lawfulness of the Tribunal's decisions in the Mangatū Remedies Report is to be assessed. Much of that narrative can be found in *Haronga*.

The Treaty Act 1975

[22] The Tribunal was established in 1975 by the Treaty Act as a standing commission of inquiry to consider what are today called "contemporary" Treaty claims. The long title of the Treaty Act reads as follows:

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

[23] The Tribunal's original functions were to inquire into and make recommendations on claims submitted to it under s 6 and to examine and report on

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10 *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 641 (CA and HC).
11 *New Zealand Māori Council v Attorney-General* [1989] 2 NZLR 142 (CA).

legislation referred to it under s 8. In 1985 that jurisdiction was extended to historic claims, but the Tribunal's powers remained recommendatory only.

[24] Then, and as the Supreme Court records in *Haronga*:

> [60] … On 30 September 1986 the Government introduced to the House of Representatives, the State-Owned Enterprises Bill,[12] to give effect to its corporatisation policy. Claims were submitted to the Waitangi Tribunal by five northern Māori tribes concerning the perceived prejudicial effect on their land claims of the transfer of Crown land to new State Corporations as provided for in the Bill. The claimants' concern was that the Bill would put the return of land to Māori ownership in accordance with Tribunal obligations beyond the power of the Crown. The Tribunal inquired into the claim. In an interim report it suggested that the Bill itself might be contrary to the principles of the Treaty, unless it were amended to restrict alienation by the State enterprises and provide for the Crown's continuing responsibility for return of land to Māori.[13]
>
> [61] In response to these concerns, the Bill was amended to include what became ss 9 and 27 of the State-Owned Enterprises Act 1986. Section 9 provided that nothing in the Act permitted the Crown to act in a manner that is inconsistent with the principles of the Treaty of Waitangi. Section 27 made provision for land which has been the subject of a claim submitted to the Tribunal before the date of the Governor-General's assent to the 1986 Act.[14] However, at that date a number of claims which were in the course of preparation had not been lodged.

[25] Section 27 provided that where land transferred to a State enterprise was the subject of a s 6 claim that land:

(a) continued to be subject to that claim; and

(b) could be resumed by order in council if the Tribunal subsequently made a finding under s 6 in relation to that land, with the Crown to pay the State enterprise the value of that land.

[26] In the *Lands* case the Court of Appeal held that s 27 did not sufficiently address the risk of prejudice to Māori relating to claims made after 18 December 1986. Greater protection for known or foreseeable claims was required. The Court gave directions regarding appropriate safeguards and left it to the New Zealand

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12 (30 September 1989) 474 NZPD 4722.

13 Wai 22 "Interim Report to the Minister of Māori Affairs on State-Owned Enterprises Bill" (8 December 1986) at 4.

14 The Act received that assent on 18 December 1986.

Māori Council and the Government to work out the details. Following negotiations, an agreement was reached. As the Supreme Court observes in *Haronga*:[15]

> [64] … the Crown would be able to transfer land to State enterprises which would be subject to return to Māori ownership (commonly referred to as resumption). If the Waitangi Tribunal were to so recommend, return would be compulsory. The Treaty of Waitangi (State Enterprises) Act 1988 was enacted to give effect to that agreement.
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> …
>
> [66] Parliament accordingly contemplated that the transfer of assets to State enterprises could take place forthwith, existing and future claims to the land involved being protected under the statutory scheme. Implicitly, Parliament, like the Court, was concerned to protect such claims on an individual basis.

[27] The Court of Appeal reserved leave to apply further under its judgment "in case anything unforeseen should arise".[16]

[28] In July 1988 the Government announced to Parliament its intention to sell the State's commercial forests. Cutting rights to trees growing on State forest land, and a right to grow and harvest two further crops would be sold, rather than the underlying land itself. In February 1989 the Māori Council, under the reservation of leave in the *Lands* case, applied for a declaration that that forestry sale proposal was inconsistent with the *Lands* decision. Answering a preliminary point, the Court of Appeal held that the application was properly brought.[17] Further negotiations ensued.

[29] Those negotiations resulted in an agreement of 20 July 1989 between the Crown and the New Zealand Māori Council and the Federation of Māori Authorities Incorporated (the Forestry Lands Agreement). This agreement provided for the Crown to sell existing tree crops and to give the purchaser thereof a right to freehold the land on which those crops were growing "subject to the Waitangi Tribunal recommending that the land is no longer liable to resumption, in accordance with the Treaty of Waitangi (State Enterprises) Act or other legislation having the same effect".

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15 *Haronga v Waitangi Tribunal*, above n 6.
16 *New Zealand Māori Council*, above n 10, at 719.
17 *New Zealand Māori Council*, above n 11.

[30] The essence of that bargain between the Crown and Māori is contained in the following clauses of the Forestry Lands Agreement:

> 6. The Crown and Māori agree that they will jointly use their best endeavours to enable the Waitangi Tribunal to identify and process all claims relating to forestry lands and to make recommendations within the shortest reasonable period.
>
> 7. If the Waitangi Tribunal recommends that land is no longer subject to resumption, the Crown's ownership and related rights are confirmed.
>
> 8. If the Waitangi Tribunal recommends the return of land to Māori ownership the Crown will transfer the land to the successful claimant together with the Crown's rights and obligations in respect of the land and in addition:
>
> (a) compensate the successful claimant for the fact that the land being returned is subject to encumbrances, by payment of 5% of the sum calculated by one of the methods (at the option of the successful claimant) referred to in paragraph 9 and,
>
> (b) further compensate the successful claimant by paying the balance of the total sum calculated in paragraph 8(a) above or such lesser proportion as the Tribunal may recommend.
>
> In none of the above will the purchaser be involved in compensation or payment to the successful claimant (i.e. the purchasers rights and obligations would be those specified in the original contract).
>
> All payments made pursuant to paragraph 8 may be taken into account by the Waitangi Tribunal in making any recommendation under sections 6(3) and 6(4) of the Treaty of Waitangi Act 1975.
>
> Payments made to successful claimants under paragraph 8 (other than stumpage) will be tax free in the hands of the recipients.

[31] Reflecting that much of the detail to give effect to the Forestry Lands Agreement remained to be negotiated, cl 13 provided:

> 13. The Crown may advertise the sale and continue with the sales process but will not call for bids for the forest (being the point at which the pro forma legal agreement will be delivered to interested parties) prior to agreement being reached between the parties on the format of the draft legislation, the consent order to be sought from the Court of Appeal and the pro forma legal agreement for sale (described in paragraph 4 above) as may be required to fulfil this agreement.

[32] The Crown Forest Assets Act 1989 was passed to give effect to that agreement. The Supreme Court described it in the following terms:[18]

> [74] … Its long title relevantly provides it is:
>
> **An Act to provide for –**
>
> (a) The management of the Crown's forest assets:
> (b) The transfer of those assets while at the same time protecting the claims of Māori under the Treaty of Waitangi Act 1975:
> (c) In the case of successful claims by Māori under that Act, the transfer of Crown forest land to Māori ownership and for payment by the Crown to Māori of compensation:
> (d) Other incidental matters.
>
> [75] Part 3 of the 1989 Act is headed "Return of Crown forest land to Māori ownership and compensation". Section 35 places restrictions on the sale of Crown forest land and any rights or interests in any Crown forestry licence. Crown forest land subject to a Crown forestry licence cannot be disposed of "except in accordance with s 8" (which requires Ministerial approval). Crown forestry licences cannot be disposed of "unless the Waitangi Tribunal has made, in relation to the licensed land, a recommendation under s 8HB(1)(b) or s 8HB(1)(c) or s 8HE of the Treaty of Waitangi Act". The first two routes described deal with the Waitangi Tribunal's options "where a claim [is] submitted to the Tribunal under section 6". The third is a "[s]pecial power" (not in issue in the present case) to recommend that land be cleared from liability to be returned to Māori ownership on application by the Crown or any licensee of Crown forest land. The Crown Forestry Rental Trust was established by deed dated 30 April 1990.

[33] The Supreme Court concluded:

> [76] The statutory history clarifies Parliament's purpose in enacting the 1988 and 1989 legislation. That purpose was to make changes to the process under the 1975 Act for addressing claims of breach of Treaty principles. The changes, which applied to claims in respect of licensed Crown forest land, gave greater protection to those who established their claims were well-founded. Rather than being dependent on a favourable response from the government to a recommendation of the Tribunal, claimants could seek recommendations from the Tribunal for a remedy which would become binding on the Crown if no other resolution of the claim was agreed. The purpose accordingly was to protect claimants by supplementing their right to have the Tribunal inquire into their claim with the opportunity to seek from the Tribunal remedial relief which would be binding on the Crown. If the Tribunal so decided, that relief could extend to returning Crown forest land to identified Maori claimants. This was in return for permitting the Crown to transfer government-owned assets, including forest crop and other forest assets, to private interests. The government was thereby able to fully implement its corporatisation policy.

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[18] *Haronga*, above n 6, (citations omitted).

[34] In *Haronga*, and against that background, the Supreme Court decided that the Waitangi Tribunal had been wrong not to grant Mr Haronga the urgent remedies hearing he sought. As I read the Court's decision, there were four principal reasons for that conclusion:

(a) The Tribunal, having decided that Mangatū Incorporation's Treaty claim was well-founded, was obliged to determine Mr Haronga's claim for resumption under s 8HB(1)(a). The Tribunal had a choice as to whether or not to grant the remedy sought and, if so, on what terms. But it had to make a choice. That was a jurisdiction it could not decline.

(b) The Tribunal had not exercised that discretion. That is, and as a matter of fact, the Supreme Court was unable to read *Tūranga Tangata Tūranga Whenua* as deciding against recommending return of the 1961 Lands to Mangatū. The Tribunal, rather than making recommendations, had offered guidance for the purposes of negotiation. Hence, rejection of Mr Haronga's application for an urgent hearing on the issue of resumption meant that he had not been heard on that issue.

(c) The ongoing negotiations between Te Whakarau, as it was then called, and the Crown did not affect the merits of Mr Haronga's application for an urgent hearing.

(d) Had the matter been considered on its merits, an urgent hearing could not have been withheld because of the likelihood that Mangatū would lose the right to the adjudication of their claim for resumption in the subsequent process whereby Treaty claims in Tūranganui-a-Kiwa were settled by legislation.

[35] The Court concluded:

> [109] If the appellant is to be heard, as is his right under the legislation, it is necessary to give urgency to his claim, which will otherwise be overtaken.

> Judge Clark was of the view that the case for urgency was "finely balanced". If it had not been for the offer to Te Whakarau, he thought the application was a very strong one. The offer does not meet the case, for the reasons given. The reasons to the contrary that prevailed in the Courts below are not on point. The factors identified make this an overwhelming case for urgent hearing.
>
> [110] In requiring the Tribunal to proceed with urgency to hear Mr Haronga's claim, we do not seek to offer any view on the merits of the relief sought on behalf of Mangatū Incorporation. We reiterate that it is for the Tribunal to exercise its statutory obligation to inquire into the claim for resumption of the 1961 land. Whether recommendations are made which include return of land and to whom is for the Tribunal to decide.

The Mangatū Remedies Report – an overview

[36] The Tribunal summarised the findings in the Mangatū Remedies Report in its 18 December 2013 letter of transmittal.[19] It first noted that in *Tūranga Tangata Tūranga Whenua* it had:

(a) As regards Mangatū, found that the Crown failed to act reasonably and with the utmost good faith, and therefore breached the principles of the Treaty, when it acquired the 1961 Lands.

(b) As regards Te Aitanga a Māhaki, made strong findings of breach with respect to their historical claims, including:

(i) the unlawful attack by Crown forces on the defensive pā at Waerenga a Hika;

(ii) the high casualties suffered by Tūranga Māori in that attack;

(iii) the large numbers of men (the Whakarau) subsequently imprisoned or deported by the Crown to Wharekauri;

(iv) the unprecedented numbers of Tūranga Māori summarily executed by Crown forces after the siege of Ngātapa pā; and

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19 Mangatū Remedies Report, above n 7, at xi-xvi.

(v) the Crown's confiscation of land in the wake of a deed of cession signed under duress by a minority of Tūranga Māori,

together with findings of ongoing breaches of Treaty guarantees of Māori ownership of customary land.

(c) As regards each of Ngā Ariki Kaipūtahi and Te Whānau a Kai, found that they shared in the prejudice of the historic breaches and had specified grievances:

(i) for Ngā Ariki Kaipūtahi, the Crown's failure to properly recognise their interests in the Mangatū Lands at the time of, and after the establishment of, Mangatū; and

(ii) for Te Whānau a Kai, their specific land claim in respect of the Tahora lands, dealt with by the Te Urewera Tribunal.

[37] Referring to *Tūranga Tangata Tūranga Whenua*, the Tribunal commented:[20]

> The wide-ranging claims of Te Aitanga a Māhaki, Ngā Ariki Kaipūtahi, and Te Whānau a Kai require a comprehensive settlement. In the Tūranga report, we observed that the settlement for Tūranga should be substantial. While the confiscation aspect of the claim was not as large as in other areas, the treatment of the people in Tūranga was amongst the worst recorded in New Zealand's history. The report said that 'reparations must be of a dimension that reflects the enormousness of the loss that the iwi and hapū of Tūranga have suffered in people and in land since 1865'. However, in order to comply with the Supreme Court's direction to hear as a matter of urgency the Mangatū Incorporation's application for a binding recommendation in respect of the Mangatū CFL lands, we decided to confine our hearings to the four applications we received for binding recommendations.

[38] The Tribunal then turned to the applications of each of Mangatū, Ngā Ariki Kaipūtahi, Te Whānau a Kai and TAMA. It first summarised its overall approach:

> In arriving at our decisions on these four applications, we took into account the extent and seriousness of the Treaty breaches, the full scope of prejudice suffered by all the applicants, and what was required to remove or compensate for that prejudice. We wanted to

[20] At xii-xiii.

> ensure that any binding recommendations we might make would provide redress proportionate to the prejudice suffered, and would be fair and equitable as between the different applicants. This was particularly important since the redress we can give by way of binding recommendation is limited at this stage to the Mangatū CFL lands.

[39] It then turned to the separate claims for resumption it had heard.

Mangatū

[40] The Tribunal acknowledged Mangatū had a well-founded claimed based on the Crown's acquisition of the 1961 Lands.[21] In the context of the history of Mangatū, and its creation by statute in 1893 at the behest of Wi Pere (a direct ancestor of Mr Haronga), the Tribunal found that the owners of Mangatū had suffered grave cultural and spiritual prejudice when they had unwillingly sold the 1961 Lands in the public interest. It was, the Tribunal observed, the only piece of land Mangatū had lost in their history. However, the Tribunal declined Mangatū's application for return of the 1961 Lands. It did so on the basis that:

(a) The price paid by the Crown for the 1961 lands was fair, and Mangatū did not suffer economic or financial prejudice.

(b) A binding recommendation would not only return the 1961 Lands to Mangatū but, pursuant to the Crown Forests Assets Act 1989, provide the substantial monetary compensation that went therewith. In the Tribunal's view, the combined value of land and money went beyond what was required to compensate for or remove the prejudice. It would also be disproportionate compared to the total Treaty settlement packages "on offer" to settle all the historical claims of Te Aitanga a Māhaki, Ngā Ariki Kaipūtahi and Te Whānau a Kai.

Ngā Ariki Kaipūtahi

[41] Ngā Ariki Kaipūtahi's application was based on their long history of grievance about their marginalised position in the Mangatū land.[22] They had sought

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[21] At xiii.
[22] At xiv.

return of 70 per cent of the Mangatū CFL Lands.[23] Before the Tribunal they had varied that claim. The varied claim was for the return of all the Mangatū Lands on the basis they would retain the accompanying monetary compensation and a small area of land to re-establish their mana whenua. They would transfer the rest of the Mangatū Lands to other applicants at the direction of the Tribunal.

[42] The Tribunal declined that application, finding it ran against the statutory scheme. Nor was the Tribunal certain that Ngā Ariki Kaipūtahi would receive fair and equitable redress as compared with other claimants. The Tribunal also had concerns about the representatives of the Ngā Ariki Kaipūtahi groups before it.

Te Whānau a Kai

[43] Te Whānau a Kai had, the Tribunal assessed, largely made their application as a defensive measure. It was clear to the Tribunal that Te Whānau a Kai would prefer to negotiate their redress with the Crown. The Tribunal declined Te Whānau a Kai's application primarily because it was not satisfied that a binding recommendation would provide them with "fair and equitable redress".[24]

TAMA

[44] The Tribunal did not decline TAMA's application, but adjourned it. It did so on very similar grounds to those on which it had declined Mr Haronga an urgent hearing. It recognised that TAMA required wide-ranging redress, in addition to what they would receive through a binding recommendation. The Tribunal advised the Government:[25]

> … If all applicants reconfirm TAMA's mandate to represent them, then TAMA can return to the Tribunal for a comprehensive remedies hearing. However, we see such a hearing as a last resort for them. As our report sets out, the applicants' need for redress is pressing, and further comprehensive hearings through the Tribunal would inevitably involve delay in obtaining such redress. While the Tribunal can make binding recommendations, other parts of the redress needed, such as an apology, cultural redress, and recognition and rebuilding of the autonomy of the applicants can only come from the Crown. We therefore consider that TAMA's energies would be

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23 The Crown was offering TAMA the right to purchase the whole of the Mangatū State Forest, as located both inside and outside the Tūranga inquiry district.

24 At xiv.

25 At xiv-xv.

> better spent in completing negotiations with the Crown as soon as possible. Moreover, TAMA has in fact been offered redress in the form of an option to obtain the whole of the Mangatū CFL lands including CFL land lying outside the Tūranga district and over which the Tribunal has no jurisdiction. In these circumstances we have decided to adjourn TAMA's application pending further discussions and negotiations with the other applicants and the Crown.

[45] Commenting more generally, the Tribunal wrote:[26]

> It seems to us that there are clear limitations to the usefulness of binding recommendations in this inquiry because they follow a strict statutory formula from which we cannot depart. Negotiations allow all parties much more flexibility to develop a satisfactory settlement package.

[46] Omitted from the Tribunal's transmittal letter was advice that it had concluded, in the case of each of Mangatū, Ngā Ariki Kaipūtahi, Te Whānau a Kai and TAMA, that redress for their well-founded claims should include the return of all or part of, as the case may be, the 1961 Lands or the Mangatū Lands. Thus:

> *Mangatū*[27]
>
> It is clear that to remove the prejudice suffered by the shareholders of the Incorporation the 1961 land, or at least a part of it, should be returned to them.
>
> *Ngā Ariki Kaipūtahi*[28]
>
> Clearly, redress would also include some land to recognise the land loss suffered as a result of this Treaty breach and to support their wish to regain their mana on the land.
>
> *Te Whānau a Kai*[29]
>
> As with Ngā Ariki Kaipūtahi, land is an essential element of redress, as is a reasonable putea to assist Te Whānau a Kai to nurture and revitalise their community.
>
> *Te Aitanga a Māhaki and affiliates*[30]
>
> We consider that redress for TAMA should include return of all of the CFL land or, if Te Whānau a Kai or others choose to revoke its mandate, a significant part of it.

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26 At xv.
27 Mangatū Remedies Report, above n 7, at 147.
28 At 165.
29 At 172.
30 At 180.

[47] Those conclusions are central to the claims made in these proceedings that the Tribunal misconstrued its statutory role when declining Mangatū, Ngā Ariki Kaipūtahi and Te Whānau a Kai's applications, and adjourning that of TAMA.

The applicants' arguments

Mangatū and the Māhaki Trust

[48] For Mangatū and the Māhaki Trust, the essence of their complaint was that in the Mangatū Remedies Report the Tribunal had decided that the Mangatū CFL land should be returned to Māori, and yet it had failed to make binding recommendations for that return. The Tribunal, they argue, could not avoid making a decision in the way that it had. In *Haronga* the Supreme Court was very clear that, in hearing applications for resumption, the Tribunal was exercising an adjudicatory function. Section 8HB of the Treaty Act provided the Tribunal with "three options only". In creating a fourth option – in which it decided to defer to the Crown's negotiation process – the Tribunal had erred in law.

[49] It had done so in three principal ways.

[50] It had misconstrued its statutory duty. In particular:

(a) It had decided that the land should be returned, but failed to discharge its duty of deciding to whom and on what terms and conditions that return should occur.

(b) It had wrongly considered that pursuant to s 6(3) it had a broad discretion, without appreciating the significance of the obligation found in s 8HB(1)(a) to decide between competing claims.

(c) Its decision to defer the Māhaki Trust's application to provide an opportunity for further Treaty settlement negotiations was an impermissible exercise of the power of deferral found in s 7(1A) since negotiations cannot deliver the statutory remedy sought.

(d) Characterising the statutory remedy under s 8HB for resumption orders as a remedy of "last resort" was inconsistent with the statutory scheme.

[51] Secondly the Tribunal, in deferring to the Crown's settlement policies and taking account of other settlements, had taken account of irrelevant matters:

(a) The Tribunal was required to make its own independent assessment (namely, independent of the Crown) of what was required to compensate for or remove the prejudice in relation to each claim.

(b) It was contrary to the purpose of the Forestry Lands Agreement and the Crown Forests Assets Act to render the statutory compensation out of reach because it was more generous than the Crown's quantum offers.

(c) Taking that approach did not compare "like with like".

(d) Schedule 1 compensation was not relevant to the determination of the question of whether land should be returned. Compensation followed the land.

[52] Thirdly, the difficulty the Tribunal had identified in determining competing interests was also an irrelevancy. The Tribunal had an obligation to decide between competing claims, and the power to arrive at a just outcome by adjusting interests and imposing terms and conditions.

Mr Brown

[53] For Ngā Ariki Kaipūtahi Mr Brown advanced similar arguments to those of Mangatū and the Māhaki Trust. Having determined that Ngā Ariki Kaipūtahi's claim was well-founded, and that action to remove the prejudice should include the return of land, the Tribunal had been obliged to make an order pursuant to s 8HB. The Tribunal had erred in concluding it did not have power to make the type of recommendation sought by Ngā Ariki Kaipūtahi, namely that land be returned to it

to, in turn, be transferred to other Māhaki claimants. Ngā Ariki Kaipūtahi were particularly critical of the balancing exercising that the Tribunal had undertaken, as between applicants before it and other claimants under the Treaty process, in reaching its decision to decline to order resumption. Concluding that there were difficulties with the representativeness of the Ngā Ariki Kaipūtahi applicants as a reason not to order resumption compounded the very prejudice suffered by Ngā Ariki Kaipūtahi from its historic lack of recognition.

[54] Like Mangatū and the Māhaki Trust, Mr Brown for Ngā Ariki Kaipūtahi argued that the Tribunal had, in effect, wrongly deferred to the Crown's settlement processes and policies, and had misconstrued the nature of the jurisdiction it had to order resumption of land.

Mr Lloyd and Ngā Ariki Kaipūtahi Whānau Trust

[55] As interveners, Mr Lloyd and the Ngā Ariki Kaipūtahi Whānau Trust supported Mr Brown's objection to the approach taken by the Tribunal in response to the state of play within Ngā Ariki Kaipūtahi. That there were two distinct groups, a whānau trust and a tribal authority, was a matter of fact. The word "group" used in s 8HB(1)(a) was flexible enough to recognise that reality. As the Tribunal itself recognised, until groups knew what asset it was they were to receive, it often made little sense to go to the expense of establishing a particular legal entity to receive that redress. The two "representative" entities of Ngā Ariki Kaipūtahi had combined in making their "flexible" submission. Just how resumed land would be held was a matter that Ngā Ariki Kaipūtahi could decide for themselves. It was not a ground for the Tribunal to decline to make a resumption order.

The Attorney-General's response

[56] The core of the Attorney-General's response to the applicants' claims was that, although the Supreme Court had required the Tribunal to hear Mr Haronga's application as a matter of urgency, it had not – as the applicants argued – decided how the Tribunal should go about reaching a decision on that application. The Tribunal was obliged to consider whether to make resumption recommendations. It

did not have to make any such recommendations. The Supreme Court, in *Haronga*, recognised the Tribunal had that threshold discretion.

[57] Nor did the Tribunal have no choice but to select one of the three s 8HB outcomes. Where the Treaty Act states, on preconditions, that the Tribunal may include a s 8HB recommendation in its overall recommendation under s 6(3), the use of the word "may" does not mean "must". The use of the word "may" created a threshold question: that question was whether or not, in the circumstances of each claim, the Tribunal considered it was necessary to recommend one of the three s 8HB outcomes. Those outcomes were not separate remedial options. They were part of the Tribunal's primary remedial power to consider the practical application of the Treaty in ways that would enable the Crown to take action to compensate for or remove prejudice found to exist.

[58] The implications of the relationship between s 6(3) and s 8HB had become very clear to the Tribunal when the other Māhaki cluster claimants also sought remedies recommendations from the Tribunal. Essentially, the Attorney-General argued, the Tribunal had decided that the best way it could comply with the Supreme Court's orders was first to determine whether or not to make resumption recommendations and then continue, if necessary, with comprehensive recommendations comprising a total package of recommended relief for all well-founded claims before it. The Attorney referred to the following passage from the Mangatū Remedies Report:[31]

> However, we are not at the stage of considering a comprehensive remedies package. While other applicants have broader remedial needs corresponding to the wider scope of their claims, the incorporation is only seeking a binding recommendation for return of the 1961 land in respect of its claim. At the incorporation's request and so as to comply with the Supreme Court direction to hear the incorporation's application urgently, our hearings are currently limited to the question of whether to grant a binding recommendation in respect of the Mangatū CFL land. Nevertheless, in order to arrive at a conclusion that is fair and equitable between the parties, the Tribunal has to take the entire set of the applicant' circumstances into account, even though we are not being called upon at present to provide a full range of remedial recommendations.

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31 Mangatū Remedies Report, above n 7, at 147.

[59] It was in that context that the Tribunal had determined the applications of Mangatū, the Māhaki Trust, Ngā Ariki Kaipūtahi and Te Whānau a Kai.

[60] In doing so the Tribunal had lawfully and reasonably exercised its discretion in deciding whether to make any s 8HB recommendations. It did not err in taking a restorative approach to remedies, characterised by the applicants as deferring to the Crown's settlement policies and practices. Nor did the Tribunal err in considering resumption applications by reference to the broader principles of redress that it had adopted when making recommendations to the Crown for settlement and that were, in turn, reflected in the approach taken by the Crown in settlement negotiations and settlement legislation. It was not unlawful for it to take account of the possibility that resumption orders would create fresh grievances for Māori, both within Māhaki and the Tūranga region, and nationally. The resumption mechanism in s 8 of the Treaty Act did not affect the Tribunal's ability to keep in mind fairness and proportionality. The wider Treaty settlement context, and the opportunity to recommence negotiations with the Crown for a comprehensive settlement of claims, was therefore a relevant consideration. The Tribunal had considered the solutions proposed by the applicant groups, but in its discretion determined – including by reference to relevant practical considerations – that implementing those solutions would not be consistent with the objective of achieving the just and lasting settlement of Treaty claims, including as between Māori where there were overriding claims.

Analysis

Statutory framework

[61] Section 6 of the Treaty Act initially established the Crown's jurisdiction in relation to claims in the following terms:

> **6. Jurisdiction of Tribunal to consider claims**
>
> (1) Where any Maori claims that he or any group of Maoris of which he is a member is or is likely to be prejudicially affected—
>
> (a) By any Act, regulations, or Order in Council, for the time being in force; or

(b) By any policy or practice adopted by or on behalf of the Crown and for the time being in force or by any policy or practice proposed to be adopted by or on behalf of the Crown; or

(c) By any act which, after the commencement of this Act, is done or omitted, or is proposed to be done or omitted, by or on behalf of the Crown,—

and that the Act, regulations, or Order in Council, or the policy, practice, or act is inconsistent with the principles of the Treaty, he may submit that claim to the Tribunal under this section.

[62] When that jurisdiction was extended to historic[32] claims s 6(1) was amended so that it read:

(1) Where any Maori claims that he or she, or any group of Maoris of which he or she is a member, is or is likely to be prejudicially affected—

(a) By any ordinance of the General Legislative Council of New Zealand, or any ordinance of the Provincial Legislative Council of New Munster, or any provincial ordinance, or any Act (whether or not still in force), passed at any time on or after the 6th day of February 1840; or

(b) By any regulations, order, proclamation, notice, or other statutory instrument made, issued, or given at any time on or after the 6th day of February 1840 under any ordinance or Act referred to in paragraph (a) of this subsection; or

(c) By any policy or practice (whether or not still in force) adopted by or on behalf of the Crown, or by any policy or practice proposed to be adopted by or on behalf of the Crown; or

(d) By any act done or omitted at any time on or after the 6th day of February 1840, or proposed to be done or omitted, by or on behalf of the Crown,—

and that the ordinance or Act, or the regulations, order, proclamation, notice, or other statutory instrument, or the policy or practice, or the act or omission, was or is inconsistent with the principles of the Treaty, he or she may submit that claim to the Tribunal under this section.

[63] As originally enacted, and following that extension of jurisdiction to include historic claims, the Tribunal's powers were recommendatory only. Sections 6(3) and (4) provided:

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[32] Amended by the Treaty of Waitangi Amendment Act 1985, s 3.

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

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

[64] As introduced by the Treaty of Waitangi (State Enterprises) Act 1988, as amended to date, s 8A of the Treaty Act provides for binding recommendations for the resumption of State Enterprises lands in the following terms:

8A Recommendations in respect of land transferred to or vested in State enterprise

(1) This section applies in relation to—

(a) any land or interest in land transferred to a State enterprise under section 23 of the State-Owned Enterprises Act 1986 or vested in a State enterprise by a notice in the *Gazette* under section 24 of that Act or by an Order in Council made under section 28 of that Act, whether or not the land or interest in land is still vested in a State enterprise:

(b) any land or interest in land transferred to an institution within the meaning of section 159 of the Education Act 1989 under section 207 of that Act or vested in such an institution by an Order in Council made under section 215 of that Act, whether or not the land or interest in land is still vested in that institution.

(2) Subject to section 8B of this Act, where a claim submitted to the Tribunal under section 6 of this Act relates in whole or in part to land or an interest in land to which this section applies, the Tribunal may—

(a) if it finds—

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

(ii) that the action to be taken under section 6(3) of this Act to compensate for or remove the prejudice caused by the ordinance or Act, or the regulations, order, proclamation, notice, or other statutory instrument, or the policy or practice, or the act or omission that was inconsistent with the principles of the Treaty, should include the return to Maori ownership of the whole or part of that land or of that interest in land,—

include in its recommendation under section 6(3) of this Act, a recommendation that that land or that part of that land or that interest in land be returned to Maori ownership (which

recommendation shall be on such terms and conditions as the Tribunal considers appropriate and shall identify the Maori or group of Maori to whom that land or that part of that land or that interest in land is to be returned); or

(b) if it finds—

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

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

recommend to the Minister within the meaning of section 4 of the Cadastral Survey Act 2002 that that land or that part of that land or that interest in land be no longer subject to resumption under section 27B of the State-Owned Enterprises Act 1986 or section 212 of the Education Act 1989; or

(c) if it finds that the claim is not well-founded, recommend to the Minister within the meaning of section 4 of the Cadastral Survey Act 2002 that that land or that part of that land or that interest in land be no longer subject to resumption under section 27B of the State-Owned Enterprises Act 1986 or section 212 of the Education Act 1989.

…

[65] As enacted by s 40 of the Crown Forest Assets Act 1989, ss 8HA and 8HB provide for recommendations in relation to Crown Forest lands in the following terms:

8HA Interpretation of certain terms

For the purposes of sections 8HB to 8HI of this Act, the expressions **Crown forestry assets, Crown forest land, Crown forestry licence**, and **licensed land** shall have the same meanings as they have in section 2 of the Crown Forest Assets Act 1989.

8HB Recommendations of Tribunal in respect of Crown forest land

(1) Subject to section 8HC of this Act, where a claim submitted to the Tribunal under section 6 of this Act relates to licensed land the Tribunal may,—

(a) if it finds—

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

(ii) that the action to be taken under section 6(3) of this Act to compensate for or remove the prejudice caused by the ordinance or Act, or the regulations, order, proclamation,

notice, or other statutory instrument, or the policy or practice, or the act or omission that was inconsistent with the principles of the Treaty of Waitangi, should include the return to Maori ownership of the whole or part of that land,—

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

(b) if it finds—

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

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

recommend to the Minister within the meaning of section 4 of the Cadastral Survey Act 2004 that that land or that part of that land not be liable to return to Maori ownership; or

(c) if it finds that the claim is not well-founded, recommend to the Minister within the meaning of section 4 of the Cadastral Survey Act 2004 that that land or that part of that land not be liable to return to Maori ownership.

…

[66] Binding resumption recommendations, whether in relation to Crown land generally or Crown Forest land in particular are, when made, initially interim recommendations.[33] They become binding, and require the resumption of the land in question, if the Crown and the Māori claimants do not settle the claim.

[67] As is apparent from the Tribunal's discussion in the Mangatū Remedies report, where Crown Forest lands are resumed, they come with monetary compensation.

[68] The long title to the Crown Forests Asset Act provides that it is:

An Act to provide for—

(a) the management of the Crown's forest assets:

[33] Sections 8B and 8HC of the Treaty of Waitangi Act 1975 respectively.

(b) the transfer of those assets while at the same time protecting the claims of Maori under the Treaty of Waitangi Act 1975:

(c) in the case of successful claims by Maori under that Act, the transfer of Crown forest land to Maori ownership and for payment by the Crown to Maori of compensation:

(d) other incidental matters.

[69] Section 36 provides:

> 36 **Return of Crown forest land to Maori ownership and payment of compensation**
>
> (1) Where any interim recommendation of the Waitangi Tribunal under The Treaty of Waitangi Act 1975 becomes a final recommendation under that Act and is a recommendation for the return to Maori ownership of any licensed land, the Crown shall—
>
> (a) return the land to Maori ownership in accordance with the recommendation subject to the relevant Crown forestry licence; and
>
> (b) pay compensation in accordance with Schedule 1 to this Act.
>
> (2) Except as otherwise provided in this Act or any relevant Crown forestry licence, the return of any land to Maori ownership shall not affect any Crown forestry licence or the rights of the licensee or any other person under the licence.
>
> (3) Any money required to be paid as compensation pursuant to this section may be paid without further appropriation than this section.

[70] Schedule 1 establishes the compensation regime. Its central provisions are clauses 1, 2 and 3, which provide as follows:

> **Schedule 1**
>
> **Compensation payable to Maori**
>
> 1. Compensation payable under section 36 shall be payable to the Maori to whom ownership of the land concerned is transferred.
>
> 2. That compensation shall comprise—
>
> (a) five percent of the specified amount calculated in accordance with clause 3 of this Schedule 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 of this Schedule or such lesser amount as the Tribunal may recommend.
>
> 3. For the purposes of clause 2 of this Schedule, the specified amount shall be whichever of the following is nominated by the person to whom the compensation is payable—

(a) the market value of the trees, being trees which the licensee is entitled to harvest under the Crown forestry licence, on the land to be returned assessed as at the time that the recommendation made by the Tribunal for the return of the land to Maori ownership becomes final under the Treaty of Waitangi Act 1975. The value is to be determined on the basis of a willing buyer and willing seller and on the projected harvesting pattern that a prudent forest owner would be expected to follow; or

(b) the market stumpage, determined in accordance with accepted forestry business practice, of wood harvested under the Crown forestry licence on the land to be returned to Maori ownership from the date that the recommendation of the Tribunal for the return of the land to Maori ownership becomes final under The Treaty of Waitangi Act 1975. If notice of termination of the Crown forestry licence as provided for under section 17(4) of this Act is not given at, or prior to, the date that the recommendation becomes final, the specified amount shall be limited to the value of wood harvested as if notice of termination had been given on that date; or

(c) the net proceeds received by the Crown from the transfer of the Crown forestry assets to which the land to be returned relates, plus a return on those proceeds for the period between transfer and the return of the land to Maori ownership.

[71] These provisions have been extensively reviewed by the Supreme Court in *Haronga*. I do not comment on them further at this point.

Approach to application

[72] I propose to answer the questions raised by these applications in three steps:

(a) I will first consider the Attorney-General's argument (which I accept was somewhat hesitantly expressed) that the Tribunal in the Mangatū Remedies Report did not conclude, in terms of s 8HB(1)(a)(ii), that compensation for the well-founded claims of Mangatū, the Māhaki Trust, Ngā Ariki Kaipūtahi and Te Whānau a Kai should include the return of the whole or part of the Mangatū Lands.

(b) If I find that the Tribunal did so conclude, I will then consider whether the Tribunal was right to approach the "return" applications on the basis that it nevertheless had a discretion under s 8HB(1) as to whether or not to make binding return recommendations.

(c) Finally, and if the Tribunal did have that discretion, I will consider whether it exercised that discretion lawfully when it decided, in the case of Mangatū, Ngā Ariki Kaipūtahi and Te Whānau a Kai, not to make a binding "return" recommendation and, in the case of the Māhaki Trust, to adjourn its application.

The Tribunal's "should include" conclusions

[73] In oral argument the proposition was put to me for the Attorney-General that the Tribunal had not made formal conclusions in terms of s 8HB(1)(a)(ii) that the response to the well-founded claims it found to exist should include the return to Māori ownership of the whole or part of the Mangatū Lands. The proposition was that in those circumstances it was "unfortunate" that the Tribunal had used the "should include" language. As I understood the submission, the argument was that there needed to be a more formal expression of those conclusions.

[74] As I indicated at the time, I am unable to accept that proposition. The Mangatū Remedies Report is a carefully considered document. It deals with each of the applications the Tribunal was considering by making specific "well-founded claim" conclusions. Having made those conclusions, which are a necessary pre-condition for the existence of the binding recommendatory powers, it goes on to consider whether it should exercise those powers. It seems reasonably clear that the Tribunal would not have undertaken that further exercise unless it had also made the "should include" conclusions, which were a further necessary precondition for making the binding recommendations it substantively considered.

[75] I therefore find that the Tribunal did make findings called for by s 8HB(1)(a)(ii) so as to put itself in a position where it could make a binding recommendation for the return to Māori of all or part of the Mangatū Land.

The s 8HB discretion

[76] At times counsel for Mr Haronga and the Māhaki Trust appeared to argue that, having made the "should include the return" conclusion, the Tribunal had no choice but to make one of the recommendations provided by subss (a), (b) and (c) of

s 8HB(1). On other occasions the proposition appeared to be the more nuanced one that, in these circumstances and having made the "should include the return" conclusion, the Tribunal was required as a matter of law to make a binding recommendation to that effect. Counsel for Mr Brown very definitely made the proposition that, having made the "should include the return" conclusion, the Tribunal had no choice but to make one of the subs (a), (b) or (c) recommendations. It had not done that and so, as in *Haronga* but in a different way, it had misconstrued the statutory scheme.

[77] The Tribunal considered that the "should include the return" conclusion was a pre-condition to it making, but did not require it to make, any one of the three types of binding recommendations provided in s 8HB(1). The Tribunal put it this way, when discussing TAMA's application:[34]

> What we must determine is whether we can and should make a recommendation now for return of the Mangatū CFL land within the Tūranga district. The issues we must therefore consider are whether making a binding recommendation in respect of the Mangatū CFL land that falls within the Tūranga district would be proportionate redress for the claimants TAMA represents, and would be fair and equitable bearing in mind the other applicants' interests. We also need to consider practical issues such as TAMA's mandate and whether there is an appropriate recipient entity to receive redress.

[78] In *Haronga* the Supreme Court made specific findings on this point. It said:

> [91] The Tribunal is not obliged to recommend resumption. That is clear both from the wording of s 6(3) and s 8HB. Section 8 HB applies to all claims relating to licensed land, as the 1961 lands are. The Tribunal has three options only in relation to claims for licensed Crown forest land. It may recommend that the land be not liable to return to Māori ownership if it finds the claim not to be well-founded. If it finds the claim to be well-founded, it must consider whether remedial action "to compensate for or remove the prejudice" it has found "should include the return to Māori ownership of the whole or part of the land". If so, it may include such a recommendation in its recommendation under s 6(3) (so that the resumption takes effect after the 90 day pause if not overtaken). If a recommendation for return is "not required … by paragraph (a)(ii) of this subsection", it may recommend that the land "not be liable to return to Māori ownership". (This discretion is necessary because the land may be subject to other claims which makes its clearance from liability premature).
>
> [92] The scheme therefore is that, following a finding that a claim is well-founded, s 8HB(1)(a) is the controlling provision. The Tribunal must

[34] Mangatū Remedies Report, above n 7, at 179.

> consider whether its return "should" be recommended as part of a recommendation under s 6(3) "to compensate for or remove the prejudice caused [by the act found to be in Treaty breach]".

[79] The applicants argued that the very clear finding of the Supreme Court was that the Tribunal had "three options only". In effect the argument is that, in terms of the Forestry Lands Agreement, the mechanisms provided by the Crown Forests Act 1989 and s 8HB and following were a type of clearing mechanism for claims relating to forestry land. That clearing mechanism would ensure that, "within the shortest reasonable period",[35] the Tribunal would have made recommendations which would have resulted either in the return of forestry lands to Māori or the confirmation of the "Crown's ownership and related rights".[36] I acknowledge it is difficult to read the Supreme Court's words "the Tribunal has three options only" in any other way.

[80] The applicants' argument, therefore, is that there is no "fourth option". They argue that there is no option to find that a claim was well-founded (s 8HB(1)(b)(i)), and that compensation should not include resumption (s 8HB(1)(b)(ii)), without recommending that the land not be liable to return.

[81] It was argued for the Attorney-General, however, that the applicants' argument took the "three options only" sentence in isolation, and out of context with paragraphs [91] and [92] as a whole. In written submissions that argument was put in the following terms:

> The Supreme Court was aware that the Tribunal had a threshold discretion as to whether to use any of the three options under s 8HB. When summarising s 8HB at [91] the Supreme Court made clear that the Tribunal is not obliged to recommend resumption and that discretion conferred by the word "may" is necessary because the land may be subject to other claims which makes its clearance from liability premature. The sentence in that paragraph that appears to have caused difficulty, if it is read in isolation and away from the context of the paragraph as a whole, is where the Court said "The Tribunal has three options only in relation to claims for licensed Crown forest land". However, seen in context, the Court was meaning that if the Tribunal chooses to recommend a s 8HB outcome then there are three options.
>
> The Tribunal's obligation to progress its inquiry to the point at which it considers whether or not to recommend return of the land does not destroy its ability to preserve the land's status as Crown forest land for other claims.

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35 The Forestry Lands Agreement at [30] above, cl 6.
36 The Forestry Lands Agreement at [30] above, cl 7.

> It can do so by dismissing an application under s 8HB by deciding not to make a recommendation under that provision.

[82] On reflection I have concluded that the Attorney-General is right on this point. The only way to understand the Supreme Court's parenthetical reference to s 8HB(1)(b) at the end of [91], that "(this discretion is necessary because the land may be subject to other claims which makes its clearance from liability premature)", is to understand that section as, in fact, providing for two possibilities where the "well-founded" conclusion in s 8HB(1)(b)(i) is made. The first possibility is that there is then a recommendation that return to Māori ownership is not required. The second is not to make such a recommendation at all. By taking that second option s 8HF is not triggered, so that the land is not cleared from the possibility of its resumption pursuant to a subsequent binding recommendation under s 8HB(1).

[83] I therefore conclude that there is a "fourth" option under s 8HB(1). Having said that, I note that the Tribunal in the Mangatū Remedies Report did not consider the s 8HB(1)(b) discretion at all. Its inquiry was not so much whether the Mangatū Lands were subject to other claims, which made the clearance from liability "premature", but whether transfer of the Mangatū Lands, particularly in light of the Schedule 1 compensation that went with those lands, would be – in effect – unfair and premature.

The lawfulness of the Tribunal's decision not to recommend return

[84] That brings me to the third of the questions I have posed: given that the Tribunal did have discretion under s 8HB(1)(a) to make a binding recommendation for the return of the Mangatū Lands to Māori ownership, whether it acted lawfully when deciding not to do so.

[85] Each of the applicants say that the Tribunal acted unlawfully: in the case of Mangatū, Ngā Ariki Kaipūtahi and Te Whānau a Kai when it declined their applications and, in the case of the Māhaki Trust, when the Tribunal deferred its application.

[86] All those applications are interrelated. Any future consideration of an application by the Māhaki Trust, as recently mandated, would necessarily involve questions as to whether or not (and, if so, to what extent) Mangatū Lands should be resumed in favour of Mangatū and its close affiliates Ngā Ariki Kaipūtahi and Te Whānau a Kai separately from any resumption by the Māhaki Trust. I therefore propose to consider the rest of the legal issues raised by these applications by asking first whether the Tribunal acted lawfully when it deferred TAMA's application, and then whether it did so when it declined the applications of Mangatū, Ngā Ariki Kaipūtahi and Te Whānau a Kai.

The Tribunal's TAMA decision

[87] In considering the lawfulness of the Commission's TAMA deferral decision, it is necessary to identify the substantive reasons of the Tribunal.

[88] Central to the Tribunal's approach is that it placed the decision on these resumption applications as one to be made as part of, and in my view as governed by, its role under s 6(3) to make (non-binding) recommendations on claims relating to the practical application of the Treaty. The Tribunal discussed that approach in [2.6] of the Mangatū Remedies Report. The opening paragraph of that section captures the flavour well:[37]

> Section 6(3) of the TOWA gives the Tribunal a discretion whether or not to make recommendations to compensate for or remove prejudice. The word 'compensate' may be taken in other contexts to suggest that remedies are to be given based on the principles developed in contract or tort law. However, the Treaty was not a contract, but an agreement between peoples. Accordingly we are of the view that a 'legalistic' approach to redress for historic breaches is inappropriate for the purposes of a political settlement between the Crown and Māori.[38] Instead, we are guided by the long title and the preamble of the TOWA and by the remedial nature of the provisions concerning recommendations. In reaching our decisions on the applications before us we will necessarily consider the extent and seriousness of well-founded Treaty breaches, the full scope of the prejudice suffered by the applicants, and what is needed to provide proportionate redress for the prejudice. However, our recommendations need to be practical. We also

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37 Mangatū Remedies Report, above n 7, at 35.

38 Waitangi Tribunal, Tūrangi Township Remedies Report, 1998 at 12.

> have to ensure that any remedies we recommend are fair and equitable to all parties and do not result in the creation of fresh Treaty grievances.[39]

[89] The Tribunal then explained that it would take the restorative approach to redress which, in the Ngāti Kahu Remedies Report, it had explained in the following terms:[40]

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

[90] This, the Tribunal said, meant:[41]

> … we have to consider whether what the applicants have asked us to do will restore the relationship between the Crown and the claimants, and will carry the Treaty partnership on into the future. Another way of putting this is whether, if granted, the binding recommendations being sought will provide fair and durable settlements.

[91] The Tribunal also noted that any redress it ordered must be equitable and not create fresh grievances: questions of fairness and proportionality were raised. Fairness and proportionality, in turn, were to be seen in the context of Crown Treaty settlement policy. Whilst land was a tāonga of enormous importance to Māori, recommendations had to recognise the Crown's prerogative to make policy for the settlement of historic grievances that took account of wider national economic and political considerations. The Tribunal went on:[42]

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

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39 Tūrangi Township Remedies Report, above n 38, at 77 sets out a broad range of circumstances which the Tribunal considers would apply in most remedies applications. These circumstances include the ones the Tribunal set out.

40 Mangatū Remedies Report, above n 7, at 37.

41 At 38.

42 At 40.

[92] In terms of the place of the power to make binding recommendations, the Tribunal referred its comments in the Ngāti Kahu Remedies Report where it said:[43]

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

[93] In deciding to adjourn TAMA's application, the Tribunal noted that TAMA was seeking comprehensive settlement with a full suite of recommendations under s 6(3), including a recommendation under s 8HB in respect of the Mangatū Lands. In terms of the direction from the Supreme Court in *Haronga*, the Tribunal had limited its consideration of that comprehensive claim to whether or not binding recommendations for resumption should be made as regards the Mangatū Lands. Yet, at the same time, the Tribunal observed:[44]

> The limitation of our hearings to binding recommendations in respect of the Mangatū CFL land at this stage of the remedies process meant that we did not receive as much evidence as would be needed for a comprehensive set of recommendations. … A full remedies process would involve looking at a range of commercial and redress …
>
> Consideration of that comprehensive redress we leave aside – we may return to it if TAMA does decide to ask for a comprehensive remedies hearing after receiving this report. What we must determine is whether we can and should make a recommendation now for return of the Mangatū CFL land within the Tūranga district.

[94] The Tribunal summarised its decision in the following terms:[45]

> Having considered these matters, we do not propose to make a biding recommendation at this point. Instead, we adjourn TAMA's application for the time being. Our reasons for doing so are:
>
> (a) TAMA has in fact been offered redress in the form of an option to purchase the whole of the Mangatū Crown forest in the settlement offer made by the Crown, including the CFL land lying outside the Tūranga district in the Waipāoa block. The purchase would be funded either from accumulated rentals or from the proceeds of the settlement. Such an offer is comparable to offers accepted by other iwi.
>
> (b) TAMA seeks comprehensive redress which can only be achieved through settlement negotiations with the Crown. While the Tribunal

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43 Waitangi Tribunal, Ngāti Kahu Remedies Report, 2013 at 103.
44 At 179.
45 At 184.

> can made binding recommendations in relation to the CFL land and resumable lands, only the Crown can provide the other forms of redress which are as necessary to the restoration of the claimants' wellbeing and the Treaty relationship as is economic redress.
>
> (c) The Tribunal would need to conduct a comprehensive remedies process to ensure that we had all the necessary evidence to make decisions as to the level of redress we would need to deliver through binding recommendations, and to be able to make the other nonbinding recommendations needed for a comprehensive settlement.
>
> (d) TAMA's mandate to represent claimant groups such as Te Whānau a Kai and Ngā Ariki Kaipūtahi would need to be re-confirmed, otherwise the Tribunal could not be sure as to the identity of the Māori group to receive the redress.
>
> (e) TAMA has not yet completed the setting up of a settlement entity to receive redress (although this factor is not determinative).
>
> (f) The Crown is willing to re-enter negotiations so that another avenue is available to TAMA to obtain redress.
>
> The decision to adjourn the TAMA application provides the parties and the Tribunal with an opportunity to discuss constructive suggestions for a way forward in negotiations with the Crown. We go on to discuss these in the next section.

[95] In my view those reasons reflect, by reference to the Supreme Court's analysis in *Haronga*, a number of errors of law.

[96] At the time of the Forestry Lands Agreement, and the statutory enactment of the terms of that agreement in the Crown Forests Assets Act (including as that Act provided for s 8HB–HI of the Treaty Act), the Crown's current settlement policy and the Tribunal's approach to comprehensive inquiries did not exist. The parties to the Forestry Lands Agreement reached what was in many ways an essentially commercial bargain. The Crown could sell the forests. The forest lands would be retained and, if subsequently (in terms of the clear anticipation that early facilitation of claims to forest lands would occur) forest lands were resumed by Māori, compensation reflecting all or part of the commercial value that accrued to the Crown from the forestry sales process (which process *as a whole* might otherwise have been bogged down in Treaty litigation) would be paid to Māori. It is of course true that, as the Tribunal observed, the Treaty was not a contract, but an agreement

between people.[46] But the Forestry Lands Agreement is very much a contract, and one the relevant factual nexus for which, and the terms of, remain relevant when interpreting the statutory provisions at issue here.[47]

[97] Very much in that context, the Supreme Court in *Haronga* made a number of findings about the proper interpretation of the s 8HB scheme:

> (a) The statutory history clarifies Parliament's purpose in enacting the 1988 and 1989 legislation. That purpose was to make changes to the process under the 1975 Act for addressing claims of breach of Treaty principles. The changes, which applied to claims in respect of licensed Crown forest land, gave greater protection to those who established their claims were well-founded. Rather than being dependent on a favourable response from the government to a recommendation of the Tribunal, claimants could seek recommendations from the Tribunal for a remedy which would become binding on the Crown if no other resolution of the claim was agreed. The purpose accordingly was to protect claimants by supplementing their right to have the Tribunal inquire into their claim with the opportunity to seek from the Tribunal remedial relief which would be binding on the Crown. If the Tribunal so decided, that relief could extend to returning Crown forest land to identified Māori claimants. This was in return for permitting the Crown to transfer government-owned assets, including forest crop and other forest assets, to private interests. The government was thereby able to fully implement its corporatisation policy.[48]
>
> (b) Contrary to the view taken in the High Court and the Court of Appeal, we consider that the Tribunal, having decided the claim on behalf of Mangatū Incorporation was well-founded, was obliged to determine the claim in Wai 1489 for an order under s 8HB(1)(a) of the Treaty of Waitangi Act. The Tribunal had a choice as to whether or not to grant the remedy sought and, if so, on what terms. But it had to make a choice. It was a jurisdiction it could not decline.[49]
>
> (c) Section 7(1) confers on the Tribunal limited powers to decide, in its discretion, not to inquire into, or further inquire into a claim. They apply to claims concerning trivial matters or where they are frivolous or vexatious or not made in good faith. The power also covers claims where there is an adequate alternative remedy. Given the very substantial protection afforded to claims in respect of Crown forest land, there can be no alternative remedy that is adequate. None of the factors identified in s 7(1) applies in the present case and there is no other provision excusing the Tribunal from its duty to inquire into the claim.[50]

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46 Mangatū Remedies Report, above n 7, at 2.6.
47 *Haronga*, above n 6, at 84.
48 At [76].
49 At [78]. This is, in many ways, the keystone of the Supreme Court's analysis.
50 At [81].

(d) In that respect, an inquiry into a claim is not complete until the Tribunal has determined whether the claim is well-founded and, if so, whether it should recommend a remedy. Where the Tribunal has decided a claim is well-founded and the remedy sought is return of Crown forest land, the inquiry must address whether the land is to be returned to Māori ownership, any terms and conditions of return, and, if applicable, to which Māori or group of Māori the land is to be returned.[51]

(e) The jurisdiction [the Tribunal has under s 8HB] to order resumption in respect of licensed Crown forest land, conferred on the Tribunal by the 1989 Act, was part of the negotiated settlement reached between the Crown and Māori in their argument, under which both parties gain something of value. It must be understood in that context.

Particular care not to preclude completion of the inquiry is necessary in such cases. They are not the same as those in which the recommendations of the Waitangi Tribunal may or may not be accepted by the Crown, and in respect of which some deference to the political process in which claims are negotiated makes good sense, particularly when the Tribunal has to husband its resources. In the case of Crown forest land, the "recommendatory" obligation of the Tribunal is an adjudicatory obligation, even if the relief available to it is a matter of judgment.[52]

(f) Their [Mangatū's] claim is for specific relief which entails removal of the very prejudice complained of through return of the 8,626 acres alienated from Mangatū Incorporation 1961. It was no answer to say in response to an application for an urgent determination on the merits that Mr Haronga and the proprietors of Mangatū Incorporation would be entitled to share in the benefits of any commercial redress offered for breach of those other claims. But any such remedy does not remove their right to the Tribunal's investigation in adjudication as to remedy in respect of the specific prejudice and breach suffered by them in their capacity as owners in 1961.[53]

(g) … the obligation on the Tribunal to identify the Māori or group of Māori to whom land must return means that the possibility of overlapping interests cannot properly be used, as it was by Judge Clark in the courts below, as a reason against the granting of an urgent remedies hearing for the proprietors of Mangatū Incorporation.

If the Tribunal is of the view that the land should be returned, it has power under s 8HB to arrive at the outcome it thinks right. It may return part only of the land or specify the Māori or group of Māori to whom the 1961 lands or the balance of the Mangatū Forest should be returned. Although compensation under Schedule 1 goes with the land, the Tribunal may recommend return with or without additional compensation and in the event may order terms or conditions. (It may be, for example, that some adjustment to any additional compensation or the imposition of terms or conditions is considered if the Tribunal finds that the price paid to Mangatū Incorporation in 1961 was fair. The

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51 At [84]

52 *Haronga*, above n 6, at [88]-[89].

53 At [99].

> Tribunal has ample powers to impose terms and conditions and to adjust interests if that seems necessary.[54]

[98] As I read the Mangatū Remedies Report, there are essentially two reasons why the Tribunal adjourned the Māhaki Trust's application. First, negotiations with the Crown for comprehensive relief were ongoing and so reflecting its "remedy of last resort" approach, the Māhaki Trust's efforts and energies were better spent in that forum. The Tribunal would need to undertake a comprehensive remedies inquiry before making a binding recommendation.

[99] Second, the task of deciding as amongst the various claimant groups was a difficult one.

[100] I think the extracts from *Haronga* that I have cited above demonstrate the error in those reasons. That is, the Tribunal is not entitled to defer to the fact of Crown negotiations to adjourn a resumption application. If a claimant invokes the Tribunal's adjudicatory jurisdiction under s 8HB then, subject to a narrow power of deferral under s 7A and the discretion under s 8HB(1)(b), a decision is required. That conclusion is reinforced by the context of the Forestry Lands Settlement Agreement. The bargain was, put simply, that the Crown could sell the forests and that specific claims for the return of forestry lands would be expedited and, where successful, the economic benefit of the sale proceeds would be paid to the successful claimants, subject to the 5 to 100 per cent range in Schedule 1.

[101] It is, in my view, at odds with the Supreme Court's approach in *Haronga* to reason, as the Tribunal did, that a significant factor in deciding not to make binding recommendations as regards the Māhaki Trust was that it had not conducted a comprehensive remedies inquiry. That reflects the Tribunal's erroneous "last resort" reasoning. It also seems a little hard on the Māhaki Trust, given that it had filed a comprehensive claim, and the Tribunal had (quite understandably in light of *Haronga*) limited itself to the Mangatū Lands resumption issue.

[102] In other words, and supplementing the process for non-binding recommendations, a claimant was entitled to invoke the greater protection of

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[54] At [106]-[107].

s 8HB(1). To indeed be greater, that protection cannot be made subject to non-binding recommendations which the Crown may or may not accept. Nor can it be made subject to Crown settlement policy.

[103] Secondly, and perhaps even more clearly, the difficulty in making the apportionment decision as between successful claimants of land and compensation is not a reason for the Tribunal not to undertake the exercise and make that decision. That was its statutory role. The Supreme Court was of the view that the Tribunal had considerable flexibility in fashioning the terms and conditions of binding recommendations to achieve an appropriate apportionment. That it was a hard task was beside the point.

[104] Finally, the transfer of land and compensation are matters which can, after the event, be taken account of by the Tribunal when making further recommendations for compensation. But it is not the Tribunal's role, as I read *Haronga*, to assess whether or not implementing the bargain from the Forestry Lands Agreement meant that a successful claimant would, in effect, receive more than had been indicated by the parameters of a Crown settlement proposal and by the Tribunal's recommendatory view of how compensation offered by the Crown might properly be apportioned between overlapping claims.

The Tribunal's decisions to decline to make binding recommendations

[105] In many ways, the reasons for the Tribunal's decision to decline binding recommendations in the case of Mangatū, Ngā Ariki Kaipūtahi and Te Whānau a Kai are very similar to those by reference to which it deferred consideration of TAMA's claim.

[106] In the case of Mangatū, the Tribunal summarised its reasons in the following terms:[55]

> Our main reasons for declining the Mangatū Incorporation's application for a binding recommendation for the return of the whole of the 1961 land are:

[55] Mangatū Remedies Report, above n 7, at 162-163.

(a) The return of the land together with the accompanying accumulated rentals and schedule 1 compensation, even at the 5 per cent level, is more than what is necessary to compensate for or remove the prejudice suffered by the incorporation shareholders.

(b) The whole package of land and monetary compensation that the incorporation would receive pursuant to a binding recommendation would be disproportionate compared to the total settlement package that was offered by the Crown to the Māhaki cluster to remedy serious Treaty breaches. Redress that seems to unduly favour one claimant is likely to create fresh grievance which will impede the restoration of the incorporation's relationship with other claimants and their relationship with the Crown.

(c) A binding recommendation for the whole of the 1961 land provides acre for acre redress. If the same criterion of an acre of redress for each acre lost as a result of Treaty breaches is applied to the applicants of the Māhaki cluster then the increase in the settlement package would be very large. In our view, such an increase would not be sustainable either economically, practically, or politically. It would undermine the basis on which other settlements have been concluded. Nor could the Tribunal guarantee that such an increase would happen. That is especially so because the settlement packages offered to Ngāi Tāmanuhiri and Rongowhakaata, the other main claimant groups in the Tūranga district, were negotiated relative to each other and the Māhaki cluster settlement package. We have insufficient evidence to know whether it would be economically feasible either.

(d) The restorative approach seeks to restore the economic, social, and cultural well-being of the claimant, rather than to punish the Crown. The incorporation does not require economic or financial restoration.

(e) The statutory schemes of the CFAA and TOWA do not allow us to adjust (except upwards) the monetary compensation that would pass with the land to the incorporation so that we cannot deduct the monetary compensation so as to provide the incorporation with redress that is proportionate to the redress other claimants will receive.

(f) As for the possibility that the 1961 land be divided, and a portion of it be returned to the incorporation, the problems of determining what would be a fair and equitable portion of the land for the incorporation as compared to other claimants weight against granting a binding recommendation in respect of a share of the 1961 land. The practical problems associated with dividing the land, while not determinative, also count against making a binding recommendation. We consider that the uncertainties involved in granting a portion in the land are such that we should not exercise our discretion in this way.

[107] As can be seen, that decision depends on two key elements:

(a) the impact of Schedule 1 compensation relative to the Tribunal's view of what is necessary to compensate for or remove prejudice, and associated relativity issues; and (again)

(b) the difficulty of determining what would be a fair and equitable portion of the land for Mangatū, as compared to other claimants.

[108] It follows from what I have already said that, in my view, both those reasons incorporate errors of law.

[109] The first error is, as before, to approach the matter on the basis that the essential consequences that flow under s 8HB and the Crown Forests Assets Act from a "should return" binding recommendation may be assessed by the Tribunal as being overly generous by reference to Crown settlement policies and offers. The scheme enacted to give effect to the Forestry Lands Agreement has two calibration methods: the amount of land to be returned and the percentage, between five and 100 per cent, of the Schedule 1, clause 3, compensation that should accompany the land. Beyond that, I conclude that the Tribunal defers unlawfully to the Crown's settlement policies and offers when it concerns itself with "fitting" the benefits of a binding recommendation into an external settlement framework.

[110] Again, I think that in terms of the Supreme Court's assessment in *Haronga*, the Tribunal has erred in its assessment of the flexibility it has when calibrating binding recommendations, and has wrongly seen the difficulty of the task involved as a reason not to perform its adjudicatory function.

Ngā Ariki Kaipūtahi and Te Whānau a Kai

[111] It follows that similar errors were made by the Tribunal when it declined the relief claimed by these two groups.

[112] In the case of Ngā Ariki Kaipūtahi, it would appear (recognising that I know little of the significance of the Mangatū Lands, and specific parts thereof, as between the whānau, hapu and iwi of Tūranga) that some symbolic vesting of land and transfer of compensation is at least a possibility.

[113] For Te Whānau a Kai, its application was very much to give it a place at the table. I acknowledge that the Tribunal's decision to decline its application in that context may be less significant than the Tribunal's decisions were as regards the other claimants. But that decision in respect of Te Whānau a Kai cannot survive given the errors of law in the decisions affecting the applicants.

Result

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

[115] In making those orders, I make the following tentative observations.

[116] At least as I understand it, the Māhaki cluster are now all the claimants to the Mangatū Lands, albeit that those claims overlap with the claim of Mangatū to the 1961 Lands. There is, moreover, a considerable degree of commonality – recognising the separate standing of Ngā Ariki Kaipūtahi and Te Whānau a Kai – amongst Mangatū and the beneficiaries of the Māhaki Trust. Rongowhakaata and Ngāi Tāmanuhiri, knowing well that the future of the Mangatū Lands and the Mangatū State Forest outside the Tūranga inquiry district remained at large, decided to accept settlement offers and settlement legislation has been passed. Given those realities, whilst undoubtedly complex, the task of fashioning an allocation within and between Mangatū and the Māhaki cluster is a task the Tribunal would, I would have thought, been well placed to undertake. In that context, subs (3) of s 8HB is important. It would allow the Tribunal, having made binding recommendations under s 8HB(1), to "take into account payments made, or to be made, by the Crown by way of compensation in relation to the land pursuant to s 36 and Schedule 1 of the Crown Forests Assets Act 1989" when making *subsequent* recommendations relating to the relevant claims.

[117] I note one further point. A key part of this statutory regime is the fact that binding recommendations when made are initially interim only. That is clearly designed to give Māori and the Crown a period for negotiation. The anticipation would appear to be that, through those negotiations, the recommended return, and associated compensation, can be adjusted voluntarily. There would appear to be no reason why, during that process, the parties themselves cannot take account of the broader context of claims to particular lands. In my view, that is another factor the Tribunal can bear in mind in terms of its "relativities" concerns. But, I observe, it is the parties to the Forestry Lands Agreement who reserved that process to themselves, and I do not think the Tribunal needs to predict or anticipate that process when it considers the "should recommend" decision.

[118] Costs are reserved.

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Clifford J

Solicitors:
Gibson Sheat, Wellington for the applicants in CIV-2014-416-24
Kathy Ertel & Co, Wellington for the applicant in CIV-2014-485-5266
Crown Law Office, Wellington for the second respondent