WAI 863/85 - POUĀKANI

CLOSINGS
HELD AT WAITANGI TRIBUNAL OFFICE, WELLINGTON
TUESDAY 12 NOVEMBER 2019 – FRIDAY 15 NOVEMBER 2019

Tribunal:	Judge Carrie Wainwright Dr Ruakere Hond Dame Margaret Bazley
Crown Counsel:	Andrew Irwin Anne O'Driscoll Henry Graham
Claimant Counsel:	Matanuku Mahuika Tara Hauraki Nathan Milner Baden Vertongen Karen Feint
Interpreter:	Conrad Noema

[1] Transcript prepared by National Transcription Service (*Ngā Kaihopu Kōrero o Te Motu)*

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(09:02) DR RUAKERE HOND: (MIHI)

.....kia kite anō tātou ia tātou tēnei te rangi tuarua. E tika ana kia whakairihia ngā kōrero o inanahi kia iri tonu anō i runga i tēnei rangi. He karakia inanahi, āna me pērā anō te āhua i tēnei rā i te tīmatanga tae noa ki te whakakōpanitanga. Nō reira, ka tuku atu te mauri karakia ki tērā pito o te whare, āna, kia tū, kia rewa atu anō tō tātou whakaaro ana ki runga. Tēnā koe, tēnā tātou.

[Interpreter: And again, as we see each other within the compounds of this house and of course we must pave way and give thanks from the karakia which led us through the proceedings yesterday, and of course we want to ensure it continues right through its ending. So, they'll be able to see and move forward with what's ahead of us.]

UNIDENTIFIED MALE SPEAKER: (09:01:55)

Kia koutou, kia mātou, kia tātou katoa. Me pēnei te mihi ki te tēpu matua. Kei a koutou te mana ki te whakaārahitia a mātou i te rā nei, nō reira tēnei te mihi ki a koutou. Me pēnā kē a mātou kaimahi, ngā kaiture, a Ngāti Raukawa kei te mihi ki a koutou. Nau mai, me ā tātou katoa. Nō reira ēna kē kei te mihi mai ki ō tātou mate kua riro nei te pō nē, nō reira tēnei te mihi atu ki a rātou mā, ki te ao wairua moe mai, moe mai, haere atu rā koutou. Nō reira, tēnā ki te āhuatanga kei te noho tahi kei raro i te āhuatanga o te rangimārie i tēnei rā, nō reira pēnā te mihi ki a tātou katoa. Ā mātou waiata tuatahi he hōnore anō.

[Interpreter: Again, warm greetings to everyone present. So, again to our host who provide manaakitanga for us and of course the counsel groups, and of course Ngāti Raukawa represented here amongst us as well. Again, we must pay homage to our dear love ones that have since passed, may they rest in peace in the confines of the arms of our lord.]

And again, which brings us here to the hearings and all what it entails. And again, but first may be commence with a waiata called, He Hōnore.]

WAIATA: 09:02

KARAKIA: 09:04

JUDGE WAINWRIGHT:
Tēnā ano tātou. Mr Mahuika, kua *whakatū te rā katoa māu. nā reira haere tonu*. [Interpreter: So the day is before you to give your evidence Mr Matanuku please.]

(09:04) MATANUKU MAHUIKA: (MIHI, CLOSING SUBMISSIONS #J100)
Heoi anō rā, ahakoa te kaupapa o te rangi nei me te momo o tēnei hui i te rangi nei, kia tīmata ai tāku whakaputa kōrero te mihi. Tuatahi ki a koe e te Kaiwhakawā, kia koutou katoa ngā mema o te Taraipiunara kei te mihi atu ki a koutou.

[Interpreter: Even though with the hearings that we find ourselves in and the importance of it and before I commence the evidence I have is to acknowledge and to you now Judge and of course, esteem members we find before me on the panel.]

Ka huri ki tēnei taha o te rūma, āna ki te tokomaha o ngā tāngata me kī, e whai pānga ki ngā whenua kei roto o Pouākani, arā, ki a Wairarapa Moana, ki a Raukawa, ki a Ngāti Kahungunu whānui tonu, āna kua haramai ki koneki ki te whakarongo, a, ki te tuku atu i ngā kōrero, i ngā whakaaro hoki e pā ana ki tēnei kaupapa nui.

[Interpreter: I turn to this side of the house and the many interest groups represented here in Pouākani and Wairarapa moana, Raukawa and of course Ngāti Kahungunu and its collectives who have come here to listen, and of

course give thought and reflections on the evidence that will be brought forward.]

Tangihia o tātou mate ka tika, te pūkahu o ngā mate kua mene atu mai i te tīmatanga mai o tēnei kaupapa tae noa mai ki tēnei wā, āna, tae noa atu ki a Te Wharehuia, ā, tērā o ngā Kaiwhakawā ō mua, nānā i whakarongo ki te nuinga o ngā mamae, o ngā kōrero e pā ana ki ēnei kaupapa.

[Interpreter: Yes, we must shed a tear for our dear love ones who have since pass, particularly those involved in its inception of this particular hearing and acknowledging Te Wharehuia and of course the position he had, who was to listen and capture the tears and laments of our people.]

Nā reira e tika ana te kōrero, rātou mā ara haruru tapuwae kei runga i te marae, kia huri whakamuri ngā whakaaro ki a rātou mā. Engari, tukuna rātou kia haere ka hoki mai ki a tātou te hunga ora. Anā, tātou e whakahaere tonu te kaupapa, i ngā moemoeā , ngā kaingākau anō hoki o rātou kua whetūrangitia. Nā reira, tātou katoa e whakawhāiti mai i tēnei rā, kei te mōhio rawa atu au ehara tēnei i te mahi ngāwari, he uaua rawa atu tēnei momo mahi. Engari ko tāku i tēnei rā, te whakaputa, te tuku atu i ngā kōrero mō te Kaporeihana Māori o Wairarapa Moana e pā ana ki tēnei kaupapa nui.

[Interpreter: So, again in how we reflect this, in our marae and we turn to them who give through and expression to our love ones and may they rest in peace, but their spirit endures amongst us. Giving effect to the aspirations of those who have since passed beyond the veil and all of us that have gathered here, and I do know, it is not an easy task, there are many pressures along this journey. But for me at this point in time it's to give evidence and speaking in regard to the cooperation in regard to Wairarapa Māori.]

Nā reira, kei roto o ēnei aku whakaaro, aku mihi atu ki a koutou, otirā ki a tātou e haramai i tēnei rā. Tēnā koutou, tēnā rawa atu tātou katoa.

[Interpreter: So, within those expressions again another welcome to all those who have arrived here today.]

So, Ma'am these are the closing submissions for the Wairarapa Moana Incorporation although as I say in paragraph one, it is the claim made by Mr Smiler for his own part and on behalf of the shareholders of what has come to be the Wairarapa Moana Incorporation.

The claimants represent the former owners of the Pouākani No.2 block which includes the lands that were taken by the Crown under the Public Works Act 1928 for the purposes of constructing the Maraetai dam and power scheme. The taking of which the Waitangi Tribunal has found to be in breach of the principals of the Treaty of Waitangi.

There's quite a bit of detail to work through today, so I thought what I would do is maybe give an outline of how I propose to try and deal with the submissions and broadly in three parts.

So, the first part will be to talk about the statutory scheme and the findings of the Tribunal and how it is that those findings might be applied in the light of a statutory scheme. The second part and I'll do this when I get to paragraph 77 because there is quite a lengthy appendix which is dealing with the economic evidence which has occupied a lot of our time.

And it's not, I wouldn't necessarily say that it is the most important part of it, but it is important from the point of view of determining whether or not the return of the land is appropriate as a remedy. To in the words of, section 8A(2)(a)(ii) to compensate for the prejudice suffered or to remove that prejudice.

And I think I said in opening that an issue there is that to determine whether there is proportionality in terms of the value of what might be returned and the

harm that was suffered, and there has been a lot of debate about what is the appropriate way to deal with that.

So, in that part of the submissions I will try to, as much as I can suggest a way to deal with all of the different economic evidence. Sorry, Ma'am.

JUDGE WAINWRIGHT:
No, I was just trying to capture what the second part of your submissions will focus on.

MATANUKU MAHUIKA:
So, I will try.

JUDGE WAINWRIGHT:
The second one is about proportionality really?

0910

MATANUKU MAHUIKA:
Yes, it is, yes. And that really derives from the views of the different economists. And how do you distil those views? There are a number of views. The question then becomes which view ought to be preferred in the light of all of that evidence. And then the last part is the issue which has arisen about the appropriateness or otherwise of the incorporation as the recipient of or the potential recipient of any resumption recommendation. There are a couple of things that I intend to interpolate into the submissions at that point, in fact, I will at various stages, but particularly in relation to how it is that any concerns around resumption might be dealt with. But I will come to that towards the end. That's the rough sequence that I hope to follow in going through the submissions.

So, to give you a further overview, if I refer you then to the executive summary. So, what the claimants are seeking is the return of the lands at Pouākani which

are subject to the application for resumption. So, we have called them the 'Subject Lands' for want of a more creative description in the submissions, and essentially they are the lands that were part of the Pouākani No.2 Block in respect of which there are resumption memorials.

So, the lands that were taken for the purposes of the Maraetai Scheme extend beyond the lands that resumption memorials are on because not all of those lands were transferred to, I think it was the Electricity Corporation at the time that the SOE Regime was established. So, there's another reasonably significant area of land that sits under the Maraetai Dam that was part of the Pouākani No.2 Block, but it wasn't felt necessary to transfer those lands to the Electricity Corporation, so there are no memorials that apply to those lands. So, it is just the memorialised portion of the lands that were taken in the Pouākani No.2 Block that are the subject of the application.

JUDGE WAINWRIGHT:

I do not think that I have apprehended that previously, Mr Mahuika?

MATANUKU MAHUIKA:

Yes, well we obviously haven't explained it to you well enough.

JUDGE WAINWRIGHT:

Obviously.

MATANUKU MAHUIKA:

Yes. But that is the case. If you look at the lands that were taken, they do include the lands that were taken for what is now Lake Maraetai.

JUDGE WAINWRIGHT:

Yes.

MATANUKU MAHUIKA:

Because of course at the time that the hydro scheme was established, it was intended to flood that gorge that sits in behind the dam. In fact, that was one of the reasons why that was considered to be a good location because there is that natural gorge and because it would then be capable of holding a large volume of water, and you saw some of that in the evidence of Mr Williamson. He said that one of the benefits of Maraetai or part of its importance in the Waikato hydro scheme is the fact that it can be used to regulate the flow because you can hold large volumes of water within that area.

So, when the land was taken, land was taken for the purposes of the construction of the dam, but also the land in behind because it was known that that land would be flooded once the Maraetai Scheme was in place.

JUDGE WAINWRIGHT:

So, but I think you have just said that some of the land that was compulsorily acquired by the Crown in the 1940s was not transferred to the Electricity Corporation?

MATANUKU MAHUIKA:

That's correct, Ma'am, yes, the land under Lake Maraetai wasn't transferred to the Electricity Corporation. The only land that was transferred was the land that was associated with the dam itself. So those are the –

JUDGE WAINWRIGHT:

So that remains Crown land?

MATANUKU MAHUIKA:

Yes, it does. So, in terms of the application –

JUDGE WAINWRIGHT:

So, this was – sorry. I do not know, I feel like Alice in Wonderland here, I do not know how this circumstance has not come to my attention before, but perhaps it is not relevant because we are really only talking about the land that

was transferred from the Crown to the Electricity Corporation, but this was land that was compulsorily acquired, so it is part of the 700 acres?

MATANUKU MAHUIKA:

Yes, that's correct. So, but of course the only land that we are able to make in a resumption application in respect of is the land that was memorialised because that land was transferred to the Electricity Corporation and their memorials were imposed as part of that transfer. The land –

JUDGE WAINWRIGHT:

So, whose title are these acres in now?

MATANUKU MAHUIKA:

It's still owned by the Crown.

JUDGE WAINWRIGHT:

So, you are able to make an application –

MATANUKU MAHUIKA:

Well we **(inaudible** 09:15:03) –

JUDGE WAINWRIGHT:

Not for binding recommendations, but for recommendations?

0915

MATANUKU MAHUIKA:

I'm not certain about that Ma'am because, you know recommendations have been made already about compensation and breach by the Crown. So, this particular application is saying, well we would like you to now make a recommendation that there be a remedy, and that remedy be the transfer of the land, you have no jurisdiction to make such a recommendation in respect of the lands under the Maraetai dam.

JUDGE WAINWRIGHT:

So, you are saying that our capacity to make recommendations now is limited to binding recommendations that are wider section 6 remedy functions, is functus officio?

MATANUKU MAHUIKA:

I think what I am saying Ma'am is that the application has been made as for the exercise of the Tribunals specific jurisdiction to make binding recommendation. We haven't sought those other sought of recommendations. So, I'm not sure that I am willing to say that is it functus officio but is not a matter that is currently before you.

JUDGE WAINWRIGHT:

Well, I think there is probably an issue from the cases about where the binding recommendations jurisdiction does sit in our wider remedy jurisdiction. And I had thought that the authorities had suggested that the binding recommendations jurisdiction was always a subset of our ability to make recommendations more generally. So, I think it probably is an issue Mr Mahuika?

MATANUKU MAHUIKA:

Yes, I think they way that the case has described it that they say, that the jurisdiction under the resumption regime I think it's section 8A to section 8HJ sits underneath the broader jurisdiction of the Tribunal under section 63 of the Treaty of Waitangi Act, but once that jurisdiction is activated the operative provisions become the resumption provisions as appose to the broad recommendation, making power that are conferred by section 63.

So, for example once we are in a discussion about whether resumption is appropriate or not the jurisdiction of the Tribunal sits squarely within section for example, in this case 8A(2)(a)(ii). So, it is subsided in that sense, but once that jurisdiction is activated the prevailing provisions or the provisions within which

the Tribunal is obliged to operate are those very specific resumption previsions set out in the Treaty of Waitangi. I do touch on that in the submissions as well.

JUDGE WAINWRIGHT:

Well, I think it is a live issue in my mind, as to obviously for instance in the Ngāti Kahu remedy situation the Tribunal there when asked for binding recommendations chose not to make binding recommendations but to make non-binding recommendations. And my understanding of that authority is not that the Tribunal was wrong to make non-binding recommendations but that it did not approach the binding recommendations jurisdiction properly.

So, I had thought that it was part of the suit of options available to the Tribunal at any point, when it's considering remedies to make binding and non-binding recommendations. But if you have a different view than yes please, clothe that with as much substance as you are able.

MATANUKU MAHUIKA:

Yes, I will come to that as part of the submissions. Because I think it is an important point the Crown has in its closing submissions, suggested an alternative approach in terms of recommending a compensation amount as appose to making binding recommendations. My understanding of the *Mangatū* decision or the *Haronga* decision is that in that case the High Court was really concerned with what the obligation is on the Tribunal once it finds that a claim is well-founded, and the choice really is to either order resumption or order the removal of the memorial on the title.

0920

JUDGE WAINWRIGHT:

Indeed. In relation to the properties that are resumable, but there is another question it seems to me which is whether the Tribunal retains more generally in addition to its binding recommendation obligations, once that jurisdiction is triggered, the ability to make other recommendations that it sees fit to make.

MATANUKU MAHUIKA:

Yes, and my answer is that I will admit it's not something that I specifically turn my mind to, partly on the basis that in our submission, resumption in this case is the appropriate remedy.

JUDGE WAINWRIGHT:

Yes.

MATANUKU MAHUIKA:

So, we would not agree that an alternative recommendation is required –

JUDGE WAINWRIGHT:

No, but that's not what I'm saying. I agree that it's not an either/or, but is it an and/and?

MATANUKU MAHUIKA:

I think beyond that, the challenge will be that if, particularly if it doesn't relate to the land in respect of which resumption has been sought, then there is an argument that those issues are not before you. In similar –

JUDGE WAINWRIGHT:

Well there is the nature of the Tribunal as a Commission of Inquiry, but you know, certainly I'm very interested in these submissions, Mr Mahuika, because I think those matters are live.

MATANUKU MAHUIKA: (CONTINUES)

So, well I got to paragraph 3. As I say then at paragraph 4, and I think we've dealt with this, in fact, let's move over paragraphs 4 and 5 because I think we've covered those in our discussion, Ma'am.

Paragraph 5 is really descriptive of the areas in the map book that I covered by the application but suffice to say it is the lands that are memorialised and that were part of the Pouākani 2 Block.

JUDGE WAINWRIGHT:

I've just asked whether we can put your submissions up on the screen so that those present can follow it more generally. Haere tonu.

MATANUKU MAHUIKA:

So, to paragraph 6 now, Ma'am.

CONTINUES READING #J100 FROM PARA 6

"In the *Wairarapa ki Tararua Report*, the Tribunal found that the Crown's actions in compulsorily acquiring land for the Maraetai Dam (which includes the Subject Lands) from its owners breached the principles of the Treaty of Waitangi." And I will set out more detail later on the specific breaches that were found. But, "The Tribunal found that the Crown should," and I have quoted here from the Tribunal report:

> "reassess the compensation paid to the owners for the land taken for the Maraetai Dam in the light of new, Treaty-compliant criteria, including:
>
> - compensation for the unique qualities and hydro potential of the lands; and
> - compensation for all 'betterment' effected by the hydro works".

"The Tribunal did not decide the nature or extent of compensation that should be paid to the owners of the land taken for the Maraetai Dam. This is the issue which is now before the Tribunal. As part of this determination, the Tribunal must," in our submissions, "consider whether the return of the Subject Lands is warranted in order to compensate the owners for the prejudice suffered as a result of the Crown's Treaty breach.

The Claimants say that the return of the Subject Lands is necessary to compensate for the prejudice caused by the Crown's breaches of the principles of the Treaty. The return of the Subject Lands to the Claimants necessarily

follows based upon a proper interpretation of s 8A of the Treaty of Waitangi Act 1975.

The Claimants are the appropriate party to receive the Subject Lands. The Incorporation represents the former owners of the Pouākani No.2 block, which includes the land that was taken for the Maraetai Dam. The Tribunal specifically recommended that compensation be paid to the owners from whom the land was taken. It is not now open," in our submission, "for the Tribunal or the Crown or any other party to re-litigate the Tribunal's earlier findings that the former owners of the Pouākani No.2 block suffered from, and were prejudiced by, Crown breaches there. Nor, in the Claimants' submission, is the Tribunal able to re-examine the 1883 Native Land Court title determination from which the list of owners of the Pouākani No.2 block originated in 1915, in order to reassess whom, the Tribunal considers, or reconsiders was prejudiced by the takings at Pouākani.

As addressed throughout these submissions the Claimants disagree with a number of the assertions made in the Tribunal's recent memorandum and directions on matters to be addressed in closing submissions," although we do, I think as the Tribunal invites, enter into dialogue on those points which I think was actually the – sat behind those directions, as well as a number of points asserted in relation to jurisdiction.

At paragraph 11 I then set out the evidence that's been relied upon. I don't think – we've all heard that evidence, I don't need to go through what that was. So, paragraph 12 now – sorry, I'm just waiting for paragraph 12 to come up – is a brief timeline and it's useful to have that timeline in mind when considering the balance of the submissions.

So, "The Crown and the Claimants have agreed a statement of facts relevant to this remedies inquiry. In addition, as directed, the Claimants have filed further chronology of relevant events. These materials, along with the affidavit

of Mr Smiler and the amended statement of claim provide an overview of the history of the Wai 85 claim, and they include the following points:

So, Wai 85 was first registered by the Waitangi Tribunal on 30 August 1989 and was the first Wairarapa claim filed with the Tribunal.

Wai 85 was initially filed as a cross claim in response to the Wai 33 claim which was filed by Mr John Hanita Paki and that was dealt with by the Tribunal in its Pouākani Wai 33 Report at Chapter 16 and 17.

The original named claimant for Wai 85 was the then-Chairman of the Committee of Management of The Proprietors of Mangakino Township Incorporated, which was in turn the trustee of the Pouākani 2 Trust." And as you will recall, it was the amalgamation of those things that led to the creation of the Incorporation.

"Between March 2004 and March 2005, the Waitangi Tribunal held nine weeks of hearings in the Wairarapa ki Tararua, including of the Wai 85 claim. It was the Claimants that prosecuted the claims in respect of Pouākani and no one else.

As noted later in these submissions, but not covered in these other documents, while providing the initial momentum for the Wairarapa ki Tararua Inquiry amongst the wider Wairarapa claimant community, the Claimants withdrew from involvement in non-Pouākani-related issues and left these to be addressed by other claimants. This is evident from the Claimants amended statement of claim in the Wairarapa ki Tararua Inquiry, which focused only on prosecuting the Claimants' claims in relation to the lands at Pouākani and also the Crown's subsequent statement of response.

In 2010 the Waitangi Tribunal's *Wairarapa ki Tararua Report* was issued. The Tribunal made a number of findings of Crown breaches of the Treaty, including

in relation to the Claimants' claims at Pouākani." And I've mentioned the claim at paragraph 6, the specific finding and recommendation in relation to the Crown's acquisition of the lands that are associated with the Maraetai Dam.

"On 10 February 2017 the Claimants filed the present application for an urgent remedies inquiry. The Claimants' application was strongly opposed by the settlement trust and representatives of the settlement trust requisitioned a Special General Meeting to put a motion directing the Claimants to withdraw this application. This motion was unsuccessful. The results of the SGM were 81.71% of those participating voters voted in favour, or 62.15% of participating shares, voting in favour of the Claimants' application." So, in other words, there were obviously some big claimants that voted against, but in terms of the number that participated in the vote, the vast majority of those participated were in support of the application.

0930

"On 2 May 2018 the Chairperson of the Waitangi Tribunal granted urgency to the application for binding recommendations."

And in our submission, "The task of this Tribunal is to decide whether to make a recommendation for the return of the Subject Lands…" so in other words the memorialised lands that were part of the Pouākani 2 Block, "…to the Claimants.

And the jurisdiction for the Tribunal to make such a recommendation is set out in sections 8A to 8HJ of the Treaty of Waitangi Act 1975. It follows that the decision to make a recommendation, and the terms of the recommendation itself, must be made strictly in accordance with the statutory scheme." And if I might just interpolate briefly there, although I refer to section 8A to 8HJ, of course that deals with all of the different resumption powers that the Tribunal has so it will deal with Crown Forest Lands and other things that are not actually before this Tribunal, but the principal source of the Tribunal's jurisdiction to

make binding recommendations in this case is section 8A, and in particular 8A(2)(a)(ii). It's a bit of a mouth full, Ma'am.

So, what I then propose to do, and I think because it's important in determining how to approach the Tribunal's task, is to touch a bit on the legislative history. Because of course, and it has been noted a couple of times, this is not a jurisdiction that the Tribunal has exercised or much at all. There's the Tūrangi-Tukua situation, but otherwise it's a jurisdiction that has largely been left alone, and the reason for that is that claimants have tended to find negotiated solutions rather than being forced to come to the Tribunal for a remedy. But of course as the Tribunal is aware though, the history of this goes back to the 1980s and all of those very significant legal events that occurred in the latter part of the 1980s in relation to Māori claims against the Crown, and I think that's important context to bear in mind when considering what is the intention of the legislative regime that's being established and what does it tell it tell the Tribunal in terms of the exercise of that jurisdiction and how the exercise of that jurisdiction ought to be approached. So, going to paragraph 23.

"The provisions introduced to the Treaty of Waitangi Act by the Treaty of Waitangi (State Enterprises) Act 1988 have their genesis in the litigation that arose out of the enactment of the State-Owned Enterprises Act 1986. So pursuant to the 1986 Act, the Fourth Labour Government intended to transfer significant Crown-owned properties to the State-Owned Enterprises that were to be established under the 1986 Act." So, it was part of that whole process of privatisation that occurred under the Fourth Labour Government.

"The 1986 Act led to the landmark Court of Appeal decision in *New Zealand Māori Council v Attorney-General*," or what is commonly known as the *Lands case*, because of course there was more than one New Zealand Māori v Attorney-General piece of litigation at that time. "This litigation arose out of Māori concerns that, once Crown-owned properties were transferred to

State-owned Enterprises, those properties would no longer be available for return to Māori ownership as part of any settlement of Treaty of Waitangi claims. The Court of Appeal held in the Lands case that s 27 of the 1986 Act gave insufficient protection against the risk that land might be transferred to SOEs in a manner which would prejudice remedies to those seeking redress." And I quote s 27 there and I don't think I need to go through s 27. So, going over to paragraph 25.

"The Court further ruled that s 9 of the 1986 Act was a firm declaration by Parliament that nothing in the Act should permit the Crown to act inconsistently with the principles of the Treaty of Waitangi and it overrode the rest of the Act including s 27. Section 9 provided that:

> Nothing in this Act shall permit the Crown to act in a manner that is inconsistent with the principles of the Treaty of Waitangi."

And in fact, His Honour, President Cooke as he was at that time, "…in his judgment in the Lands case described section 9 as follows:

> The wording of s.9 is plain and unqualified. In its ordinary and - natural sense the section has the impact of a constitutional guarantee within the field covered by the State-Owned Enterprises Act."

The Court of Appeal then made a series of orders in June 1987 and these are summarised in clause (e) of the Preamble to the State-Owned Enterprises Act. And what the Court did is:

> (i) made a declaration that the transfer of assets to State enterprises without establishing any system to consider in relation to particular assets or particular categories of assets whether such transfer would be inconsistent with the principles of the Treaty of Waitangi would be unlawful; and

(ii) gave certain directions concerning the preparation by the Crown of a scheme of safeguards, which was to be lodged in the Court of Appeal after it had been submitted to the New Zealand Māori Council for agreement or comment; and

(iii) made a further declaration (which might be varied or discharged at any time on the motion of the Crown) that in the meantime the Crown ought not to take any further action affecting any of the assets referred to in the statement of claim, by way of transfer of assets or long-term agreement or arrangement, that is or would be consequential on the exercise of statutory powers conferred by the State-Owned Enterprises Act 1986."

So, these are very significant findings. So, the Crown has or the Fourth Labour Government at that time had, as part of its policy for reforming the economy of New Zealand, decided that there were certain activities that the Crown ought not to continue to undertake. So, it sought to privatise those by putting them into State-Owned Enterprises and then having them operate, if you like, at slightly arm's length from the Crown even though there were shareholding ministers, and this was a cornerstone part of that policy. And what the Court of Appeal found in the *Lands* case based on s 9 is that it was unlawful for it to give effect to that regime without there being some form of protection for Māori claims against the Crown, and it was that that led to the creation of the regime which we're currently asking the Tribunal to exercise or this particular jurisdiction.

So, as I say at paragraph 28, "The Lands case prompted negotiations between the Crown and the New Zealand Māori Council. This ultimately led to the 1988 Act…" which is the Treaty of Waitangi State-Enterprises Act 1988, "…being passed, which, amongst other things, provided the Tribunal with its binding powers of recommendation in respect of former SOE land.

Paragraphs (g) and (h) of the Preamble to the 1988 Act record what was agreed between the negotiating parties in terms of the safeguards to apply after the transfer of assets to SOEs. These are the safeguards set out in sections 8A to 8HJ of the TOW Act 1975." And I then quote from paragraphs (g) and (h) of the Preamble, and what that provides is that:

> (g) it is essential, in order to protect the position of Māori claimants and to ensure compliance with section 9 of the State-Owned Enterprises Act 1986, that there be safeguards–
>
> > (i) including power for the Waitangi Tribunal to make a binding recommendation for the return to Māori ownership of any land or interests in land transferred to State enterprises under that Act; and
> >
> > (ii) requiring the Waitangi Tribunal to hear any claim relating to any such land or interests in land as if it or they had not been so transferred…"

So, this is the idea that land is treated as but still in the hands of the Crown, not in the hands of, as it currently is, Mercury.

> "…(iii) precluding State enterprises and their successors in title from being heard by the Waitangi Tribunal on claims relating to land or interests in land so transferred; and
>
> (h) the New Zealand Māori Council and Graham Stanley Latimer and the Crown have agreed that amendments to the Treaty of Waitangi Act 1975, the State-Owned Enterprises Act 1986, and the Legal Aid Act 1969 are required in order to allow the transfers and to protect existing or likely future claims before the Waitangi Tribunal…

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The agreement between the Crown and the New Zealand Māori Council was advantageous to the Government of the day as it allowed it to progress an important aspect of its economic policy." So, we tend to forget about that when we consider the jurisdiction and the motivations of the Crown when it was establishing it. It wanted to do this. This was an important part of its economic policy, and in return for that, it created this jurisdiction. "The quid pro quo for the Crown being able to transfer a large area of land to SOEs was the additional power given to the Tribunal to make binding recommendations under the new statutory scheme.

Sections 8A to 8HJ therefore have two important roles:

> (a) to protect Māori claims against the Crown for breaches of the Treaty of Waitangi; and
>
> (b) to provide a means by which those claims might be addressed."

The next section, and I will touch on it a bit more, is dealing with, when this regime was established – were, was the focus just on the land or was the focus on the land and improvements. And the importance of this is that what is it that the claimants were attaching their claims to and were therefore intended to be covered by the resumption regime.

And in our submission, "The provisions inserted into the 1986 Act by the Amending Act in 1988…" so that's the SOE Act and the State Enterprises Treaty of Waitangi Act 1988, "…make it clear that Parliament explicitly countenanced the Tribunal awarding a successful claimant not just the land, but the land as well as the associated improvements (at least as those improvements existed at the date of transfer to the relevant SOE). Notably, in

most instances those improvements will not have existed at the dates in which the Crown committed its relevant Treaty breaches."

So, Subsection 27A(1) of the State-Owned Enterprises Act, which was inserted as a consequent of the 1988 amendments, provides:

> "Where any land or interest in land is transferred to a State enterprise… the Registrar-General of Land shall, without fee, note on the record of title the words "Subject to section 27B of the State-Owned Enterprises Act 1986 (which provides for the resumption of land on the recommendation of the Waitangi Tribunal…

Furthermore, subsection 27B(1) of the Act, which was also inserted through the 1988 Amendments, provides:

> Where the Waitangi Tribunal has … recommended the return to Māori ownership of any land or interest in land transferred to a State enterprise … that land or interest in land shall, if the recommendation has been confirmed … be resumed by the Crown in accordance with section 27C of this Act and returned to Māori ownership.

That Parliament intended the improvements on s 27B memorialised land to be available to a successful claimant to the associated land is further supported in considering how the value of improvements is treated differently under the Crown Forest Assets Act 1989," which is still dealt with as part of that broader regime. So, it's a part of the significance of s 27A and B is that they don't distinguish between land and improvements. But what you find when you look at the Crown Forest Assets situation, because it was necessary to sever the forests from the land, that there is a regime that deals specifically with the improvements in that case. But that fact that it was necessary to deal specifically with improvements in the case of Crown Forest Assets meant that there must have been an underlying assumption that in other areas where that

severance wasn't necessary, that it was assumed the improvements would just go with the land. So, I will try and explain that a bit further.

"Under Schedule 1 of the Crown Forest Assets Act, a successful claimant to the relevant land is entitled to compensation set by reference, in clause 3, to the value of commercial forestry assets attaching to that land. A successful claimant to the land also becomes entitled to licence fees paid by occupiers of the land from the date that separate Crown Forestry Licences were created, separating tree value from land value. These features are provided for despite the fact that those commercial forestry assets almost certainly did not exist at the date of the relevant Treaty breaches. This can only be rationalised by recognising that Parliament intended that a successful claimant to the relevant land should also be entitled to the value of the improvements (in this case trees) attaching to that land.

Thus, a successful claimant under the SOE scheme is entitled not just to the land claimed, but also the improvements attaching to that land. That is clear from the wording, in our submission, of the 1986 Act. It is further indicated by the statutory compensation provided for under Schedule 1 of the scheme's successor (the Crown Forest Assets Act), as well as the Crown's understanding of how improvements were dealt with under the SOE scheme as revealed in the lead-up to the 1989 Agreement.

Given both the origins and clear provisions of the statutory scheme, if the Claimants have a well-founded claim and the claimed land should be returned to the Claimants in order to remove its prejudice, then it follows that the Claimants should also receive the maximum available compensation. This is what the scheme provides, under its own terms."

So, the significance of, if I can explain the Crown Forest Assets part a little bit more, the significance of it is that there are several dimensions to the Crown Forest Assets Scheme. So, the Crown was wanting at the time that the

Scheme was established to sell the Crown Forests, a decision was made that the Crown didn't want to be in forestry any longer. It didn't – because it was selling to private interest, it kept the land and it sold rights to the forest. But what happened is that the rentals that were accumulated from those forests, accumulated not for the benefit of the Crown but accumulated within the Crown Forestry – with Crown Forestry Trust – Rental Trust – that was the word I was looking for, Ma'am, thank you very much, I knew there was one more word. So, within the Crown Forestry Rental Trust, but for the benefit of the claimants. But in addition to that, there was a compensation scheme which is tied to the value of the trees, and so what that is saying is that the return of the land and even the rental derive are not sufficient in the package of things that ought to be available to a successful claimant. What is also available to a successful claimant is an entitlement to compensation in addition to the return of the land and access to the rentals. So, the inference to be drawn from that is that there is a belief that – sorry, Ma'am, were you going to ask a question?

JUDGE WAINWRIGHT:

Well in your paragraph 39, when you talk about, "That is what the scheme provides," you mean the Crown Forest Assets scheme?

MATANUKU MAHUIKA:

Well no. In paragraph 39, I'm saying that if you look at the way that the Crown Forest Assets scheme applies, and you consider it against the SOE Act scheme which doesn't have to deal with that separation, the assumption of the Crown Forest Assets Scheme is that the claimants also have an interest in the improvements, they have an interest in the trees.

JUDGE WAINWRIGHT:

But in the Crown – well in the State Enterprises regime, there is no specific provision for compensation. So, when you say, "Should also receive the maximum available compensation," you really mean the maximum available value attached to the assets?

MATANUKU MAHUIKA:

Yes, yes.

JUDGE WAINWRIGHT:

Right

MATANUKU MAHUIKA:

But the point that I'm dealing with here is the point around, "Should we be assuming that improvements are included or not?", and if you look at the fact that the Crown Forest Assets Act scheme assumes that there is an interest in the improvements, if you look at the fact that there's no reference to improvements or no attempt to sever those from the land in the original State-Owned Enterprises Act scheme, the assumption must be that the starting point at least is that the improvements should go with the land so there's not an assumption that there would be a severance or that the only interest that a successful claimant might have is an interest in the land itself and not the improved value of that land, and that makes sense in the context of what was a broader type of compensation scheme that was being established as part of the 1988 amendments to the Treaty of Waitangi.

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So yes, you are correct, Ma'am, what we are talking about is the maximum value that's available ought to be awarded if it's found that there's merit in doing so, and in particular what the Tribunal is expressly told not to turn its mind to is the impact on the current holder of those assets, because of course they receive the assets, subject to the memorial. They were aware of it, and Parliament went so far as to say, "And you're not even entitled to be heard in relation to easements."

So, if I then go to paragraph 40, and this is the context for the resumptive memorials, and this is one of these instances where I have to disagree with

what we think the Tribunal was suggesting in its memorandum about the nature of the claims being considered at the time that the regime was entered into.

CONTINUES READING #J100 FROM PARA 40

So, what the Tribunal memorandum and directions states is that:

> We will have assessed the historical context of and reasons for the legislative provisions enacted for the Tribunal to return state enterprise land and Crown forest land. We will have considered the likely intentions of the negotiating parties at that time, when the only Treaty settlement was that relating to fisheries, and the Tribunal was dealing with claims iwi by iwi.

And in our respectful submission, we don't think that that's correct, or it could be characterised in that way, and we'll try and explain that in a bit more detail.

"So as the Tribunal has noted, the historical context to the resumptive provisions is important." So, in other words, what did Parliament have in mind when it was thinking about claimants. "However, in the Claimants' view, the Tribunal's conclusions on the historical context are flawed," or let's say "incorrect". "At the time the resumptive provisions were agreed and added to the Treaty of Waitangi Act the Crown did not have a specific policy for settling Treaty of Waitangi claims. The initial stage of the fisheries settlement was not entered into until 1989." So, it was given effect by the Māori Fisheries Act 1989. "The CFAA and related agreements were also not entered into until 1989 following further litigation that relied, in large part, on the precedent established by the Lands case.

Tribunal inquiries at that time were by region or dealt with specific claim issues, such as: the *Report of the Waitangi Tribunal on a Claim by J P Hawke and Others of Ngāti Whātua Concerning the Fisheries Regulations (1978*); the *Report of the Waitangi Tribunal on the Waiau Pā Power Station Claim (1978)*;

the *Report of the Waitangi Tribunal on the Motunui–Waitara Claim (1983)*; the *Report of the Waitangi Tribunal on the Kaituna River Claim (1984)*, and the *Report of the Waitangi Tribunal on the Manukau Claim (1985)*. The Lands case records a useful summary of the Tribunal's progress:

> An affidavit by Mr Verrity, the deputy director of the Tribunals Division of the Department of Justice, records that as at 29 April 1987 the Waitangi Tribunal had disposed by substantive reports and recommendations of six claims. Eleven had been disposed of by way of withdrawal or otherwise. Reports or decisions were pending on four more. There were still 88 claims lodged with the Tribunal, 58 of them since the 1985 amendment (in force from early 1986 which extended the jurisdiction back to matters occurring ever since the Treaty."

So, you know, it was an early stage really in this process, the late 1980s and the big settlements hadn't occurred and really the whole process was still evolving because of course up until the '85 Amendment, you could only deal with claims that arose since the passing of the Treaty of Waitangi Act. So, they had to be post-1975 claims. The 1985 Amendment made it possible to start looking at historical claims and that really, if you like, opened up the role of the Tribunal and I suppose was a precursor to the modern Treaty Settlement policy and approach.

"In addition, the Waikato-Tainui and Ngāi Tahu settlements, which were the first settlements of the modern era, were yet to be concluded at the time the 1988 Act was passed (Waikato-Tainui was settled in 1995 and Ngāi Tahu in 1998). Amongst other things, those settlements included the relativity arrangements which have had a bearing on the value of subsequent settlements. Other early settlements such as the Ngāti Whakaue/Wai 94 Deed of Settlement (1993) and the Ngāti Whātua Deed of Settlement of Surplus Auckland Railway Lands (1993) all occurred after the 1988 Act. Importantly, however, these settlements were themselves specific to particular areas of land rather than having an overt

iwi focus. The Ngāti Whakaue/Wai 94 Deed of Settlement (1993) related to the former Pukerua Ōruawhata block and resulted in the establishment of the Pukerua Ōruawhata Ahu Whenua Trust to resolve and hold the benefits of that settlement. The Ngāti Whātua Deed of Settlement in respect of Surplus Auckland Railway Lands dealt specifically with the surplus railway lands in Auckland and was for the benefit of Ngāti Whātua Ōrākei not Ngāti Whātua as a whole."

Over now to paragraph 44, "Given:

(a) how few claims had been reported on by the Tribunal by the time of the 1988 Act;

(b) that the claims that had been reported on were not iwi-focused; and

(c) the nature of the completed-settlements at that time (again, not iwi-focused), it is difficult to describe the Tribunal as having been dealing with claims on an "iwi by iwi" basis at this time. The Claimants therefore disagree that Parliament, in enacting the 1988 Act, contemplated the use of the 1988 Act as being iwi, rather than Māori claimant-specific."

And the other feature, if I might just interpolate, which is worth noting there is of course the party that was prosecuting much of this litigation and much of this progress was the New Zealand Māori Council, which of course members of the Māori Council had their iwi affiliations, but the Māori Council itself is established under the Māori Purposes Act 1962 and itself did not have at all an iwi focus, and in fact in a number of the events that occurred around that time talked about doing things for the benefit of Māori rather than the benefit of iwi.

So, after that reasonably lengthy lead up we get to the provision of the Treaty of Waitangi Act 1975.

So, "The preamble to the Treaty of Waitangi Act provides that:

> …it is desirable that a Tribunal be established to make recommendations on claims relating to the practical application of the principles of the Treaty and, for that purpose, to determine whether certain matters are inconsistent with those principles.

The Tribunal's jurisdiction to consider claims is conferred by s 6 of the Treaty of Waitangi Act. Section 6(1) gives the Tribunal power to consider any claims that a Māori or group of Māori "is or is likely to be prejudicially affected" by any legislation, policy or practice or act or omission of the Crown that "was or is inconsistent with the principles of the Treaty". This provision covers any Crown act or omission occurring at any time on or after 6 February 1840." And as just discussed, that actually came about as a result of the amendment in 1985. It wasn't initially established in that way.

"In exercising any of its functions, the Tribunal is to have regard to the two texts of the Treaty of Waitangi in Māori and English respectively as set out in the First Schedule to the Act.

The Tribunal's power to make a binding recommendation is under the umbrella of its general recommendatory power contained in s 6(3). The provisions of s 8A(2) clearly link the Tribunal's jurisdiction to make resumption recommendations to the Tribunal's jurisdiction under s 6(3).

Section 8A(2)(a)(ii) states that the Tribunal must find that the act of returning land is to be part of the action to be taken under s 6(3) and is to be included in its recommendation under s 6(3) along with other recommendations under that provision.

Section 6(3) contains within it two stages: first, a finding that the claim is well-founded (this is the same finding referred to in s8A(2)(a)), secondly, a recommendation to the Crown as to the action to be taken.

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If, having inquired into any claim submitted to it under s 6, the Tribunal finds a claim "well-founded" it may then, but only then, consider whether to make recommendations to the Crown by way of remedy." So, in other words the ability to make recommendations as to a remedy flows from whether a claim has been found to be well-founded. And I cite there, and I won't go through it, the decision of the High Court in *Koia v Waitangi Tribunal* which deals with that point.

If I go over to paragraph 53, "The same threshold applies in the context of a recommendations made under s 8A as was confirmed by the Tribunal in the *Tūrangi Township Report*:

> In short, the condition precedent for the exercise of the Tribunal's power to make recommendations for the return of land, whether governed solely by s 6(3) or by that provision and s 8A(2)(i) and (ii), is a finding under s 6(3) that a claim submitted to it under that section is well-founded.

In summary, a recommendation, be it binding or non-binding, must follow a well-founded claim.

In relation to claims to land subject to SOE memorials, following a finding that the claim is well-founded, s 8A(2) is the controlling provision." So, this is my earlier comment that once it's well-founded, once the resumption jurisdiction is triggered, the regime that determines the jurisdiction of the Tribunal in that case becomes the resumption provisions. "For well-founded claims to SOE land the

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

So, what I then go to Ma'am, is dealing here with the relevant principles that ought to be applied. So, there are two parts to the test that the Tribunal applies. The first is whether there is a well-founded claim, and the second is whether, in the light of that well-founded claim, the Tribunal ought to make a recommendation for the return of memorialised land to compensate the claimants for the prejudice suffered or to remove the prejudice that they suffered. So, I am paraphrasing a bit, but that's essentially the wording of s 8A(2)(a)(ii). So, in considering whether or not you ought to require the return of land, in our submission the first thing to consider is the duty to provide redress.

So, "In the *Lands* case, the Court of Appeal held that the Crown is obliged to provide redress for breaches of the principles of the Treaty of Waitangi.

The Tribunal has similarly found that the Crown has an obligation to remedy past breaches of the Treaty, arising from its duty to act reasonably and in good faith as a Treaty partner. In considering a variety of claims, it has emphasised that redressing Treaty grievances is necessary to restore the honour and integrity of the Crown and should serve to restore the mana and status of Māori. In the *Ngāi Tahu Land Report* the Tribunal added in response to President Cooke's comments in the *Lands* case that:

> It would appear to follow from this ruling that failure by the Crown, without reasonable justification, to implement the substance of a Tribunal recommendation may in itself constitute a further breach of the Treaty. It could well be inconsistent with the honour of the Crown.

The Crown's approach to redress in respect to the Claimants' claim is set out in the Ngāti Kahungunu ki Tāmaki Nui-ā-Rua Deed of Settlement. The Deed of Settlement has little reference to the findings of the Tribunal in the *Wairarapa ki Tararua Report.* In particular:

(a) The Crown does not concede that the taking of the lands at Pouākani under the Public Works Act breached of the Treaty. The Crown's acknowledgment in the Deed of Settlement is limited as follows:

> The Crown acknowledges that its failure to inform Ngāti Kahungunu owners and discuss the proposed taking of Pouākani lands for the Mangakino power scheme prior to the Crown's entry onto that land and the construction of a number of structures on that land constituted a breach of te Tiriti o Waitangi/the Treaty of Waitangi and its principles."

So, of the Crown acknowledgement –

JUDGE WAINWRIGHT:

Can I ask you, Mr Mahuika, what you submit is the relevance of this for the purposes of our inquiry into whether we should make binding recommendations? Are you saying that – well, what are you saying?

MATANUKU MAHUIKA:

Well actually, I was going to go through that and then come back, but I think there are two points that come out of the submission. The first point is that there is an obligation on the Crown to provide redress.

JUDGE WAINWRIGHT:

Yes.

MATANUKU MAHUIKA:

So, having established that there is a well-founded claim, then the – it's presumed that the Crown needs to provide redress in respect of that claim. So,

when the Tribunal is looking at the exercise of its jurisdiction under s 8A(2)(a)(ii). There must be a shorter way of saying that, but under that section. It needs to bear in mind that there is this onus on the Crown to provide redress. So, that ought to have a bearing on the Tribunal's decision as to whether or not that exercises its resumption jurisdiction. So, in other words, I would argue based on that principle that the resumption has to be in favour of the granting of redress of all other things are equal. So, for example, if the value of the land is proportionate to the loss, then the presumption should be that resumption occurs.

JUDGE WAINWRIGHT:

Sure, but I am asking you really, because what you are effectively arguing here is that the draft proposal to provide redress for the Treaty breaches of the Crown in relation to Wairarapa Māori does not – is a failure by the Crown to implement the substance of the Tribunal's recommendation.

MATANUKU MAHUIKA:

Yes, and so that was the second part of it. So, I'm saying that the duty to promote redress applies and the Tribunal in exercising its resumptive recommendation powers ought to apply presumption in favour of redress right to the claimants. The second part of it, and this is really for the sake of completeness because I think my friends will argue that they have been looking to provide redress to the owners at Pouākani. So, the first point is I would say that well actually that's irrelevant to the exercise of your resumption powers, Crown policy should not have a bearing on whether or not you choose to do this.

JUDGE WAINWRIGHT:

But you are making submissions along the same lines?

MATANUKU MAHUIKA:

But well – secondly, for the avoidance of doubt in case you don't agree with that submission, there actually is nothing in there for the owners of Pouākani.

JUDGE WAINWRIGHT:

Well I understand your submission, but I'm asking you more broadly whether the Tribunal needs to have regard to – I mean, for instance, say the Tribunal's – I mean, the Crown's proposal for settlement did specifically respond to the Tribunal's findings but provided, I don't know, something by way of redress that wasn't what the parties were seeking, would we care about that? I'm just – I want your submissions on –

MATANUKU MAHUIKA:

Yes, no, look, I think that's a fair point.

JUDGE WAINWRIGHT:

– what the Tribunal should – the question in my mind is whether our jurisdiction under the sections that you have been talking about this morning, is separate and distinct from any actions that the Crown may take in its executive capacity to make settlements with groups of Māori, because I had thought that they're on different continuums.

MATANUKU MAHUIKA:

Yes.

JUDGE WAINWRIGHT:

But I am interested in your legal submissions on that.

MATANUKU MAHUIKA:

Ma'am, I would agree with that, yes, and then haven't been as explicit about it in describing that, but –

JUDGE WAINWRIGHT:

Well in fact your submission implies that they are not.

MATANUKU MAHUIKA:

Yes, and it's not intended to do that, which was a point that I'd noted to come back to in explaining. So…

JUDGE WAINWRIGHT:

Right. So, this is like submission in the alternative in the event that the Crown's submissions or the other submissions on the adequacy of the settlement arrangements.

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MATANUKU MAHUIKA:

Yes, and of course the challenge for me Ma'am, partly on first stance, so I can't anticipate what the Tribunal might ask and might think. Certainly, my friends have made submissions in relation to the settlement that Crown has brought evidence on it, so really, it's just trying to address that.

JUDGE WAINWRIGHT:

Well I am just asking you for context because it appears that you are accepting that premise and –

MATANUKU MAHUIKA:

No, no, that's not intended here.

JUDGE WAINWRIGHT:

All right.

MATANUKU MAHUIKA:

So, I will happily adopt what you said. But and what you're saying is correct, this is a distinct jurisdiction in Crown Treaty Settlement Policy and I think the comment is made about that in the *Haronga* decision, is not something which should have a bearing on whether or not the Tribunal decides to exercise its power to make resumption recommendations, and this is the same sort of situation. The purpose of this is just to illustrate that actually if that argument is

made, there really is nothing that is being done for the owners at Pouākani anyway, but which I think is probably important to say anyway, just to partly explain why it is that –

JUDGE WAINWRIGHT:

Well it is not important to say it if it is not relevant, Mr Mahuika.

MATANUKU MAHUIKA:

No, but – yes, I do accept that if it's not relevant, we don't need to argue about it, but you know, there is something that is made of this. The reasons, the motivations of the Incorporation have been in question by some, and I suppose the reason for putting this in there, and I accept we could've explained it more clearly as to say, "Well, this is not just the incorporation trying to enrich itself. Actually, if you look at the content of the settlement, that there really isn't anything which deals with the claims at Pouākani," and is to give that context if you like to the actions that have been taken by the Incorporation.

JUDGE WAINWRIGHT:

Thank you.

MATANUKU MAHUIKA:

So, on the basis of that, I think I will skip over that section.

CONTINUES #J100 FROM PARA 61

And the essence of the point that we were just discussing is at paragraph 61, and what I say there is that despite all of that, "In any case, the Supreme Court has made it clear that the Crown's preference to negotiate settlements and, when doing so, to negotiate with large, natural groupings is irrelevant to the Tribunal's exercise of its jurisdiction under ss 8A-8HJ. The Claimants have a right to the Tribunal's investigation and adjudication as to remedy in respect of the specific prejudice and breach suffered by them in their capacity as owners in 1947 when the land was taken." And the authority cited for that is the *Haronga* decision of the Supreme Court.

So, what I then do Ma'am is go to the resumption criteria, and – sorry, I'm just checking the time.

So, "The Court of Appeal in *Haronga* confirmed that there are four statutory prerequisites for resumption:

> (a) the claims are well-founded;
> (b) the claims relate to Crown forest licensed land or memorialised former SOE land;
> (c) the remedy ought to include return of the land to Māori ownership; and
> (d) the group to whom the land should be returned is clearly identified as appropriate for that purpose.

We deal with all four pre-requisites in these submissions; however, focus primarily on the latter two.

The Court of Appeal has directed that, once the statutory prerequisites are met, the residual discretion of the Tribunal is of "limited scope". We acknowledge that the Tribunal has not yet arrived at this point. In particular, an evaluation of whether the land "should" be returned is an important part of this Tribunal's assessment of the present application. The submission of the Claimants is, of course, that the evidence establishes that return of the Subject Lands is necessary to compensate for the prejudice suffered by the Claimants. Furthermore, upon establishing a well-founded claim, it is submitted that a recommendation that the land "should" return, follows in both equity and logic if you have a statutory regime that is designed specifically to allow that." Which is another way of expressing the view I expressed a bit earlier that there is in effect a presumption. Once you establish that it's well-founded, there is a presumption of redress, and your issue then becomes an issue such as the proportionality of the redress being provided to the claim that's been suffered.

"For completeness, we note that the Courts have clarified that, at the point the statutory pre-requisites are met, the Tribunal's residual discretion is very much a limited one. As the Court of Appeal said, the discretion resides within the latter of the two alternatives; a finding (once the statutory prerequisites are satisfied) that the land be returned or no longer be liable to the Tribunal's binding recommendations." So, in other words, those are your alternatives: order resumption; remove the memorial. "The discretion within the latter case "is necessary because the land may be subject to other claims making its clearance from liability premature"." So, in other words, you may not remove the memorials if there are other claimants, that's why there is a discretion to not do that as well in the context of that. But, that is the nature of the discretion that the Tribunal has once we get to that point.

"On the facts of this case, the residual discretion (should the Tribunal get to that point) is simply not applicable. There are no other extant claims that would make the Subject Lands' clearance from liability premature." And the reason for that is that all other claims in respect of that area have been settled.

"In the Wairarapa ki Tararua Report…" and I'm on whether the claims are well-founded, "…the Waitangi Tribunal found that the Claimants' claims, which include claims in respect of the Subject Lands, were well-founded. Specifically, the Tribunal found that the Crown breached the principles of the Treaty of Waitangi in:

> (a) compulsorily acquiring the Subject Lands from the owners for the Maraetai hydroelectric power scheme;
> (b) inadequately compensating the former owners of the Subject Lands for the taking of the Subject Lands for the hydroelectric power scheme, including failing to account for the unique hydro potential of the Subject Lands;

> (c) not compensating the former owners of the Subject Lands for the loss of productivity caused by establishing power line corridors across the Claimants' remaining lands to support the hydro dam; and
> (d) compulsorily leasing 683 acres as a site for the Mangakino township."

And then at paragraph 68 I quote the specific breaches that the Tribunal found. I don't think I need to go through those, Ma'am. The essence of the point really is that there is no doubt that these claims are well-founded. This is not a case where the Tribunal has not dealt with these issues. The Tribunal has dealt with these issues and has made findings of Treaty breach and recommendations that the Crown should, amongst other things, compensate for its failure to take into account the hydro potential of the land at the time that the land was acquired from the claimants.

So, dealing with the second of those prerequisites, that the claim relates to Crown forest Licensed land or memorialised former SOE land.

"The importance of this requirement was highlighted recently by the Tribunal.

The Wai 85 claim and this application clearly "relate to" memorialised former SOE land." I don't think there is any doubt or anything for argument about that. "There is no issue as to nexus. The Subject Lands are the very same lands that were taken by the Crown. The taking of the Lands was found by the Tribunal to be in breach of Treaty principles and caused prejudice to the owners." All of those are things that flow from the Tribunal's findings.

"The situation is analogous to the Crown breaches in relation to the Mangatū lands which resulted in the forced sale of the 1961 land. In that regard, the Supreme Court expressed their claim for relief in this way:

> This is a claim for restoration of the very land the loss of which has caused the prejudice found to have been suffered in breach of the

> principles of the Treaty… The loss of nearly 9,000 acres from the Block in 1961 was the Treaty breach which qualifies them to seek redress through its return.

In that case, the Supreme Court recognised that the breach could not be more closely connected to the land. Similarly, it is the direct taking of the Subject Lands from the Claimants which qualifies them to seek redress in this instance." Sorry, Ma'am, I noticed that you have your… I was just waiting for the question. 1020

"The Wai 85 claim also includes other parts of the land at Pouākani that is not memorialised land and is therefore not subject to the Tribunal's binding powers of resumption (and as a result this application). The reason for this is that the land transferred to the SOE Electricity Corp in 1987 did not include all of the land that was taken from the Claimants under the Public Works Act." And I think we discussed that at the outset, Ma'am. "Only the land that was "reasonably required for commercial purposes" such as areas covered by a dam, power station, switch yards and related structures was transferred to the SOE and therefore became memorialised. The margins of much of the hydro lakes, for example, remain under the ownership and stewardship of the Crown and/or local government." So, I neglected to mention that earlier. Some of the land I think is sold by local government rather than by the Crown. "As a result, it is not possible for the Tribunal to make binding recommendations in respect of all of the lands taken from the Claimants by the Crown for hydro purposes. While the loss to the Claimants goes beyond the Subject Lands it is only the Subject Lands that the Claimants can seek in compensation through this application as compensation for their well-founded claims."

So, to paragraph 74, and our submission that the remedy ought to include the return of land.

"In the Claimants' submission, the whole of the Subject Lands should be returned to the Claimants in order to compensate the Claimants and remove the prejudice they have suffered.

As we've set out earlier in the submissions, the statutory test to determine whether land should be resumed is what is required "to compensate for or remove the prejudice"." So that is the statutory directive that's given to the Tribunal in exercising this jurisdiction, to compensate or to remove the prejudice.

The essential argument for the Claimants is that:

(a) the Claimants owned the land at Pouākani;
(b) the Crown took possession of the land at Pouākani, including the Subject Lands, without notice, later compulsorily acquired ownership under the Public Works Act, imposed a compulsory leasing regime, and committed other related breaches;
(c) the Crown provided entirely inadequate compensation for the taking of the Subject Lands from the owners, including by not taking account of the land's unique potential for hydroelectric power development;
(d) the Claimants bore a significant financial burden, and social consequences, of running the leasing scheme at Mangakino; and
(e) the s 27B memorials regime empowers the Tribunal to return the Subject Lands to the Claimants," and in all of the circumstances, that is the appropriate step for the Tribunal to take.

So, what I propose to do next, Ma'am, is this – the section that follows is a summary of the economic evidence. Rather than deal with that summary, I thought it might be better if I went to the appendix and worked through that. Just because there's more detail in there, and I think, given the time available and the fact that this is quite important, I think it's useful to go through the evidence. Not overly –

JUDGE WAINWRIGHT:

No, I agree, but can you just map out the path then, Mr Mahuika? What are we going to do?

MATANUKU MAHUIKA:

So, what we can do is go to the appendix to the submissions.

JUDGE WAINWRIGHT:

Appendix 1?

MATANUKU MAHUIKA:

Yes.

JUDGE WAINWRIGHT:

And we will go through those –

MATANUKU MAHUIKA:

This is document #J100(a) which is a document on the scheme – on the –

JUDGE WAINWRIGHT:

Which turned out not to be submissions but sub emissions?

MATANUKU MAHUIKA:

Yes, it's a new word, Ma'am.

JUDGE WAINWRIGHT:

They're the ones that are under the submissions.

MATANUKU MAHUIKA:

Yes, that's right.

JUDGE WAINWRIGHT:

Ka pai.

MATANUKU MAHUIKA:

Someone will pick it up at some point I'm sure.

JUDGE WAINWRIGHT:

So, we are going to go through appendix 1, and then what? We are going to come back to –

MATANUKU MAHUIKA:

We will come back to the issue of the appropriateness of the Incorporation is the recipient of any resumption –

JUDGE WAINWRIGHT:

So where do we come back to the prejudice in paragraph 77, following?

MATANUKU MAHUIKA:

The prejudice really overlaps with the –

JUDGE WAINWRIGHT:

Look, I am in your hands, I just want a road map.

MATANUKU MAHUIKA:

Okay. So, what I propose to do is I will come back to – look, it's probably useful if we come back to – so if we take as read in the main submissions paragraph 77 to 88 and then we'll come back to them at paragraph 89 where we talk about what's required to remove the prejudice, which is just a couple of pages –

JUDGE WAINWRIGHT:

So, you're saying that 77 to 88 are effectively a summary of what's in appendix 1?

MATANUKU MAHUIKA:

That's correct.

JUDGE WAINWRIGHT:

All right. Okay. Well, do you want to embark on appendix 1 now then?

MATANUKU MAHUIKA:

Yes.

JUDGE WAINWRIGHT:

Well there is only five minutes before the break, so perhaps it would be a bit more coherent if we were to embark on your appendix after the break.

MATANUKU MAHUIKA:

Well there was just one preliminary matter that I was going to cover and that was around the approach that the Tribunal ought to take when considering the various economic evidence that's been placed before you.

JUDGE WAINWRIGHT:

Good.

MATANUKU MAHUIKA:

But I'm happy to deal with that after the break if you would prefer for me to deal with all of those things at once. This is a live issue –

JUDGE WAINWRIGHT:

Yes, I think we will deal with the economic evidence thing –

MATANUKU MAHUIKA:

Together.

JUDGE WAINWRIGHT:

– after the break. *Nā reira whānau, kia hiki tātou hui ināianei tae atu ki te 11.00 karaka. Kia ora.*

HEARING ADJOURNS: 10:27 AM

HEARING RESUMES: 11.03 AM

JUDGE WAINWRIGHT:

Tēnā anō tātou – Sorry, Margaret. – Tēnā koe, Ms Feint.

(11:03) KAREN FEINT: (MIHI, APPEARANCE)

Tēnā koe, Judge. Ngā mihi o te ata ki a koutou kua tae mai nei i tēnei ata. [Interpreter: Morning. Greetings to you all and all of us who have arrived – I have arrived.]

I will just slide in and record an appearance for Ngāti Tūwharetoa and Annette Skyes has also asked me to record an appearance for the Pouākani Trust.

JUDGE WAINWRIGHT:

How can you record an appearance when they are not – are you representing the Pouākani Trust in that context?

KAREN FEINT:

I am not but I understand that they've sort leave to appear during this hearing week, I'm not aware whether that leave has been granted or not.

JUDGE WAINWRIGHT:

I think it has not been granted – well, I do not know that we have responded to an application to appear, but we have not granted leave for the Pouākani Trust to present the submissions that they were seeking to present. So, I think if they had applied to be present as an interested party we would not have had a difficulty with that. So, I do not that there has been an application simply to appear. But, anyway, they are not appearing because you are here.

KAREN FEINT:

Well, I understand that Ms Sykes may be appearing –

JUDGE WAINWRIGHT:

Right.

KAREN FEINT:

- but I can't tell you exactly when. I can try and find out more –

JUDGE WAINWRIGHT:

No, that is fine. I mean, if she's – if Ms Sykes wants to be present on behalf of the Pouākani Trust, Kei te pai tēnā.

KAREN FEINT:

Ka pai.

JUDGE WAINWRIGHT:

Kia ora.

KAREN FEINT:

Well, I will advise her. Kia ora tātou.

MATANUKU MAHUIKA:

So, Ma'am, we are at the appendix dealing with the economic evidence.

1105

JUDGE WAINWRIGHT:

Make sure you are talking into the microphone.

MATANUKU MAHUIKA:

Sorry, sorry, Ma'am.

JUDGE WAINWRIGHT:

We cannot be too confidential here, Mr Mahuika.

MATANUKU MAHUIKA:

Yes, certainly. So, I said before the break that I'd propose to deal with the question of how – there are a number of economists that have given evidence in the context of this inquiry. Well, three specifically, there is Dr Yeabsley, Dr Meade and of course the independent witness, Dr Coleman and I'm not sure to what extent, we can also take into account economist such as Dr **(inaudible 11:05:53)** who presented at that joint session. So, that's why I say there are a number –

JUDGE WAINWRIGHT:
I think they are all before us.

MATANUKU MAHUIKA:
Yes.

JUDGE WAINWRIGHT:
To the extent that they are relevant to the different applications of our jurisdiction in the forest and the –

MATANUKU MAHUIKA:
Yes, that's correct.

JUDGE WAINWRIGHT:
- non-forest context.

MATANUKU MAHUIKA:
And so, if I put it this way, the challenge we have is to then discern and which of those opinions are appropriate to apply to relation to this issue that is before us. And picking up on the point that you have made as well, Ma'am, for example, Dr Coleman's evidence, there is a mix of Mahaki related and Wairarapa Moana related issues that arise there in the Mangatū Mahaki context sort of non-land related issues such as unlawful imprisonment, the killing of people and those sorts of things are very prominent issues.

And, it is fair to say that Dr Coleman grappled with that quite a lot during his evidence, but then there are more tangible matters such as the loss of land or the acquisition of land by the Crown which are different in terms of how you might approach them in terms valuating impacts. So, that is the first part of it.

The second part of it, and I'm – I feel obliged to say this because the Crown has been very direct in its attack on Dr Meade and its closing submissions. I think to the point of suggesting bias on the part of Dr Meade, which I think is an affair and – my initial inclination was to say it's an outrageous thing to be suggesting in terms of an expert who is expressing an opinion and dealing with something which is acknowledge by Dr Coleman for example is not doing something that is normal for economist to grapple with but something that we nevertheless need to grapple with. So, it's a – partly for the need to defend Dr Meade's integrity in this matter because he has gone through, in his way, a very thorough, multi-facetted exercise in trying to work out how much you quantify the loss that has been suffered by the owners of Wairarapa Moana.

JUDGE WAINWRIGHT:

And for what it is worth, Mr Mahuika, it is the Tribunal's impression that all of the expert witnesses who tried to assist us in grappling with how we should approach those questions of compensation and value over time, that they all approached the work with sincerity and integrity. So, any misgivings that anyone else may have about that, are not share by the Tribunal.

MATANUKU MAHUIKA:

Thank you for that indication, Ma'am. So, then that takes me to the next point which is, 'okay, how do you deal with the differing views that the economists are – have put before the Tribunal? And there is a lot of detail, you have Dr Meade's evidence which gives specific valued parameters based on a number of different scenarios. You have Dr Yeabsley's approach which, if you like approaches – the exercise from a slightly different – or from a quite different philosophical stand point. And then you have Dr Coleman who doesn't actually

express a view in relation to value but does express some views in relation methodology.

1110

So, in our submission, the best that can be done in those circumstances is to say, "Okay, so we have these different perspectives from the economists." Which one of them does the essential task that we asked - but all that is asked of them by reference to the findings of the Tribunal. And then, what I would say is that, it's then about – if there is an area where they congregate, where is it? Where is that? That's the best that we as non-economist can do, we can say, "Well, okay, where is their support for this methodology, where is there not support? Where does that take us in terms of an outcome."

And so, it's in the context of that, in this submission we try and look at the different views that the economist take, where they different but where in our submission, we think that there is a coalescing of views to the extent that there is a coalescing of views. And bearing in mind the complexity of these issues. So, rather than making observations about the individual economist, it's about who's approach is the better approach in the light of the nature of the exercise that we are compelled to undertake by virtue of section 8A 2a2, of the Treaty of Waitangi.

So, it's against that background that these submissions are made and to the extent that I need to interpolate because it will be no surprise to the Tribunal that the approach that we favour ultimately is Dr Meade's and our submission ultimately there is considerable support for Dr Meade's methodology that came out of Dr Coleman, particularly the discussion that occurred with him about what may or may not be appropriate as a methodology.

Admitting that there are a few challenges if you go through the cross-examination transcript because there is a mixing in of the Mahaki non-financial, very historical issues which the more tangible land loss related

issues and valuations associated with the Maraetai scheme and therefore what was the prejudice that resulted from the claimants not being either adequately compensated at that time or otherwise, being able to participate in some other way in the Maraetai scheme.

Because there is a lot of discussion about counter-factual in the context of the evidence from the economists, were necessarily forced to go into counter-factual territory by virtue of the Tribunals' findings. The Tribunal found that the compensation pay failed to take into account the potential of the land at Pouākani for hydro-electric power generation. And then the question becomes, "well, what does that look like? And what might have been done?"

So, I'm not sure if you recall an exchange that I had with Dr Coleman where I suggested to him that one way that you might have done that, you know, in this counter-factual world, is perhaps, you'd have had a joint venture in relation to that, so that the Crown would have avoided the need to pay money but it would have conferred an ownership state of some description on the owners that – of Wairarapa Moana in recognition of the unique value of this land and the fact that you perhaps couldn't pay for it at that time. And of course, there were, I think Dr Coleman said he had some sympathy for that approach. And of course, we do have some examples of where those types of arrangement were entered into.

So, there are the forestry lease arrangements in the 1950s and more recently, although it doesn't involved with the Crown, you do have some examples and I accept that we could only take them to an account to a limited extent that of arrangements that were entered into by the likes of Tauhara, by the likes of Tuaropaki where given the opportunity to freely contract, they have entered into various types of joint venture arrangement, which give them an ownership stake in the land.

Now, in those cases it's geothermal power, but in my submission, there's no difference in substance between geothermal and hydroelectric. Different type of power generation but it recognises that a unique attribute because the resource that's available due to the characteristics of the land that's being dealt with and that's really the question that we need to grapple with and try and try and take into account, in determining what was the extent of the prejudice and therefore what is an appropriate response in order to either compensate for that or to remove that prejudice?

And it's perhaps not an easy exercise but that is, in my submission the exercise which Dr Meade has endeavoured, as best he can to try and give some guidance on without being definitive on a number, and in doing so, has looked at a variety of different scenarios in order to try and give a range, and we do cite in this submission some overseas examples of approach that have been taken. Now, they would need to be considered in the light of those regimes, but it really is to say two things.

First of all, this is not – it's unique in New Zealand, if you like, the process that we're going through right now, but it's not a unique challenge trying to say what is the value of the historical loss and how do you approach it? Do you compound? If you compound it, what rate? How do you take into account foregone consumption, those sorts of issues, that were raised and, you know, do you do it on an ex-post basis or an ex ante basis?

So, do you say that the deal ought to be based upon what was believed by the parties at the relevant times, so in 1947 or what was discovered by the parties, subsequent to that event? So, what mind set do you attribute to them going in, because it maybe has a bearing on where you would land in terms of value.

JUDGE WAINWRIGHT:

Well, yes, those two, but also the other scenario that you have just spoken about which is the possibility of a joint venture and what the parties might have

realised from that, that is another – it is neither ex ante or ex post because it was not actually in anybody's mind.

MATANUKU MAHUIKA:

No, no, that's –

JUDGE WAINWRIGHT:

So, it is a hypothetical –

MATANUKU MAHUIKA:

Yes.

JUDGE WAINWRIGHT:

- situation which many of these are, actually, because in the time that we are speaking of, the mindset of the Crown, and in fact, probably also of Māori who had a pretty low expectation of the Crown, understandingly – understandably was not that the Crown's approach would be such as to contemplate all these possibilities which we would now identity as having been – would have been preferable and more Treaty compliant and all the rest of that.

MATANUKU MAHUIKA:

Yes.

JUDGE WAINWRIGHT:

But, how do we deal with that, Mr Mahuika, because it is kind of like blue skies, isn't it?

MATANUKU MAHUIKA:

Well, I think Ma'am, that that is part of the challenge that we have – if I go back to the Tribunal's finding it said that, "The Crown should reassess the compensation paid to the owners for the land taken for the Maraetai Dam in light of new Treaty compliant criteria." So, its necessarily, and look, I'm not sure that this was where you were trying to push the parties at the time of those

recommendations but it necessarily, in the language of the economists, pushes us into that counter-factual world, but the question I'm asking, what is. So, what is a fair and appropriate arrangement to reflect the unique characteristic of that land bearing in mind that the claimants were denied the opportunity to participate in that benefit. So, though they weren't compensated for it at the time and haven't had an opportunity to do that whereas the Crown had the benefit of the dam, of the power generation, on the evidence of Dr Meade, which is not, I don't think, disagreed with as to the fact of, more as to the extent by Dr Yeabsley, what was the extent of the avoided costs? So, this was a cheaper option for the Crown than other options, which is where I think the ex-ante, ex post point comes in. So, the Crown believed it needed to produce a lot of power. It believed that Maraetai was the place to do that. It very quickly discovered that there were maybe some alternatives, but at the time that it would have been having that discussion, it was placing a large amount of value on Maraetai and of the lands at Pouākani. So, if you take the ex-ante approach then you have to look at it from a point of view of what it saw as being that benefit even though after the event it may be discovered that there were some other things that it could have done and that they were cheaper than it had assumed.

It is that the, as I said though, the nature of the challenges that we are in a counter-factual spaces and it's a question then about making some reasonable assumptions as to what we think would have been a Treaty compliant regime and therefore what the prejudice is to the owners at Pouākani because we are not talking about whether there was prejudice, we're talking about quantifying.

1120

JUDGE WAINWRIGHT:

So, are you suggesting then, that in looking at what a Treaty compliant compensation regime would have looked like, that the Tribunal needs to combine the actual understandings of – or the Crown principle, in the 1940s

about the potential places where these facilities could have been located and combined that with a hypothetical Treaty compliant regime under which that might have been established?

MATANUKU MAHUIKA:

I'm just thinking about my answer. I think the answer to that is yes and let me explain that. So, the Crown at the time that it looked to establish Maraetai, was under pressure to establish electricity generation facilities and had identified that Maraetai was an important place to establish such a facility. So, it went into that process having identified that this was a very important piece of land for it establish this facility and with the view that hydro was the way to go.

Subsequent to that, it discovered that maybe it wasn't but when you are considering what value did the Crown attach to it? At that time, it attached a lot of value to that particular piece of land, it was important they got it. And then you do, then you have to say, "Well, in a Treaty compliant world, which I accept is not the world that the actors in that time we're living in but what is what we have to try and do here is say, "Okay, in a Treaty compliance sense, what should the Crown have done with that knowledge and understanding at that time?

JUDGE WAINWRIGHT:

Well, one of the things that was discussed when this evidence was being presented was – the Crown was considering its options and it looked at Maraetai and saw the topographical advantages that it provided but it was suggested that if, in considering its options, and if it was operating in a Treaty compliant world, and it was therefore assessing the obligations it would have to Māori in respect of that side, it wouldn't not have chosen it.

MATANUKU MAHUIKA:

Yes.

JUDGE WAINWRIGHT:

Because it would have cost too much, relative to other places.

MATANUKU MAHUIKA:

Ultimate, I'm not sure how far that argument gets you because –

JUDGE WAINWRIGHT:

Well, I –

MATANUKU MAHUIKA:

And the reason I that, Ma'am, is that despite that suggestion there's not just one facility at Maraetai, there's two. If you recall the evidence of Mr Williamson from Mercury, the Maraetai dam is the biggest hydro facility on the Waikato river and again, as Mr Williamson said, Maraetai is important because of that big nature reservoir that sits in the gorge behind the dam where lake Maraetai is located. It's essential for the regulation of the flow through the, I think, the six or so dams that comprise the Waikato scheme.

So, if you look at Maraetai in that broader context - so, while you might say, "well, we would have done something else, actually, the fact of the matter is that that Maraetai facility is central to the entire Waikato river hydroelectric scheme.

JUDGE WAINWRIGHT:

It is really hard for us to make that assessment though, isn't it?

MATANUKU MAHUIKA:

Yes, but it seems implausible to me on the basis of that, there's not only one, there are two dams there.

JUDGE WAINWRIGHT:

Yes.

MATANUKU MAHUIKA:

You know, it is the largest dam, it is central to the scheme and to the regulation of water –

JUDGE WAINWRIGHT:

But then, you know, that the argument would surely run - I mean this is the problem with counterfactuals, there is just the possibilities are endless –

MATANUKU MAHUIKA:

Yes.

JUDGE WAINWRIGHT:

And I think that is very challenging for us, because, the response to that would surely be, well, if – well, the two potential responses, one is that if you are going to use Māori land and your being Treaty compliant, you should be protecting the interest of your Treaty partner, and you should be choosing options that would advantage them as well the Crown.

MATANUKU MAHUIKA:

Yes.

JUDGE WAINWRIGHT:

So, you should not be put off by the fact that you have got Treaty obligations to the Māori owners of the land. You should be embracing that and going, here's an opportunity for us all to be better off. So, that is one response.

MATANUKU MAHUIKA:

Yes.

JUDGE WAINWRIGHT:

Another response might be, well, if the Crown is only concerned with the – a cost benefit analysis that does into include the attractiveness of benefiting te iwi Māori, then if the Maraetai was too expensive, then they would reconceive the design of the scheme, on the Waikato river and no doubt that would have been

possible. You know, it is like – because there are no – I mean, I accept what you say that Mr William said about, you know, the natural advantages of the gorge, blah-blah, but no doubt you could rethink it if the Maraetai option, for instance, would, you know, were not on the table, does that mean that they would have abandoned the Waikato river? I do not think so.

MATANUKU MAHUIKA:

No, and – but I also don't think it goes so far as to say that the Crown would have be abandoned Maraetai because of the geography and the advance that it gives you. So, it's "I don't have a – and I'm not able to discuss with you, like what is the geography of the entire Waikato river, and therefore the hydro scheme. What do know though is a matter of fact, is that it is the largest dam and it is very important in that scheme.

So, I think – there is a likelihood that even if they didn't build a dam there, given the natural advantage of that geography that there would be a desire to build a dam at some later point. And what we also know is that the motivation to build a dam there was because of that natural advantage. So, there was a compulsion on the part of the Crown to get something done and this was seen as being an ideal space to put it. So, to think that Crown might not have wanted to benefit Māori at all in the way that it went about, or the fact that it might have created a cost.

Again, we are in a difficult space to know whether or not that would or would not have been an obstacle, given that there are other joint venture types of arrangements around forestry and those sorts of things at that time. The fact of the matter is, it was just never considered. The land was just taken. The owners were paid a niggardly amount for it. There was no consideration given to the enormous social and economic benefit that would be derived from the construction of this hydroelectric facility at Maraetai.

And of course, it's gone beyond the social and economic in a general sense, it's actually now a privately – a partly privately-owned entity that the Government itself derives enormous financial returns from and none of that, in the 70 odd years, since the construction of the dam, has been available to the owners of Pouākani. So, the process that we are in now is saying, "okay, how do we value that? What should they have done?" And I suppose the flip side of that is, so therefore what benefit were the owners of Pouākani deprived of? Or put another way, what prejudice did the suffer from not having access to that benefit.

Given that nodding, I was thinking of pulling out stumps and calling it –

JUDGE WAINWRIGHT:

No, do not do that.

MATANUKU MAHUIKA:

Quit while I'm ahead. Okay, so what I propose to do is try and go through the economic evidence because there is – you know, it's fair to say that actually, it did take up a bulk of the hearing time and so it does merit some careful consideration.

And you will have to forgive me, the submissions used some of the language that the economist have used and have done our best to just try and capture the essence of it. Okay, well there will be a test afterwards.

READS SUPPLEMENTARY SUBMISSIONS #J100(a)

"So, starting with the overview. These supplementary closing submission address matters relating to economic evidence filed and presented in this remedies inquiry. By way of overview, the claimants submit the following:

1.1) The Tribunal is justified in awarding the maximum of available compensation to the claimants."

And maximum available compensation is really a synonym for the full value of the land in respect of which resumption is being sought. Because in this process, when we are considering what compensation regime, that is the maximum. So, whatever that value is, our submission is that, that based on the different value ranges, it is appropriate to award that is compensation to the owners at Pouākani.

1130

And the reason we say that is because, that is what was intended by the statutory scheme for the claimants, with a well-founded claim and to whom the land should be return to remove that prejudice which was the earlier discussion we had about the nature of this jurisdiction and the intention of the jurisdiction at the time that it was created in the late 1980s.

1.2) "Dr Meade's conservative, partial lower-bound estimates of the Incorporation's losses comfortably exceed the maximum available compensation. Likewise, Dr Meade's estimates of the required economic base either include or exceed (depending on which current values of the claimed land and improvements are applied) the maximum available compensation. This conclusion as been proved robust to the testing by economic expert - by the economic expert engaged by the Tribunal, Dr Coleman, and to an extent, by Dr Yeabsley, and ultimately there was support for the methodology applied by Dr Meade from Dr Coleman.

1.3) Dr Meade's loss estimation approach has implemented the Tribunal's own, very specific recommendations regarding Maraetai compensation, now this is important. Dr Meade did so by assessing the unique qualities and hydro potential of the taken lands.- "

And in terms of reproach, Dr Yeabsley in our submission, did not take that approach. In fact, you will recall in the last piece of evidence, he provided a valuation of something like $300,000. I put the question to him in

cross-examination, “So, are you discounting to zero, the hydro potential? And his answer was yes.” So, in our submission, in considering which of the economist to favour, it is relevant that Dr Yeabsley doesn’t grapple with the Tribunal’s recommendation. In fact, he – the Tribunal has found that there are unique hydro qualities, Dr Yeabsley in his approach and his analysis says, “because there are alternatives, I’m going to say the value of that is nil.” Whereas, in our submission, it is already been determined that there’s a value attaching to that and so, by discounting that value to nil, again, in our submission, Dr Yeabsley is not in fact, undertaking the exercise that he is required to undertake by virtue of the Tribunal’s findings.

> “- Instead Dr Yeabsley attempted, in our submission, to re-litigate the Tribunal’s recommendations, including arguing that the Subject Land was not uniquely suited for the generation of hydroelectric power. This view is not only contrary to the Tribunal’s findings, in our submission, it is also not supported by the evidence.”

And I have made reference to the evidence of Mr Williamson, who talked about the importance of Maraetai, its scale, its role in the larger, Waikato Hydroelectric System.

1.4) “And additionally, key features of Dr Meade’s approach for estimating losses are supported by precedent. So, specifically, Dr Meade’s exponential compounding of the historical losses at sub-investment compounding rates to arrive at the current losses rests on an orthodox economic methodology, conservative assumption and rationale, all of which have been accepted by, for example, and we have given you a couple of Canada’s Specific Claims Tribunal decisions in 2016 of which I will refer to. Similarly, estimating historical losses as a fair share of ex ante expected net social benefits means Dr Meade’s loss estimates implement the negotiating damages approach. This aspect of his approach also follows precedent, including from New Zealand,

United Kingdom and Canada. This means that the Tribunal would neither be breaking new ground, nor adopting unsettled or novel economic approaches in accepting these key features of Dr Meade's approach.

1.5) If the Tribunal should award the Claimants less than the maximum available compensation, despite the losses and required economic base being sufficient to justify doing so, it is submitted that this would signal to the Crown that it can breach its Treaty obligations towards both the Claimants and other Māori without fear of being held fully to account. For the reasons given in the body of the submissions for the Claimants, and repeated in this Appendix, this would be both contrary to the specific scheme established under the Treaty of Waitangi (State Enterprises) Act 1988 and inconsistent with the Crown's duty to provide redress for Treaty breaches."

So, the next section deals with what is the maximum compensation available and that depends on two things, the current value of the lands and the associated improvements and whether any reduction should be made to the value to a portion between the subject lands and other lands which are not on Pouākani 2. So, I think the essence of our submission in opening is that the substantial value associated with the Maraetai scheme should go with the Pouākani 2 lands because that's where the bulk of the scheme is, is located. And even if you look at the maps that show the boundaries of the Pouākani 2 block, it does come down actually into the reservoir and into the area where water from the dam flows out. So, the reason for that is that the river bed is being flooded. So, the actual boundary of the marae – of the Pouākani 2 blocks is under water, even around the dam itself, and in front of the dam.

JUDGE WAINWRIGHT:

I want to fully understand the implications of that submission, Mr Mahuika.

MATANUKU MAHUIKA:

Yes.

JUDGE WAINWRIGHT:

Because that question that you pose in 2.2 is a very important question for us. And I'm not sure that I fully understand your reply and I wonder if we need to look at a map.

MATANUKU MAHUIKA:

Yes, that's a good idea. Someone to find a –

JUDGE WAINWRIGHT:

Kōrua.

MATANUKU MAHUIKA:

Perhaps, I've got the maps, Ma'am. Sorry. #J19(a) is the map book.

JUDGE WAINWRIGHT:

Look, they are all over it.

MATANUKU MAHUIKA:

Well, I'm glad someone is. So, #J19(a) is the map book.

JUDGE WAINWRIGHT:

Kia ora.

MATANUKU MAHUIKA:

Sorry, Ma'am, I'll just make a bit of room.

JUDGE WAINWRIGHT:

So, just to approach this issue, we had evidence, didn't we, valuation evidence that identified parts of the scheme that weren't located on Pouākani 2 –

MATANUKU MAHUIKA:

Yes.

JUDGE WAINWRIGHT:

And that therefore, discounted the value of the assets to take account of that and the implication was that I took from that evidence, that it is within our jurisdiction only to make binding recommendations in favour of Wairarapa Māori.

MATANUKU MAHUIKA:

Yes.

JUDGE WAINWRIGHT:

In respect only of the land that has section 27(b) memorials and is within Pouākani 2.

MATANUKU MAHUIKA:

Yes, and that's correct, Ma'am. This map doesn't show it very well, but – so, that's – the area you can see there is the former Pouākani 2 block. And –

JUDGE WAINWRIGHT:

You mean – well, what does that shaded block do?

MATANUKU MAHUIKA:

So, that shaded area I think is the Maraetai block.

JUDGE WAINWRIGHT:

That is the Maraetai side of the river, right?

MATANUKU MAHUIKA:

Yes, it is. And that the issue I am raising is that – so, it is clear that all of Maraetai 2 is on the former Pouākani block, there is no argument about that, I don't think.

JUDGE WAINWRIGHT:

All of Maraetai 2?

MATANUKU MAHUIKA:

Maraetai 2.

JUDGE WAINWRIGHT:

You mean that that is what –

MATANUKU MAHUIKA:

Yes, yes.

JUDGE WAINWRIGHT:

- the power station, yes.

MATANUKU MAHUIKA:

The question then is, how much of Maraetai 1 is also located on the former Pouākani 2 block. So, it's certainly affix to the block, but actually the –

JUDGE WAINWRIGHT:

What do you mean affix to the block?

MATANUKU MAHUIKA:

Well, it runs from the former Pouākani 2 block to the Maraetai block. So, it's affixed on both sides of the river. On one side it's on Pouākani 2, and over the other side –

JUDGE WAINWRIGHT:

So, this is the Maraetai 1 power station you are talking about, right?

MATANUKU MAHUIKA:

Yes, Your Honour. Yes. And that's –

JUDGE WAINWRIGHT:

So – Yes.

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MATANUKU MAHUIKA:

- the dam, if you look at – sorry, I'm just going to the map book. So, if you look at – I think it's the last page of the map book, there's some photos. So, if you look at that photo there, as I understand it to the right, that is Maraetai 2.

JUDGE WAINWRIGHT:

The terraced area?

MATANUKU MAHUIKA:

Yes, so that's all on the former – Well, it's all on the Pouākani 2 block. But the dam.

JUDGE WAINWRIGHT:

So, - sorry, can I just ask you some questions. So, the Power Station Maraetai 1, which is - that is what is shown bridging the two rivers.

MATANUKU MAHUIKA:

Yes, yes.

JUDGE WAINWRIGHT:

And Maraetai 2 is the one with – where you can see the tail race in this picture.

MATANUKU MAHUIKA:

Yes. So, what it looks like is that there is a perversion of water that's come in from Lake Maraetai on to that structure which built into the side of the Pouākani 2 block.

JUDGE WAINWRIGHT:

So, in this picture, which side is the Pouākani block and which side is the Maraetai block?

MATANUKU MAHUIKA:

So, the right-hand side is – well, the right-hand side as I'm looking at it is the Pouākani 2 block. So, the area that you can see the trees on it, that's the Maraetai block.

JUDGE WAINWRIGHT:

Okay. So, the area with most of the works on that we are looking at is Pouākani 2?

MATANUKU MAHUIKA:

Yes.

JUDGE WAINWRIGHT:

So, it is the flat area which I think has more structures on it now, does it not?

MATANUKU MAHUIKA:

Yes. It does, yes.

JUDGE WAINWRIGHT:

So, the flat area on – well, I am going to say the left-hand side looking at – I am girl, okay? I am looking at this photograph –

MATANUKU MAHUIKA:

You are also the Judge, you can –

JUDGE WAINWRIGHT:

So, the photograph in the photograph as I am looking at it, the pine trees are on the left.

MATANUKU MAHUIKA:

Yes.

JUDGE WAINWRIGHT:

And that is the Maraetai side.

MATANUKU MAHUIKA:
Yes.

JUDGE WAINWRIGHT:
So, what are you saying about the Maraetai 2 and the Maraetai 2 Power Station and the Maraetai block?

MATANUKU MAHUIKA:
So, what I'm saying about the Maraetai 2 Power Station is all of that is on Pouākani 2.

JUDGE WAINWRIGHT:
Right.

MATANUKU MAHUIKA:
So, in the end, there's no question about the location of that. Maraetai 1 is – it's actually located on both blocks with a bit of it running –

JUDGE WAINWRIGHT:
Well, it straddles the two, does it not? And it is on the river -

MATANUKU MAHUIKA:
Yes.

JUDGE WAINWRIGHT:
- which is where the Pouākani Trust's submissions come in.

MATANUKU MAHUIKA:
Yes, although, and the point I was really just making is that, and it doesn't show it well on the maps, but the boundary of the Pouākani 2 block goes into the area that's underwater in front of the dam, because of course, there's been flooding

that's occurred as a consequence of the establishment of the scheme. So, the river the course is actually a narrower area then the area that's shown on there. So, that then becomes a consideration for the determining how you deal with Maraetai 1.

JUDGE WAINWRIGHT:

You are going to have to show me that, Mr Mahuika, because I am not following that argument.

MATANUKU MAHUIKA:

I think maybe the way to do it, I was really just using it as an example of what you need to take into consideration about–

JUDGE WAINWRIGHT:

Well, we cannot take it into consideration if we do not understand it.

MATANUKU MAHUIKA:

Yes, I accept that.

JUDGE WAINWRIGHT:

Is the point – I do not understand that point that you have just made.

MATANUKU MAHUIKA:

So, the point that I've made is that, it's not just that the Maraetai 1 dam is affixed to the Pouākani block, actually part of that dam will also be on the block itself because the boundary of the block doesn't stop at the water, but it comes into the water. So, if you are looking at the former boundary of the Pouākani block, actually, it comes into the water way, it doesn't stop where the water –

JUDGE WAINWRIGHT:

So, it is sort of the river?

MATANUKU MAHUIKA:

It's in the river, yes. So, that means that it's not just affixed, they are actually, and it will be the same on the Maraetai side. Parts of that dam is sitting on the blocks themselves as opposed to it all being in the middle of the river, that was really the point.

JUDGE WAINWRIGHT:
Well, half is on each.

MATANUKU MAHUIKA:
Yes.

JUDGE WAINWRIGHT:
Right.

MATANUKU MAHUIKA:
Something like that.

JUDGE WAINWRIGHT:
Yes. We probably cannot determine – well, I mean I am sure we could if we had a survey and all of this, but in our current state of knowledge, looking at that power station, straddling the river as it does, and if we are proceeding on the basis that each title runs into the river, it looks roughly 50/50.

MATANUKU MAHUIKA:
And the point I was making and I'm sorry that's – if it's created some confusion is that it's not a discounting. What you have is a series of different assets. So, you have all of the Maraetai 2 generation facility which is clearly on Pouākani.

JUDGE WAINWRIGHT:
Mhm.

MATANUKU MAHUIKA:

And then there is an issue there about an apportionment in respect of Maraetai 1 because some of it is on Pouākani and some of it is where –

JUDGE WAINWRIGHT:

So, how are you saying we deal with that?

MATANUKU MAHUIKA:

It was really to make a point that that apportionment is not being taken into account in the way that the valuations have been, have been undertaken. So, there is the potential - If it is determined that the compensation goes beyond, say, the value of Maraetai 2, there is also value in Maraetai 1, which may be transferred as a consequence of a resumption order being successful. At the very less, you need to deal with the fact that Maraetai 1 is on Pouākani 2. So, I wasn't trying to make too much of an issue, it was really just to pick up on that point. And it was really – I was really just trying to explain why –

JUDGE WAINWRIGHT:

I do not understand the point you are making.

MATANUKU MAHUIKA:

I was really just explaining why in 2.2, some consideration needs to be given to an apportionment value between Pouākani –

JUDGE WAINWRIGHT:

But there has been an apportionment value, hasn't there in that value, valuation?

MATANUKU MAHUIKA:

No, no there isn't, no. Mr Reid's valuation doesn't apportion.

JUDGE WAINWRIGHT:

It just discounts?

MATANUKU MAHUIKA:

Mr Reid values three things. He values the land at, I think, 18.6 or $18.7 million, based on some assumed lease terms that were provided to him by the Crown. He then values Maraetai 1, I think at $440 million and Maraetai 2 at $600 million. But what he doesn't do is he doesn't grapple with how would you apportion the value of Maraetai 1 between Pouākani 2 and Maraetai. So, it was really just –

JUDGE WAINWRIGHT:

So, he has valued the land at Maraetai 1 and Maraetai 2.

MATANUKU MAHUIKA:

Yes.

JUDGE WAINWRIGHT:

And you say, the land is about 18 million, the Maraetai 1 is about 400?

MATANUKU MAHUIKA:

440, I think is his number.

JUDGE WAINWRIGHT:

And Maraetai 2 is –

MATANUKU MAHUIKA:

600.

JUDGE WAINWRIGHT:

So –

MATANUKU MAHUIKA:

And I wasn't wanting to –

JUDGE WAINWRIGHT:

Well, I want to – do not apologise, I want to understand this as fully as we can.

MATANUKU MAHUIKA:

And it was really just to make the observation that, that in the valuation there's no – no effort has been made to apportion the value of Maraetai 1, which as you have correctly identified, straddles the two blocks, so it's partly on Pouākani and partly on Maraetai. So, in looking at these values, there is an apportionment, but Mr Reid doesn't undertake that exercise –

JUDGE WAINWRIGHT:

Right, so – you are right, I had – you are right - So, you are saying for the purposes of our binding recommendations to understand the level of value that we are dealing with, we need to come to some division as between Maraetai land and Pouākani 2 of Maraetai 1, is that what you are saying?

MATANUKU MAHUIKA:

You may, depending on where you land in terms of the value of the loss. So, if you took, say, for example, some of Dr Meade's higher estimates, I think his highest estimate is $1.4 billion, if you decide that that's a value of the loss then actually you don't have to worry about the apportionment because that value greatly exceeds the value of the combine facility. So, -

JUDGE WAINWRIGHT:

Just as a matter of practicality, well, my brain wants to go, how much are we – how much is available –

MATANUKU MAHUIKA:

Yes.

JUDGE WAINWRIGHT:

- and then go, and what is the scale of the prejudice or the value of the prejudice.

MATANUKU MAHUIKA:

Yes.

JUDGE WAINWRIGHT:

And I think you are saying that if we feel the need to do that the there has to be some apportionment as between the Maraetai block and the Pouākani block of the value of Maraetai 1.

MATANUKU MAHUIKA:

Yes, that's correct.

JUDGE WAINWRIGHT:

And would you accept that, you know, for practical purposes, that it should be split?

MATANUKU MAHUIKA:

You are taking me beyond something that I could give you a liable view on, Ma'am. I think that certainly –

JUDGE WAINWRIGHT:

Well, we do not have valuation evidence on that, do we?

MATANUKU MAHUIKA:

Certainly, there should be a split. I'm trying to recall how the different assets associated with Maraetai 1, a split between the two blocks. I know there are some – I think there's a switch yard on the former Maraetai block, but there are other parts of the broader power generation scheme that are on Maraetai 1, so.

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JUDGE WAINWRIGHT:

You mean that – well, do we have evidence that enables to tell how much value there is in each half?

MATANUKU MAHUIKA:

No, in my submission I don't think we do.

JUDGE WAINWRIGHT:

I do not think we do.

MATANUKU MAHUIKA:

I think Dr Meade did have a discussion about it with the Tribunal, but of my recollection is that –

JUDGE WAINWRIGHT:

He did not know either.

MATANUKU MAHUIKA:

He did not specify an apportionment. He made the same point that I make which is that, actually there has to be an apportionment between the two.

JUDGE WAINWRIGHT:

And anyway, how would you split the value? Because, presumably, neither side is able to work on its own so that for the facility to work, it needs to be whole.

MATANUKU MAHUIKA:

Yes.

JUDGE WAINWRIGHT:

So, whether, you know, this engine house is on that side and this pipe and on that side and they are worth x, it is kind of a nonsense because they are all part of a facility that has to work coherently.

MATANUKU MAHUIKA:

Yes. So, I mean you could pay you on that basis, that you should attribute 100% because without one side you can't operate it, or you could just come up with an arbitrary split –

JUDGE WAINWRIGHT:

Yes.

MATANUKU MAHUIKA:

- which is probably the more appropriate way to approach it.

JUDGE WAINWRIGHT:

Yes, well, that is another problem.

MATANUKU MAHUIKA:

I wouldn't say that it's a problem, it's really, depends on where you land with compensation as to how much of a problem it is, or it isn't. It might create a technical question to deal with, if there is to be some impact on Mercury's ownership, but there would be that impact anyway through the resumption of Maraetai 2. It is part of the Waikato Hydroelectric Scheme, so –

JUDGE WAINWRIGHT:

Well, I think the evidence took us to the point where it is not severable.

MATANUKU MAHUIKA:

No, no, but I think it was also accepted by Mr Williamson that it is nevertheless something that they are able to come to agreements on. Ultimately, my recollection of his evidence is that, as long as there was a coherent management of the scheme then that wouldn't be an issue. So –

JUDGE WAINWRIGHT:

You mean separate ownership of the power stations?

MATANUKU MAHUIKA:

Yes, yes. So, his concern was just to be able to ensure that you could manage flows through the Waikato River. And you may recall that put to him in cross-examination, the fact of the Waitaki scheme where there are two different electricity generators that own dams on that scheme. They have agreements

between themselves as to how they manage flows. There's nothing that precludes that from occurring in the context of this.

JUDGE WAINWRIGHT:

No.

MATANUKU MAHUIKA:

And of course –

JUDGE WAINWRIGHT:

Well, that's a different question really, isn't it? I mean, the issue that we are talking about is for the purposes of the binding recommendations. What are we talking about in terms of potential value?

MATANUKU MAHUIKA:

Yes, it is different from the issue of value, but it is relevant to the –

JUDGE WAINWRIGHT:

Well, it would be relevant if we had had evidence that you cannot run them separately. You know, they cannot have separate owners, that is impossible, but we do not have that evidence.

MATANUKU MAHUIKA:

No, that wasn't the evidence.

JUDGE WAINWRIGHT:

All right. Thank you for that.

MATANUKU MAHUIKA:

Ma'am, I am just looking through because we may have covered some of the submissions, so I don't repeat myself. So, I do discuss a bit more in paragraph 3, what is on which blocks and then in 1.2.2 at paragraphs 4 and 5, I talk about Mr Reid's valuation which is covering the issue that we covered, Ma'am. So,

there are the values there. Maraetai 1, 440; Maraetai 2, 600; and then 18.75 was the value of the land, and then deal with the apportionment point after that.

JUDGE WAINWRIGHT:

And then you go on just talk about what he did not value and that includes that land that you discussed at the outset that I said I had not tumbled to previously.

MATANUKU MAHUIKA:

Yes, yes.

JUDGE WAINWRIGHT:

And that took us to the –

MATANUKU MAHUIKA:

And then the last comment there, Ma'am, is that "Mr Reid, did not attempt to separately identify or apportion Maraetai dam between the two blocks, or apportion the value of the infrastructure.

JUDGE WAINWRIGHT:

And the land that we were talking about at the outset, which you said was Pouākani land under the Maraetai dam –

MATANUKU MAHUIKA:

Yes.

JUDGE WAINWRIGHT:

- that the Crown never transferred to the Electricity Corporation –

MATANUKU MAHUIKA:

Yes.

JUDGE WAINWRIGHT:

- that is in the first sentence, is it?

MATANUKU MAHUIKA:

Yes.

JUDGE WAINWRIGHT:

And that is relevant if we took the view that it would be available to the Tribunal to make recommendations other than binding recommendations.

MATANUKU MAHUIKA:

Yes, subject to my earlier question, if you like, about the extent to which the Tribunal can make such recommendations, but yes –

JUDGE WAINWRIGHT:

Well, that is what I identified, it is a live issue which I would like –

MATANUKU MAHUIKA:

Yes, but in answer to your question, yes.

JUDGE WAINWRIGHT:

Yes, okay, thank you.

MATANUKU MAHUIKA:

And if you look at the – if you really go back to that map, I don't know if we can do all that –

JUDGE WAINWRIGHT:

I am sure we can, Sana is very good at this.

MATANUKU MAHUIKA:

So, if we go back to that photo, the land that we are talking about, if you look at the dam, the land on the right-hand side, so when the Marae – So, you can see the natural gorge there and when the Maraetai dam was established –

JUDGE WAINWRIGHT:

When you say the natural gorge, you are talking about the water above the tailgate.

MATANUKU MAHUIKA:

No, what I'm talking about, is if you look at that – the geography of that area, it has high banks on either side. So, one of the benefits of the Maraetai scheme is that the construction of the dam is means that there is a big reservoir that's able to be created behind it because of the high cliffs on either side. But the area that we are talking about on the right-hand side, the river course wasn't that high. So, there is an area of land there that was flooded and is under Lake Maraetai but was part of the Pouākani 2 block and was part of the land that was taken because the Crown was aware when they took, when they were establishing the scheme, that they would have to flood that part of the land in order for the scheme to work.

JUDGE WAINWRIGHT:

So, - I am just – Are you talking about right and left as I talked about or have switched?

MATANUKU MAHUIKA:

I'm talking about the side opposite from the side where the trees are.

JUDGE WAINWRIGHT:

Okay. So, the land that wasn't transferred to be electricity corporation –

MATANUKU MAHUIKA:

Yes.

JUDGE WAINWRIGHT:

- is which land?

MATANUKU MAHUIKA:

Is land that's under Lake Maraetai.

JUDGE WAINWRIGHT:

So, that is behind the big wall?

MATANUKU MAHUIKA:

On – behind the dam, yes.

JUDGE WAINWRIGHT:

Right, yes. Okay. So, the back of the picture, the top left-hand corner of the picture.

MATANUKU MAHUIKA:

As you look at it, yes.

JUDGE WAINWRIGHT:

So, that is still Crown –

MATANUKU MAHUIKA:

Well, that is a mix of Crown and Council owned land and I can't tell you the exact proportions because we did have to know that for certain for the sake of this -

JUDGE WAINWRIGHT:

Right.

MATANUKU MAHUIKA:

- this application.

JUDGE WAINWRIGHT:

Okay.

MATANUKU MAHUIKA:

I'm just going to grab some water please, Ma'am. So, I am paragraph 6, Ma'am.

JUDGE WAINWRIGHT:

Mhm.

MATANUKU MAHUIKA:

Although, we may be able to skip over some of other parts of this as a result of the discussion we've had or at least move through it relatively quickly. So, this is then dealing with the appropriateness of the Land-only valuation and our submission is that, is two-fold really. So, we made the submission earlier that in our view, the underlying assumption of the regime is that the improvements will the follow the land. But, nevertheless, Mr Reid has done a land only valuation and he has arrived at a figure of 18.75 million. Not a lot turns on this, but we make the submission for the sake of completeness…

CONTINUES SUPPLEMENTARY SUBMISSIONS #J100(a), PARA 6

…"That although Mr Reid was instructed by the Crown to include a land-only valuation (with improvements assumed retained by Mercury). He notes that his land-only valuation is hypothetical and has 'serious limitations' since [and we have added emphasis to this].

> 'proper valuation of the freehold interest necessarily includes the value of the hydro-electric dam and associated infrastructure at the date of the transfer [of the relevant assets to a State-Owned Enterprise."

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So in other words he's saying actually it is very difficult to sever the land from the improvements that are on it.

"This situation is compounded by the artificial lease that the Crown required Mr Reid to assume in his land-only valuation, which assumes the outcome of what would be a negotiated agreement between any landowner and…" Actually, I said "genesis" there, I meant "mercury", "…for a fair sharing of the relevant land's contribution to the value of the Maraetai 2 power station. Just

as the Tribunal determined that denying the benefit of the hydro potential of the Subject Lands was wrong in assessing compensation, so too is this assumption

Mr Reid was required by the Crown to assume in his land-only valuations." So in other words, doing the land-only valuation, assuming a lease to mercury now doesn't really address the essential question that the Tribunal was asking about what compensation should be payable. And then I won't go into it but go on to discuss the lease terms and a problem with being given the lease terms is that in any event leases are negotiated between willing participants and so this assumes what the outcome of a negotiation would be, and I assume that's why Mr Reid said it was very hypothetical because of course he doesn't know what the parties might negotiate. So that takes me to paragraph 10 which is about –

JUDGE WAINWRIGHT:

Can I just ask a question about your final sentence in paragraph 9, you say that valuation cannot therefore be relied upon as a basis for assessing the maximum compensation that should be available to the claimants, what role would that valuation play in that anyway?

MATANUKU MAHUIKA:

I think what we are saying, Ma'am, is that the 18.75 million is not a starter in terms of considering what ought to be available. What ought to be available is a combination of the land plus the improvements. So you have to look at the improved value of the land in terms of assessing the benefit to the Crown and therefore the compensation that's payable.

JUDGE WAINWRIGHT:

So if we are looking at these valuations that you discussed in 4.1 to 4.3 –

MATANUKU MAHUIKA:

Yes.

JUDGE WAINWRIGHT:

– because of the tenuous, well you say tenuous, premises upon which the valuer was instructed to proceed to get to the 18.75 million, if we take that out, do those valuations in 4.1 and 4.2 include land?

MATANUKU MAHUIKA:

My understanding is yes.

JUDGE WAINWRIGHT:

Right, okay.

MATANUKU MAHUIKA:

So that's the land, plus improvements, whereas the 18.1 seeks to try and sever –

JUDGE WAINWRIGHT:

Just the land.

MATANUKU MAHUIKA:

– the land from improvements –

JUDGE WAINWRIGHT:

Okay, thank you.

MATANUKU MAHUIKA:

– and is therefore subject to the limitations that Mr Reid noted himself in providing the valuation.

JUDGE WAINWRIGHT:

Yes, thanks for clarifying that.

MATANUKU MAHUIKA: (CONTINUES #J100(A) FROM PARA 10)

So setting aside Mr Reid's land-only valuation and noting that Mr Reid did not attempt to make the apportionment of Maraetai 1, his valuation of land and

improvements of Maraetai 1 and Maraetai 2 suggests that the maximum compensation available to the Incorporation as at October 2018 was $1,040Mn (which is the sum of the valuations for the two). So bear in mind the discussion that we had about the apportionment. This is just taking the round figure.

Dr Meade undertook some reassessment of that. HIs view, and I think it was in his supplementary evidence, was that actually if you were valuing it from a purchaser's point of view, there are some maintenance and other things that you will take into account, which he believed would have a discounting impact on the value and that Mr Reid hadn't taken into account, and so he makes some valuation reassessments.

So, "In making his reassessment, Dr Meade made the following adjustments:

1. He applied an increase to Mr Reid's valuations to better reflect the fall of Mercury financial year…", so, the valuation wasn't made based on a full financial year, so he's tried to take into account a full financial year, "…and to provide for additional revenue streams that Mr Reid appeared not to have recognised or provided for…", so he thought actually there was an omission, so that would go into the positive side of the letter in terms of the valuation.
2. But then he also, "applied a reduction to Mr Reid's valuations to make a technical correction for Mr Reid's assumed generation levels for each station." So Dr Meade's research suggested that Mr Reid had overestimated the generation coming out of those stations, so therefore that had an impact on value. So he's taken that into account in his reassessment. And, "…to provide for both additional expenditures and efficiency gains which Mr Reid referred to but apparently did not value, and to better align certain other valuation assumptions with available evidence."

Dr Reid also undertook a discounted cash flow-based assessment, and the result of this is that he came up with the following valuation ranges:

1. So for Maraetai 1, he believed that the valuation was $376M to $388M.
2. For Maraetai 2, he believed the valuation was $480M to $514M.

So he comes up with differences that are material in terms of the value of the assets that have been dealt with.

And, "As such, and noting Dr Meade's valuations also do not seek to make the apportionments of Maraetai 1, the maximum compensation available to the Incorporation based on Dr Meade's valuations are:

1. $855M – based on his reassessment of Mr Reid's valuations; and
2. $902M – based on Dr Meade's Discounted Cash Flow."

So Dr Meade comes up with some lower valuations, and these are important to bear in mind as a backdrop to this because they are relevant to determining what is the value of the thing that is being transferred to – well, that would be transferred to the owners in the event that the resumption application is successful, and therefore to the issue of proportionality.

I think I've covered this next point in the body of the submissions, and that deals with whether or not improvements – it's assumed by the statutory scheme that improvements should flow with the land or not. So what I would do is then go to 1.4 on page 10 please.

JUDGE WAINWRIGHT:
Say that again?

MATANUKU MAHUIKA:

So the next section, Ma'am, from paragraph 16 to 27 really just repeats and a little bit more detail of the submission in the body of the submissions dealing with whether or not the statutory scheme assumes that improvements should flow with the land or not.

JUDGE WAINWRIGHT:

I am interested in that submission, Mr Mahuika. I have actually noted some questions to ask you about that later. So, I would suggest that you do –

MATANUKU MAHUIKA:

So would you like me to go through that submission?

JUDGE WAINWRIGHT:

– give us chapter and verse on that because just how automatic it is, is a live issue for us.

MATANUKU MAHUIKA:

Yes. So the essence of my submission on this is that there is a presumption that improvements flow with the land. I don't think I could discount 100% that there might be circumstances where that doesn't flow, but what I'm saying is that the way that the statutory scheme is constructed assumes that you're dealing with land and improvements, and there are a number of indications that the scheme gives, that that's what it's thinking about. First of all, there is nothing in the statute which seeks to deal with the land and improvements separately. It talks about the transfer of everything.

Secondly, there is the aspect of the scheme which says that the land is dealt with on the basis of its improved value as at the date of transfer. Which, in itself, is assuming that that is the value that you're looking for. So it does allow for improvements that have been made subsequent to the transfer to be taken into account, but improvements that are there at the time of the transfer can't be taken into account, which suggests to me that those improvements are treated as being dealt with along with the land.

1210

Then thirdly, there was the submission that I made in relation to the Crown Forest Assets Act which assumes that in addition to the land that the owners will have an interest in the improvements in that land, and it does that in two ways: First of all, by allowing for a successful claimant to have transferred to them or to obtain the accumulated rentals from that forest land; but also, the fact that there is a compensation scheme which is intended to apply in addition to the rental scheme. Assumes that there is an interest that goes beyond the land itself and into the improved value of the land.

JUDGE WAINWRIGHT:

Yes, that the improvements would be part of the package for the purposes of the Tribunal's exercising its jurisdiction is not that automatic that I was interested in burrowing into, it is more that I intuited from your – once you have got your well-founded claim, that is the leaping off point.

MATANUKU MAHUIKA:

Yes.

JUDGE WAINWRIGHT:

And then you say, "Well, that means that the land plus the improvements are what the Tribunal is dealing with," but it is also available to the Tribunal, isn't it, to return part of the land or interest in land.

MATANUKU MAHUIKA:

Yes.

JUDGE WAINWRIGHT:

So I suppose I want to understand what you are saying how it has all triggered, because I got the impression that you are saying, "Once you are in, it all comes," whereas I am trying to understand how the proportionality –

MATANUKU MAHUIKA:

Yes, so I think there are a couple of stages there. So, what you say is correct. The jumping off point is, is there a well-founded claim and is it memorialised land. So, those are the first two prerequisites and both of those are satisfied here.

JUDGE WAINWRIGHT:

Yes.

MATANUKU MAHUIKA:

I don't think there is any argument about that. Once you get to that point, it's then the question for the Tribunal is does it exercise its jurisdiction or not?

JUDGE WAINWRIGHT:

'Should it' – That's the language.

MATANUKU MAHUIKA:

Yes, yes.

JUDGE WAINWRIGHT:

Yes, so it is not "does it", it is "should it". So that is an interesting…

MATANUKU MAHUIKA:

Yes, so is this something that it ought to do.

JUDGE WAINWRIGHT:

So there is a value judgment involved in "should", isn't there?

MATANUKU MAHUIKA:

Yes, there is.

JUDGE WAINWRIGHT:

Yes.

MATANUKU MAHUIKA:

But my – and the point that I was making was that if you look at the obligation on the part of the Crown to provide redress, then there is, in my submission, a presumption, and I think it's reflected in the history of the Act and the scheme of the regime that's been established. So there is a presumption in favour of redress. So therefore, in my submission, a presumption in favour of the exercise of the jurisdiction, subject to the caveat, which I have accepted, that there has to be some level of proportionality between the harm that's been suffered and the redress that's been provided, and the reason for that is that section 8A(2)(a)(ii) talks about compensation or removing the prejudice. So what it is saying explicitly is that there needs to be a connection between the prejudice suffered and, you know, the act of compensation –

JUDGE WAINWRIGHT:

Yes. I certainly understand that that is part of the Tribunal's exercise of its jurisdiction to remove the prejudice, but I am not sure where the Crown's obligation to provide redress comes in.

MATANUKU MAHUIKA:

Yes. Well, where it comes in is that in my submission, once you get to that point, if we get to the point where we accept that there is proportionality, so in other words the return of the land is –

JUDGE WAINWRIGHT:

Okay, you have made a leap now.

MATANUKU MAHUIKA:

No, no.

JUDGE WAINWRIGHT:

But that is – because it is that bit that I am interested in.

MATANUKU MAHUIKA:

Yes. So what I am saying is that I will flip it around and do it the other way. So what I was saying is that there is a presumption in favour of redress. So therefore, once you get to the point where you establish that the redress aligns to the value of the prejudice, then that presumption is in favour of the exercise of the jurisdiction.

JUDGE WAINWRIGHT:

But why do you have to have a presumption in favour of redress?

MATANUKU MAHUIKA:

Well I think because –

JUDGE WAINWRIGHT:

I mean, I think – well, it is interesting where you are coming from. It seems to me –

MATANUKU MAHUIKA:

Well because –

JUDGE WAINWRIGHT:

– you are talking about a presumption of redress that the Tūrangi Tribunal talked about in relation to the Crown's obligations.

MATANUKU MAHUIKA:

Yes.

JUDGE WAINWRIGHT:

But the Tribunal's jurisdiction is fully described in the legislation, isn't it?

MATANUKU MAHUIKA:

Yes, it is, but there is a discretion for you to exercise at a point –

JUDGE WAINWRIGHT:

That is where the “should” comes in?

MATANUKU MAHUIKA:

Yes, that’s right, and should you do that, and so should you order resumption, or should you not order resumption, which in this case would involve also - **(inaudible** 12:15:54)

JUDGE WAINWRIGHT:

And I – and in the argument that we have had around this in this forum thus far, that should, it seems to me, delivers us to the question of proportionality.

MATANUKU MAHUIKA:

Yes.

JUDGE WAINWRIGHT:

Some kind of assessment of the scale of the prejudice. These are the scale of the redress.

MATANUKU MAHUIKA:

Yes. That’s correct, and I think what I’m saying Ma’am is that, and perhaps presumption is the wrong way of describing it, but the essence of the submission is that once we identify that there is that proportionality, then –

JUDGE WAINWRIGHT:

But I am asking you to tell us how we identify that proportionality because it seems to me –

MATANUKU MAHUIKA:

Yes, well that’s the balance of this.

JUDGE WAINWRIGHT:

Okay.

MATANUKU MAHUIKA:

But I'm just talking about the approach.

JUDGE WAINWRIGHT:

All right.

MATANUKU MAHUIKA:

So let's say that I establish that there is proportionality in this. Once we get to the point that there's proportionality, then my submission would be that there is almost a compulsion on the part of the Tribunal to order the resumption, and the reason –

JUDGE WAINWRIGHT:

Right, but I am happy with that, Mr Mahuika, I was just concerned when you start talking about things like presumption, that there is no requirement to demonstrate proportionality.

MATANUKU MAHUIKA:

No, no, I wasn't suggesting that at all. What I was suggesting – that was why I said maybe I should flip it around. Once you've established that there is proportionality, then my submission would be that there is almost a compulsion to order redress because the scheme is predicated on the need to provide redress and to remove prejudice suffered by claimants, and if you line that up against the obligation of the Crown to provide redress, that's just further support for the idea that when you get to that point that it's proportionate, then the appropriate response is to order the resumption.

JUDGE WAINWRIGHT:

Well I would agree with that. I think that you are putting in things that do not need to be there, I just do not think we need a presumption, we do not need to think about that, it is all in the statute.

MATANUKU MAHUIKA:

Yes, so that was, and again, was really just expressing it in that way, I wasn't say that –

JUDGE WAINWRIGHT:

Yes.

MATANUKU MAHUIKA:

But I think I've explained it, so let's leave that there.

JUDGE WAINWRIGHT:

So you are going to help us at some point with how we determine whether the proportionality requirement is satisfied such that we should make the binding recommendations you will say for all of the assets.

MATANUKU MAHUIKA:

Yes, and this is where the economists become important because they are the ones we've tried to grapple with, with this question, and so that's where the – so we have Mr Reid's valuation and you have Dr Meade's revisiting if you like of those valuations or providing an alternative, and what they do when we talk about maximum compensation is that they give us some value ranges that we're looking at in terms of the value of the assets that will be transferred. So if you go back to those previous paragraphs, Maraetai 2 at 600, Maraetai 1 at 440, maybe a decision around apportionment. If there was no apportionment, it would be a billion. If it isn't, then it's between 600 and a billion.

If you go to Dr Meade's numbers, then I think his valuations are Maraetai 2 the top range is 514. The combined valuation at the top range is a shade of $900 million. So, that becomes your valuation range between 514 and 900. And so then, now that's our starting point for our analysis, and the question then becomes how have the economists approached the issue of loss? And that comes back to the point that we were discussing about where necessarily in a counterfactual world. So we have to say, "In a Treaty compliant world, what should the Crown have done?" And we have a problem speculating about what

may or may not happen with the Maraetai dam because what we know is that there is a very big dam at Maraetai, in fact there are two power facilities and we know that it is central to the Waikato scheme. So yes, we do have the challenge of saying. "Well would they have built it or would they not?" The fact of the matter is that they have, and the country has derived enormous benefit from that, and the owners of the lands at Pouākani have derived none.

1220

I was just wondering, I am about to embark on a new topic. I know that it's a bit early. I could try and –

JUDGE WAINWRIGHT:

Well I guess the question is whether we are satisfied that, broadly speaking, we are going to be able to get through it all today.

MATANUKU MAHUIKA:

I was hoping to be further through this part of it. I was really aiming to get this part of it done.

JUDGE WAINWRIGHT:

Right.

MATANUKU MAHUIKA:

I would have thought so. I could keep on going for the next 10 minutes or so, maybe just knock off a couple more sections to utilise the time.

JUDGE WAINWRIGHT:

All right let's do that.

MATANUKU MAHUIKA:

So what I might try and do is I might try and go from – finish parts 1.3 and 1.4. Well actually Ma'am, I think I've covered 1.3, that is the issue of what happens with the improvements.

JUDGE WAINWRIGHT:

Yes.

MATANUKU MAHUIKA:

So I will go straight to 1.4. So this is the position of Drs Coleman and Yeabsley in relation to the evidence of Dr Meade. The reason this is important is that it's really trying to test where do the different economists land and where is their support and where is there not.

CONTINUES #J100(A) FROM 1.4

So, "Dr Coleman argued in his written evidence that in contexts where stewardship principles apply, land return (or payment of equivalent value) is a necessary element of any compensation package. So he said:

> Modern economic theory has analysed valuation techniques consistent with stewardship principles, … This theory is consistent with a group attributing the non-monetary events in the past similar values as if the events were to occur today. **Compensating a group with such values for past wrongs suffered may require the return of land, or payments sufficient to enable the group to purchase land in alternative places.**

Notably, the Incorporation is an organisation that can be said to apply stewardship principles. It provides funding to the Wairarapa Moana Trust to support the social and cultural development of the owners and whānau. With the Wairarapa Moana Trust, the Incorporation also contributes to the Mangakino community through educational and marae grants, financial support to the Mangakino Area School, and sponsorship of local community groups. Even the Incorporation's logo includes a tagline referring to its stewardship focus.

The Claimants regard themselves…" and I think this is important, "…as kaitiaki of the lands they were provided by the Crown at Pouākani.

The Claimants have struggled and persevered with nurturing the Pouākani lands into a taonga worthy of future generations. As the Tribunal found, "Wairarapa Māori received no benefit at all from the Pouākani land for the first 40 years of their ownership of it. It was, in fact, a detriment, as they struggled in vain to get the Crown to provide access or development assistance or both". Worse still, the Tribunal further found that "[b]efore [the landowners] derived any benefit from the Pouākani land, nearly 800 acres of it were compulsorily acquired for hydro works, and another nearly 700 acres were compulsorily leased for the Mangakino township … [and] running the Mangakino leases took a huge toll on the community of Pouākani landowners …".

The Claimants have endured decades of hardship, sacrifice and risk to make those lands capable of providing for the current and future spiritual and physical needs of their people. Having done so, the Claimants continue to suffer socio-economic deficits relative to both European New Zealanders, and all New Zealanders, and that's evidence by Dr Meade's evidence. While the Incorporation has been able to make meaningful distributions to its owners and beneficiaries since 2000, for most of the century until then those owners and beneficiaries, they have reinvested practically all of the meagre returns produced by their lands for the benefit of future generations.

Those lands at Pouākani which have been retained are held as Māori freehold land under Te Ture Whenua Māori Act 1993, and are subject to the restrictions on alienation, to ensure they are preserved for the Claimants' successors. Any of the Subject Lands returned to the Claimants would be regarded and held likewise.

The fact that the lands taken at Pouākani were not ancestral lands does not diminish the Crown's obligations to the Claimants under the Treaty of Waitangi

or lessen its responsibility to fully compensate the Claimants for its breaches of the Treaty." I just need to interpolate here, and I'll try to make this submission carefully, but it is accepted that the lands at Pouākani are not within the traditional territory of Ngāti Kahungunu ki Wairarapa, but the fact of the matter is that they are held and treated by the owners of Pouākani as if they are. So this is, and the reason I am wanting to be careful about this is if this is not suggesting that it's not in the territory of Ngāti Raukawa or Ngāti Tūwharetoa, but it is important in considering the position of the Incorporation that it's not just seeking land for the sake of seeking land, they have been put on this land through no choice of theirs, but they have it there and they treat it as Māori people treat land, as you would treat ancestral land even though it is not within that territory.

So while it's accepted that it's not within the lands of, you know, their traditional tribal lands, there is still a cultural connection that the owners that Pouākani have to the lands at Pouākani. Now, that creates challenges. You know, I'm aware of the tensions that it is creating in this hearing between the owners of the Wairarapa Moana Incorporation and Ngāti Raukawa and more recently Ngāti Tūwharetoa, and I don't think it's the intention at all for the owners of Wairarapa Moana to create offence or to say to Ngāti Raukawa or Ngāti Tūwharetoa, "This is not your territory," but they have a connection to that area and to those lands now as well, which is something that can't be resolved in the context of this, but is important context to understand the position of the owners at Pouākani.

So, and as I say there, "The Claimants have treated their remaining lands at Pouākani as a taonga. To less than fully compensate the Claimants for the takings at Pouākani on the basis that those lands are not their original ancestral lands undermines that relationship. Further, to suggest that less than full compensation is warranted because the Claimants, through the incorporation structure adopted, have achieved relatively recent economic success after decades of struggle, would be to multiply punish them for the Crown's

successive breaches, and to hold their own hard work and relatively recent economic achievements against them." There is an irony in the Crown's submission that this incorporation is doing reasonably well. First of all, it is through no efforts on the part of the Crown, it is through the efforts of the owners, and it seems, well, it's simply unfair in the context of the issues that we're discussing to then say, "Well therefore you're not entitled to comment."

JUDGE WAINWRIGHT:

Is it relevant?

MATANUKU MAHUIKA:

I'd argue that it isn't, Ma'am, but it is a submission that has been made and there were questions put to Mr Smiler about that point during the course of his evidence.

CONTINUES #J100(A) FROM PARA 35

"In response to questions Dr Coleman made this point and he said:

> [I]f iwi have a condition of stewardship, it's difficult to understand how losses could be fully compensated without the return of the land.

Indeed, when estimating historical losses, Dr Coleman further acknowledged that an additional sum should be added to the current value of the relevant land. That sum is required to reflect the welfare losses of the claimant due to not having enjoyed use of the land for some period of time.

In other words, the current value of the Subject Lands provides an under-estimate of the losses, and hence is a conservative lower-bound estimate of those losses. This justifies the return of all the claimed land, as doing so under-compensates the Incorporation's losses."

1230

We also suggest, and just the three paragraphs before lunch, "Similarly, Dr Yeabsley for the Crown agreed that current land value can be a relevant metric for compensating past losses." So I accept that he came to a different ultimate conclusion, but he did accept this point. He said:

> "[G]iving back either the item that caused the wrong or redressing the wrong or giving back equivalent value is something similar to some of the suggestions that have been made by Dr Meade. The value of the land in some of the cases seems to be what I'm saying."

In fact, I recall arguing – not arguing, but putting to him during cross-examination that if there are all of these uncertainties, why don't you just give the land back, and his answer to that question was "yes".

"To this, Dr Yeabsley would add a measure of temporal compensation, in recognition that the claimant has not enjoyed use of the land for a period of time." So that's an aspect of his three-pronged approach.

So, "In summary, Drs Coleman and Yeabsley, albeit for different reasons, reach the same conclusion. Specifically, current land value can be a relevant measure of a claimant's losses, especially when that claimant seeks to preserve land for the benefit of future generations (as is the case for the Incorporation). However, current land value is only an under-estimate – or conservative lower-bound estimate…", in the words of the economists, "…– of the claimant's loss, since it provides no recognition for the claimant having not had use of the land for some period of time."

So Ma'am, that might be an appropriate place.

JUDGE WAINWRIGHT:

Kia ora. Ka hui anō tātou ā te hāwhe pāhi i te kotahi karaka.

HEARING ADJOURNS: 12:31 PM

HEARING RESUMES: 1.29 PM

JUDGE WAINWRIGHT:
Kua whakapakari te tinana me te hinengaro.

UNIDENTIFIED MALE SPEAKER: (13:29:36)
Āe, te tūmanako, āe koirā te whakaaro.

JUDGE WAINWRIGHT:
Haere tonu.

MAHUIKA MATANUKU:
Ma'am, we're at 1.5 on page 13 of the appendix. There was just a couple of matters arising out of some of the exchanges we had prior to the break I was going to touch upon. You asked about whether Mr Reid had done an apportionment, and he hadn't, but we went back and checked the transcript of his cross-examination. I think Your Honour actually asked him a question whether it was possible, and he said, "Hypothetically, yes you would." I rate it, he didn't say on what basis you would rate it. That was the answer to the question, so.

And I just felt that I should rate it with Your Honour for the sake of completeness, because in the answer to your question I said no he hadn't, and while it is correct that he hadn't actually done that, he did answer a question on it, which is on the record.

The second matter is that there is another map, and I won't take you to it, but it's #J26(a), which I think shows some of the lands that have been submerged as a consequence of the establishment of the past, so the discussion that we were having about where the lands are located.

JUDGE WAINWRIGHT:

You sure we do not have to look at it?

MAHUIKA MATANUKU:

Yes. It simply illustrates the point that I was making. He would answer questions later, but it was really just for the sake of completeness in relation to that, but I'm very confident we don't have to look at it.

JUDGE WAINWRIGHT:

I just misled Dame Margaret.

MAHUIKA MATANUKU:

As long as it wasn't me Ma'am, that's fine. So, coming back to that appendix and reception of the appendix deals with the historic losses and our submission based on Dr Meade's evidence that they exceed the maximum available compensation, bearing in mind that that is a reference to the value of the land and improvements that might come back.

So, to paragraph 41, in relation to the Wai 85 claims, the Tribunal found that the former Pouākani 2 Block lands taken for the Maraetai Scheme were uniquely suited for use in that scheme, in other words for hydro-electric power development and recommended that the Crown applying Treaty compliant criteria should provide for (a) the unique qualities and hydro potential of that land, and/or betterment affected by the hydro works, and that's the passage that I quote at paragraph 6 of the main submission.

Dr Meade assessed compensation in terms of only the LIMB above (ie, for the unique qualities and hydro potential of the subject land. He did not attempt to evaluate the required compensation in relation to the second LIMB (ie, for the betterment affected by the hydro works, which is important because it's relevant to the extent to which you might rely on his final figures. Likewise –

JUDGE WAINWRIGHT:

But hasn't – doesn't the valuation effectively capture the betterment?

MAHUIKA MATANUKU:

That's the improved value of it, but what he doesn't do is then turn around and value the prejudice suffered by the claimants for not having participated in that I suppose.

JUDGE WAINWRIGHT:

Okay.

MAHUIKA MATANUKU:

Likewise, Dr Meade has assessed economic losses from not having been compensated for the unique qualities and hydro potential of the taken lands, including the lands that are subject with this application. He has not attempted to value any social or cultural losses, experiences consequences of the Crown's breaches in relation to those lands.

For these reasons, it is our submission that Dr Meade's loss estimates representative a conservative lower bound figure or figures, which therefore, under state those losses and therefore the compensation that might be payable to the claims. This is a material factor to be brought in mind when considering the prejudice suffered by the claimants in proportion to the value of the lands to be returned.

Now, Dr Meade talked a lot about his estimates being conservative. I think couple of times he said, "Extremely conservative." Dr Coleman in his evidence made reference to, yes, he wouldn't say, "Extremely conservative," but some of those estimates are conservative, and he was really doing it because the exercise here is not to be absolutely precise as to what the value is, but it is an order of magnitude type of comparison.

1335

So, you won't need to be absolutely precise about the number, there just needs to be a comparable level of harm and value involved in the return of the land in order for that to, as we discussed earlier, trigger the Tribunal's jurisdiction to return that land in order to compensate or remove the prejudice suffered by the claimants.

So, the uncertainties involved in estimating historical losses have been acknowledged by the economic experts engaged by all parties. Dr Meade was in our submission, frank about the importance of addressing such uncertainties when assessing historical losses and took deliberate measures to do so. So, he adopted multiple areas of very material conservatism when estimating losses so as to understate – rather than overstate – those losses.

So, in other words, he was endeavouring to be conservative so that there couldn't be an accusation that he was inflating them for the purposes of the discussion that we're now having.

As to specifics, Dr Meade characterised losses as the foregone fair share of the net social benefits expected from the Maraetai Scheme at its inception in circa October 1947, when the lands were being taken for that scheme. To estimate those net social benefits, Dr Meade made close inquiry into the available historical record, and adduced multiple historical records in support of his approach. He further emphasised the in-principle equivalence of land valuation and assessment of those net social benefits.

And in questioning from Your Honour of the Crown's economic expert Dr Yeabsley, it was confirmed that the Tribunal was seeking such an "ex ante" or forward-looking land valuation approach, and it says, "We're taking an ex ante position here, because we're looking at what would have happened [i.e. as at October 1947] if the Land Valuation Tribunal had had the hydroelectric potential of the land as a criterion for value."

Now of course, as we've discussed earlier, that's actually quite challenging in the sense that how do you value the hydro potential, so in other words, valuing what is quite a scarce and highly valuable resource that's associated with that land, and that's where we got into the discussion about things such as maybe you do it on a joint venture basis or some other sort of basis, but it necessarily involves first of all, thinking what do they know at 1947, or what were the drivers on them at that time when they were having that negotiation, and then secondly, what do we think in Treaty compliant world, which they didn't occupy, but which we do, what do we think they ought to have done?

So, the fair share of net social benefits that Dr Meade estimates represents the extra value that should have been included in the price that was ultimately paid for the subject lands as at circa October 1947, to compensate for the "unique qualities and hydro potential" of their land in the Maraetai Scheme. Instead, any such payment was precluded by virtue of the regime through which the valuation was conducted

Dr Meade's assessment of losses sought to implement the Tribunal's finding, and as we've submitted previously, Dr Yeabsley did not because Dr Yeabsley effectively discounted any hydro potential notwithstanding the Tribunal's findings.

Under cross-examine, Dr Yeabsley admitted that his approach for assessing the incorporations losses made no allowance for the subject lands' unique qualities and hydro potential, despite the Tribunal's recommendations.
1440

Furthermore, in the subsequent brief provided by Dr Yeabsley, which was assessing losses, he argues for the subject lands value in October 1947 being based on a highest and best use of farming rather than hydro generation. He does so on the basis that there were a number of alternative sites where hydro generators could have been built if not at Maraetai, and other (unspecified)

ways of addressing North Island power shortages. As such in our submission, he explicitly disregards the Tribunal's finding that the Maraetai site had unique hydro potential, and I've got a quote there. "The availability of alternative sites and other ways of addressing power shortages] **undermines the scale** of the unique and special attributes of the land," is a quote from Dr Yeabsley although as I've noted when it was put to him, "Have you attributed it of value?" His answer was, "No," he hadn't. He had discounted that as a factor that he took into account into his valuation exercise, which given the significance of the hydro potential, has a significant impact in our submission on the extent to which you can rely on the conclusions that Dr Yeabsley reaches in his evidence, because it omits one of the crucial aspects of the Tribunal's own findings of breach and prejudice in relation to the lands at Pouākani.

Dr Yeabsley's conclusion must be viewed in light of the Tribunal's findings. Specifically, the Tribunal found that the subject lands must have been uniquely suited for the Maraetai Scheme and could not have been substituted for, and the owners should have been paid more for their lands accordingly.

Indeed, the subject lands were so special that the Crown built not just one power station, but two, at the site (and did not build power stations on the Waikato River at sites other than those envisaged in 1947, when Dr Yeabsley asserts it could have done so). While the Tribunal found that the subject lands were clearly uniquely-suited to what was a nationally-important power scheme and hence the owners should have been paid more for their lands based on that unique suitability, Dr Yeabsley in our submission concluded that there was effectively nothing unique about Maraetai, which requires the Crown to provide additional compensation and simultaneously sought to relitigate the Tribunal's findings that the site had unique hydro potential.

JUDGE WAINWRIGHT:

That quotation has reminded me that in fact the uniqueness and the characterisation that we made of the land as being unique, didn't derive from

an investigation in evidence as to whether any other sites would have done, but from a legal analysis of the right of the Crown to exercise the compulsory acquisition powers, because in the Tribunal's analysis, under the Public Works Act, if there were viable alternatives that didn't involve taking Māori land, then the Crown was under a Treaty obligation to exercise those.

MAHUIKA MATANUKU:

Yes.

JUDGE WAINWRIGHT:

So, we inferred that in taking Maraetai, it was in effect implicitly conferring on those sites' uniqueness because otherwise it would not have been compelled to take them.

MAHUIKA MATANUKU:

Yes, Ma'am, I understand your point. I couldn't argue with the logic of that and the fact of the matter is that it did it, and obviously have that potential because there are two dams.

JUDGE WAINWRIGHT:

But what I am acknowledging, and it is just the recollection has just come upon me that the kind of - that analysis is different from Dr Yeabsley's analysis.

MAHUIKA MATANUKU:

Yes.

JUDGE WAINWRIGHT:

Because he is going, "Were there actually other sites?" Whereas, we were coming from a Public Works Act analysis.

MAHUIKA MATANUKU:

And I think that's also where the difference between the exam ex ante and ex post perspective on it comes, so –

JUDGE WAINWRIGHT:

Well, that is another aspect, isn't it?

MAHUIKA MATANUKU:

Yes, but it is related because at the time – so in order for Dr Yeabsley's analysis to work, you have to say that, "Well, although they thought it was important, there are other things that they could've done," and –

JUDGE WAINWRIGHT:

But they did not know that at the time.

MAHUIKA MATANUKU:

And they discovered it subsequently.

JUDGE WAINWRIGHT:

Yes, mmm.

MAHUIKA MATANUKU:

But at the time, if you put yourself in the minds of the officials in 1947, they thought that this was the thing that they needed to do.

JUDGE WAINWRIGHT:

Mmm. I suppose the aspect of that ex ante perspective that was raised in evidence, and which I referred to before, is that one of the elements that the Crown took into account was the price.

MAHUIKA MATANUKU:

Yes.

JUDGE WAINWRIGHT:

And that involved discounting the – well, the Tribunal said, discounting the true value of the land and getting a bargain effectively, and that would have informed the choices ex ante.

MAHUIKA MATANUKU:

Yes, it may well have done, although I think the –

JUDGE WAINWRIGHT:

Well, we did have evidence about there being some financial exigency in the Crown at the time.

MAHUIKA MATANUKU:

Yes, and that was where the suggestion was made that the alternative is to do it on a joint venture basis.

JUDGE WAINWRIGHT:

That is right, yes, yes.

MAHUIKA MATANUKU:

Because it does not actually involve the Crown and in fact –

JUDGE WAINWRIGHT:

No, stumping up.

MAHUIKA MATANUKU:

–what it does is, it means that the landowners get a benefit providing this unique piece of land for the purposes of hydro development.

JUDGE WAINWRIGHT:

Yes. Yes, thank you.

MAHUIKA MATANUKU:

Just bear with me for a second Ma'am, I'm just trying to avoid repeating anything. I think I will go through paragraph 53, so putting to one side the fact, that in our submission, it's not now open, to the Crown, or the Tribunal for that matter to relitigate those findings in the context of this remedies stage.

In our submission, Dr Yeabsley's conclusion is simply not supported by the evidence. So, Mr Parker, the Crown historian notes the unique hydro potential of the land as a key reason why the Crown compulsorily acquired the land from the claimants for the Maraetai Scheme, which I think Ma'am is the point that you just made about what the Tribunal was thinking. The unique hydro characteristic of the land was further acknowledged by Mr Williamson from Mercury. So, Mr Williamson's evidence was that the Maraetai scheme is the largest hydro scheme on the Waikato River, with a key feature of the area being the natural gorge that exists up river from the dams in the area that has now been flooded for Lake Maraetai. This natural reservoir means that the Maraetai Scheme plays a vital role in the regulation of flows throughout the wider Waikato Hydro Scheme.

Mr Reid, for the Crown, likewise argues in favour of assuming a highest and best use for the subject lands of farming, on the basis that the hydro generation scheme being developed in the 1940s was not intended to generate a profit, and as such, I was asked to provide a retrospective valuation of the land as at 1946. I would seek to value the land on its potential in 1946, which I am assuming would have been for farming use.

Again, this is contrary to the Tribunal's clear findings as to the unique hydro potential of the land. The fact that the Crown urgently committed so many resources to building such a large power station at Maraetai, and later built a second station of the same size at that site clearly demonstrates that the expected net social benefits of providing large amounts of generation, at low generation cost and at a time of rampant and growing demand for electricity accompanied by damaging rationing and blackouts, were considered to be unquestionably large.

So that all of these social circumstances that are driving the Crown towards making the decision.

The highest and best use of the subject lands was therefore for hydro generation, since such use generated large expected net social benefits. The Incorporation's predecessors should have enjoyed a fair share of those benefits, and the Tribunal has already found and effectively recommended as much.

The fact that profit was not anticipated as at 1947 should also in our submission be disregarded. By compulsorily acquiring the land the Crown put itself in a position to benefit from the resulting Maraetai Scheme and has in fact now derived significant benefit through the transfer of the Maraetai Scheme under the SOE Act and the subsequent partial privatisation of Mercury.

As summarised above, the maximum available compensation as assessed by Mr Reid is just over a billion dollars and, sorry, and by Dr Meade at a range of between $855 and $900 million

By comparison, Dr Meade has partially, although not comprehensively, assessed the losses as at September 2018 to be in the range of 850 to 1.450 – 850 million to 1.45 billion by applying materially conservative valuation assumptions and arriving at a conservatively-assessed loss range – and valuing only some but not all of the losses.

Despite being conservatively and only partially assessed, Dr Meade's lower bound assessment of the claimants' losses produces a range of figures that equal or are greater than the maximum available compensation.

So, even his lowest loss assessment of $850 million equals on one of his valuations, the maximum available. So, the value of the entire Maraetai Scheme, that's Maraetai 1 and 2 at $855 million. His highest estimate of course, is much higher than the value of the combined scheme, and this means in our submission that based on those numbers, the Tribunal is justified in awarding the claimants for the maximum available compensation. In other words, resuming the land.

The next section deals with the required economic base. Part of Dr Meade's evidence and before going through this, one of the important things to remember about the economic base evidence that Dr Meade in the context of Wairarapa Moana is that it was secondary to his assessments of actual loss based on the failure to take into account the unique hydro potential. So, he said, that's one way of doing it, by working out what was lost in terms of lost opportunity or in terms of the net social benefits that the Crown derived that weren't derived or that the owners of Wairarapa Moana were prevented from benefitting from.

So, that was the principle pathway that he took. He also did an assessment of the economic base ,if you like, is another way of having a look at this particular issue, although in his evidence, it wasn't the primary approach that he thought was appropriate in this instance.

So, he undertook a data base assessment. We got to paragraph 63.

"Dr Meade's assessed range for the required economic base rests on more than one estimation approach. Those approaches are necessarily exploratory rather than definitive, like the Tribunal's restorative approach, which was couched in tentative and exploratory terms. Dr Meade has not sought to defend that approach, but rather to explore what might be required to implement it, at an order of magnitude level, and as a cross-check on his loss estimates."

I mean that's the essence of it. He's done that first analysis. He said, "Well, let's look at it from an economic based point of view as a check. Are we wildly out of kilter, and so that's how that ought to be considered.

Again, a summarised in section, well 1.2 above in the submissions, the maximum available compensation as assessed by Mr Reid and Dr Meade are set out there.

By comparison, Dr Meade has assessed the claimants' required economic base as at September to be in the region of $500 million to $1 billion. So, even his lowest base assessment of $500 million is essentially the same as his estimated values of Maraetai 2.

Conversely, his highest economic base assessment is the equivalent of Mr Reid's valuation of the entire Maraetai Scheme. It is comfortably higher than both of Dr Meade's assessments of the value of the combined Maraetai Scheme using the two methodologies that Dr Meade used. And in our submission, if the Tribunal were to award the claimants less than all of Maraetai 1 and 2, then this would only mean, the claimants' required economic base exceeds the awarded compensation. This reinforces in our submission, that the Tribunal is justified in awarding, in other words, making a recommendation for resumption of the land, on the basis of the economic basis assessed by Dr Reid relative to the value of those assets.

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What I then deal with next Ma'am is some decisions out of Canada, and also the United Kingdom. How much do you want me to go through these, the details, yes?

JUDGE WAINWRIGHT:

I had in my mind in fact to ask you questions in this area, so I think you should make up the ground.

MAHUIKA MATANUKU:

Okay. So, during questioning by the Crown, it was put to Dr Coleman that the Waitangi Tribunal is breaking new ground in developing approaches for assessing past wrongs. Likewise, when questioning Dr Meade, Your Honour put to him that economic tools for quantifying losses for historical claims of indigenous peoples, are embryonic and debateable.

And I think it was accepted by – certainly, it was accepted by Dr Coleman and I don't know that Dr Meade would dispute this, that the idea of valuing past losses is a matter that has been the subject of some debate and the point of difference perhaps between the Crown and the claimants is that Dr Meade says you can use some of the tools that are used for economic analysis and apply them, and that gives you a solution of sorts. And there were some agreements by Dr Coleman at least as it applies to valuing land and other assets, although perhaps more problematic when it came to non-financial or non-based actions that had occurred.

So, there are two recent decisions of the Canadian Claims Tribunal in first nation compensation cases that we say suggest otherwise, and what we mean by that is that, it suggests that, that actually these things are being grappled with. Some of the tools that Dr Meade has applied, also appear to have applied in both cases. And so, I wouldn't go so far as to say that that's a definitive answer to the question, but what it does do is it gives an indication if you like to the Tribunal about how this has been grappled with in other situations, and perhaps some comfort that some concepts that Dr Meade was suggesting, ought to be applied in this case, have been applied elsewhere. So, it's not like he is – he's out there on his own arguing for these things, particularly around the issue of compensate – around compounding and how you might deal with it.

So, these decisions accepted conventional economic theory for the assessment of historical losses, notably those decisions involved the Tribunal accepting the compounding methodology, level of compounding rates, and compounding rationale comparable to that proposed by Dr Meade in his estimation of the Incorporation's losses.

So, specifically, in December 2016 the Canadian Claims Tribunal released two decisions in cases where it was required to "award compensation for losses in

relation to First Nation claims that it considers just, based on principles of compensation applied by the courts.

So, some differences but also some similarities actually to the type of exercise that this Tribunal has been asked to undertake, namely and I'm not going to attempt to say that first name. I'm not quite sure how would say it. I summarised that as the HFN decision for no other reason Ma'am than to avoid doing violence to the name every time I say it – relating to foregone timber revenues (ie. monetary losses) dating back to 1938 (so therefore a period of time not dissimilar to the period relating to the taking of the Pouākani.

And then secondly, the *Beardy's & Okemasis Band* decision, which I'll call the BOB decision and for the same reason as the first one, relating to wrongly unpaid annuities (ie. monetary losses) dating back to 1885 and 1888.

In summary, the Canadian Claims Tribunal:

- accepted in both decisions the claimants' economic experts' evidence that full historical monetary losses should be compounded exponentially at trust fund rates, which for the most part exceeded pre-tax Government bond rates, or exceptionally, were at pre-tax Government bond rates;

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- further accepted, that compounding foregone historical monetary amounts in this manner provides a conservative lower-bound estimate of the claimants' actual consumption-related losses;

rejected, in both decisions, the Canadian Crown's economic experts' contrary position that foregone past consumption should not be compensated at all, or alternatively compensated only with simple interest calculated by reference to CPI rates, which is substantively equivalent to Dr Coleman's preference for non-monetary losses declining with time. Although that comment is subject to

the further discussion that occurred with Dr Coleman regarding how you might apply the stewardship principal.

Because I think Dr Coleman ultimately accepted that a level of compounding is appropriate if there is a history of doing that. So, if there's a history of less than 100 percent consumption and putting funds aside for future growth, for generations to follow.

And finally, observed, that adopting the Canadian Crown's experts' approach for compensating consumption would be inequitable, as it would mean that poorer claimants would receive less compensation than better resourced claimants for like claims and would also afford claimants "less protection than the law of equity affords to non-Aboriginal, commercial plaintiffs".

It is notable that the economic expert for the claimants – as the (now-deceased) University of Toronto professor of economics, Professor Arthur Hosios, is how you say that name – appealed to the same economic principles as Dr Meade for estimating losses based on foregone consumption possibilities and arrived at a practically identical compounding approach. So, in a working paper setting out his approach, Professor Hosios showed that:

> "[E]quitable compensation for lost consumption opportunities must be greater than the amount that would have been earned had the expenditure on consumption been entirely saved…
>
> We cannot accurately measure equitable compensation but have determined that it must be at least as large as what would have been earned had the entire $100 [historical monetary sum due but not paid] been saved …"

So, in fact, if anything what the Professor is suggesting in that case is that foregone consumption is more valuable than if you put the money in the bank and earn interests on it.

It follows from this analysis by Professor Hosios in the Canadian cases that it is conceptually unnecessary to distinguish which part of any historical financial sum is consumed or reinvested when assessing losses of a party from having been denied that sum. It is also unnecessary to impose Dr Coleman's distinction between monetary and non-monetary losses, or between welfare and monetary losses. It is likewise unnecessary to impose Dr Yeabsley's distinction between financial harms and harms arising in "social" settings. Bearing in mind that those distinguishing are not as important really, in the Wairarapa moana case as they might be, say in Māhaki.

Assuming that all of any historical loss amount is reinvested is a conservative assumption, as the party making the reinvestment might have done better – in welfare terms – by consuming some of the available sum. This means their historical welfare losses would have been higher if consumption had been allowed for instead of assuming full reinvestment of monetary losses. So, this argument would apply had Dr Meade compounded historical monetary losses at market investment rates, that's not actually what he did anyway he applied than investment rates.

So, what Professor Hosios is suggesting is that you should have a higher rate, Dr Mead actually applies a lower rate, a Southern investment rate for this purpose when based on that argument about how you treat foregone consumption. There is an argument that that should have a greater value than your normal investment rates, because of the social benefits that come from that consumption.

Importantly, since assuming all of a financial loss was saved rather than consumed is a conservative assumption, this means that it is unnecessary to

precisely specify a claimant's counterfactual historical consumption and reinvestment rates. So, my analogy making such counterfactual assumption, conservative loss estimates are produced, and debate about those assumptions become superfluous. In other words, under either scenario you would be applying a compounding approach, there might be a debate about what that rate is and there is Professor Hosios's view that, actually foregone consumption is more valuable than investment, either way you have a compounding effect.

Dr Meade raised similar arguments to those of Professor Hosios. This was also discussed with approval by Dr Coleman [and it's our emphasis]

> "The position of Dr Meade and Mr Mellsop [for Ngāi Tūmapūhia a Rangi in Wai 429] is that if [a claimant] had received the money they will have adjusted their saving to ensure the time-discounted marginal utilities of their consumption at different stages of their life were equalised. A little of the money may have been spent immediately with the rest spent in dribs and drabs at subsequent dates; in general, the discounted value of their own spending at a future time should be assumed to be *at least as large* as if they had spent the money immediately.
>
> Dr Meade and Mr Mellsop are correct that this is the way economists impute the nonmonetary value of a pound that [a claimant] should have received in the past."

Importantly, this approach is appropriate for producing a lower-bound estimate of backward-looking losses for foregone consumption. It is not just appropriate for forward-looking valuations of consumption.

So, like Dr Coleman, Professor Hosios in the Canadian cases framed his argument in terms of "marginal rates of substitution", and further noted the economically orthodox nature of this approach (i.e. describing his approach as

a “standard economic model”, and a “workhorse in the profession”), and that the approach was conservative. And there’s quite a long quote there, do you want me to read that quote or?

JUDGE WAINWRIGHT:

(MICROPHONE SWITCHED OFF 14:07:19)

MATANUKU MAHUIKA:

Okay, in which case I will go through its Ma’am;

> As with foregone investments, the *welfare* gain that would likely have been derived from foregone consumption cannot be measured directly. However, minimum proxy values in dollars can be estimated by reference to existing evidence of the benefit that could have been derived from saving. …
>
> Professor Hosios explained that the true value of consumption to the HFN, had it received the foregone revenues and consumed portions of them, could in fact have been much higher. The value derived by reference to the available savings rate inevitably yields a “lower bound” value, because all that can be inferred from a decision to consume is that the welfare gain to be derived by deferring consumption to a later date, i.e. saving, was less than the gain to be achieved through immediate consumption …. In the starving man example, food could have immeasurably high, lifesaving value. However, Prof. Hosios asserted that the historically available savings interest rate is a measurable, conservative, proxy rate that can be used to estimate the true value of foregone consumption, because at all times this interest rate would have been an available alternative use of funds for the HFN ….
>
> Economists call the rate that reflects the subjective value of a choice to

consume to the spender the 'marginal rate of substitution' or 'MRS.' Professor Hosios defined the MRS as the 'rate of return from saving such that, for given levels of current and future consumption, the individual or group in question is just indifferent between saving and spending that dollar' …. In other words, the benefit from *saving* at that rate would exactly match the benefit from *consuming*, so either option would give equal benefit to the individual or group, albeit in different ways. In applying the MRS concept to *consumption* behaviour, Prof. Hosios again emphasized that he was employing a *standard economic model*, a '*workhorse' in the profession* …. Professor Hosios explained that in the HFN's spending history, the true MRS for each year is unknowable. However, in each year where the record showed that *consumption* occurred, he could infer that the HFN's, so in other words the marginal rate of substitution of that community for that year was greater, than the available savings option, otherwise they would have saved.

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In Professor Hosios' opinion, the annual interest rates for savings were thus *conservative, lower-bound proxies* for that community's true marginal rate of substitution."

So I will end reading through the quote there.

So, "It is notable that Professor Hosios used the same language as Dr Meade to characterise his approach – particularly his description of his compounding rates as being "conservative", and "lower-bound" rates of return. It is also notable that Professor Hosios relied on the conservatism of his calculations to "cushion" his approach against theoretical critiques." And the judge in that case that made the comment:

> "I take comfort in Professor Hosios' repeated assurance that his 'lower-bound' calculations will help avoid excess and may in a practical manner **cushion some of the theoretical critiques raised by the other side**."

This mirrors the approach taken by Dr Meade. As Dr Meade noted in answer to questioning from the Tribunal at the special joint sitting of the Mangatū and Wairarapa Moana Tribunals:

> So summarising the Mahuika olive grove plus argument, as a matter of mathematical convenience I exponentially compounded historical loss amounts at sub-investment rates. **I deliberately consciously, as a design choice, chose to use sub-investment rates in a conventional framework because this was my way of skinning the cat whichever way**. Whether you think hyperbolics' better, whether you think Chichilnisky's better doesn't really matter. **Using low rates in an exponential framework gets you into the same sort of territory** and all I was trying to do is get orders of magnitude numbers. I wasn't trying to split the atom and say, 'The number's X, write a cheque for X' I didn't need to. **I just needed to show that if the numbers conservatively estimated were at least as great as the available compensation then the Tribunal can take that as comfort that awarding the maximum available compensation is justified**."

So to summarise, "In more than one compensation decision involving historical First Nation claims, the Canadian Claims Tribunal has adopted the same…", or at least a similar approach to Dr Meade, "…when compounding historical losses to present values. More than that, the compounding approach, types of compounding rates and conceptual foundations shared by the approach of Dr Meade and Hosios approaches were all explicitly accepted and adopted by the Canadian Claims Tribunal.

So this should give the Tribunal comfort that the compounding approach taken by Dr Meade is neither unconventional or exceptional and has been applied in similar circumstances in the Canadian context."

So this next section, Ma'am, is dealing with, very briefly, the idea that estimating losses as foregone share of expected future benefits also has precedent. And the reason going through this is to show that while this is new for the Tribunal, actually the different approaches are not in and of themselves. It's not alchemy or something like that. These are things where actually it has been applied previously. So this is not Dr Meade just making stuff up, this is actually an approach that he's endorsing that has been taken in other places in actually very similar types of circumstances.

So paragraph 82. "Dr Meade estimated the losses from having historically been denied compensation for the unique qualities and hydro potential of the Subject Lands as the fair share that the Claimants were denied, of the net social benefits – expected from the Maraetai Scheme as at 1947 – adjusted to 2018 value. In contrast, Dr Yeabsley for the Crown, and Dr Coleman…", I think ultimately to a lesser extent, "…have each advocated the use of hindsight when assessing losses – taking into account what actually happened, as opposed to what was expected to happen as at 1947." So this is this "ex ante", "ex post" point again.

"As noted above, when questioning the Crown's economic expert, Your Honour confirmed that the Tribunal was seeking an "ex ante" or forward-looking approach." I've already referred to that passage, and that approach is ultimately supported by, we say multiple precedents:

1. "It is in accord with the "negotiating damages" approach taken in the UK courts." And this was referred to I think by Dr Meade.

2. It was adopted by the New Zealand courts in the Wai-O-Tapu decision," and of course

3. it is the approach which is taken in the Canadian situation.

"In relation to the latter, the Canadian Claims Tribunal adopted an approach and adopted language similar to that has been used by Dr Meade where it said:

> In order to determine what likely would have happened in 1947, when Canada was carrying out the transaction to purchase land to replace Montney, it is necessary to examine what would have been in the minds of the Parties at the time the decision would have been made. The Claimants submitted that had Canada informed itself fully and properly consulted the Band, that process would have occurred by November 26, 1947 at the latest, when Canada accepted the Province's offer to sell the Replacement Reserves. I agree. The decision about what to do would have been made in response to the circumstances known to the Parties at the time the decision had to be made. [I]n attempting to restore the Claimants to the place they would have been in absent the breaches, we must put ourselves in the shoes of the Parties on November 26, 1947 at the latest. Canada's perspective would have consisted of the information it had or ought to have had of all of the circumstances at the time. The Band's perspective and likely reaction would also have been based on its knowledge and understanding of the circumstances then."

So in our submission, the Tribunal would be squarely following earlier precedent if it took approach that was consistent with the approach that Dr Meade has argued for.

So in this next section, Ma'am, we deal with the question of estimating losses based on compounded historical values and the idea that it's generally supported. And there was quite a bit of discussion about this, and ultimately,

it's our submission that, and it comes down to the point of which economist's view do you favour.

Dr Meade advocated for an approach that involved compounding of what he assessed to be the loss as at the time that Maraetai was taken, and there was some discussion about compounding and what would be the appropriate approach to take.

So you will recall Dr Coleman earlier in his or in presenting his evidence was initially of the view that the notion of stewardship assumed 100% consumption and therefore no compounding, but we ended up in the point where he accepted that if there is an ethic of stewardship, there is an ethic of investing for future generations, then actually it was fair enough to do some compounding, but it might be at a rate which is less than the full investment rate. So my recollection of the exchange is that it was put to him that, okay, say your return is 7% and if you assume 50% consumption, then that means that 3.5% of that is consumed every year.

Now putting to one side the discussion about, you know, that comes out of the Canadian cases around what happens if you differ consumption or you lose the opportunity to consume, that means that you would still have a compounding at 3.5%. So you still get that compounding effect, but you just get it at a lesser rate, depending on the assumption that you make about the rate of consumption.

So basic point is, if you don't have 100% consumption and you put some aside, then that is going to compound because the fund, if you like, will grow, and there was a lot of discussion in evidence in relation to that, particularly with Dr Coleman. Understandably because he was the Tribunal commissioned expert and I suppose was the person who was being used to test the approach of the other economists to see how reasonable or otherwise their evidence was.

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So, “Dr Meade estimated losses based on historical monetary values compounded exponentially at sub-investment compounding rates. Importantly, the sub-investment rates applied by Dr Meade are materially lower than available investment rates. As well as being consistent with Canadian precedent,” which we have referred to, it is our submission that Dr Meade’s approach was ultimately supported by Dr Coleman, and also there is some support for that in our submission from Dr Yeabsley.

So dealing with Dr Coleman’s position, “Dr Coleman’s principal concern with compounding was the effect that it would have over long periods. However, he agreed that compounding over periods of up to 150 years is “plausible”, and generates numbers that are not,” to use Dr Coleman’s words, “patently stupid”.

“Ultimately his concern was to ensure that compensation amounts generated from compounding did not produce perverse results. Therefore, the more distant the events for which compounding occurs, the greater the impact of compounding and the more a judgement needed to be made as to the impact. In the case of Wairarapa Moana Dr Coleman acknowledged that compounding was recent enough that compounding would not be problematic.

Dr Coleman also agreed that it is valid, by analogy, to apply concepts for adjusting future values to current values, when adjusting past monetary values to current
values. In doing so he noted that exponential compounding at some positive rate of interest is how the courts apply compounding when compensating a claimant for having been kept out of their money for a long period of time, Dr Coleman also agreed that compound interest is more normal then, and to be preferred over, simple interest.” And I have the reference there to his evidence.

"Dr Coleman further agreed that the sub-investment compounding rates applied by Dr Meade are lower than investment rates of return. In his written evidence he supported the use of such higher investment rates of return when the claimant who suffered the original loss is still alive, and also for indefinitely-lived legal corporations such as Mangatū or Wairarapa Moana Incorporation. Under cross-examination, Dr Coleman also agreed that recent living memory monetary losses of incorporations are particularly appropriate for compounding at investment rates." This is a question asked in the context of Mangatū and the question was:

> "Q. Well, would you agree that **because Mangatū Incorporation is a corporation and because they're living memory losses, relatively recent – we're only talking 1962 – that it's appropriate to taking a monetary approach** to assessing the losses and use compounding interest to do so?
>
> A. **That would be one of the most appropriate places to do that, yes.**

The Incorporation's 1947 losses fall into the same category," in our submission, as the losses relating to Mangatū from 1962, "…being losses of an incorporation that has members who were alive at the time of the relevant breaches, and therefore personally suffered due to those losses.

More generally, under cross-examination by Crown Counsel, Dr Coleman clarified that compounding historical monetary losses at investment rates of return is appropriate in circumstances where the claimant would have made a deliberate attempt to invest any historical monies received," and this is Dr Coleman's comment:

> "[I]f there is a deliberate attempt to invest monies, then investment approaches [i.e. exponential compounding at investment rates of return] should be used.

Although, the issue was not squarely before them, Dr Coleman's test for whether historical losses should be adjusted to current values using exponential compounding is coincident with the test that comes out of the High Court Australia in the recent *Griffiths* decision regarding historical Aboriginal claims.

Indeed, under cross-examination by Crown Counsel, Dr Coleman agreed that if a claimant would have deliberately invested any monies it had, exponentially compounding historical monetary losses at the rates would result in Dr Meade's loss estimates not just being appropriate, but also conservative." And again, Dr Coleman said:

> "[I]f there was a trust fund set up that – and we were confident that the money would have been put into there and it would [exponentially] compound over time, then I would consider that Dr Meade is correct in saying that. I wouldn't say extremely conservative, but I would say conservative…"

So in other words, he's agreeing that if there is that stewardship ethic which involves putting funds aside for future generations, trying to grow your spending power and your ability to influence the position of your people, if that ethic is there, then it is appropriate to apply a compounding approach. He doesn't agree that Dr Meade was extremely conservative but does agree that it would produce a conservative outcome.

JUDGE WAINWRIGHT:

Looking at the *Griffiths* case that you talk about below, the premise appears to be based on whether there's evidence that upon earlier payment of the

compensation, the claimant would have put the compensation to work at a profit. What do we know about that here?

MATANUKU MAHUIKA:

Yes. Well that was one of the matters that was discussed with Dr Coleman, and I think the examples that we can look at is really what is the approach, for example, that the owners of the Incorporation take now that they have the means in order to do that, and because that's the best evidence we have about the way that they approach things or the attitude that they have. And what is evidence from the way that the Incorporation has been acting is that first of all it's been trying to arrest some of the complicated situations that it has, but now it's focussing on trying to grow the asset that it has. So, it doesn't consume 100%. It puts money aside. It grows, and it's consistent actually if you, at the risk of giving evidence here, but if you look at the investment approach, even a number of the iwi take, and I'm sure that the settlement trust would take that approach in a post-settlement situation as well. So, there is a need to consume because there is an existing need that those communities have, but there's also an acknowledgement that there needs to be growth over time to increase spending power. So there isn't 100% consumption. In fact, if you look at the cite those are some of these iwi, actually it's saying that they're being a return on their investments in real terms which is greater than the rate of inflation, so therefore you are getting growth over time of that investment portfolio and therefore its real spending power.

So I think Ma'am, in answer to your question, it's hard to know because they didn't have any money until 2000, but what you can see since then is that there is a conscious effort to grow to increase spending power to invest, not consume 100%, and that's your best indication as to what the ethic is that drives the Incorporation, and I think drives most Māori organisations: retention of land, retention of assets, protection of culture and growth over time.

JUDGE WAINWRIGHT:

So if we look at the earlier period that Mr Hemi was talking about yesterday with Manihera, where we saw high levels of consumption from returns, should we have regard to that?

MATANUKU MAHUIKA:

I think its high levels of consumption relative to what they were earning, and they weren't earning very much. So, what's important from Dr Coleman's point of view is what is the ethic, what does the stewardship ethic mean, and ultimately, he conceded, and it's reflected in the *Griffiths* decision as well that if there is an ethic about investing and growing over time, then that's something which should inform you when you are looking at how you would apply compounding in these situations. Bearing in mind this is one aspect of it because of course the other aspect is all of the discussion around foregone consumption and what that means, and the value of consumption. That also has a value attaching to it, and of course one of the consequences of being denied the opportunity to benefit from the unique hydro potential of the land is that you're denied the opportunity to benefit from that consumption.

1430

So if you look at the Professor Hosios approach to this, that also suggests that you should have a compounding, or you should take a compounding approach to assessing the damage that's occurred, and arguably higher than an investment rate of return because the consumption would occur in circumstances where it wasn't better to say.

CONTINUES #J100(A) FROM PARA 97

So I think I've covered paragraphs 95 and 96, so I go to paragraph 97.

"Dr Coleman emphasised in both his written and oral evidence that he strongly disagreed that historical non-monetary losses (including foregone consumption) should be exponentially compounded at any positive real rate of return. However, under cross-examination he agreed that the following two

approaches can result in an historical loss producing the same current accumulated financial value:

1. exponentially compounding just the reinvested portion of an historical financial amount at investment rates of return; and
2. exponentially compounding all of an historical financial amount at a sub-investment rates of return."

And this is the piece of cross-examination I referred Your Honour to.

"Specifically, Dr Coleman agreed that investing a financial sum at a 7% p.a. investment return, but consuming half of the resulting return and hence reinvesting just the other half of that return, is equivalent to growing that financial sum at half the 7% p.a. rate compounding." So Dr Coleman said:

> "[If an historical claimant would have said 'we] want to put the money in a trust fund and the trust fund will earn interest and we will spend half that interest to be passed out to current people every year and half of it will be compounded going forward', yes, under those circumstances, if you came up with that rule you would say, 'The value of the fund in X number of years' time should be this much'. And it would be the interest rate halved and then compounded out because that's actually what the institutional structure is that you would have set up. And that seems – you know, that seems quite plausible … [a]nd legitimate.

This was supported by the reply evidence of Dr Meade who presented calculations showing that compounding historical losses at sub-investment compounding rates could provide the same outcomes."

If I go to paragraph 100. "As Judge Milroy observed, if the consumed part of any investment return was in fact less than the certain proportion referred to above, then Dr Meade's approach would produce an even *higher* current "trust

fund" value than compounding only reinvested amounts at full investment rates. Hence Dr Coleman's alternative approach to Dr Meade's may not result in lower loss estimates than those produced by Dr Meade, given the Incorporation's actual reinvestment rate has historically been high, and in the counterfactual (i.e. absent the Crown's breaches) would in all probability have been even higher still." So in other words, they would have had greater resources to invest and they would have invested those arguably at a higher rate of return, certainly that 3.5%.

"Dr Coleman also argued that when estimating the current value of historical losses, in addition to any "trust fund" calculated under either of the two approaches set out in paragraphs 98.1 and 98.2 above, an amount should be added for the welfare loss associated with the claimant's foregone consumption," so that's the comment there about it's not just the compounding, actually, so if you don't just lose the compounding effect of reinvestment but actually you also lose the consumption opportunity and that also has a value attaching to it.

"Dr Coleman expressed the view that when translating historical non-monetary losses – such as welfare losses from foregone consumption – into current loss values:

1. The appropriate metric to apply is time preference, not market interest rates, although he volunteered that, in practice, market interest rates are often used to estimate rates of time preference, rendering this conceptual distinction somewhat moot;

2. In any case, as a matter of personal preference, he would not apply exponential compounding when translating historical welfare losses into current values. Instead, he would make no time adjustment at all, or even discount values the more distantly they occurred, whether in the

future or in the past. This would be equivalent to using a 0% p.a. real rate in an exponential compounding."

I think there are two things, however, first of all, Dr Coleman didn't present any evidence to support his approach. Secondly, in my submission, this is one of those areas where he is thinking about things like the Māhaki situation with the historical harms associated with imprisonment, torture and those sorts of events as opposed to thinking about the likes of lost opportunities from land or from the ownership of land.

"Indeed, when being questioned by Your Honour, Dr Coleman accepted that no one has tested his hypothesis that "some people at least will have declining valuation on events that happen more and more distantly in the past." He also accepted that no country applies a 0% rate of return for time-adjusting future values." So in other words, he – I don't know that he contradicted, but he noted some limitations with that second limb of applying a 0% return.

"Irrespective of whether or not Dr Meade and Dr Coleman agreed on how to translate historical welfare losses into current values the current value of such losses will still be a significant positive amount. Under Dr Coleman's approach this positive amount should be added to the value of any "trust fund".

Dr Meade estimated the current value of the Incorporation's losses by compounding historical losses at sub-investment rates, but he did not add any additional amount, and only estimated the current "trust fund" value. This means that Dr Meade's loss estimates produced using this method, aside from any conservatism in his other assumptions, are likely to have been under-estimated." So what that means is that Dr Coleman was saying that you ought to apply not just the compounding effect to the trust fund, but you should also take into account the loss consumption. Dr Meade's formula doesn't take into account that second element. It simply applies the trust fund approach as opposed to looking at other factors.

"As shown in Section 1.5.3, Dr Meade's assessed losses for the Incorporation based on compounding historical losses at sub-investment compounding rates are equal to or in excess of the value of the Subject Land. The conditions under which Dr Coleman would accept that Dr Meade's estimates using this approach are conservative," and in our submission have been satisfied. "Since Dr Meade's assessed losses are based on conservative loss estimates, yet still equal or comfortably exceed the maximum available compensation, in our submission, the Tribunal is justified in ordering the resumption of the land."

Deal then briefly with Dr Yeabsley's what we say is support for Dr Meade's approach.

"Dr Yeabsley for the Crown, like Dr Coleman, has objected to the notion that an historical loss would be compounded untouched for an extended period of time." And bearing in mind that actually Dr Coleman's is a qualified objection because ultimately, he accepts that there are circumstances where that's quite a plausible approach to take.

"While not directly endorsing the conceptual basis for Dr Meade's approach," in our submission, "Dr Yeabsley advocates an approach, that in practice could produce comparable results. Dr Yeabsley agreed that compensating only current land value would not fully compensate a claimant's loss, since an additional sum is required to recognise that the claimant has not enjoyed use of the land for some time." So this is the temporal compensation factor that's part of Dr Yeabsley's three-part approach.

"Dr Yeabsley further agreed that this could involve applying an interest rate over a long period of time, and he said:

> Now, conceptually different to a changing, but in the end, it could add up to being the same thing. You can think of it as some kind of low interest rate applied over a long period of time.

Dr Yeabsley also agreed that the particular route taken to reach this conclusion might not be as important as the fact that the different approaches reached the same answer:

> [A]n output overlap doesn't say anything about the underlying philosophy logic and reasoning and is, to be frank, in practical terms it might be all that matters."

1440

So in other words, he's saying that philosophically he had a different view, but it could arguably take you to the same place, and that will depend on how you value the loss and what you applied as your temporal compensation amount under Dr Yeabsley's approach. He doesn't, in our submissions, take a very generous approach when applying his formula, but his formula arguably, if it's applied in a more generous or less niggly fashion, could take you to a similar sort of place. And of course, Dr Yeabsley's approach in our submission suffers from, amongst other things, the fact that he discounts to zero the hydro potential of the land and therefore ignores that aspect of the Tribunal's findings, and of course we can't know because he didn't apply what he would've come up with had he accepted the finding and simply applied his approach to us.

"This is exemplified by the fact that Dr Yeabsley's assessment of required compensation is mathematically equivalent to applying an average annual exponential compounding rate of 6.44% to WMI's 1947 losses." So in other words, he does apply an interest rate, it's just not a very generous starting point that he applies that rate to. "That rate is materially higher than Dr Meade's average compounding rate." So even though Dr Yeabsley claims he is not

applying exponential compounding at any interest rate, he in fact does in terms of his calculation, although his ultimate end point is affected by his starting and his view of what that starting point should be.

Interestingly and also for the sake of completeness, the other economists that appeared and gave evidence in respect of these matters largely agree with the evidence of Dr Meade, and this is important because this is about saying, okay, is this alchemy? We say it's not. We say Dr Meade is applying conventional economic principles and there is support for that in respect of Dr Coleman, there are some differences.

There is a kernel of support from Dr Yeabsley, but there is also support from the other economists that have appeared and given evidence in relation to these matters. Those this is not a matter of Dr Meade being out there all by himself on a limb. In fact, if you look at where the economist gravitated, actually it's more Dr Yeabsley that is on the limb than Dr Mead, although perhaps part of the reason for that is Dr Yeabsley's view about the hydro potential and his view that nothing should be done to take that into account.

Ma'am, what I propose to do, I am just conscious of the time, is I will go through paragraphs 113 to 118. I won't deal in detail with Dr Meade's economic base estimates, I think we've discussed those, and then I will go from there and deal with the conclusion very quickly. I don't propose to go through the second appendix, that's really the valuation material that we've already discussed, that will round that off and then I will be in a position to finish the balance of the submission.

So returning to paragraph 113. "Based on an assessment of all of the evidence it is clear that Dr Meade's loss estimates are conservative, and therefore understated, for the following reasons:

1. he assessed the losses due to not having been compensated for the unique qualities and hydro potential of the Subject Lands, but not for 'betterment' effected by the hydro works;
2. he assessed the losses due to having received no share of the net social benefits expected of Maraetai 1, but has not valued any of the net social benefits associated with Maraetai 2 (which was conceived of, and constructed, years after Maraetai 1);
3. his assessment of the net social benefits from Maraetai 1 have not accounted for any incidental benefits that generator created for other power stations along the Waikato Scheme, or for the North Island electricity system more generally;",

So that's part of the unique character of Maraetai, is that it was one of the things that helped to facilitate the establishment of the Waikato Scheme.

4. "…he allowed for the possibility that cheaper alternatives to an oil-fired replacement for Maraetai might have been possible, despite those alternatives not being considered viable in 1947; and
5. he estimated the expected net social benefits from the Maraetai Scheme in net present value terms by discounting expected future net social benefits at a positive discount rate to 1947, when it was not official practice to do so.

Additionally, as noted in Section 1.5.1, Dr Meade has assessed only the economic losses in relation to Maraetai, not the social and cultural losses.

Dr Meade presented evidence to the Tribunal that the last area of conservatism that I've just noted – using the present value, as at 1947, of expected net social benefits, instead of the sum of all such expected benefits – means his loss estimates are roughly one third of what they might otherwise have been. In other words, had he adopted the practice of the day instead of applying modern discounting techniques, his estimates could have been much higher.

For this reason alone, whatever criticism Dr Yeabsley or Dr Coleman level at Dr Meade's loss estimates, if those criticisms do not reduce his assessed losses by more than two thirds, then Dr Meade's assessed losses remain robust.

As discussed in Section 1.7.2, Dr Coleman and Dr Yeabsley both advocated the use of hindsight in assessing losses, even though the Tribunal confirmed that its recommendations required a forward-looking ex ante approach. However, even if such hindsight was applied, Dr Meade's loss estimates remain robust, in our submission, due to:

1. not having included any allowance for the net social benefits of Maraetai 2;
2. having already allowed for significant probabilities of geothermal and coal-fired generation technologies.

More generally, as already discussed in Section 1.7.3, Dr Coleman's disagreement with Dr Meade's historical compounding approach is somewhat moot. This is because Dr Coleman's "trust fund" approach can in fact support comparable or even higher loss estimates than Dr Meade's. In our submission, Dr Yeabsley's criticism of Dr Meade's compounding approach is also moot, since his own approach for estimating losses implies an average annual exponential compounding rate comparable to that of Dr Meade." He just starts at a different point.

So if I now go to paragraph 130, and this is the graph that compares Dr Meade's assessed losses and economic base against he and Mr Reid's estimates of the value of Maraetai 1 and Maraetai 2 (which values, together, constitute the maximum available compensation.) I'm trying to find the colour version of that. You may have to bear with me a little bit Ma'am, I'm colour blind, so if there's a bit of a problem here, it would be because of that.

But so what you have in the blue is you have the values of Maraetai 2, and the reason that comes first is because that's the part that is clearly on Pouākani No.2 Block. Then you have the orange which is Maraetai 1, and those two together give you the combined values using the different approaches.

So the first column is Mr Reid's valuation, so that's the 600 and 440. The second is Dr Meade's reassessment of Mr Reid's valuation applying those matters that I referred to earlier, and the third is a valuation that Dr Meade did using discounted cashflows. So what they do is they give you a range of values. 1450

Then you have, in those two boxes with that other colour, the lighter colour, with the green, yes, you have the ranges that Dr Meade comes up with using his different approaches. So in the first of those is his assessment of the losses that are suffered, so this is not his economic base that this is what he thinks, applying his compounding methodology, should have been received by the owners of Pouākani No.2 had they been given the opportunity to participate. So he comes up with that range of just over 800 million to 1.45 billion. Then if you take the economic base approach, what you do is you get that range from 500 million to $1 billion.

And in our submission, what is clear from the table is as follows:

1. That the bottom end of Dr Meade's loss assessment and the top end of his economic base would arguably justify the return of all of Maraetai 1 and Maraetai 2; and
2. even based on Mr Reid's high evaluations, they will justify the Tribunal awarding all of Maraetai 2 and at least half of Maraetai 1;
3. even at the bottom end of Dr Meade's economic base assessment (so the area of $500m), in our submission this would justify awarding all of Maraetai 2 (if you based it on Dr Meade's Maraetai 2 valuations);

4. it also justifies awarding almost 85% of Maraetai 2 (if you assumed Mr Reid's valuation);
5. conversely, the top end of Dr Meade's loss assessment would clearly encompass the value of Maraetai 1 and Maraetai 2.

And what we say there is, "While Dr Coleman's written evidence for the Tribunal suggested otherwise, in his oral testimony Dr Coleman admitted that his critique of Dr Meade's evidence overstated the differences between the two experts. Under cross-examination by counsel for the Claimants, it was put to Dr Coleman that he did not think that Dr Meade's approach was wrong, but rather that he preferred certain alternatives (mainly in relation to nonmonetary losses, which are of less consequence to the Incorporation than to some of the other claimants who were also participating in that hearing). In reply, Dr Coleman stressed that where he and Dr Meade agreed, possibly those were the most important cases," and this is an answer to that question:

> "I potentially wasn't as clear as I could have been here. It would be – I do believe that in some of their uses, [Dr Meade's and Mr Mellsop's methodologies are] wrong; that **in other of their uses and potentially more important cases, that they are right** …

When questioned by Crown Counsel, Dr Coleman concluded similarly:

> [M]y criticisms are on particular options in the menu rather than all the options in the menu, so I want to make it quite clear that by ruling out one, which I think is – a better word – unsound, **does not mean that there are others which I think are fully sound and which actually may be the determining ones.** Not only because they're the right arguments against a menu of things which may be not quite right, and which may be right, but also because there are legal considerations about which I do have no expertise, which say this is actually how we're going to do it.

In summary, it's our submission that the Tribunal therefore ought to recommend the return of the Lands to the Claimants on the basis that, as we've said:

1. this is what was intended by the statutory scheme;
2. that Dr Meade's exponential compounding of historical losses at sub-investment rates is reasonable, and produces conservative, lower-bound loss estimates (something that in our submission was accepted by Dr Coleman, you could argue was also endorsed by Dr Yeabsley, and has been adopted in recent Canadian decisions that we discussed). Those losses comfortably exceed the current value of the Subject Lands;
3. Dr Meade's estimates of the Incorporation's required economic base are robust and conservative and are as great as the current value of the Subject Lands."

Bear in mind also that they're used as a type of control against the other approach that Dr Meade takes because we are dealing with land so a tangible asset that you can attribute a value to.

"Finally, it should be observed that Dr Meade's loss and economic base assessments, and estimates of Maraetai Scheme current value, were made as at September/October 2018." So just as a matter of completeness, with the passage of time, you know, it may be that it's necessary to look at those again.

So Ma'am, I don't propose to go through the balance of the appendix, I was – it is five to three, I was going to go back and just finish off the balance of the submission.

JUDGE WAINWRIGHT:

I'm assuming that you are not proposing to do that in five minutes, or are you?

MATANUKU MAHUIKA:

No.

JUDGE WAINWRIGHT:

No.

MATANUKU MAHUIKA:

I would like to, but no, sorry.

JUDGE WAINWRIGHT:

So what page do we go back to now?

MATANUKU MAHUIKA:

Ma'am, I was going to go back to, yes, I think I originally said 89, but I think I've covered that.

JUDGE WAINWRIGHT:

I think that that – as far as I can ascertain, that material from 89 goes to that question of proportionality, doesn't it?

MATANUKU MAHUIKA:

Yes, it does.

JUDGE WAINWRIGHT:

The "should" question.

MATANUKU MAHUIKA:

Yes.

JUDGE WAINWRIGHT:

And I think it is important that you address that.

MATANUKU MAHUIKA:

Okay, yes.

JUDGE WAINWRIGHT:

We have only got three minutes. I think perhaps we will leave it at that point and come back to paragraph 89 at half past three.

MATANUKU MAHUIKA:

Thank you, Ma'am.

JUDGE WAINWRIGHT:

Kia ora.

HEARING ADJOURNS: 2.57 PM

HEARING RESUMES: 3.30 PM

MATANUKU MAHUIKA:

Tēnā anō koutou. So, we are on to paragraph 89 of the submissions and dealing with the question of what is required to remove the prejudice.

CONTINUES CLOSING SUBMISSIONS #J100 FROM PAGE 29, PARA 89

"The Tribunal has previously dealt with the provisions of section 8A of the Treaty of Waitangi Act as part of its *Tūrangi Township Remedies Report.* In assessing whether the land should be returned in that case, the Tribunal accepted that the Tribunal's jurisdiction to make binding recommendations sits within its general jurisdiction to make a recommendation upon having determined a well-founded."

JUDGE WAINWRIGHT:

Mr Mahuika, did I hear correctly that you called a Treaty of Waitangi Act?

MATANUKU MAHUIKA:

I really am not certain, Ma'am. I've been standing here for some time, Ma'am, I'm not sure that I remember what I've said in the last 20 minutes.

JUDGE WAINWRIGHT:

I am going to draw veil over that.

MATANUKU MAHUIKA:

I may have done, couldn't say. I'd have to watch the take which is what I think football managers say when people do things wrong. Didn't see, I'd have to look at a replay. So, yes, - where was I?

JUDGE WAINWRIGHT:

The Tribunal also found…

MATANUKU MAHUIKA:

Yes.

CONTINUES CLOSING SUBMISSIONS #J100 FROM PAGE 29, PARA 89

"The Tribunal also found that the restorative approach to remedies was appropriate adopting the approach to remedies outlined in the *Muriwhenua Land Report.*

On the basis of this approach, the Tribunal considered a broad number of factors to be relevant in determining whether the land in that case should be returned. And these factors are listed at paragraph 90. So, they include:

(a) the seriousness of the case. in other words, the extent of the property loss and the extent of consideration given, in that case, to hapū interest;
(b) the impact of that loss, having regard to the numbers affected and the lands remaining;
(c) the socio-economic consequences;
(d) the lands necessary to provide a reasonable economic base for the hapū and to secure livelihoods for the affected people; and
(e) the impact of reparation on the rest of the community (so that local and national economic constraints were also relevant in that case).

As is already been discussed, the Courts have accepted that the resumptive regime fits within the Tribunal's general recommendatory jurisdiction under section 3 of the Treaty of Waitangi Act. However, in this regard the Courts have noted that:

> 'The scheme therefore is that, following a finding that a claim is well-founded, section 8HB(1)(a) – which was a relevant provision of that instance - is the controlling provision. The Tribunal must consider whether its return 'should' be recommended as part of a recommendation under section 6(3) to compensate for or remove the prejudice caused [by the act found to be in Treaty breach].'

This contemplates a more limited inquiry than that considered in the *Tūrangi Township Remedies Report* because it removes the Tribunal's discretion to have further regard to all the circumstances of the case. The Court of Appeal made this point in *Haronga*, saying:

> 'Within this context, we are satisfied that where the claim is Crown Forest land the reference in section 6(3) to the Tribunal's power to recommend 'if the Tribunal thinks fit having regard to all the circumstances of the case' applies only to the threshold inquiry contemplated by that provision into whether the Crown should act to compensate for or remove the prejudice. The phrase 'all the circumstances of the case' does not extend the statutory discretion to the next stage of the inquiry into the appropriate remedy. Section 8HB(1) then becomes the controlling provision.'"

So, for example, all of the circumstances – what I interpret that to mean is that the ability to exercise a broader discretion applies to that initial inquiry as to whether there had been a breach but once we're into the remedies stage of the inquiry, then the controlling provision becomes – in that case, it was section 8HB, in this case it is section 8A2(a)(ii). Hence my reservations earlier

about how far the Tribunal might be able to go in making other recommendations. Excuse me for a second.

"Accordingly, once the Tribunal has made that threshold decision of whether the Crown should act to compensate or remove the prejudice, the choices available to the Tribunal as to what action should be taken become very limited – it must determine whether the land is to be returned or not (and, therefore, cleared of liability).

Logically, the return of the Subject Lands to the Claimants removes the Prejudice or removes it as much as the Tribunal is able to remove it if the value of the prejudice exceeds the value of the land.

And As the evidence of Dr Meade demonstrates, the return of the Subject Lands to the Claimants is not disproportionate to the significant prejudice suffered by the Claimants as a result of the Crown breach. If anything, there are good arguments that the prejudice suffered by the Claimants exceeds the value of the Lands.

So, that then takes us to the question about the - "

JUDGE WAINWRIGHT:

Just to consider your submission in 93 in relation to that quotation, Mr Mahuika – So, you are saying that having regard to all the circumstances of the case is relevant to the determination as to whether the Tribunal should get the Crown to act to compensate or remove the prejudice?

MATANUKU MAHUIKA:

I think that is what the Court of Appeal is saying on *Haronga*, yes.

JUDGE WAINWRIGHT:

So, that feeds into that 'should' question.

MATANUKU MAHUIKA:

Yes, I think so, Ma'am.

JUDGE WAINWRIGHT:

So, when the Tribunal is deciding whether it should make binding recommendations to return all or part of the land, it should have regard to all the circumstances of the case.

MATANUKU MAHUIKA:

Well, it's actually not that clear from the quote.

JUDGE WAINWRIGHT:

No, that is why I was asking you for your opinion.

MATANUKU MAHUIKA:

Yes. I mean, my opinion would be that the – all circumstances of the case supplies to that threshold requirement about whether there has been a well-founded claim against the Crown. Once you get to the point of exercising the resumption jurisdiction, which is what is being asked, and that's where the 'should' question arises the operative provision becomes –

JUDGE WAINWRIGHT:

Say that again?

MATANUKU MAHUIKA:

So, once the resumption jurisdiction is activated, or once an application for resumption is made, the controlling provision becomes, in that case, it was section 8HB, in this case it is section 8A2. So, that becomes the controlling provision in terms of what the Tribunal may or may not do. And of course, the wording of section 8A2(a) is very specific in directing the Tribunal to return the land if the Tribunal determines that its required in order to compensate the claimants for the prejudice suffered or to remove that prejudice. So, that in my submission becomes the focus of the inquiry.

1540

JUDGE WAINWRIGHT:

Well, I would have to say, having now read that several times, I think it is really unclear what it is saying because if it is talking about the Threshold Inquiry being the inquiry that the Tribunal conducted in order to determine whether or not the claim was well-founded that reads really oddly to me because, why would you talk about that – if what it is saying, which I think is what you are saying is once you have got a well-founded claim all the Tribunal needs to do is determine whether it should return all of the land or part of it.

MATANUKU MAHUIKA:

Or any of it.

JUDGE WAINWRIGHT:

Mhm.

MATANUKU MAHUIKA:

And the reason I say it and I – look, I agree with you, Ma'am, first of all, that it is not as clear as it might be.

JUDGE WAINWRIGHT:

No.

MATANUKU MAHUIKA:

And it could be because actually that question doesn't specifically arise in *Haronga*.

JUDGE WAINWRIGHT:

Well, it is just hard to imagine that if that is what the Court was trying to say, that it did not just say that, I mean, does the use of the words "Threshold Inquiry" is what causes me difficulty. Whether they are talking about the Threshold Inquiry as to the exercise of the binding recommendation

jurisdiction, or whether they are talking about the Threshold Inquiry being the inquiry that gave rise to the well-founded determination in relation to the claim, I just think that that is –

1540

MATANUKU MAHUIKA:

And I accept that there are some, you know, the other four prerequisites and they – is the claim well-founded is –

JUDGE WAINWRIGHT:

That might be the Threshold Inquiry.

MATANUKU MAHUIKA:

Yes, yes.

JUDGE WAINWRIGHT:

Okay, yes.

MATANUKU MAHUIKA:

But, I think - and the point that I am making is that once you get into the situation where an application for resumption is made, what is clear is that, that special jurisdiction becomes the controlling jurisdiction, if you like, for the purposes of the Tribunal and the focus of that very specific jurisdiction is on whether or not you should order resumption in order to compensate or remove the prejudice. That becomes the focus of the inquiry.

CONTINUES CLOSING SUBMISSION #J100 FROM PAGE 31, PARA 96

So, I think I'm paragraph 96 in dealing with the question of the group to who the land should be returned. In our submission, it clearly identified as an appropriate for that purposes.

"So, in our submission, the claimants are the successors of the owners of the Pouākani No.2 Block from which the Subject Lands (and other lands) were taken by the Crown for the purposes of hydro development.

So, the owners of the Pouākani No. 2 later formed what is now become the Wairarapa Moana ki Pouākani Incorporation. The Wai 85 claim is brought on behalf of the shareholders of the incorporation. The claimants are therefore the successors of those from whom the Crown took the lands in the first place.

So, the Proprietors of Mangakino Township Incorporation was amalgamated with the Pouākani II Trust in July 2002 to form the Incorporation. The Shareholders of the Proprietors of Mangakino Township Incorporated because and then became shareholders in the new incorporation. So, the Crown has in fact previously dealing with this predecessor organisation to the Wairarapa Moana ki Pouākani Incorporation, in dealing with the return of other lands from the Pouākani No.2 Block - so, this would not be the first time that land has been returned to the owners of this block from the Crown - when those lands were no longer needed for the hydro purposes for which they were taken and were declared surplus.

In summary, and as set out in the evidence filed I support of the application, the claimants maintain that the lands should be returned to their ownership. Specifically, because:

(a) The Claimants were the owners of the lands taken by the Crown and are therefore those that were affected by the Crown breaches. And in our submission, this was recognised by the Tribunal in its findings in the *Wairarapa ki Tararua Report;*

(b) It was the claimants that were left with the inaccessible lands and without capital investment to develop them;

(c) It was the claimants who took on the debt burden required to develop the lands at Pouākani that they were left with after the lands were taken;

(d) It was the claimants who were burdened with and have had to bear the cost of the leases left by the Crown when the Crown, as the Tribunal recorded, acted in its own self-interest to the disregard of the owners of the land;

(e) It was the claimants that brought the Wai 85 claim, in respect of the subject lands;

(f) And it was the claimants that brought the remedies application to the Tribunal and the application has of course been strongly opposed by the Crown, Raukawa and the settlement trust. At least initially before the settlement trust made its own application."

So, the essence of the argument is the land was taken from the owners of the land at Pouākani, it's basically the owners of the land at Pouākani or at least of the successors of those owners that are making the application. So, it is the same group of people that are seeking resumption, as lost the lands in the first place in 1947.

"Related to identifying the correct body to whom to the memorialised lands should be returned, the claimants do not agree with the Tribunal's view that their desire for specific redress for their claims is somehow 'political' or something which has only arisen during the Treaty settlement process. The Wai 85 claim, which was filed in 1989, sought specific redress then for the claimants. The Claimants have consistently advocated for specific redress in respect of the issues relating to the lands at Pouākani and endeavoured to engage with both the Crown and the settlement trust on this very issue. The evidence of Sir Kim Workman illustrated some of the efforts that were made by the claimants to mediate these issues but as that evidence, which has not been disputed, shows it was the settlement trust that ultimately walked away from that process.

The Tribunal is correct to identify its role as being to 'ensure that it is indeed those Māori who experienced the prejudice from the Crown's Treaty breaches

that were identified in its report who also benefit from the assets that are available for transfer through the binding recommendations regime. In this regard the Tribunal has, in its report, identified that it was the owners at Pouākani that experienced the prejudice arising from the Crown breaches, and it is the owners of Pouākani – oh, it is the owners at Pouākani that ought to benefit from any transfer effected through the binding recommendations regime.

Recently, as we are all aware, the settlement trust filed its own resumption application in respect of these Lands. Prior to this point the settlement trust had steadfastly opposed the claimants' resumption application. In its own application the settlement trust filed an affidavit in support by Mr Bruce Stirling. We have, of course, been given an opportunity to make submissions having heard the evidence, more so at Mr Hemi, but – so this is, obviously, written before the evidence was prepared and considered.

And the claimants have been granted leave to respond to Mr Stirling's affidavit, which they have now done. However, what Mr Stirling's affidavit seeks to do is to re-visit the Native Land Court's 1883 title determination in respect of Wairarapa Moana lands and asserts that this decision was "controversial" or disputed, that the Native Land Court's inquiry was brief or cursory, and that some 500 owners should have been recorded on the title. And as everyone is aware, the 1883 title determination formed the basis for the ownership list for the 1915 vesting of the lands at Pouākani No.2.

In our respectful submission, it is apparent that the Tribunal sees Mr Stirling's affidavit as a reinforcing its view that compensation for the public works taking at Pouākani should be broader than the owners from who the land was taken. And it will be no surprise to the Tribunal –

JUDGE WAINWRIGHT:

Can I just – Can I just interpolate there -

MATANUKU MAHUIKA:

Yes, Ma'am.

JUDGE WAINWRIGHT:

- Mr Mahuika, but I think you mischaracterise our view in that sentence -

MATANUKU MAHUIKA:

Yes.

JUDGE WAINWRIGHT:

- as expressed in that memorandum of directions which is a tentative view –

MATANUKU MAHUIKA:

Yes.

JUDGE WAINWRIGHT:

But to the extent that we disclosed a tentative position, it was not that those who were prejudice by the public works taking at Pouākani were not the people who ought to be compensated, it was that there were wider claims that affected everybody and that more people ought to be compensated.

MATANUKU MAHUIKA:

Yes.

JUDGE WAINWRIGHT:

So, this makes it sound like an either-or situation and I do not think that that is how we put it.

MATANUKU MAHUIKA:

Look, I don't have the memorandum in front of me, but I'm happy to take Your Honour's correction on it. Thank you, Ma'am.

I think the essence of the point is the view about whether or not the compensation should go just to Wairarapa Moana or others. So, I apologise if that mischaracterises the memorandum and I do accept also, as I think I did earlier, that it was a tentative view which is also why I predicated going through that with – you know, respectively – it is respectfully submitted because – for that reason.

CONTINUES CLOSING SUBMISSIONS #J100 FROM PAGE 34, PARA 105

"So, as will be addressed further in evidence and submissions or as – was addressed in the evidence of Mr Hemi. The claimant's don't agree that the title investigation and determination was controversial. They don't agree with the suggestion that the 1883 title determination was disputed once it was issued, given the absence of an appeals, rehearings or petitions seeking to re-visit or amend the names recorded on the title, and don't agree that the Native Land Court's inquiry was brief or cursor, and of course, Mr Hemi made reference to Mr Stirling's own work."

1550

Now, Ma'am, I am very conscious of the exchange that you had with Mr Hemi in relation to that, you know there are some – it will be clear from Mr Hemi's evidence because other evidence wasn't given in that way that it was obviously stirred some emotion, the re-visiting, if you like, of that issues about whether or not the 1883 list is or is not correct which is a – and the reason for making quite pointed submissions on it because the incorporation is strongly of the view that of all of the claim issues that arose in the Wairarapa ki Tararua Inquiry, this was not one of them.

And although this issue has been raised, the point I think that perhaps contributed to the strong feelings that Mr Hemi in relation to it is of course, it calls into question, the legitimacy of descendants of that 139 owners who are there. I know that's not the intention but that's, if you like, an interpretation that

can be applied to it. And that has prompted a reaction the matters of record, but just to perhaps give some slide explanation of that situation. I'm sure that's not anybody's intention but that's perhaps how it was interpreted.

So, there are several issues, in any event, Ma'am, that arise as a result of Mr Stirling's evidence.

"The first is connected to the indication, tentatively, that the Tribunal may not bound by the pleadings of the parties. In our submission, while the Tribunal may not be bound by the pleadings of the parties in respect of relief, it is also not possible to read-in claims of breach not previously made by claimants."

So, what I mean by that is there was never a claim before the Wairarapa ki Tararua, that there was an issue with the 1883 list or that there was something inappropriate or improper that happened in relation to that list. And if I could interpolate a little bit in there, a lot does rely on Manihera's comments and I accept your indication, Ma'am, that actually it could have been rather than it being, sort of an underhanded move by Manihera.

He could have been supporting the broader narrative that we want to make it hard to lose Wairarapa Moana, we have to protect it, so therefore, I'm going to talk about all of these people having an interest in order to make it hard for the Crown to do the thing that we don't want them to do and that is inquiry Wairarapa Moana. So, it's possible that there was that aspect to it.

The caution that – that is a statement that was made at that time in a context that we don't fully understand, but against some complexity that we are aware of, typically occurred in the context of Māori Land Court hearings and inquiries, especially for something as important as Wairarapa Moana. So, while you could on the one hand say that, perhaps that's evidence on the controversy, on the other hand it might not, and our challenge is with the passing of 130 odd years since all of those exchanges occurred, it is very difficult for us to say.

But what we do know is that there was a series of wānanga, there was a hearing, there was another series of wananga. 139 people were chosen to go on that title. On the face of it, there doesn't appear to be snipping a dispute, there are some comments, but I would be surprised if you looked at any significant Native Land Court awards, or awards in respect of any significant pieces of land, if there wasn't the odd comment by the people that disagreed with aspect of it.

The important, however, is that it's very hard to re-visit those things that happened so long ago. And so, the position for the incorporation is, for whatever reason, these 139 names were put on the title. There doesn't appear to have been dispute, subsequent to that, although, you know, there are the odd snippets that you could come up with where people say things which may be questionable. But, at the end of it, we have to accept that that was the decision that was made at the time and it appeared to be endorsed.
1555

And I think, putting aside the other aspects that Your Honour has commented on, that's the essence of Mr Hemi's evidence. It's about – well, maybe but we do have to consider the plausibility of the alternatives, so who were the other names? If there were other, why weren't those names proposed? Why did the representatives of those individuals come forward and express their concern at being excluded?

There's the one reference to Karaitiana, perhaps having found his way onto the list when it's suggested that he shouldn't have. Although, in our submission it's interesting also that the question mark is raised about Karaitiana's presence on the list, and circumstance where he was also contemplating selling his interest. So, it's arguably a convenient thing to say at that time, that actually Karaitiana shouldn't be there because Karaitiana wants to sell. I don't know but these are all things that actually we can't know because of the passing of time.

"So, secondly in our submissions, the Tribunal may not seek to revisit the 1883 Native Land Court title determination in this remedies phase, and the question of whether or not the Tribunal can properly re-traverse a decision of the Native Land Court as address by the Tūranga Tribunal. And this is a matter which has been quite relevant to what has been happening in the respect of the Mangatū Remedies situation because of course, in the case of Mangatū, there was or there has been ongoing and consistent objection by Ngāriki Kaiputahi, to their exclusion from the Mangatū Blocks. And the relevant passage is the passage that I have highlighted on the next page, over on page 36, if we just go – the part that's in bold in that quote. From what the Tribunal said in that instance,

> 'We accept also that the threshold to be met before intervention can be justified so long after the actual hearing should be a high one. The Tribunal should not lightly upset long-standing determinations of right between hapū. A useful standard would be whether the decision of the Court when viewed against the evidence which was or should have been before it was so demonstrably unsafe (in meaning or right) as to have justified the intervention of the Crown at the time. Thus, it must be established that the Court applied an obviously wrong principle, failed to take account of plainly relevant evidence, or misunderstood evidence in some material way. The categories of failure cannot of course be closed, but the principle must be that the Tribunal should intervene only in clear cases.
>
> In respect of the Mangatū block, Ngāriki Kaiputahi have consistently and persistently objected to the decision of the 1881 Native Land Court, but with little effect. They appealed against court decisions in the period 1917 to 1922, and lodged two parliamentary petitions on the matter, one in 1958 and another in 1975. It remains to be seen, however, whether the claimants can show that the 1881 Court's rejection of Ngāriki Kaiputahi rights was demonstrably unsafe.'"

JUDGE WAINWRIGHT:

I do not know whether the Tribunal has determined that the Native Land Court's determination was demonstrably unsafe, but can I just ask you, perhaps, if you

do not know this, Mr Mahuika, Ms Feint, am I correct that the Tribunal for Mangatū has indicated its intention that Ngāriki Kaiputahi should benefit from binding recommendations?

KAREN FEINT:

No. What they've said is that they are returning all of the Mangatū land and that all the claimants have well-founded claims that relate to the Crown Forest Land.

JUDGE WAINWRIGHT:

And that includes Ngāriki Kaiputahi?

KAREN FEINT:

Yes, it does. So, their intention is that everyone will benefit but the question is how that will be allocated.

JUDGE WAINWRIGHT:

So, without determining that, the Native Land Court was wrong to exclude Ngāriki Kaiputahi from the Mangatū land, the Tribunal has indicated that intends that Ngāriki Kaiputahi will benefit from the binding recommendations.

1600

KAREN FEINT:

So, the Tribunal determine that the 1881 decision was demonstrably unsafe, Ngā Ariki Kaipūtahi were included in the lands as owners, so they are owners in Mangatū blocks but the issue is over the proportion of shares that they should have got, and they set that they had been prejudice by the land court determinations of their relative interests. and the Tribunal found that they had been prejudice but said, we cannot now undo what's been done and workout what should have been done, instead. So, it's a well-founded claimant and they accept that Ngā Ariki Kaipūtahi are entitled to redress.

JUDGE WAINWRIGHT:

All right, thank you.

MATANUKU MAHUIKA:

Which differs from this situation Ma'am when the well-founded claimers that claim that relates to the owners of the lands at Pouākani that were taken in 1947. Yet, there wasn't a suggestion that there were other claimants who were disadvantage by that. So, if you are to revisit whether or not that's an appropriate class of people you necessarily have to go back and revisit the 1883 tittle determination to open that up to a wider class.

And that's the point of this submission is that, in order to undertake that sort of approach there is a very high threshold that you need to overcome, and you'd need to establish that it was demonstrably unsafe, the determination that made by the Court at that time, and in our submission there's evidence of that.

And certainly, the evidence is quite different, so if you look at the bottom of the quote that I've just read. Ngā Ariki Kaipūtahi objected in 1881 they applied in the period between 1917 and 1922 and they logged two parliamentary petitions object. Whereas in this situation there is no evidence of such an objection to people being excluded from the tittle to the Pouākani lands.

JUDGE WAINWRIGHT:

One of the possibilities that we have explored at very junctions in our inquiry into these questions Mr Mahuika is whether all of the names on the ownership list were there in their individual capacity only or whether they were there in some representative capacity. And there is the occasional mention that implies that those individuals may have been there, as a proxy for a wider group in some circumstances and we do not know, in which circumstances or which hapū they might have been representing or which smaller group they might have been representing.

MATANUKU MAHUIKA:

And actually, Ma'am I do have a submission that I've been asked to make in relation to that point, but I proposing to deal with it at paragraphs 143 and 144, where we deal with some of the engagement.

JUDGE WAINWRIGHT:

All right.

MATANUKU MAHUIKA:

So, this part of the submission is really talking about what stroke is there to revisit and what other circumstances that you might revisit if that's where we end up looking in terms of this.

So, opposing to the incorporation as I say in the submissions that at paragraph 110, the Crown and the settlement trust have melted a sustain attack on the claimants and the incorporation by alleging that it only comprises a group of individual shareholders. A suggestion is that the incorporation is there for its own it a not deserving of a remedy. However, Māori land owners are in our submission a group of Māori entitled to the protection of the Treaty and the benefit of a resumption order.

This is especially so, in the case of the claimants that have a well-founded claim in respect of findings of prejudice that have already been made by the Tribunal. In addition, the Tribunal has recently, that same memorandum and again, accepting that is attentive position referred to the claimants as incorporation shareholders or modern-day shareholders.

And with the possibility that this implied that the Crowns breaches have somehow impacted less upon the claimants, because of how they have more recently chosen to organise their remaining land interests at Pouākani. All because the structure adopted by the owners means the owners are less deserving of compensation for the breaches they have suffered and endured.

The incorporation as it exists now and as we've noted in this submission, is a recent development formed in 2002. In 2015, when the Pouākani No.2 block was vested those owners held an undivided interest in the land. success of Waitangi Tribunal reports has recorded the absents of option for collective ownership of land and limited option for Māori land owners to organise their interests.

While the Crown evidence in this inquiry is that the Crown does not support incorporations as mandated bodies and Treaty settlement negotiations or as appropriate bodies to receive settlement redress, that is a matter of Crown policy, which as submitted is not a relevant consideration for the Tribunal.

The Tribunal is required to exercise its discretion independent of that policy, as the Mangatū remedies reports records there are several other examples where the Crown has been prepared to engage and settle within corporation. The claimants have already proven the high level of support amongst their community for both specific redress and the present application.

The incorporation is the successors of the owners that suffered from the prejudice brought about by the Crowns breaches by the Treaty in respect of the lands at Pouākani. As recorded in the evidence filed to date and the decision of the chair person to grant urgency to the claimants, the claimants have established substantial support amongst their community for both specific redress and this application.

In our submission no other party in this remedy's inquiry including those parties that might be considered as the beneficiaries of binding recommendations has been put to a test of proving support for its application. And likewise, no other parties have provided evidence of that support.

In particular it's noted that is, that the settlement trust and its supporter requisitioned Special General Meeting in order to put a motion, an opposition

to this application and that motion failed. Given the Tribunals reference to modern day shareholding and the incorporation that claimant consider it is important for the Tribunal to be reminded that shares and incorporations are not the same as freely traded shares in private companies and Your Honour is aware of this.

Shares in incorporations are undivided interests of Māori freehold land in a subject to the provisions of Te Ture Whenua Māori Act 1993. As such, the land owned by the incorporation and shares held by owners are subject to the strict restrictions on alienation imposed by that Act, the same restrictions would apply to the subject lands, if these lands were returned.

And as we discuss further below, the claimants are prepared to receive the subject lands, or would be prepared to receive the subjects on Trust, in such a way that the subject lands are not held in relative shares. And I'll elaborate on that slightly, when I get to paragraphs 143 and 144.

So, the position of the incorporation is actually, the land was taken from the owners, so it should be returned to the owners and you could argue that it was taken from the owners in their relative shares. So, if you had a large than you suffered relatively speaking, a large detriment at the times that the lands were compulsory acquired, because you had more that you lost and therefore you were deprived of greater benefit.

But not withstanding with the incorporation is of the view that it would be prepared to receive those lands in a way which didn't hold them in relative shares. So, where the land would be held on behalf of all of the owners, but not in those shareholdings that have been referred to earlier.

So, while the Crown and the settlement trust have asserted there may have been trading or share purchasing in the incorporation. No actual evidence has been produced to establish this allegation. In fact, the evidence suggest that

the current owners are the descendants of the original owners, even though the process of succession has led to the significant fragmentation of some shareholdings but not others who have for example, certain owners have much smaller families and therefore groups of successors.

1610

It is the claimants' position that it should not be open to the Crown having imposed a tenurial system without the ability to hold any land, and any form of collective title and only later providing for the option of incorporation and legislation to know criticize the claimants for having chosen that option, the options available to the claimants are the options that the legislation allows it to take, they don't have alternative.

There are basically two, there is a Māori incorporation or there is a trust of some description under Te Ture Whenua Māori. And rightly or wrongly, those are the options that the owners of the land are to compel to consider if they wish to own the land, but it's not something in our submission that ought to be held against them.

JUDGE WAINWRIGHT:

Can I just say, that I am intrigued that you have inferred from our pronouncements that we take some kind of view that the owners are less deserving because they are in an incorporation.

MATANUKU MAHUIKA:

Yes.

JUDGE WAINWRIGHT:

That has never crossed any of our minds. So, I am a little bit alarmed that we have said thing that implied that it might have, because, *karekau*.

MATANUKU MAHUIKA:

I think, and I'm not going too far in saying this, it's certainly how the incorporation has interpreted some of the comments.

JUDGE WAINWRIGHT:

Well, I can say without reservation that the incorporation is mistaken, because we do not have any such sentiment. In fact, on the contrary I think speaking for Dame Margaret and myself, who were involved in the historical inquiry, we were always very impressed after that long and difficult history the incorporation got itself into a position where in the early 21st century, it was able to begin paying dividends and has done well.

I mean, that is a success story that I cannot imagine that anyone would decry. So, I must, I must counteract that view and I do not understand where it came from, because there is no part of it here.

MATANUKU MAHUIKA:

Thank you, Ma'am. The representatives of the incorporation that have heard that, is probably more important for them than me to have heard that explanation.

JUDGE WAINWRIGHT:

No, it is complete news that me that we might even have approached that position, but you know, you never know how you might be interpreted.

MATANUKU MAHUIKA:

Yes, shall I move on from that.

JUDGE WAINWRIGHT:

Please do.

MATANUKU MAHUIKA:

I think I'll jump to paragraph 118. And this is about what claimant groups might be entitled to benefit from a resumption application which is another one of the tentative topics that was raised by the Tribunal.

JUDGE WAINWRIGHT:

Indeed.

MATANUKU MAHUIKA:

And so, what has been suggested is what is quote there in paragraph 118, where the Tribunal has said that its coincided towards the view that if were to make binding recommendations it would do so, in favour of a wider group than the application seeks. Tentatively the Tribunal is thinking that the Crowns actions that relate to the lands at Maraetai effected all the Māori people of the Wairarapa plus tangata whenua at Pouākani.

And I think, that we can accept that the Crowns actions, for example they did effect Raukawa and they did effect Tūwharetoa, because the transferred lands within their territory to Wairarapa moana. The challenge with that and with the tentative view is first of all, what we are dealing with is a remedy of the Wai 85 claim so, in our submission you're constrained by that aspect of the jurisdiction.

So, having found that the claims of the Wai 85 claimants are well-founded, section 8(1)(2)(a)(ii) directs the inquiry at the determining whether or not the return of that land is required, in order to compensate or remove the prejudice. So, that is quite a specific type of inquiry that is activated at this stage.

The second aspect of it and I'm sure my friends for the Crown have a view on this as well, is that there are no longer live claims on the part of Ngāti Raukawa and Ngāti Tūwharetoa, those claims have been settled. So, to the extent that we are in the remedies phase of this process, there are no longer live claims on the part of Ngāti Raukawa and Ngāti Tūwharetoa to be doubt with, or for

which a remedy is required because they have settled those claims and then by extension whatever prejudice has been suffered is remedy as a consequence of those settlements.

And we could get into an exercise of saying, was it adequate or was it not? It's not a matter for me or for us, in the context of this. The question is, is there a claim for which a remedy is required, and the facts of the settlements means that there isn't. Which I think then takes me to other considerations. So, I've effectively summarised the submission to paragraph 125.

So, the relevance of whakapapa and other tikanga associated with the land. so, the closeness of whakapapa or tikanga associated with the land a sought, is not determinative in our submission in respect of an application of the binding recommendations.

Despite the subject lands not being within the traditional tribal territories of the claimants, the claimant's evidence and in particular the evidence of Sir Kim Workman and Mr Hemi demonstrate that the claimants have developed significant associations with the land overtime and have in fact, doubt with the land as kaitiaki.

They have in substance, doubt with the lands at Pouākani as if it was there tradition land and that was really the comment that I was making earlier. So, there is no denial that these lands are not within the traditional territories of Ngāti Kahungunu ki Wairarapa, but they are lands that the owners have developed a connection with overtime.

I was trying to think of other examples of where this situation has arisen, where a relationship has perhaps developed post 1840 and they're probably not directly comparable but there are some situations where people were forced to relocate. A good example of that occurring was after that eruption of Tarawera, with the situation that now exist with Tūhourangi and Ngāti Wāhiao at

Whakarewarewa, where Tūhourangi had to leave their lands around Tarawera because of the eruption, and because of its impact and they moved to Whakarewarewa to reside with their relatives there.

And similarly, I'm aware of arguments that have occurred within Ngāti Awa and Ngāti Rangitihi about the Ngāti Rangitihi presence at Matata and whether or not that was a traditional heir of occupation of an area that they moved to after they were no longer to occupy the lands at Tarawera. So, those are not directly on point, but there are situations because of circumstance people have moved to other areas. There is, and it hasn't been talked about or debated in a lot of detail, it's obvious that there is some complexity around what happened at the time of that relocation.

There is evidence from incorporation that there was a level of engagement, I accept that that's contested by the Ngāti Raukawa witnesses, but I think the point is, the incorporation and the owner of the lands at Pouākani would say that they didn't just go there, that there was they believe some process that they went through. Which doesn't mean that there tangata whenua in the same way as Raukawa or Tūwharetoa, but it did lay the ground for their occupation and they've now been there for over a century, and they have developed connections with this area.

So, again, it a matter where while we can acknowledge the impact of that relocation on Raukawa and Tūwharetoa, that wasn't something that was really the fault of the owners at Pouākani, they weren't given a lot of alternatives. So, for better or worse that's where they are, and having been forced to relocate there, the land that they got was taken from there by the Crown for the Maraetai scheme without recognising the unique values.

And the way that I would characterise that, it was given to those owners in the first place because it was thought that it didn't have any value and is accessible. As soon, as it was established that there was value in it, none of that value was

given to the land owners, it was all acquired by the Crown for its own benefit and that's at the heart of the issue that we're dealing with.

1620

Now, the issues of the presence of the Pouākani owners their relationship with Ngāti Raukawa and Ngāti Tūwharetoa, that will be something that they will continue to have to work through, because nobody is going anywhere in that and it will be necessary to continue to work on that relationship, but that doesn't affect the fact that there was and there is a very specific claim that is unresolved on the part of the Pouākani land owners, against the Crown and though that has a value attaching to it, and the resumption mechanism is a way by which compensation can be obtained, in order to remove the prejudice that they suffer.

So, in our submission there is no requirement in the relevant statutory provisions for a claimant to establish a specific or particular whakapapa or other tikanga association with the land, which is being sought and as I have said there is nevertheless an association. Such a requirement would further prejudice those Māori that received as compensation for other reason, land holdings outside their traditional or customary rohe.

The claimants do not dispute the whakapapa, ancestral or other tikanga associated with the other iwi, in respect of this area. The claimants also, do not question or dispute the grievances other iwi may have in relation to the Crown actions or omission in relation to Pouākani. Counsel is obliged however to note that the claims of Raukawa and Ngāti Tūwharetoa in relation to these lands where settled in compensation paid by the Crown as agreed in that settlement.

As far as the record of inquiries shows Raukawa did not seek the return of the land, and I don't wish to take that last point very far, no particular wāhi tapu were identified, I'm obliged to note that but really for the record. The more significant point is that, it was the owners of the land at Pouākani that suffered

the hardest and what we're really trying to do is address the harm that the Crown did.

In regard to such customary associations that the other iwi has in respect of the land in which the Crown may have recognised it is also noted that Lake Maraetai which Raukawa has a statutory acknowledgment over is not memorialized as I've said in an earlier part of this submission. It's not within the subject lands and is therefore not subject to the claimant's application. Recommendations in favour of the claimants in respect of the subject lands would not affect of undermined that statutory acknowledgement. Dealing then with the quantum of the remedy and I think I have doubt with this already, in some detail.

It is submitted that it is not necessary for the Tribunal to determine a quantum before, or as part of, deciding whether to make recommendations under s 8A. Section 8A(2)(a)(ii) does not require or contemplate an assessment of "quantum of the remedy". However, as set out earlier in this submission, it is submitted that the Tribunal is justified in awarding it the maximum available compensation available. To use Dr Meads language, what we need to do is satisfy ourselves as to the order of magnitude that there comparable without saying it is differently this amount. Once you can get to that point than your justified making the resumption order.

JUDGE WAINWRIGHT:

Do you have a reference to his evidence where he uses the order of magnitude language?

MATANUKU MAHUIKA:

Not while I'm standing here right now, but I could certainly find it, Ma'am.

JUDGE WAINWRIGHT:

Thank you.

MATANUKU MAHUIKA:

When I say I, I mean we? But I think it was in the quote that I referred to in going through the appendix when he talks about, I think skinning it is the expression that he uses in that, he doesn't have to be precise that's not the job to be exact and give you an exact number, he just needs to, we just need to be satisfied that were thereabouts.

JUDGE WAINWRIGHT:

Well, if there is.

MATANUKU MAHUIKA:

We will find out.

JUDGE WAINWRIGHT:

That would be good, thanks.

MATANUKU MAHUIKA:

So, I am now close to the end on page 44 paragraph 131. So, section 8A(3) provides:

> "(3) In deciding whether to recommend the return to Māori ownership of any land or interest in land to which this section applies, the Tribunal shall not have regard to any changes that, since immediately before the date of the transfer of the land or interest in land from the Crown to a State enterprise, or an institution within the meaning of section 159 of the Education Act 1989, have taken place in—
>
> (a) the condition of the land or of the land in which the interest exists and any improvements to it; or
>
> (b) its ownership or possession or any other interests in it."

So, under section 8A(3) the Tribunal may only consider the condition of the memorialised land and the ownership and possession and other interests in the land that existed as at the point immediately prior to the date the memorialised land transferred to the SOE. The Tribunal may not consider any changes to the memorialised land that have occurred after the date the land transferred, and the Tribunal has accepted this point.

The claimants position going to paragraph 134 is that the Tribunal should not be influenced by the position of the present-day owner or by any other parties that may assert interests in the land (per s 8A(3)(b)0. This has a particular bearing on the evidence filed by Mercury Energy Limited, which the Crown has chosen to adopt. The position of the Claimants remains that this evidence is precluded by the statutory scheme and therefore cannot be taken into account by the Tribunal.

The Tribunal should also not have regard to improvements and other interests in the Subject Land that did not exist prior to the transfer to electrical.

However, it is noted that Mr Williamson, when presenting his evidence for the Crown and Mercury Energy Limited, in response to questions from counsel, acknowledged that despite the worst-case scenario of his written evidence, transfer of the Subject Lands to the Claimants would not result in disruption to the operation of the broader hydro scheme, or Maraetai Dam, or the national grid.

And I think there was a question that Dame Margaret asked of Mr Williamson in relation to that point. So, this is the worst case, so why talk about the worse why not talk about what's possible and Mr Williamson acknowledged that, yes, it would be possible to make this work and that was the context of the likes of the Wai O Taiki scheme where there's more than one operator, but they still make that scheme work.

In terms of conditions, the Claimants' position is that the Subject Lands should be returned without conditions. As noted above, once returned to the Incorporation's ownership it will not be possible to alienate the land except in accordance with Te Ture Whenua Māori Act 1993. In addition, the Claimants are prepared to receive the Subject Lands subject to restrictions ensuring those lands are inalienable. Counsel is also instructed to advise that the Claimants are prepared to receive the subject lands to be held on trust and without relative interests, which is the point that I've already made.

In its recent memorandum and directions, the Tribunal has invited parties to consider "the principles that should apply to relative shares" in the subject lands, if the Tribunal were to make binding recommendations. Again, the primary position of the claimants is that the lands were taken from them in breach of the Treaty of Waitangi or taken from their predecessors as recognised by the Tribunal, and should therefore be returned to the claimants, although subject to the comment I've made, actually the claimants would be happy if the land came back to the incorporation and the incorporation then held not in relative shares, but on behalf of that community.

In terms of principles, the Claimants' position is that the Tribunal should consider who it was that suffered the losses for the Crown breaches arising from the public works takings at Pouākani. As set out above, the breaches and effects of the breaches suffered by the Claimants, and no other parties. In addition, the evidence presented in this inquiry records the socio-economic impacts of the breaches on the Claimants.

The Claimants do not accept the characterisation of the Crown particular breaches at Pouākani as part of an "unbroken continuum." The "unbroken continuum" of Crown breaches has been proposed, the incorporation believes to support a view that the breaches at Pouākani were experienced by, or borne not by the owners at Pouākani, but by Wairarapa Māori generally.

1630

The Crown breaches at Pouākani had very clear victims and were borne by a very identifiable group," and that was the owners of the lands at Pouākani.

"However, to the extent we can view historical events as part of an "unbroken continuum" as the Tribunal suggests, in the Claimants' view that is merely descriptive of the Crown's general behaviour towards Māori throughout the 19th and 20th centuries, which the Tribunal has found time and again to have been inconsistent with the Treaty, and which was suffered by Māori right across the country.

While the Claimants seek return of the Subject Lands in full the Claimants are prepared to discuss the following arrangements," which are in paragraphs 43 and 44.

"The Claimants have already sought to engage with the settlement trust in respect of the resumption application and the Subject Lands. Prior to the settlement trust's own application for resumption and the Tribunal's memorandum and directions the Claimants wrote to the settlement trust proposing an alternative whereby the Lands be shared and that further discussions be undertaken to find a way to recognise the interests of Raukawa, and others potentially, such as Ngāti Tūwharetoa at Pouākani.

The Claimants have yet to receive a formal response to that correspondence. They remain open to engagement with the settlement trust and those parties with customary interests at Pouākani, and also in relation to ensuring the ongoing operation of the Maraetai power scheme."

Now, I need to be a little bit careful in respect of that submission simply because the primary position is that the land was taken from the Incorporation and therefore in terms of section 8A(2)(a)(ii), the appropriate remedy is to return.

What this is trying to indicate is that the Incorporation is conscious of the wider interest and is prepared to engage in relation to those matters. That doesn't detract from its view of the law, but it is important I think to acknowledge that that process is underway.

JUDGE WAINWRIGHT:

When you say the process is underway, you mean it's really not underway, because you have overture in your evidence, well your evidence from the bar is that there has been no response, is that right?

MATANUKU MAHUIKA:

At the time the submissions were written, there hadn't been any formal reply to the correspondence. So as far as I can take it is to indicate that the parties have had some tentative discussions.

JUDGE WAINWRIGHT:

Okay.

MATANUKU MAHUIKA:

It is, again I'm giving evidence, but to give an explanation, it is challenging to have a discussion in the context of the current application –

JUDGE WAINWRIGHT:

Of course.

MATANUKU MAHUIKA:

– with the uncertainty in terms of what the outcome might be.

JUDGE WAINWRIGHT:

Well yes, I can understand that. But as far as we are concerned, if the parties were to find a way to engage and were to find a means of arriving at an outcome independently of the Tribunal's analysis –

MATANUKU MAHUIKA:

Yes.

JUDGE WAINWRIGHT:

– and were able to present that to us, we would not mind.

MATANUKU MAHUIKA:

Yes, thank you, Ma'am.

And look at it as – acknowledge that there are, as I've said, there are relationships that have to persist beyond this application, which is the motivation. That doesn't detract from the view as to what the strict jurisdiction is and what it requires in respect of the Tribunal and what it can do. The way I would describe it is however the, if you like, the gateway into that broader discussion is the Incorporation because it's the Incorporation that is the claimant, it is the successor to the owners.

JUDGE WAINWRIGHT:

Well it is a claimant, isn't it? I mean that is one of the things that I wanted to draw to your attention because –

MATANUKU MAHUIKA:

Yes.

JUDGE WAINWRIGHT:

– as you are telling me that Wai 85 is the applicant and that they suffered the loss and they are the people who ought to receive whatever it is.

MATANUKU MAHUIKA:

Yes.

JUDGE WAINWRIGHT:

You have not helped us in that analysis with how or whether we should balance the interests of other applicants – and other applicants.

MATANUKU MAHUIKA:

Well the other applicant is the settlement trust, and –

JUDGE WAINWRIGHT:

Well it is not formally the settlement trust, but arguably –

MATANUKU MAHUIKA:

No, but my recollection of even that claim is a claim that comes through the vehicle of the Mangakino Township Incorporation which is really a subset of the Incorporation now because those have been merged. In fact, my recollection is that it was the Incorporation that was the original claimant in respect of that application. And it ultimately doesn't detract from the principle point, was that it was the owners of the land at Pouākani who are the ones who were prejudiced.

The Tribunal found that it was the owners of the land at Pouākani who were prejudiced. So therefore, when we are looking at the exercise of the resumptive jurisdiction with the very explicit direction that it is to determine whether or not to compensate or remove the prejudice suffered as a consequence of that, there is a very clear direction in the statute that there must be a nexus between the compensation and between the findings of the Tribunal around, you know, who suffered prejudice, because the aim of the jurisdiction is to address that prejudice.

JUDGE WAINWRIGHT:

Yes, and you've defined the prejudice as being a prejudice that arises from the compulsory acquisitions in the 1940s.

MATANUKU MAHUIKA:

Yes.

JUDGE WAINWRIGHT:

So, that does narrow the ambit of the Tribunal's perspective, that's true.

MATANUKU MAHUIKA:

Yes. So what I will do then is go to paragraph 150 if that's okay? I'm just conscious of time, Ma'am, and wanting to get through before the end of the day, and this is about whether or not the settlement trust is an appropriate entity.

"Since the Claimants filed their application for an urgent remedies inquiry the Crown and the settlement trust have been critical of the Claimants, including for:

(a) the structure of the Incorporation;
(b) its alleged lack of support for this application;
(c) alleged shortcomings or anomalies in its shareholder register; and
(d) the alleged lack of returns it provides to the Wairarapa community and various other reasons."

So the purpose of this part of the submissions is to rebut that point and to comment on the appropriateness of the settlement trust as an entity to receive any land that might be resumed.

"These submissions address and rebut the Crown's Treaty settlement policy objections to incorporations as appropriate entities to receive Treaty settlement redress, as inconsistently applied as this policy is. As noted, the Crown objection has likewise been rejected elsewhere.

These submissions have also addressed the jurisdictional obstacles to the Tribunal making binding recommendations in favour of Raukawa and Rangitāne.

But as a result of the settlement trust's recent application for resumption, no attention has really been given in this proceeding to the suitability of the settlement trust as a recipient of binding recommendations." So in other words, because of the timing of everything, the Incorporation and the Incorporation witnesses, particularly Mr Smiler, were subjected to quite an interrogation by counsel about the Incorporation and its adequacy. But a similar interrogation of the settlement trust's adequacy has not been undertaken.

"So as outlined above, it is the Claimants, we say, that bore the prejudice of the Crown breaches at Pouākani. The settlement trust represents a far wider and broader community of approximately 110 hapū. Many of these 110 hapū have no connection to the Subject Lands and the consequences of the Crown breaches at Pouākani. In addition, given the Tribunal's recent memorandum and directions, the overwhelming majority of those hapū do not have very close connections with Wairarapa Moana."

So you could look at this by reference to Mr Stirling's evidence. So Mr Stirling I think identified 22 hapū, potentially up to 30, that had an interest in Wairarapa Moana, and that was taking what I think we can call a broad view of who have interests.

1640

The settlement trust itself represents 110 hapū, so a much, much greater grouping of people than even Mr Stirling identifies in his evidence as having a connection to Wairarapa Moana. So if the settlement trust is to be the beneficiary of a resumption application, then those that are benefitting go well beyond the category of people that suffered the harm, even if you take a broader view that it is all Wairarapa Māori, it is still a much greater category, if you take a broader view than the view that I'm advocating for which is that it must be the owners. Either way, the settlement trust represents a grouping of

people that include, on the face of it, a substantial number that don't have a connection to these claims. The Tribunal has also received –

JUDGE WAINWRIGHT:

Just to confirm that I understand that submission, Mr Mahuika, you are saying that the settlement trust would not be a suitable recipient of assets pursuant to binding recommendations because they represent many Wairarapa Māori who have no connection with Wairarapa Moana?

MATANUKU MAHUIKA:

Yes.

JUDGE WAINWRIGHT:

None?

MATANUKU MAHUIKA:

Just on the face of those numbers, Ma'am. So they represent 110 hapū on a best construction of it, there are 30 hapū that, Mr Stirling's evidence, so the settlement trust's own evidence, says have a connection with Wairarapa Moana and could potentially have been included in the ownership group. So I'm just doing it based on the numbers, and on the face of that number, that is a much larger grouping of hapū than those that were identified in the settlement trust's own evidence, conserving a connection to this area.

JUDGE WAINWRIGHT:

Right, thank you.

MATANUKU MAHUIKA:

CONTINUES #J100 FROM PARA 155

"The Tribunal has also received no evidence of any support from the beneficiaries of the settlement trust for the settlement trust's recent application. In fact, the Tribunal has received considerable evidence from the trustees and

beneficiaries of the settlement trust that the Tribunal should not make binding recommendations in respect of the Subject Lands."

JUDGE WAINWRIGHT:

Because this is your final hurrah, Mr Mahuika, I think I should ask you to tell me what you think the relevance to this process is of the question of support for an application. I understand what you have said about the fact that the Incorporation has been put through the mincer to demonstrate that it can line up all its ducks. As a matter of fact, I accept that that's so, but as a matter of law, it seems to me that those ideas somehow burrow from the mandate context of settlements and I am just wondering what your legal submission is on the relevance of those processes for our jurisdiction? Would you like to walk around for a minute?

MATANUKU MAHUIKA:

It's okay.

JUDGE WAINWRIGHT:

I do not want you to be distracted while you give your answer.

MATANUKU MAHUIKA:

I think the point is this and that is that the Incorporation, it has been through the mincer, it has undertaken a number of processes to confirm that it has support for making this application. But as a consequence of that, it can say that it has the support of the owners. So in other words, the class of people who have been affected by this land. It can point to that in support of the application –

JUDGE WAINWRIGHT:

But that is only relevant. I mean, we are only interested in that if support is a crucial part of the Tribunal's exercise of its jurisdiction under section 8A.

MATANUKU MAHUIKA:

Yes, I understand the question, and so I think that's correct in the sense that I would say that it's not relevant because the Corporation, it's the successor to the owners, so therefore it's the appropriate vehicle.

JUDGE WAINWRIGHT:

And isn't it the Tribunal's job under its jurisdiction to determine who the right people are?

MATANUKU MAHUIKA:

Yes, yes.

JUDGE WAINWRIGHT:

Isn't there a nexus that the Tribunal must draw between the assets, the prejudice and the people, isn't that part of what –

MATANUKU MAHUIKA:

Yes, that's correct, yes. I mean, that is, as section 8A(2)(a)(ii) says, it's about compensating or removing the prejudice from the group that suffered the prejudice, yes, and I say in this situation it's the claimants, so it is –

JUDGE WAINWRIGHT:

So that's a submission about who the people are.

MATANUKU MAHUIKA:

Yes.

JUDGE WAINWRIGHT:

But as far as our jurisdiction is concerned, irrespective of whether the application had support, our jurisdiction is to work out in relation to our determination of well-foundedness who the people are who were prejudicially affected, what the assets are that can go back and where there is proportionality between those things, isn't it?

MATANUKU MAHUIKA:

Yes, except that the Tribunal has, in its findings, already identified the people that are affected.

JUDGE WAINWRIGHT:

Well affected by the narrow view of what the prejudice is, which is the prejudice identified in relation to the 1940 activities.

MATANUKU MAHUIKA:

Yes, yes, the taking of the lands at Pouākani.

JUDGE WAINWRIGHT:

Yes, which is – yes.

MATANUKU MAHUIKA:

Which is the subject of the application, yes.

JUDGE WAINWRIGHT:

Yes, thank you.

MATANUKU MAHUIKA:

So I agree with that structure, but it's just that I think, well I'm saying to you is that in our submission, actually the identity part has already been resolved. So to that extent you are correct. The matter of support or otherwise is really a material, and the purpose of raising it was to say, well, if there is a contest between parties, it's very clear that the Incorp –

UNSPECIFIED SPEAKER: (16:46:30)
(MICROPHONE SWITCHED OFF 16:46:31)

MATANUKU MAHUIKA:

Sadly, that seems to be how these things work. But it's really just making the point that even if it gets to that stage, accepting my earlier comment that it's not

relevant, for the reasons that I said, it is very clear that the Incorporation has the support of the owners to pursue this application. It's less clear that the settlement trust has that support. So, that's really as far as I can take it. I think we just need to take that as it is. But I accept your primary point which is it is not really a relevant consideration. So that really deals with the balance of that point, Ma'am. So I was going to simply go to the conclusion.

CONTINUES #J100 FROM PARA 158

So in conclusion, "It is submitted that the statutory scheme and its application to these facts is, despite the length of the submissions, straightforward.

The Wai 85 claim meets the statutory prerequisites for resumption:

(a) The Wai 85 claim has been determined as well-founded by the Tribunal.

(b) The Wai 85 claim relates to memorialised former SOE land and there is a direct nexus between the Treaty breach and the Subject Lands.

(c) The prejudice suffered by the Claimants as a result of the Crown breach of the Treaty is significant. The return of land is at least proportionate to this loss. Conversely, the Crown and now non-Crown shareholders have been greatly enriched (and continue to be enriched) from the Crown's breach.

(d) The Claimants are the appropriate group to whom the land should be returned. They are the successors to the former owners of the Pouākani No. 2 block which includes the Lands in respect of which resumption is sought.

Where the statutory prerequisites are met, the residual discretion available to the Tribunal is extremely limited.

A recommendation that the lands subject to the application for resumption be returned to the Claimants is, in our submission, the appropriate step for the

Tribunal to take having regard to all the circumstances of the case but, in particular, the strict nature of the statutory scheme and the spirit of the agreements reached between the Crown and Māori in 1987 which envisaged the return of land to successful claimants."

So Ma'am, if there are no further questions, those are my submissions.

JUDGE WAINWRIGHT:

Taihoa. Ko te kōrero kei konei e pā ana ki ngā pātai a Dr Hond –

MATANUKU MAHUIKA:

Āe.

JUDGE WAINWRIGHT:

– mehe ka tīmata ia ināia tonu nei, mehe ka tīmata anō āpōpō patapātai ai.

[Interpreter: What we've discussed just now in regard to questions, we do have questions from Dr Hond. He wants to commence questions now and then continue on in the morning.]

1650

MATANUKU MAHUIKA:

Kei a koutou te mana. [Interpreter: And again, it's up to you.]

DR RUAKERE HOND:

Heoi anō, tēnā, e wānanga ana pēhea te pau o te wā –

MATANUKU MAHUIKA:

Āe.

DR RUAKERE HOND:

– me te whakaaro atu nei, "Ka roa tō whakautu?" Ana ka tono atu –

MATANUKU MAHUIKA:
(Over-speaking 16:50:35)

DR RUAKERE HOND:
Matanuku, e te pou kōrero, ana kua pau i a koe i te rā nei te kōrero, nō reira e mihi ana. [Interpreter: Yes, no, no, you've had a long day on the stand and no doubt the evidence that you've given out throughout the day has been well received.]

I suppose the question I have is really founded around the concept of it was indicated in your closing that Wairarapa Moana Incorporated is considering a format or a structure that would be appropriate to receive this amount that we're talking about.

MATANUKU MAHUIKA:
Yes.

DR RUAKERE HOND:
And, but we don't have indication of what that might look like. Are you able to shed light on that?

MATANUKU MAHUIKA:
Other than the broad indication I've given, not really, other than that. As I understand the proposal, it is a proposal to receive the lands, for the Incorporation to receive the lands from Trust without specified interest for the benefit of the owners I suppose, and I'm being a little bit cautious because I think it's talking about not just those that are on the ownership list, but there could be broader whānau members involved, I'm not sure. Okay, I'm getting a nod so that –

JUDGE WAINWRIGHT:
I'm just wanting to understand exactly what we're talking about here.

MATANUKU MAHUIKA:

Yes.

JUDGE WAINWRIGHT:

Are you asking him what the Incorporation would do if the Incorporation were to get the binding recommendations –

DR RUAKERE HOND:

Yes, yes.

JUDGE WAINWRIGHT:

Or are you asking him what the conversations are around the potential –

MATANUKU MAHUIKA:

No, I think it's the first question, Ma'am.

JUDGE WAINWRIGHT:

No? The first ques –

DR RUAKERE HOND:

Yes. So what does it look like?

MATANUKU MAHUIKA:

Yes, so the answer to that question is it would look like a trust without divided interests for the benefit of the, like, the whānau of the owners of the lands at Pouākani. So, you know, maybe recognising that some didn't succeed, and others have, and also recognising that because of the way that succession works, there are differing interests. But the idea is that there wouldn't be divided interest or specified interest, it would be on behalf of a collective. That's the proposal that it's looking at if resumption to the incorporation occurs. Yes, so I'm getting a yes.

DR RUAKERE HOND:

Heoi anō, ko te ia o te whakaaro nei, along the lines of that in terms of Wairarapa Moana, if the ownership had stayed with those owners, the 139 owners there, the relationship would've been maintained.

MATANUKU MAHUIKA:

Yes.

DR RUAKERE HOND:

However, the transfer of the land into Pouākani meant that few people from Wairarapa were able to access those lands, even though they were owners on paper, how many people were able to come through and develop that relationship, and the way in which owners were able to share the benefits from, well, as the evidence referred as the benefits from it didn't really come about until much later. So…

MATANUKU MAHUIKA:

I think that's correct, the Incorporation hasn't really been profitable until the early 2000s because of all of the challenges that were associated with it, so I don't think it was a matter of people being included or excluded, it's just that it wasn't possible because of the arrangements that the owners inherited for them to make a return off those lands. It has done more recently.

I think that the evidence, if you look at the financial statements, is that the returns have been good some years but not so good in others, but there has been an appreciation in the value that's available to the owners, and so therefore some capacity to make distributions. But that is a comparatively recent development because of the circumstance that, as you say, the owners of the lands at Pouākani were left with.

So, inaccessible land, no access was provided by the Crown until on the face of it the time that the Maraetai developments occurred, and even then, they inherited things like the leasing scheme in relation to the township at Mangakino and all of those other challenges associated with trying to make that land work.

And you saw – and you had some evidence of those challenges from Sir Kim when he was talking about his time being involved with the – another running of the Incorporation. But I don't think it was a situation where some were benefiting, and some weren't, it was more that it wasn't possible to confer a benefit because of the extremely difficult circumstances that the owners of the lands as Pouākani, as a class, found themselves in.

DR RUAKERE HOND:

I suppose the – from the perspective, the way I look at it is that if people have shares – no, sorry, if owners succeed to their land interests, if people are away from it and perhaps they are potentially less inclined maybe to succeed to shares within land, and so some who are in that area receive – they succeed to the ownership of those lands, and so the change of the nature of ownership over time becomes very different to potentially what it was in 1883.

If – I suppose what I was seeking was how would the Incorporation recognise the breadth of relationships. So, some of that is whakapapa to those, the 139. Others whakapapa to hapū if they are able to show that, and how would they receive benefit from that as beneficiaries for all this.

MATANUKU MAHUIKA:

If there's a little of complexity to those relationships that I'm not able to answer, but in terms of dealing with the issues of succession, some succeed, some haven't, some families are bigger than others, so therefore some people have bigger shares. The idea of the Trust is to remove those relative shareholding so that everybody is a participant. So that's the way that the Incorporation is thinking of dealing with that issue.

DR RUAKERE HOND:

In respect –

MATANUKU MAHUIKA:

As to the other matters, I'm afraid that would be – it's above my pay grade in terms of understanding what those complexities might look like and whether they're there at all in terms of, you know, the 139 owners. Once you incorporate those families, do you actually leave everybody out? I'm not sure if that would be the case.

DR RUAKERE HOND:

It just speaks to the confidence around the appropriateness of the group and how those others will be recognised or be able to be involved.

MATANUKU MAHUIKA:

Yes, and I think that, well the incorporation, you saw it from Mr Hemi's evidence, is very confident that that 139 captures those that have the interest or the interest that amounted to title, and the Incorporation's proposal about how it might receive any resumed lands is to try and deal with some of those other sorts of issues that you refer to, so avoiding people that maybe didn't succeed, or dealing with situations where because of the issues that arise with succession to Māori land, you know, have different sized interest.

You know, my family has 14 children, another family might have one. So, and it's dealt with in the memorandum that was provided if you descend 111, then you have a certain shareholding, but if you come through a family that has had a series of large families, you have, you know, a much greater fragmentation of that interest. The Trust proposal is designed to try and deal with that so that there is an equitable arrangement insofar as it relates to the shareholders, even though as I said in submission there is, I think, a very fair argument on the part of the Incorporation that the owners were affected in their relative shareholdings when the land was taken. So, it's appropriate to still deal with them in their relative shareholdings, but that's not the thing that the Incorporation is pushing.
1700

DR RUAKERE HOND:

Kotahi te pātai e toe ana pea, ko te… [Interpreter: One more question there, Sir…] The communication with Raukawa –

MATANUKU MAHUIKA:

Yes.

DR RUAKERE HOND:

– and Kahungunu ki Wairarapa Tāmaki Nui ā Rua, do we have any record of the nature of the communication and what was the invite to have this discussion?

MATANUKU MAHUIKA:

No, I think – all I'm really saying is that there is a discussion and that it's ongoing. I'd be reluctant to – there is a letter that was sent, but the proposal in the letter is just that a proposal – and I don't know that it would be appropriate to disclose the content of it because it is part of an ongoing, hopefully, process of dialogue.

DR RUAKERE HOND:

It would help us in understanding the way in which the relationship is being considered.

MATANUKU MAHUIKA:

And as I've said in response to the arguments from Her Honour Judge Wainwright, discussion will be an ongoing process and is made challenging by the virtue of the fact of this application, so people are taking their positions in respect of the application and that creates challenges for the process of dialogue.

DR RUAKERE HOND:

Tēnā koe, ngā mi[hi].

JUDGE WAINWRIGHT:

Kua pau ināianei ngā pātai o ngā mema. [Interpreter: We've exhausted our question time at this point in time.]

MATANUKU MAHUIKA:

Ka pai, kua pau anō taku hau. [Interpreter: Nil.]

JUDGE WAINWRIGHT:

I te mea kua pātai ai au aku pātai i a koe e kōrero ana. [Interpreter: And of course I have asked questions I've needed to ask of you.]

MATANUKU MAHUIKA:

Tēnā koe.

JUDGE WAINWRIGHT:

Nā reira tēnā koe, koutou, ki ō koutou whakaaro ki roto i ēnei pepa i te mea, āe, he tino āwhina ki a mātou ēnei whakaaro. [Interpreter: Thank you Sir for your insight, the evidence that you have given is a lot for us to think about.]

MATANUKU MAHUIKA:

Tēnā koe e te Kaiwhakawā otirā koutou katoa me te roanga ake o tā koutou whakarongo mai ki a au i tēnei rangi, nā reira kei te mihi, tēnā koe. [Interpreter: Thank you very much for your time, I know you've had a long day in the seat, so I do appreciate your patience.]

DR RUAKERE HOND:

Oti anō, kua pau ngā pātai o tēnei taha. Te āhua nei, ana kua pau ngā kōrero mō tēnei rā. E tika ana kia mihia atu koe i tērā i te tū hei pou kōrero mō tēnei rangi. Tika ana kia mihi ki te Kaporeihana a Wairarapa Moana, tēnā e whakaari ana i roto i ngā kōrero. Nā te mātotoru anō o ngā kōrero, whakaatu ana i te hōhonu anō o te whakaaro i roto i te Kaporeihana mō te whenua te take. Nō reira e tuku atu, tēnei te mihi ki a koutou katoa ki roto i te whare i runga i ngā kōrero i te rangi nei, tēnā koutou, tēnā tātou. Kei te tuku atu ko te mauri o te

karakia whakakōpani ki a koe e te matua, nāu i wāhi, māu anō e whakakōpani i runga i ngā whakaaro hōhonu i te rangi nei, tēnā koe otirā tēnā tātou.

[Interpreter: So with the questions coming to an end, and again we will end our hearing. And again, we wish to thank you for your time on the stand, a long day it has been. And of course, the in-depth and magnitude of the evidence that you have given today, so we thank you for that. So, again, greetings to all. And I will hand over matters to our elder to complete our day in prayer.]

MIHI (KAUMĀTUA)

HĪMENE (WHAKAARIA MAI)

KARAKIA WHAKAMUTUNGA

HEARING ADJOURNS: 5.06 PM

HEARING RESUMES ON WEDNESDAY 13 NOVEMBER 2019 AT 9.01 AM

(09:01) DR RUAKERE HOND: (MIHI)

… *te moana o Wairarapa, i tēnei rā ka piki rā ki te taumata o Titiraupenga, otirā Tongariro Maunga, nō reira ka eke ki runga nei ngā whakaaro ki runga i tēnei wānanga i tēnei kōrero. Ka whakatakotohia te kupu, te kōrero, kia puta ai ko*

tēnei mea, he māramatanga ki runga i a tātou. Engari i tēnei wā, kei te hiahia kia tukua atu te mauri, he karakia. A, whakaitihia atu ko tērā te mana ki te wāhi ngaro, ki runga i a tātou katoa. He maungārongo i runga i te whenua ka tae ki tēnei te maungarongo ki tātou te tangata. Nō reira Raukawa, tēnā anō koutou, ana tēnā, kei a kōtou tērā te tuku i te whakaaro rā.

[Interpreter: … the in-depth evidence from our Wairarapa in relation to Titiraupenga and Tongariro Maunga. And of course, this particular group will be giving evidence, and helping us understand. But however, before we commence proceedings, I will pass over to matters to lead us in a prayer. I will hand that part over to our Raukawa people to lead us in prayer.

MOTEATEA

KARAKIA

MIHI

MŌTEATEA

JUDGE WAINWRIGHT:

Tēnā anō tātou. Ā kō ake nei ka huri āu ki a koutou Raukawa, engari ināia tonu nei, Mr Milner, i te whakamutunga o te ahiahi inanahi, kua puta mai ētahi atu pātai mā Mr Mahuika, nā reira mehe kei konei ia, ka huri a Dr Hond ki a ia patapātai ai. Nā reira, āhea ia e hoki mai ana?

[Interpreter: Soon I will hand matters over to Raukawa to commence, but however, Mr Milner, at the end – yesterday afternoon, at the end, there were questions in relation to Mr Mahuika's evidence, so Mihi is present, and Dr Hond did want to ask questions of him. So, with that, when do we – is he likely to return, and when?]

NATHAN MILNER:

A muri i te whakatā Ma'am, after that morning interval.

JUDGE WAINWRIGHT:

Ka pai. Nā reira, ko te wā pai pea a te whakamutunga o te kōrero mai o Raukawa, kia ora. Nā reira, Mr Vertongen, Raukawa mā.

[Interpreter: So, with that, that would be the appropriate time with evidence of Raukawa and we will ask questions of him at that time, thank you. So, Mr Vertongen, and Raukawa over there, I hand matters to you.]

(09:09) BADEN VERTONGEN: (MIHI, CLOSING SUBMISSIONS #J101)

Te Rōpū Whakamana i te Tiriti o Waitangi tēnā koutou. Ko Ngāti Kahungunu ki Wairarapa kua tae mai nei i tēnei wiki, ngā mihi nui ki a koutou. Tūwharetoa, ngā mihi, te Karauna, tēnā koutou.

[Interpreter: Ngāti Kahungunu ki Wairarapa who have gathered here during this week. I certainly want to acknowledge you. Tūwharetoa, again, our Crown counsel.]

And Ma'am –

JUDGE WAINWRIGHT:

Can you make sure that you are keeping your volume up Mr Vertongen, we would like you to fill the room, becomes tiring if people have to struggle to hear.

BADEN VERTONGEN:

Yes, Ma'am. It falls to me than to walk you through the closing submissions on behalf of the Raukawa Settlement Trust, and these are #J101. There's also some supporting material which was circulated this morning and hard copies are being handed out as well. There's nothing new in here. There are more sort of tables and flow charts explaining some of the options and processes I'll

to today. I feel very lost without a whiteboard to draw some of these on, so this is a whiteboard I prepared earlier.
0910

In moving through the submissions on behalf of Raukawa, hopefully you would have had a chance to read these and have noted that Raukawa are looking to take a different approach to presenting closing submissions. We have been minded in the directions and the challenge being put forward by the Tribunal that what you've – what we understand you have been seeking is not positional approaches from the parties and not for us to continually tell you why we think we are writing to oppose urgency. But what you prefer is us to think outside the box and start looking at creative solutions and pathways forward that will support everybody how we can possibly get to a win/win.

So, that's the approach that Raukawa have taken in presenting these submissions. And you'll see that at 1.4, Raukawa C, the challenge that the Tribunal has put in front of us has two parts. One is to ground that solution in a tikanga based model. And the second is to deliver an outcome that provides for whanaungatanga and provides a win/win for everybody.

So, to get to that win/win outcome, what Raukawa feel we need to do is put aside the entrenched positions that we've taken to date and to look at the underlying interest of each party. Doing so requires some bravery and some leadership and these can be difficult questions to ask and answer particularly within the legal framework that requires us to take entrenched positions, but I've been very much guided by the direction of Ms Eparaima here, that Raukawa want to find a solution that works for everybody and it's up to Raukawa to show some leadership and show how that can be done and move from an oppositional position.

So, within these submissions, Raukawa set out a view that a win/win solution is possible and it's one that can be founded in tikanga and consistent with the

Tribunal's legal obligations. There is a way forward that constructs a solution which would deliver a financial outcome to Wairarapa Māori. It would include the potential to structure financial benefits to assist Wairarapa Māori to address various impacts of Crown actions including harm done to the relationships within Wairarapa Māori.

There's a way forward that provides Pouākani land to Wairarapa Māori as a tool that Wairarapa Māori can then use to address the relationship with Raukawa while having no detrimental impact on Wairarapa Māori themselves.

We think there's also a way whether financial tools can be provided to Wairarapa Māori to pass on to Raukawa to address that relationship as well while having no detrimental impact on Wairarapa Māori. And ultimately, this would be a solution that enhances the mana of all parties involved and merge the parties towards a state of *ea* and doesn't require the parties to trade off tikanga against financial outcomes.

So, to the structure of getting us to that point as set out in section of the submissions, what I propose to do is to work through the submissions as they stand.

The next section focuses on the legal framework, particularly the prejudice that the Tribunal is tasked with addressing. How issues of tikanga fit within the statutory task of the Tribunal and the various tools that the Tribunal has before it under the Act.

The next section is Raukawa's attempt of summarising what we've heard the underlying interests of the parties to be, and that might be slightly different from the position the parties are taking in these proceedings but examining and getting to the heart of some of those underlying issue sis a key part of what we need to do if we need to find a win/win solution.

0915

The next stage is then focussing on how we might construct an outcome that addresses the prejudice we had to remedy as well as how we are providing for the underlying interests for all the parties. And then finally, there's some specific questions that the Tribunal has asked the parties to address in your 29 August memorandum directions which we can talk to as well, and the issues around the appropriate entity to receive redress and how an iterative process might be structured.

Throughout these submissions, I'm using the term "Wairarapa Māori" as the collective group for Wairarapa Māori where there's a difference between the incorporation and the settlement trust we refer to them individually, and I use the term "Pouākani land," to refer to the land that's subject to the current application. Mr Mahuika yesterday was using the term "subject land" the same thing.

So, if we can turn to part B.

Now, I haven't proposed to go through any of the detailed historical background or a very detailed analysis of the legal structure of the Act. All of the other parties have provided that and as I say, there are fourth rendition from myself may not add here. Instead, Raukawa is willing to focus on things from a Raukawa perspective and where the other parties may have left some gaps.

But just very briefly, there are four criteria that apply to the exercise the Tribunal's binding powers. It's common ground here that the claims by Wairarapa Māori related to the Pouākani land and that those claims are well-founded. The outstanding question at this point is whether or not the Tribunal should return land or whether land is not required to address the prejudice that the Tribunal has already found, and the key element of that test as was discussed a little bit yesterday is there should.

As Raukawa at 3.6 and in their opening submissions, the Courts have framed that should question in a number of ways including whether or not the Tribunal should grant a remedy, whether a grant of remedy is appropriate, whether it's something the Tribunal ought to do, and our submission is, that's a very values-based judgment, the question of whether or not the Tribunal should return land, is a question of what it ought to do. What is right is a values-based – is a values-based decision.

At 3.8, "The identification of the group of Māori that any remedy is also arguably, well in our view it is, an element of whether or not the land should be returned, returned as part of the Tribunal's powers to order, binding recommendations. And that's because the question is whether or not the return of land to a particular group will be effective in remedying the prejudice, and we largely adopt the submissions of the settlement trust on this point.

There's also a clear discretion for the Tribunal. The Tribunal is not obliged to exercise its binding powers at this point, but whilst the Tribunal has come to the view that land should be resumed or alternatively that a step is not required, the Courts are clear that the discretion becomes limited and the Tribunal has essentially two options before it.

The various Court cases talk about four options, but in this particular circumstance, really there are only two options because there are well-founded claims and the question in front of the Tribunal is simply whether or not to order the return of land. But we're not at that point yet, so the discretion the Tribunal has not become narrowed. It's still a very wide discretion for the Tribunal, and as the Tribunal noted in your 29 August memo, the Courts have given little guidance on how to approach that question.

How Raukawa conceive of what the Courts have said so far is the guidance of the Courts have provided that there is quite a structured starting point for the

Tribunal's inquiry. The Tribunal has very little discretion about whether or not to begin an inquiry into remedies.
0920

There's quite a structured limited number of outcomes the Tribunal can find and effectively hear whether or not to return land, but how to get from those two points is still very much an open question for the Tribunal, and there is lots of discretion in front – lots of discretion of flexibility in front of you.

And the analogy I use at 3.14 is effectively the Tribunal has to start its journey from a particular point has to end in a number of end points. How you take the journey, the stops you may take along the way, how you travel, is left to the Tribunal to decide.

At 3.16, Raukawa's submission is that the structure of the legislation itself points to that view. The Tribunal's not bound to grant a remedy. Wairarapa has wide discretion to do so, and again, it's a values-based discretion, values-based judgment. That suggests there is a wide discretion.

The legislation directs the Tribunal's inquiry to what is required to address the underlying prejudice that is found, it is a restorative approach and again that seems to suggest a quite a flexible enabling approach is open for the Tribunal.

The structure of the legislation contemplates that the original claimants are not necessarily the ones who might receive any remedy, instead the Tribunal is directed to identify the Māori or group of Māori who are entitled to a remedy. So, there's a role there for the Tribunal to be actively inquiring into who is the most appropriate recipient of any remedy and how that would go to addressing the prejudice. So, that's an active inquiry role for the Tribunal, which suggests a flexible, and inquisitorial role at this stage, rather than a narrow defined – yes, a narrow-defined approach.

And of course, the structure of the legislation places the responsibility to do all of this on the Tribunal themselves. It's for the Tribunal to determine what the remedy should be. It is for the Tribunal to exercise its values judgment and they turn on how the claim is pleaded or how the parties have chosen to structure themselves. It's a discretion and it's an obligation for the Tribunal.

At 3.17, Raukawa also note that the Tribunal has consistently taken a restorative approach to remedies, both binding and non-binding remedies, and at no point in the litigation surrounding the Tribunal's approach to its exercise of binding powers, has that restorative approach been questioned or rejected by the Courts, and so the Tribunal can take some comfort that there is a flexible restorative lens, so you can be applying to this question.

And such a restorative approach requires some flexibility. It requires the decision-maker and the Tribunal in this case to consider what's required to restore the essence of the party's position rather than whose case is stronger or weaker.

So, within that broad discretion though, the Tribunal's fundamental touchstone is whether or not the return of land will remedy or compensate – remedy compensate or remove the prejudice that's been caused by the Crown. And that's a common consideration for both the Tribunal's non-binding and binding powers.

And at 4.3, the point I'm really stressing there is that the focus needs - is that is that focus that is on the prejudice rather than necessarily how the claims ha As a result, Raukawa is of the view that it is not necessarily the 'claims' that require a nexus with the memorialized land in question, but that this issue is better seen as it being the prejudice the Tribunal has identified as requiring a connection to the land. The return of land must be what should occur to address the prejudice, not the claim itself.

0925

So, at 4.4, as Raukawa come to this inquiry at I guess from an unusual perspective or almost an external perspective to all of the other parties have been involved and even the Tribunal itself, because we haven't been engaged in the historical inquiry. And so, when we get to the question of what is the prejudice that is to be remedied and which of those prejudices and claims have a nexus with the land, it occurs to Raukawa that the Tribunal has already largely come to that view and largely structured its findings unconsciously or otherwise and structured its findings in a way that associate a bunch of prejudice on claims with issues associated with Wairarapa Moana and Pouākani. And we can see that from the way the Tribunal has already structured its claims – structured its discussion for claims prejudice in remedies and the existing Wairarapa ki Tararua Report.

There's a chapter there that's specifically deals with Lake Wairarapa and Pouākani chapter 7. And the nature of the Tribunal's discussion in that chapter links those claims together and provides a coherent narrative and a coherent nexus between all of those claims and issues relating to Pouākani.

So, in our submission, the Tribunal has already identified effectively what are the issues and what are the prejudices it sees as having a relative connection to the Pouākani land and distinguish them from the broad suite of arms that Wairarapa Māori have already suffered generally as a result of Crown actions.

And I think really that leaves us in a middle ground between the position that the Wai 85 claimants have taken that there's a very narrow – effectively one claim that relates to the Pouākani land and the broad position that the settlement trust has taken and its alternative in its application that there is a whole range of effectively everything that the Crown did to Wairarapa Māori can in some way be seen to link to issues at Pouākani.

The Raukawa position is there's a middle ground there that the Tribunal has already reached in chapter 7 of its report. And the prejudice that the Tribunal has already founded is having some connection to issues associated with Wairarapa Moana and Pouākani, are set out at page 717 of the report and I haven't produced them in full there, but to briefly summarise how Raukawa understand or how Raukawa read what the prejudices are there, broadly there's an impact on the mana and cultural identity of Wairarapa Māori and that's particularly in relation to the connection with Wairarapa Moana.

There's certainly a financial and economic impact on Wairarapa Māori as a result of the loss of resources in Wairarapa and from issues associated with the Crown's actions in the Pouākani area.

There's a range of emotional and spiritual harms that had been caused by the relentless long-term impact of Crown actions, and Raukawa note that the Tribunal's concern in the discussion in that chapter also talked to one of the manifestations of that harm, today being the internal conflicts that we see present in the Wairarapa Māori claimant community.

The Tribunal has also found that the prejudice caused to Wairarapa Māori has been the undermining of the traditional leadership which forced Wairarapa Māori towards options they would have never chosen otherwise and electing to take land at Pouākani as compensation for the loss of the moana and to take up land outside their tribal rohe.

There's also the prejudice done to the harm done to the relationship between Wairarapa Māori and Waikato Māori through the grant of land in the Waikato in an area where Wairarapa Māori were not tangata whenua.

Now, that's a broad suite of all sorts of all sorts of different types of prejudice there, and some of them are very different in nature from others. Some of them

are financial and economics. Some are firmly grounded in tikanga and in for example, the impact on mana.

0930

And Raukawa is very aware that that creates a difficult challenge in front of us all because we have to find a remedy to that that addresses some very different prejudice, and there's not necessarily a one size approach – one size fits all approach that's going to work to address everything there.

You know a financial payment might address some economic harms but might not be the appropriate remedy for issues grounded in tikanga. In addition, we are very aware, Raukawa very aware that a particular remedy that addresses one element of prejudice may worsen or cause further harms.

For example, the return of land in the South Waikato might address some of the economic harms to Wairarapa Māori but would do more damage to relationships and being inconsistent with Tikanga.

And so, it's Raukawa submission that in building an outcome and creating, constructing a remedy the Tribunal must take care that that remedy does not cause further harm or further grievances and that's been clearly signalled as well, by the Court of Appeal on the second Haronga decision; that

The Tribunal shouldn't be creating a fresh set of grievances.

At 5.1 Raukawa taken on board the Tribunals signalling, extremely strong signalling that we need to find a way of ensuring tikanga is at the heart of any remedy that's delivered.

Raukawa agreed with that position that the Tribunal's put forward in its 29 August memorandum. Raukawa is certainly of the view that a consideration of

what the Tribunal should do, to address prejudice needs to be founded, needs to come a Te Ao Māori place and be founded in tikanga, but particularly important that if we are going to be addressing the impact of rights and interests that are founded in tikanga, for example the impact on mana then the remedy for that needs to be founded in tikanga as well, otherwise it's not effective.

That's certainly part of the Tribunals role to take a tikanga lens. The various directions that the Courts given to the Tribunal that the question of should is a values judgement and should turn on ought or what is appropriate is entirely consistent with taking a tikanga bases approach.

Effectively, the Tribunal's task with doing what is right or what is tika, so that's entirely consistent with grounding your approach in tikanga. The ordinary Courts are also increasingly willing to consider elements of Tikanga in their own decision making and so there's no inconsistency between, there's no inconsistency in the Tribunal taking an approach strongly grounded in tikanga and a more adjudicatory remedies process here.

In coming to a view of what a tikanga based approach might look like or what are the key elements of such an approach, Raukawa has been strongly guided by what was a very helpful session on the tikanga or remedies, or tikanga or redress.

And we set out there at 5.7 what we've taken to be some of the key points that have come out of that session. First and foremost, Raukawa see a process that's founded in mana and enhancing mana, has to be a key element of any remedies process.

Professor Adds noted during that session on the tikanga redress, that many of the redress processes we are talking about are in fact, about the restoration of mana and about the movement up and down in that scale. Raukawa would

agree with that, that fundamentally any approach we get to must be mana enhancing, any outcome we get to must be mana enhancing.

Raukawa also noted there was quite a bit of discussion within that session about how you get to – what you do to enhance mana and that mana came from both the process of giving and receiving redress and there's an exchange there between Paul Meredith and Peter Adds.

Where Paul Meredith is talking about the level of mana should be reflected in the level of redress that's being given. Peter Adds is saying, yes there is a proportionality that cuts into those topics, there's an issue about how much redress is needed to restore and reinstate mana to a position where it's been prior to the harm and then they both say, but there's also the mana in giving the redress too.

So, that the restorative mana comes from both the receiving of the redress to restore and put you back in the place where you were before the harm was caused, but also in the party that did the harm and there's mana that comes from providing redress.

The other foundation principle that Raukawa based their approach is there, and this is the idea that any remedy of outcome we construct here should restore some sort of balance, particularly a balance in the relationship between the parties.

And again, this was covered in some detail during the wānanga session and it was something that was talked to by all of the groups. So, Kim Workman talked to this idea in some detail as well, as did Ms Eparaima, and Mr Meredith and Professor Adds discuss this in some detail during their discussions of concepts of muru and utu and how their process is to restore a balance.

Raukawa would also say that any outcomes needed to -- it needs to be tika, it needs to be founded in what's right, it needs to be consistent with underlying values and cultural norms need to be consistent with tikanga. That's not necessarily something that was discussed in great deal during the wānanga on the tikanga of redress, but it something that's come through in the evidence and the submissions as this process has developed.

Particularly, from the settlement trust and for example Raukawa note the evidence and this Te Whaiti, that tikanga doesn't allow us to seek, to take land which within another iwi's rohe in our Treaty settlement. And that doing so, would be detrimental to the health and well-being of Wairarapa Māori themselves.

At 5.8 there's also issues of proportionality that came through in that tikanga of redress session. One of the key concepts that came through in discussing the proportionality of redress was that tikanga often demanded a greater level of redress and the loss suffered.

Peter Adds noted the traditional view was it's not necessarily an eye for an eye, but it might be the idea of two eyes for one eye. And in response to later questions on this point from Mr Te Hiko, Peter Adds went on to say, "In order to restore a balance it requires a greater response of the actual loss, and that's a relative term it's not just a one for one balance. Sometimes that balance or restoration of balance required more than the original hara to fix the scales in their proper places, as it were.

And again, he draws that back to the idea that this is about the mana of the offending party, about the mana involved in giving redress. There was quite a bit of discussion around, during that tikanga redress session around ideas of utu and muru, for Raukawa though we see those as the mechanisms for achieving some of these fundamental aims.

0940

The mechanisms for enhancing and Peter Adds agrees with this point, that they were mechanisms and examples of how you enhance the mana of all the parties, and the fundamental point that came out of that tikanga redress session for us was what we're trying to achieve is a restoration of mana and a rebalancing of relationships.

So in terms of how we start to think about – in terms of thinking about how do we start to get there, at section 6 there is a discussion of what are the tools that are available within the legislation for the Tribunal, and Raukawa was very minded that the other parties have approached the question of what should the Tribunal do in ordering the return – in exercising its binding recommendation powers, and they've approached it as a very binary question, it's about do you return land or not. But it is Raukawa's submission that it would be a mistake for the Tribunal to take that binary approach if we're just can return land or we can't return land and see that is the only tool you have available to you.

Instead, your powers under s 6(8) and within the wider structure of the Act can be seen more as a tool box, that you have a range of options and you have quite a bit of flexibility in how you use a number of different options and a number of different conditions or how you might structure a set of binding recommendations to provide quite focussed outcomes.

And we get to that view that it's possible to see a number of tools rather than just one tool. If we see an ownership interest in land is consisting of a bundle of rights and interest, and this is a very standard property law approach to interest in land. So in ownership interest in land is not just one set of rights, it's a number of intertwined connected bundles of rights, and they can be held together as one set of fully owned land, or you can pull them apart and have different interests in lands. So you can separate a right to occupy land from the underlying ownership of the land, you can have beneficial interests in land, you

can leasehold interest in land. There's a number of different strands to what it is to own land.

The challenge we have here today as well is that we are not faced with just a legal bundle of rights, instead we have two different bundles of rights associated with land at Pouākani. So we have the legal bundle of rights and we have also a bundle of rights and interests that are founded in tikanga. And they are intertwined, but unfortunately also pulling in slightly different directions, and that's happened simply because the last group of Māori who had legal title here are not the ones who had the take whenua in the land.

And so if we see ownership interest in land as being made up of a bundle of a number of different rights, we then get to a point where it is Raukawa's submission what the Tribunal is able to do is untwine those different rights and interests and deal with rights and interests separately. And if you're able to deal with rights and interests, strands of rights and interests separately in different ways, then that gives you a number of different tools in a wide suite of abilities in front of you to build a tailored solution that addresses the interests of all the parties rather than just one blunt tool. And that's clearly an approach that's contemplated by the Act itself.

So, at 6.5 there, there is the quote from s 8A(2)(a) of the Act that the Tribunal may:

> *"….include in its recommendation under section 6(3), a recommendation that land or that part of that land or that* ***interest in land*** *be returned."*

So it's Raukawa's submission that clearly what the Act is contemplating is that you have a number of options in front of you, you can take that bundle of rights and return it completely, you can chop that bundle of rights up into parts and return that, or you can deal with the interests in the land and untwine the bundle of rights and deal with it in that way.

In addition, the Tribunal also has the power to order that resumption of land, or interests in that land, on 'such terms and conditions as the Tribunal considers appropriate' to address the prejudice it has identified. Again in Raukawa's submission, that suggests that the Tribunal has the ability to target particular rights or interests in land by putting various conditions on how those interests are going to be returned so that you can achieve quite a tailored outcome."

And over at 6.7, it might be – it's helpful at this point to sit out what some of those strands of rights Raukawa feels we're talking about as part of these proceedings. So clearly there's an underlying ownership issue associated with the land and that's effectively a very simple "whose name goes on the title" type of ownership right rather than the full bundle of rights.

Separate from that, there is a right to draw the financial and economic benefits associated with the land. That's that issue here. Effectively, who is able to utilise the land for financial gain and you can separate that from who actually owns the land. Here, given the nature of the land, it is likely that the financial benefit that any party is going to draw from the land will come from the right to enable access for other parties, particularly Mercury, to continue to use the land for electricity generation. No parties sitting out in front of the Tribunal here, they're the ones that are going to take over the power station and be the ones that are running the power station. All of the parties have said that the financial benefit for them is going to come in some way with a relationship with Mercury Energy either selling the land back to Mercury or I think the Incorporation has proposed some other arrangements.

Raukawa also believe that the right to be recognised, and engaged with, as tangata whenua who have the ancestral rights and interests that derive from take whenua rather than from legal rights is an important strand of rights we need to be dealing with.

But at the same time, there are other historical associations with the land that have come from more contemporary, non-tikanga based rights. And essentially what we are saying there is that Wairarapa Māori were the last ones on the title before it was taken by the Crown, and that is a historical fact, that doesn't need to be dealt with.

The right to occupy and use the land is a separate strand of right from who owns the land or who might be drawing financial benefit from the land.

And at that last bullet point, it's important to keep in mind too that there are different time scales that can apply to some of these rights and we can manipulate and play with some of those time scales as well through our terms and conditions.

So some of these rights apply over a long time. Take whenua and the tikanga-based rights are forever. But some of the financial rights might be set for particular terms. So beneficial interests and trust arrangements may have a limited life. Leasing arrangements may have a limited lifespan as well. So we can be creative with the terms and conditions to be applied to manipulate some of those timespans to tailor an outcome as well.

I then come on to talking about the ability of the Tribunal to use both section 6(3) and section 8 to construct a remedy, and I am very aware that when I get to this point, I am coming up to the edge of a whole that Mr Mahuika found himself in yesterday about whether the Tribunal's functus officio and the jurisdiction of the Tribunal to use – to make remedies outside section 8A. So rather than being pushed into that hole, I might just leap in already.
0950

Now, my understanding is that that's not a live issue for this Tribunal. It was an issue that was raised by the Crown, particularly in the context of the Tribunal's AA powers, but it was raised by the Crown in the Crowns initial proposition to

this application proceeding to an urgent hearing, and as such it was addressed by the Chief Judge at an early stage, prior to urgency being granted and I have the reference for that as being on the Wai 85 record.

I'm not sure if it's been imported into the Wai 863 record of inquiry, but it's Wai 85 #2.37 and there's a set of memorandum directions from the Chief Judge, which deal with jurisdictional issues and particularly whether the Tribunal is functus officio.

I'm not sure if we want to find that now, if you just take my word for it.

JUDGE WAINWRIGHT:
Sorry, I am aware of that document. We have looked at it.

BADEN VERTONGEN:
Okay.

JUDGE WAINWRIGHT:
But, if you want to make particular comments in relation to it, we can easily go to it?

BADEN VERTONGEN:
No, I was just going to note that my view is that that's doubt with the issue largely and particularly at paragraph 37, the Chief Judge is noted that in the discussions between paragraphs 31 and 37 the Chief Judge notes that the existing recommendations the Tribunal has found are focused on negotiated outcomes and that the door if left open for the parties to explore other remedies.

And particularly, at paragraph 37 the Chief Judge talks about any other remedies being open?

JUDGE WAINWRIGHT:

Well, that talks about the Tribunals ability to exercise its functions under section 8A because the Chief Judge was satisfied that any exercise of that power needed to be explicit it couldn't be implied, but what are you relaying on for your proposition that the rest of our recommendatory powers are also on foot?

BADEN VERTONGEN:

So, towards the end of that paragraph there's a passage where the Chief Judge says, "But this does not mean that the Tribunal have completed its inquiry, as the question of binding recommendations and any other remedies outside settlement, may still remain open for the Tribunal to consider.

So, I read that as the Chief Judge turning his mind to this point and saying it's not just binding recommendations that are open for this Tribunal to consider, it is any other recommendations outside settlement as well.

JUDGE WAINWRIGHT:

Okay.

BADEN VERTONGEN:

So, on that basis that then leaves the Tribunal with the ability to make recommendations under both section 6(3) and section 8A.

And at 6.10 the structure of the Act is clear that the section 8A recommendations are intended to sit within a wider package of section 6(3) non-binding recommendations. So, the Tribunal is to include in its recommendations under section 6(3) the specific binding recommendations under section 8A.

And therefore, it's Raukawa submission that the Tribunal has the ability to develop a tailored package of remedies, including various terms and conditions as well or suit of binding and non-binding recommendations that specifically target individual rights and interests, as a way of navigating through the

challenging set of prejudice that we have to address here. So, that whole up range of prejudice, one size fits all isn't going to work, and so you have suit of option available to you, to navigate your way through that.

Raukawa are also in the unusual position and difficult position that Raukawa has settled its claims, historical Treaty of Waitangi claims against the Crown but it's important for Raukawa to note that the unusual and difficult position that we find ourselves in, in this inquiry arises because of that and not because that Raukawa do not have well founded claims that are associated with Pouākani, Raukawa do, and the Pouākani Tribunal has already discussed and found claims for Raukawa and other tangata whenua in the area.

Instead the difficulty for Raukawa is that Raukawa has settled its Treaty of Waitangi claims against the Crown and that's been given effect through the Raukawa claim settlement Act.

Section 14 of that Act specifically defines what historical claims are and what claims have been settled. And they are the claims that Raukawa has in relation to Crown actions, against the Crown prior to 21 September 1992 and at section 15 of that Act, that provides that those claims are settled and excludes the jurisdiction of this Tribunal to making recommendation again about Raukawa claim in respect of Crown actions, pre-1992.

Section 17(1)(f) also provides that the Tribunal can't exercise its binding recommendation powers for the benefit of Raukawa, but it's important to note that that specific restriction doesn't extend to the Tribunals powers to issue non-binding recommendations under section 6(3), it's limited to the Tribunals binding powers, so the section 8A powers. And instead, the broader restriction of section 15, is what applies to the Tribunals non-binding powers.

So, what Raukawa understand this mean is that the Crown and Raukawa have addressed their relationship in relation to events prior to September 1992. And

that the mamae between Raukawa and the Crown that arose from the Crowns role in the original loss of the Pouākani lands, and then the Crowns roles in the transfer of that land to Wairarapa Māori has been addressed, as well as addressing the taking of other lands in the Raukawa takiwā for hydro development along the Waikato river.

However, those are still important historical facts for the context of this inquiry, and as historical facts they can be considered by the Tribunal as part of the relevant circumstances and the settlement of those issues has not removed the obligation on the Crown to address post 1992 issues or to continue to meet its obligations to Raukawa. And the impact of any recommendations might have on the current recommendations between Raukawa and the Crown is still relevant to this Tribunal.

Of course, this isn't an unusual situation for settled Māori to be in, there are a number of examples of settled iwi seeking to protect their own interests, the integrity of their settlements, or the impact of harm from other redress coming through. That was the case for Taranaki whānui in the Tribunal, in the Port Nicholson block inquiry, it was also the case for Ngāti Whātua in recent litigation in front of the supreme Court.

And so, Raukawa aren't prevented by their own settlement from arguing that the use of land in the Raukawa takiwā is redress for Wairarapa Māori, has the potential to cause fresh grievance, well that would be inconsistent with the structure of the Raukawa settlement and the commitments given by the Crown in that settlement.

But probably, most importantly is at 7.9 that what hasn't been covered by the settlement between Raukawa and the Crown is the relationship between Wairarapa Māori and Raukawa. So, this remains a live issue and it's been the particular focus of Raukawa as these proceedings have continued.

And Raukawa has been very careful in how we've presented the case today, in the evidence we've put forward that Raukawa hasn't sought to re-open claims against the Crown, hasn't sought to pursue redress for those claims, but has wanted to talk about the relationship between Raukawa and Wairarapa Māori.

And there are some limits on how far the Tribunal can go to address the relationship between Raukawa and Wairarapa Māori, because the Tribunals jurisdiction is clearly on the action of the Crown, rather than necessarily the relationship between two iwi groups.

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But what Raukawa say is that, "it is open for the Tribunal to say, that Crown actions led to Wairarapa Māori being forced to choose unpalatable options that harmed the relationship with Raukawa. It would then be open to the Tribunal to recommend that the Crown now or the Tribunal itself, now empower Wairarapa Māori with the ability to address those harms themselves and that wouldn't be reopening Raukawa's claims against the Crown.

So, at section 8, it's just sort of a brief summary of where get to for looking at the wider statutory framework. So, to briefly recap where we have got to so far.

- Now that we are into a section 8A remedies inquiry the test for the Tribunal is what should occur, what the Tribunal ought to do, what is appropriate.

- And once the Tribunal comes to a view whether or not land is appropriate to be returned, you have fixed number of – a set number of outcomes, but you've got a great deal of flexibility and discretion about how you get there.

- And that discretion is a values-based judgement and key elements of that decision should include:
    - How the return of land is going to address the prejudice in front of the Tribunal the Tribunal has already found.
    - Whether or not that return of land will cause further prejudice;
    - And how to construct that remedy in a framework that's consistent with tikanga, in particular, assisting in restoring a sense of *ea* or enhancing the mana of the parties.

To get there the Tribunal's got wider powers to deal separately with difference in different interest in land and to put terms and conditions on the return of land or interest in the land to tailor make an outcome and to place binding recommendations within a wider suite of non-binding recommendations as well.

And that the Tribunal is not able to make recommendations that address the historical claims of Raukawa. But, there is still relevant historical background and relevant for considering – and it's relevant to consider the impact any outcomes might have on Raukawa.

And that the relationship between Raukawa and Wairarapa Māori have not been addressed as part of Raukawa Settlement. And so, it's still open for the Tribunal to consider matters that relate to the relationship between Wairarapa Māori and Raukawa and the steps that might be taken to address that relationship.

We come into **Part C**.

So, as I said at that start, Raukawa has approached these submissions on the basis of trying to find a win-win way forward, taking Your Honour – the lead from Your Honour that this issue is almost one that cried out for some sort of mediated solution in facilitated discussion. And so, how would you do that

without having had the opportunity to sit in the room and be mediated or facilitated.

So, Raukawa's kind of step back and gone, 'Well, what would that have looked like anyway? And what would that process have drawn out?' And what would be important is identifying the underlying interest of the parties rather than necessarily the position they've put forward in their claims and their submissions today.

And getting to grips with the underlying interest is important in building a win-win solution. So, there's little utility in setting out how the Tribunal should way the strength and weaknesses of each party's case. That's just simply positional, instead, Raukawa want to move to a more productive way forward and make some attempt at setting out the underlying interest to the parties.

And so, this section discusses what Raukawa have heard from the parties. So, it's very much Raukawa's interpretation of what those underlying interests are and would have been better for all of the parties to have gone through this process themselves, but this is very much Raukawa's attempt to do that.

And in getting to this point, Raukawa do acknowledge that the parties have been forced into a positional approach so far and that's because of the statutory framework has driven that. And it is important to acknowledge that while we may strongly disagree with each other, we do need to acknowledge and respect and try find a way that builds on the interests that underlie those positions.

So, over at paragraph 10, we start by doing this with the Raukawa position. And so, today the Raukawa position in front of the Tribunal has been to simply oppose any application for resumption because Raukawa will see that as a repetition of past harms and a source of future grievance. And Ms Eparaima has talked about this in some detail in her own evidence. But to step pass that position and start underlying – and start looking at what underlies that fear or

that concern, there are a number of specific interests that Raukawa believe they have an obligation to protect and provide for.

So, underlying that position and underlying that concern is an issue about the stages and acknowledgement of Raukawa as tangata whenua in the Pouākani area. And as Ms Eparaima has noted in her evidence, the concern has been that granting of land to others in the Raukawa Takiwā can't be seen as anything other than a minimising of the mana of Raukawa in that area and that has real and practical harms which Ms Eparaima talked to.

And we know that that's – this isn't a new concern for Raukawa. There was an exchange in cross-examination with Sir Kim about the extent to which the Raukawa presence and the acknowledgement of Raukawa as tangata whenua has been a long and lasting issues for Raukawa. It's something Raukawa has struggled with since the 1980s when Sir Kim was involved in helping to restore a Raukawa presence. And even though Raukawa have not settled and have started to move forward and assert a stronger Raukawa presence in their takiwā, it's still a fragile thing post-settlement.

Also underlying the position Raukawa have taken today is very much a sense of, there is still an ongoing hurt and mamae that comes from the presence of Wairarapa Māori in the Raukawa Takiwā and that is a hurt that comes from Wairarapa Māori choosing to take up land in the takiwā. And Raukawa acknowledge that that choice was a difficult – was not necessarily a freely given one and there were a lot of pressure and a lot of difficulties on Wairarapa Māori in coming to that position, but it was still a choice that was taken and a harm that caused by – a harm that was caused on Raukawa.

And it has been a different – and it's a very difficult thing for Raukawa to say and to point to that harm, particularly given the desire on Raukawa to build relationships and the obligation that Raukawa feel they have to support those

who have come across and now reside in the Raukawa takiwā. And again, Raukawa understand why that has happened.

And part of the difficulty Raukawa have had in these proceedings is that the perspective for the other parties is very much on the impact of the Crown actions on Wairarapa Māori and the harm that the Crown has been causing to Wairarapa Māori and that is perfectly appropriate from that perspective but for Raukawa the perspective and the interest is a very different one. The interest – the issues around Raukawa and the Crown have been addressed but what hasn't been addressed are those issues between Raukawa and Wairarapa Māori and it is a continuing hurt that is driving the Raukawa position.

And there are number of components to that hurt. There's again, the related issues of mana whenua and tikanga and what a strong Wairarapa Māori presence does in the Raukawa Takiwā, and to the visibility of Raukawa and the mana of Raukawa in their own takiwā. There's certainly a financial and economic component to that hurt where Raukawa see other Māori drawing a financial benefit over time from whenua Raukawa have lost and that is a continuing and ongoing hurt……

1010

Raukawa also feels that there are some cultural harms to tikanga that arise through the presence of Wairarapa Māori in the Raukawa takiwā.

And during the course of the tikanga redress session, there was some discussion about descent to Waimate in the claimant community, and it's not something Raukawa had necessarily put two and two together and come to that conclusion but are certainly aware that there is that sense of Waimate in the Mangakino community and in the people Raukawa provide for, and it is more than likely that that sense comes from some of the cultural harms that have been caused by the dislocation of Wairarapa Māori into the Raukawa takiwā.

And there were some, also, some examples of cultural harm that were discussed in the evidence of Ms Eparaima, particularly during her discussion with Dr Hond around the pepeha that are given by the children from Wairarapa Māori and the hurt that that causes for Raukawa.

Part of the underlying issue Raukawa feel they need to address and has been driving a Raukawa position has been the underlying concern for Raukawa that they need to be able, as tangata whenua, to care and support for everyone who resides in their takiwā, and you heard from Ms Eparaima about the obligations Raukawa sees on itself to provide services and provide outcomes for everybody in the takiwā, not just for Raukawa.

And moving forward, Raukawa continues to grapple with how best to do that, particularly in some sort of relationship with Wairarapa Māori as well as other neighbouring groups.

Raukawa also –- concerns and in a difficult position because the oppositional stance we've been required to take today does clash with other interests that Raukawa would have preferred to have seen come out of this process, and in particular Raukawa had consistently maintained that they believed that Wairarapa Māori are entitled to appropriate and just redress for their Treaty of Waitangi claims.

And Raukawa are deeply uncomfortable that they've been put in the position where they have to oppose redress for Wairarapa Māori. And instead, Raukawa would prefer to be in a position where we're providing for redress for Wairarapa Māori.

So if we are going to take a way forward that addresses the interest of Raukawa, Raukawa feel that any remedies outcome we might build should be one that:

- reflects Raukawa as tangata whenua in the Pouākani area.
- It's something that would address the hurt and mamae between, and the cultural harms in the relationship between Raukawa and Wairarapa Māori that has been caused by the Crown actions.
- It should be an outcome that provides the ability and capacity for Raukawa to continue and extend the way in which they support all of those people who live in the takiwā, including Wairarapa Māori.
- I should be some sort of platform that provide for and improves relationship with Wairarapa Māori now and into the future; and
- Fundamentally it should be an outcome that delivers redress to Wairarapa Māori and provides for Wairarapa Māori resolving their own claims against the Crown.

Turning to what Raukawa believe the underlying interest for the Incorporation are, and again this is prefaced on the understanding that this is what Raukawa have heard underneath the Incorporation's position to date.

Raukawa's view is that the fundamental underlying issue for the Incorporation appears to be a financial one, and that what the Incorporation is seeking is a financial return for at least some members of Wairarapa Māori, and exactly who is a question for Wairarapa Māori themselves.
1015

Clearly there are issues of mana and rangatiratanga that are linked to that, but what we feel we've heard from the incorporation is been that they've primarily about the ability for the incorporation to provide outcomes for its shareholders and it's a financial ability and the ability to do things financially.

And we've come to that view because the main focus of the evidence and the more compelling evidence from the incorporation has been about financial impact and about the value of compensation and also there's evidence in front of the Tribunal that the incorporation has traditionally seen its holdings in the

Pouākani area as economic assets that are being willing to trade off for economic benefit and sale in the past.

Now, there's been some evidence as well from the incorporation about other association with the area and a need to build to find a tikanga link to associations in the Pouākani area. Raukawa are uncomfortable, I think it's fair to say with how the incorporation has gone about that but understands and acknowledges why the incorporation has felt the need to do that, because of the statutory framework and the desire of the incorporation to put its best foot forward.

But, Raukawa's view is that some of those cultural interests, the incorporation pointed to are overstated. If there is a cultural connection into land in the Pouākani, it's not to the land that's actually the subject of this particular incorporation, its land that remains, it's a connection to land that remains in the Wairarapa ownership although -- was in their ownership and they've elected to sell.

The land that we're talking about in the context of this application was taken from Wairarapa Māori before Wairarapa Māori arrived and developed that connection and Sir Kim, when questioned in cross examine, agreed that was the case, that when he talked about a connection with the whenua he was talking about the connection with a farm and with a land that had remained in Wairarapa Māori ownership.

In additions, the connections that Mr Hemi points to, such as marriage, Raukawa believed that they can't be seen as forming the basis for a take whenua. They were connections in marriages that didn't go to tangata whenua in the area, they went to Waikato-Tainui rather than to Raukawa or Tūwharetoa. Some of the marriages didn't produce children, so didn't appoint marriages at all or didn't produce children and so didn't create a connection to the whenua. And the timing was wrong as well, the connections Mr Hemi were

pointing to seem to be prior to discussions or considerations of moves to the Pouākani area.

Mr Te Whaiti also disputes those relationships and so there's no agreement within Wairarapa Māori about whether there is that traditional connection to the area. And just to comment too, on the point Mr Mahuika made yesterday, where he pointed to other examples of iwi who have been trans located outside their traditional rohe into other areas, and he talked about the example of various Te Arawa groups following the Tarawera example.

Raukawa would say, well that's not analogist situation to this at all, that those groups were closely related and closely connected to the groups where they went and that the moves were based on traditional connections and they were about exercising and using those traditional connections for support, whereas there isn't that traditional connection between Wairarapa Māori and Raukawa, and this is a move that was forced on everyone by the Crown it's not one that has been built around traditional frameworks and traditional support structures.

Raukawa also note the that the focus of the incorporation in the past seem to have been largely not on reconnecting and re-enhancing connections to the Pouākani area that stated focus of the incorporation has actually been to rebuild connections into the Wairarapa area. And we can see that from, it's a simple thing such as the incorporations logo which represents Wairarapa Moana rather than Pouākani. The way the incorporation has sold and traded land in Pouākani Who purchased land in the Wairarapa and the discussion that was put to Mr Hemi in cross examination from his book.

And instead the focus on inquiring land was in Pouākani, really kicked off only as part of the Treaty settlement process and a potential outcome under that approach and so Raukawa very much of the view that what's laying behind the incorporations position and presences here today are financial outcomes and if we can find financial outcomes to Wairarapa Māori than we will go a long way

in addressing the interests, the underlying interests that the incorporation are concerned with, not necessarily ownership of the land.

And if we turn to what Raukawa understand or what Raukawa has heard from the settlement trust as an underlying position, there are some challenges in sort of distilling an underlying interest from the settlement trust at this point, simply because of the two alternatives the settlement trust has put forward, they seem to be very all or nothing alternatives. The settlement trust position as I understand it, is either no binding recommendations and no outcome of this process for Wairarapa Māori and that the settlement continue or in the alternative, everything out of this process and everything to the settlement trust and those two very apposing alternatives there.

But what Raukawa has taken from the position of the settlement trust throughout this process is really underlying the position the settlement rust has been a driver to achieve the best interests, the best possible settlement outcome for Wairarapa Māori in general and the difficulty that the settlement trust has in getting to a position about what the best outcome might be, is that they're having to balance a whole range of competing factors and we can see that in the evidence from Mr Potangaroa who describes the settlement trust as being focused on four pou, achieving what's best in a cultural sense, environmental sense, financial sense and a social sense.

And so, the settlement trust is how you struggle with how you package an outcome together that deliveries all of these. And Raukawa would also like to acknowledge that there is an underlying driver from the settlement trust who act as far as possible in a way that is consistent with tikanga and doesn't cause further harm to Raukawa and that's been a strong theme throughout the evidence, the submissions of the settlement trust.

And just some examples of that, understood there at 12.4 for examples, comments from Mr Te Whaiti about redress, about not seeking redress in other

iwi rohe, comments from Mr Potangaroa that the settlement trust didn't want to create second wrongs, commitments in the resumption application itself from the settlement trust, that it wanted to take steps to recognise Raukawa as mana whenua and find a way to enhance mana of both iwi and comments in the closing submission on behalf of the settlement trust about preserving relationships with the Raukawa.

And it has been very unfortunate for the settlement trust, that seems to be had been forced into a position where it having to make trade-offs between what it initially seen as a very principal tikanga based position of opposing a remedies outcome, to now having to put its hand up for remedies outcome.
1025

At 12.6, as part of acknowledging that underlying concern on behalf of the settlement trust to act consistently with tikanga and not do further harm to Raukawa, Raukawa would like to specifically acknowledge the position of Mr Te Whaiti in particular in the exchange between himself and Her Honour where Her Honour was testing Mr Te Whaiti, and quite rightly, on whether or not he felt that there was a better outcome that might be achieved for Wairarapa Māori through binding recommendations.

And Raukawa particularly noted Mr Te Whaiti's response that a better outcome was not possible, and that the reason why a better outcome was not possible was because it was inconsistent with what he felt tikanga required. It would be taking land in somebody else's customary rohe and that was not something he was comfortable doing.

And it's important for Raukawa to specifically acknowledge that view because what Raukawa had heard in that position was Mr Te Whaiti effectively saying that there was no amount of financial gain that could outweigh tikanga, and he wasn't prepared to trade off his values and his tikanga for a $600 million windfall

effectively. And Raukawa want to expressly acknowledge the mana and leadership that was shown in taking that position.

But it's obviously, it's open to others to come to a different view about how you find that balance between financial outcomes and tikanga outcomes, and the settlement trust is, as we've said, is in that difficult position of trying to find a balance and what it feels the best outcome is, and so that's what's led to the settlement trust having to move from Mr Te Whaiti's position into filing its own resumptive application.

And so while Raukawa can't support that application, Raukawa do understand why the settlement trust has felt the need to put its hand up for binding recommendations and the return of land at Pouākani, and Raukawa acknowledge that that's not a step that the settlement trust preferred to take, but it's one that they're being forced into, and it's been one they've been forced into as the proceedings have evolved in their assessment of what might be best has changed.

However, from the outside looking in, Raukawa do see that that position has no balance outcome that the settlement trust has been seeking, and instead it's one that's too contradictory **(inaudible** 10:27:55). The settlement trust on one hand is saying no, no to a remedy's binding recommendations and a return of land. They don't want it, they want to act consistently with tikanga, but in the alternative, we'll put tikanga aside and we'll take the financial benefit. And it's a very – it's like sitting on a seesaw. It's either one option or it's the other, there's no balance there.

And Raukawa is very aware that that is a difficult and contradictory position for the settlement trust to find itself in, and at 12.14, Raukawa's attention is drawn, we're reminded of one of the elements of prejudice the Tribunal has already found, that Wairarapa Māori leaders were left with no alternative but to lead their people towards unpalatable options, and it seems to be unfortunate that

this process has lead the settlement trust to having to effectively repeat that process now by putting its hand up for a resumption order and making its own binding recommendations application.

So where this leads us in terms of what Raukawa understand an underlying interest for the settlement trust to be is that Raukawa has heard that the settlement trust is looking to achieve the best possible redress package for Wairarapa Māori.

Ideally, the settlement trust, as we have heard it, is looking for an outcome that's balanced and it balances financial, cultural, social and economic aims, and that they're trying to find a way to do that that is consistent with tikanga or at least doesn't force them to be put in a position where they're having to trade off tikanga with financial outcomes.

And so Raukawa believe that there must be a middle ground between those two extremes of the seesaw, and there must be a way forward that enables the settlement trust to act consistently with the tikanga of Ngāti Kahungunu ki Wairarapa Tāmaki Nui ā Rua and not for example simply to seek commercial advantage for the two arms of the seesaw.

JUDGE WAINWRIGHT:
Mr Vertongen, that might be a convenient moment to break for the morning adjournment.

BADEN VERTONGEN:
Yes, Ma'am.

JUDGE WAINWRIGHT:
Nā reira e te whānau, kia hoki mai ā te 11.00 karaka.

HEARING ADJOURNS: 10.30 AM

HEARING RESUMES: 11.01 AM

BADEN VERTONGEN:

Kia ora anō. So, where we left off before the break, Ma'am, we were talking about how Raukawa has understood had understood the interest of the various parties and we have got through to paragraph 13 and this is Raukawa's sort of view of what the Crown interests are because if we are talking about the interests of all the parties in these proceedings, we wouldn't want the Crown to be left out.

So, clearly the Crown's interests here are limiting the financial impact on the Crown of any resumption application. There's some issues about precedent value clearly from Crown and largely, we should leave the Crown to talk about some of those.

What Raukawa would like to note though from the material that the Crown has provided is the issues and the concerns expressed by Mr Williamson, particularly around position of Mercury and the impact on Hydro-Electric generation from any binding return of land and Raukawa note that that evidence went to the nationally significant nature of the infrastructure on the Pouākani land.

Mr Williamson discussed the potential consequences for the wider Waikato River hydro scheme in the national group and the energy market in general if resumption were to impact on Mercury's management and operation of that infrastructure. But as a result of questions from the Tribunal from cross-examination from Mr Mahuika, Mr Williamson did notice – did agree that there was a distinction between the operation of the power underlying ownership of the land.

Given the national significance of some these issues, Raukawa suggest it's a key factor a way into any consideration in how you build a remedies outcome,

particularly, how do you ensure that the land remains available with some security around the continued use of the land as a key piece of natural infrastructure for electricity generation.

What Raukawa hasn't noted in these submissions to is any interests that might have been expressed by Ngāti Tūwharetoa, given Ngāti Tūwharetoa had signalled a role as an interested party early on but haven't participated to date, up until his point. So, it's been very difficult for Raukawa to make any comment about what those underlying interests might be. But, for completeness, Raukawa has noted from this submission of Ngāti Tūwharetoa that they have been happy for Raukawa to affectively represent the interests of the shared hapū in that area so far, but that's seems to have changed recently so that may be a question for my learned friend to answer rather than Raukawa.

Raukawa has noted from the submissions of Ngāti Tūwharetoa that they are focused on a very hapū perspective and they are shared hapū with Raukawa, they are the same hapū that fall within the Raukawa structure.

Raukawa would like to make the point though that the position that Raukawa has taken so far in these proceedings has been an iwi focused one rather than talking about position of particular hapū and that's a distinction from the view Ngāti Tūwharetoa takes obviously, it's not in a fatal view or a reconcilable one, Raukawa and Tūwharetoa have that relationship as a long-standing one and have been able to address these issues in the course of their own settlement negotiations, both for Ngāti Tūwharetoa settlement and the Raukawa one, and through the CNI forestry settlements. So, there are relationships that are able to be addressed.

1105

The reason Raukawa takes a more iwi focused approach to some of these issues rather than drilling down into hapū specific interests, largely that to get to that hapū focus becomes quite difficult especially in this area, issues

associated with exactly which hapū have interests within the Taupo-nui-a-Tia and the Pouākani blocks are very contentious, you would have seen that from the Pouākani report that they were highly litigated, there's this series of hearings, defining ownership of the Pouākani block originally that led to appeals and to royal commissions then to further re-hearings, and not all of the hapū that Ms Faint have pointed to in her submission were awarded interests in the block and so Raukawa has found in the course of its own settlement negotiations had to get down to hapū level, you effectively drive a mini overlapping claims process and we have to buy into the argument about which hapū should be where, and who should benefit from what.

And so, the approach Raukawa has taken throughout Raukawa Treaty processes is been to step back from that and approach things as an iwi, on an iwi basis an recognise the views of everybody and not carve up, but step back and be holistic. And Raukawa would like to continue to take that approach.

So, that takes us to paragraph 14 and then just to quickly summarise where Raukawa feels we have got to about what the interests of all the parties. There's an interest for everyone enhancing the mana of all of the parties involved for Raukawa and the settlement trust there seems to be a common interest in addressing the relationship between Raukawa and Wairarapa Māori and ensuring that any outcomes has a basis in tikanga. There's clearly an enhance financial outcome that's important for Wairarapa Māori as well, for Wairarapa Māori there is an underlying interest, we feel from our perspective in finding a balance redress package that addresses cultural, social, economic aspects of their claims in a need to act on accordance with tikanga and avoid being put in a position where there is trades off between what is right in a tikanga sense and a financial outcome.

There's an interest for the Crown in ensuring, avoiding a potential impact on the on-going operation of the Maraetai power station and for Raukawa there are key interests in recognising Raukawa as tangata whenua, addressing the

mamae Raukawa has suffered and continue to feel because of the presence of Wairarapa Māori in the Pouākani area. And there's an on-going responsibility for Raukawa to provide for all Māori living in their takiwā, including Wairarapa Māori.

So, as we move forward into a discussion about what are the outcomes we might build from here, it's important to test those outcomes against those underlying interests and we have to do that, if we want to get an outcome that achieves that sense of *ea* and addresses whanaungatanga. And these are outcomes that broadly consistent to with the prejudice the Tribunal to task to addressing, so there's no conflict in addressing prejudice and addressing those underlying interest.

That take us to Part D at this point Raukawa start turning our minds, what type of outcomes are possible and in the supplementary material that was circulated this morning there's a table that compares the various options that we'll discuss against, well we understand the prejudice to be the interests of the parties and what a tikanga based outcome might be. So, as we move forward and discuss each of the options in turn, there is also a table that compares them side- by- side there.

So, at 15.2 the position that's been put in front of the Tribunal so far, has been effectively one of two options either make binding recommendations and resume land or don't. Raukawa view is that there is a third option that's available as well, a more tailored approach. And we will talk about that as we go through, but that first option of an option one at paragraph 16. So, Raukawa remain of the view and this is the position Raukawa have taken to date is that the Tribunal can rightly be concern that the resumption of Pouākani land to Wairarapa Māori, risk repeating the grievances rather than remedying them, and it would therefore be open to Tribunal to conclude that the resumption of land to Wairarapa Māori is not a remedy, it should recommend.

On that basis, it would be open for the Tribunal to find under section 8(A)(2)(b)(ii) that the return of land to Māori is not required to remedy the prejudice cause by the Crown actions, and it's not something that the Tribunal should, ought to do and the Tribunal can then step out of the section 8(a) processes and return to its section 6(3) powers and recommend simply a financial package. And the Tribunal can get create in how that financial pack might look, it might just simply be an addition pūtea for Wairarapa Māori or you might target it a particular way to go, to particular elements of prejudice and we can discuss that more as we get to our creative options in option three.

If we apply that option, option one, to whether it addresses the prejudice, clearly it provides a financial outcome to Wairarapa Māori, so it addresses that element of financial and economic prejudice, there's some flexibility in how the Tribunal could recommend financial redress to target particular pūtea to address particular elements of prejudice. Particularly around pūtea being aimed to restore the connection and mana of Wairarapa Māori in connection with the moana, or a pūtea might be constructed in a way which thrives the incorporation in the settlement trust to be working together and it aims to rebuild some of those relationships, within the Wairarapa Māori claimant community.

There's also the potential for a financial outcome to be provided or recommended in a way that was aimed at addressing the prejudice done to the relationship between Wairarapa Māori and Raukawa. And again, I'll talk about what that might look like in a bit more detail as part of option three.

JUDGE WAINWRIGHT:

Just to be clear Mr Vertongen, you are suggesting these recommendations as non-binding recommendations?

BADEN VERTONGEN:

Yes, Ma'am.

JUDGE WAINWRIGHT:

Okay.

BADEN VERTONGEN:

And options that were purely financial and didn't deal with a binding recommendation of land would not repeat the harm to Raukawa surrounding the return of the use of land in the Raukawa takiwā as redress for Wairarapa Māori and create no new and fresh prejudice. Raukawa do acknowledge that this might not be a perfect solution, a purely financial outcome doesn't grapple with some of the issues associated with mana whenua and interests in the whenua, it doesn't necessarily address some of the harm done to the mana of leadership of Wairarapa Māori and having to pursue other pathways and help you unwind those issues. And there is the concern that the Tribunal raised in opening submission about whether parties, particularly the Crown would abide by non-binding recommendations that were purely financial.

So, Raukawa acknowledge that they sure comings and they are issues of concern. If we address that option of non-binding recommendations against doe its diverse interests to the parties. Again, it goes to the financial aspirations of Wairarapa Māori, so it does address that interest. It preserves security in the hydroelectric and the structure of Pouākani because we are not using the land so, it addresses that interest.

1115

Well, there's a great deal of uncertainty about how you might package or whether you can effectively deliver a financial outcome that addresses the range of other interest we've already talked about. And it may be that a purely financial outcome does not necessarily address some of the more tikanga or relationship-based interest that the parties are concerned with, but for Raukawa, there certainly remain some appeal in the fact that, well, this outcome be perfect. It might not provide for all of the interests or all of the – address all of the prejudice. It does not directly clash with them either. It doesn't create

further harm. It gets us somewhere, maybe not the whole way, but it doesn't drag us back.

And if we address this non-binding option in the lens of the, is it a tikanga-based solution? In a very similar way, not really, but it doesn't do harm either. It's an option that doesn't clash with mana whenua. It doesn't unbalance a sense of *ea***,** but it doesn't necessarily move us in the right direction either. But because it doesn't move us backwards, again Raukawa sees it as a viable option that is open to the Tribunal, and it does appear to be the settlement trust's preferred option as well.

So, then the second option is binding recommendations as put forward by the incorporation in the settlement trust with two slightly different spins on them. But broadly both of those applications are simply seeking the return of the land as a whole to one party or another.

From the incorporation's perspective, that seems to be the incorporation simply saying that they're the ones entitled to resume the land and they will take it and they might hold it on a trust, but they are the ones that should be entitled to the binding recommendations.

Raukawa is disappointed that the incorporation hasn't grappled with the position Raukawa find themselves in or hasn't sought to address Raukawa's concerns as this process has gone on but has continued to emphasise a flaw and discredited association in the area in minimising Raukawa's connection. And Raukawa ID disappointed that that has forced Raukawa into having no other option but to oppose what the incorporation has been putting forward, simply because Raukawa has found that approach to be deeply offensive.

And as we will go through in more detail, Raukawa believe that the approach being put forward by the incorporation doesn't address the prejudice the

Tribunal has identified. It conflicts with the interest to the parties, and it's not consistent with tikanga.

The settlement of trust has also put forward its own application for binding remedies. It's put it forward in the alternative to no remedies at all and Raukawa do acknowledge the settlement trust have looked to the position of Raukawa as mana whenua and have tried to grapple with how to address Raukawa interests and has stressed that – has stressed the need to address the interest of Raukawa and do so appropriately.

The settlement trust also stresses the importance of tikanga and that the relationships are fundamental for the way forward, but unfortunately how the settlement trust has got there hasn't quite achieved those aims.

So, the settlement trust has been placed in a position where they have felt the need to make their own remedies application despite some of these views, and they've added in a number of some litigation steps I suppose you could call them into a binding recommendations application to try and reconcile the fundamental conflict between a tikanga-based outcome and where land isn't resumed to return to Wairarapa Māori and the financial benefits that might come from resumption. But Raukawa has some concerns with those issues in mitigation.

1120

And those steps that the settlement trust have proposed include the settlement trust would sell the land back to Mercury and that seems to be aimed at addressing the discomfort that the settlement trust has in retaining land in the Raukawa takiwā.

As part of that process, the settlement trust has offered to pass the land through Raukawa, Raukawa who would then be the ones to transfer it on to Mercury while the settlement trust took the financial benefit. And the settlement trust

has proposed a 5% trust – as trust being setup for 5% of the proceedings from that sale to be jointly administered by Raukawa and Wairarapa Māori, but it would apply in a limited geographic area and effectively from a Raukawa perspective, that achieved it sort of 2.5 beneficial – 2.5% beneficial interest in the value of the land.

The settlement trust has noted that Raukawa were informed of the application in advance in some of this thinking, but Raukawa want to be clear that being informed of the application in advance is not the same as being a position as we negotiated or jointly developed. Instead, Raukawa see the settlement trust application as very much one that has been unilaterally put forward by the settlement trust. And as a result, because the settlement trust hasn't grappled with exactly what Raukawa have been trying to say, the proposals don't go to addressing some of those issues. They don't go to addressing the tikanga and the underlying interest to the parties, and they're not ones that are seen by Raukawa as appropriate.

The particular concerns that Raukawa have about some of those proposals need to be seen from the Raukawa perspective. So, in a wider sense, Raukawa are also very aware that the settlement trust's position about the return of land at Pouākani is very much founded also in an assumption that there is redress on the table in the deed of settlement concerning the moana itself. And so, from Raukawa's point of view, the land at Pouākani was compensation for the loss of interests in the moana in what it appears to Raukawa to be, is that there is the ability to return interest in the moana Wairarapa Māori while at the same time, Wairarapa Māori are retaining a $270 million stake in the compensation that was provided for the loss of those interests in Pouākani and there's nothing that can be done to remove or change that. The incorporation is there holding redress from the loss of interests in the moana and will continue to do so. That can't be unpicked or unravelled.

And at the same time, Wairarapa Māori are now seeking an additional $600 million benefit from the return of land in the takiwā. So, there's Wairarapa Māori are effectively in the position where there's a return in interests in the moana on the table. There is compensation for the original loss of those interests, which is still being held by Wairarapa Māori, plus additional compensation now being sought. And in return, what has been offered is a part interest in 5% of the value of the Pouākani land to Raukawa as an appropriate way of addressing that concern.

But in saying that, Raukawa want to be very clear that it is not the particular financial outcome that's of concern. It's the underlying desire to restore balance and rebuild that relationship and whether the outcome has been developed in the right way that is of concern. And there is an opportunity here to heal the relationship between Raukawa and Wairarapa Māori that hasn't been taken to date, and it can be taken if the settlement trust is to ask exactly what are the issues in that relationship that do need to be addressed, and how can we find mechanisms to address those issues? How can we return to it sensibly? How can we enhance the mana for all the parties?

I note in the closing submissions of the settlement trust, they talk about how the Crown might do that in respect of Wairarapa Māori and really that needs to happen as well within the terms of the relationship between Raukawa and Wairarapa Māori. It drilling down to what are those issues in that relationship and how do we work together to repair them?

1125

So, does either applicant's approach to remedies address the underlying prejudice that the Tribunal has found? Clearly there would be some addressing of the financial and economic impacts if the Tribunal were to deliver land at Pouākani back to Wairarapa Māori. However, that remedy particularly structured in the way proposed by the incorporation doesn't address a number of the other elements of prejudice that the Tribunal has found.

It doesn't address the prejudice done to the relationship between Raukawa and Wairarapa Māori. The use of land in the Raukawa takiwā to address the grievances of Wairarapa Māori was a source of harm in the first place and it's been acknowledged as a poisonous act by the Crown and repeating that action doesn't make it right.

It's an option that doesn't address the prejudice done to the mana of Wairarapa Māori leadership by forcing them to explore options that they would not have considered otherwise.

Again, it's the acquisition of land outside the Wairarapa that was the very source of that harm and prejudice in the first place and this option simply proposes repeating that same action. And so, in this case, all they can do is pass that same and amplify harm onto a new generation of leadership.

This option also fails to address some of the internal division within Wairarapa Māori and risks deepening and creating fresh division. It pits the views of rangatira like Mr Te Whaiti against other Wairarapa Māori who have been assigning a greater priority to financial outcomes. And again, Raukawa say that this option risks repeating the very prejudice it is supposed to remedy.

For Raukawa themselves, Raukawa see the approach being put forward by the incorporation is a fresh source of grievance and harm. Raukawa – the evidence provided by Raukawa have been very clear about that, that the use of land today within the Raukawa takiwā has redress for an iwi who have no *take* whenua, rights to that land is a fresh source of grievance. It was an utter unfairness and a poisonous act in 1915 and it would be so again today.

There was the evidence from the Crown that agreed with that position, that the Crown saw the use of land in the Raukawa takiwā as redress for Wairarapa Māori, is a fresh source of grievance and it breached the Crown's

obligations towards Raukawa and unfortunately it appears to that the conditions the settlement trust have proposed don't go to adequately addressing some of those fundamental harms.

They're conditions that haven't been developed in conjunction with Raukawa. They're ones that have been imposed on Raukawa and they do little to address and improve the relationship between Raukawa and Wairarapa Māori.

They continue to rely on the use of land of – land in the Raukawa takiwā to address the grievances of Wairarapa Māori and delivery financial benefit to Wairarapa Māori from that land in the Raukawa takiwā, and it fails to undo and unpick some of the unfortunate choices that past leaders were forced to make.

There is – that centre there is a token, return of land to Wairarapa Māori under the mitigation measures proposed by the settlement trust and from the Raukawa perspective, what they do is Wairarapa – the settlement trust would provided – would take the benefit of the return of land in the Tribunal's binding recommendations. It would then pass it onto Raukawa who it had affectively be forced to then sell it onto Mercury so that the settlement trust can achieve a $600 million benefit and that is not a position that Raukawa is particular comfortable with, or very uncomfortable with. It's not a sound basis for restoring the relationship between the iwi and it doesn't address the past harms done to Raukawa or the harms done to the mana of Wairarapa Māori leadership, the past.

Instead, from a Raukawa perspective it seems like, being forced into that position where Raukawa had to on sale land to Mercury for the benefit of Wairarapa Māori simply risks creating a fresh source of tension and harm…… 1130

And again, at 17.22 it appears to Raukawa that the main shortcoming in the settlement trust position is that the settlement trust hasn't specifically asked

what is required to restore that balance between Raukawa and Wairarapa Māori. It's asked that in the context of the relationship between the Crown and Wairarapa Māori, but it hasn't asked that in the context of the relationship between Raukawa and Wairarapa Māori.

In terms of whether a binding recommendation for the return of land as sought by either applicant would address the underlying interests of the parties, again, the answers are very similar. Clearly the binding return of land to Wairarapa Māori in some form will create an economic and financial benefit for Wairarapa Māori, but it doesn't achieve the balanced outcome that the settlement trust have been seeking. It undermines the potential to build and improve a relationship with Raukawa.

In terms of the Raukawa interests, Raukawa are also concerned that what the settlement trust has been proposing actually creates further difficulties for Raukawa interests and the way Raukawa liked to act and the values Raukawa hold to. For example, Raukawa, have a long-standing and valued relationship with Mercury. Raukawa are deeply uncomfortable with a position such as that proposed by the settlement trust where they would be put in a position of being a party to the transaction where effectively the settlement trust is looking to squeeze value out of Mercury by selling the land back to them, and Raukawa are just simply deeply uncomfortable about being put in a position or being a party to that arrangement.

In terms of the Trust arrangement proposed by the settlement trust where a small percentage of the proceeds of that sale would be put in trust to provide for outcomes for people living in the Mangakino area, that's an approach which is inconsistent with the Raukawa interests as well.

As I've mentioned, Raukawa take an iwi wide approach and don't limit how they provide services or outcome to particular areas.

Raukawa would be concerned about a trust or any sort of trust arrangement or any sort of outcome that delivered outcomes particularly to Mangakino would prevent services being applied to members of Wairarapa Māori and Raukawa who live in other areas such as Tokoroa, Pūtāruru or anywhere else in the takiwā.

And it's not clear to Raukawa how that proposal has actually been constructed, how many of the Wairarapa Māori continue to live at Mangakino, how many have moved since the sale of some of the properties there and to places like Tokoroa, Pūtāruru, and so would be excluded from the proposal the settlement trust has put forward.

And for completeness, it's not clear that the structure of binding recommendations put forward by either set of applicants addresses the underlying issue about this security and certainty of hydro electric generation from the land at Pouākani. Instead, it appears that both options simply create greater uncertainty because the incentive is on both parties to try and extract some financial benefit from their relationship with Mercury.

In looking at whether the nature of binding recommendations proposed by either applicant is consistent with tikanga, the Raukawa view is that the resounding answer is no and that either option is fundamentally inconsistent with tikanga.

1135

The Incorporation's proposal in particular provides for the transfer of land to a group with no take whenua in that land. It doesn't move anybody towards a sense of ea. It repeats a series of harms to both Raukawa and Wairarapa Māori and it moves us all further away from that sense of balance, and it's founded on a misstatement of cultural interests of Wairarapa Māori and an undermining of the Raukawa mana whenua.

It's not an outcome that does anything to enhance anybody's mana. There is a financial benefit, but it's not mana enhancing. Instead, Raukawa believes it actively harms the mana of everybody involved.

And the refinements proposed by the settlement trust don't get us to that place of restoring mana in sense of *ea* and whanaungatanga relationships either.

And again, particularly from the Raukawa perspective, that key relationship we're concerned with is the one between Raukawa and Wairarapa Māori. So Raukawa do acknowledge the settlement trust has put some effort into trying to find ways to address those relationships. But again, as we've talked about, they haven't, you know, grappled in any detail or actually asked Raukawa what are some of those issues, how do we build a mechanism to address the relationship.

And Raukawa can't see in the submissions the proposals from the settlement trust how those outcomes are actually consistent with tikanga. The settlement trust has said they are thinking about tikanga, but we can't quite see how. For example, what is this thinking from the tikanga sense that leads to a conclusion that a 5% trust is consistent with tikanga, restores mana and restores us into there.

How does that align with the tikanga-based principles that redress should be equivalent if not greater than the original harm. You know, how is it consistent with a notion that mana is derived from the provision of redress and a provision of redress that's greater than the original, and the provision of greater redress, the more mana you enhance by providing redress.

Now, in saying Raukawa have concerns about the approach of the settlement trust and how in the refinements the settlement trust has put in place, Raukawa is certainly not saying that the settlement trust has expressed the desire to find an approach based on tikanga and then put that aside and come up with

another model and one that delivers a small outcome to Raukawa and enormous benefit to Wairarapa Māori, that's not what Raukawa is trying to saying and clearly that can't be the case because the preferred alternative being put forward by Wairarapa Māori is the principled one where there is no financial benefit and no financial outcome to them. Their preferred option is no remedies application to let their existing settlement proceed.

So again, the difficulty Raukawa was struggling with in the settlement trust approach is it's that all or nothing extremes of the seesaw. So if we have – if our two options so far are either decline resumption and have non-binding recommendations or issue binding recommendations for the return of land and neither are particularly – neither get us exactly where we want to, is there a more tailored third option we can explore? And that is what Raukawa has set out under paragraph 18 as our third option, a more tailored approach to resumption.

And Raukawa says that it is possible for the Tribunal to construct that tailored option and utilise the range of rights and interests and draw apart that bundle of rights and interests and deal with the return of land in a more specific way and effectively build a redress package that includes the land at Pouākani being resumed to Wairarapa Māori but doing that in a way that enables them to pass that land onto Raukawa so that lands return to tangata whenua, but it's done in a way that doesn't have any detrimental impact to Wairarapa Māori.

1140

That can be separated from the financial benefits being delivered to Wairarapa Māori, and there is a range of ways to structure those financial benefits to address key elements of prejudice. There's a way of providing some financial benefit to Wairarapa Māori for Wairarapa Māori to pass on to Raukawa as a way of addressing harms done by the presence of Wairarapa Māori in the Raukawa takiwā.

And this is a much more complicated, complex structure of remedies and simply returning the land. And so, the next stage of these submissions to work through these in some detail. So, I'm at 18.4 now.

So, the place to start in all of those elements is probably how do you construct a financial outcome for Wairarapa Māori, because clearly some additional financial outcome is required as an underlying interest, well the parties and essentially the delivery the land at Pouākani is simply a mechanism for delivering that financial outcome.

So, again as I said earlier nobody's proposing that they're going to run a power station on that land, the financial outcome, the financial benefit comes from Wairarapa Māori being able to lease or access, to lease or leverage the presence of Mercury on that land.

And so, what Raukawa suggest is that the Tribunal can impose a set of terms and conditions on the resumption where mercury are guaranteed to remain on the land and continue to generate hydro electric power on the land, but as part of that these arrangements can be put in place, so that Wairarapa Māori can draw a financial benefit from mercury's presence on the land and all of the parties are in one way or another, talking about throughout this.

What the Tribunal can say though is that that benefit to draw the financial return from the presence of mercury on the land can be severable from the underlying ownership interests in the land, and who's name gets to go on the tittle. And effectively what the Tribunal can do is strip apart some of the financial outcomes from who's name gets to go on the tittle. And then if we're able to separate and give separately with mercury being present on the land generating power who's drawing a financial benefit from that and that's separate from who's name gets to go on the tittle.

Then we get to ourselves to a position where we don't have to be making trade-offs about financial benefit and some of the tikanga outcomes and mana whenua and who has interest in – who has taken whenua interests in the land.

In saying that there is still some underlying discomfort for Raukawa about Wairarapa Māori drawing benefit from land in the Raukawa takiwā, because that is one the hurts that Raukawa continue to feel. But there's also a number of ways we can address that or mitigate that risk or that hurt. And that come through sort of the stage utu process the Tribunal has in mind.

So, the first step might be for the Tribunal to give some initial views on where your thinking is going. The Tribunal might say at an early stage that you're incline to make a binding order for the return of land and that's appropriate for a number of reasons, including issues of mana whenua, complex history of the land but also you want to retain the leverage to deliver financial outcomes.

And so, having done that the Tribunal could talk about what the overall level of that financial outcome should be. So, effectively say the Tribunal is looking to deliver x dollars as a financial outcome for the parties, having done so, the Tribunal could then invite the parties to go away and consider what the mechanism actually look like for delivering that financial outcome, and to some extent this is effectively, my understanding of what the Tribunal's been pushing the parties to try and do already and there has been some difficulty in the parties coming together and doing that.

But the difference, hopefully that this process would make would be if the Tribunal were to say this is the pūtea that is one the table, that gives the incentive for the parties to come together and have some of the discussions. Raukawa understanding is that some of the difficulties the parties have had in getting to a negotiated outcome so far, has been that uncertainty about what the financial outcome might be and that effectively every parties coming into this process both, by looking at our best alternative to a negotiated outcome is

somewhere between $600 million and a Billion dollars' worth of land coming back to us, our worse alternative to a negotiated outcome is effectively where we are now, so why are we coming to the table we might as well just roll the dice in front of the Tribunal and see where we get too.

But if the Tribunal were to say, this is the pūtea you're talking about go away and figure out how it comes out, that changes that framework and that drives an incentive for the parties to come together. That then puts two different pathways in front of the parties, either we do or come together, and we find a way forward and we come back to Tribunal with a proposal about, this is how the financial outcome is going to be delivered.

Ideally that might be a lump sum payment instead of the Crown buying out mercury's interest, the Crown front's up with a lump sum payment to the parties and says here the cash. In which case the Tribunal could still order the return of land but the condition you would Impose around the presence of mercury on the land and what benefits might be drawing from the presence of mercury on the land would be a nil peppercorn level.

The alternative is that the parties can't agree on the mechanism for delivering a financial outcome to the levels the Tribunal set, in which case we will come back to the Tribunal and the Tribunal then puts the dollar value on what the mechanism for mercury continuing presence of the land, effectively sending what the value of the lease might be.

And at that point the Tribunal could also put a fix term on that lease, so if you came up with the value we're trying to deliver is x million dollars then it's not hard to say that can be delivered over a 30-year period of the rental is why. So essentially those two options are that the Tribunal has set what you think the financial outcome should be, there's the option to capitalize that or to see it as a return from the land over time.

So, Raukawa strong preference is that any financial outcome for Wairarapa Māori is delivered in that lump sum immediately and separate from the value delivered from the land, because that removes the sense that Wairarapa Māori are continuing to extract the value from land in the Raukawa takiwā. It's different from an option one process, which was the non-binding recommendations that just delivered a financial outcome, because here the Tribunal's retaining the ability to deliver value through the terms and conditions it might put on mercuries presence on the land. It's effectively the Tribunal's retaining the stick to drive an outcome if things don't go well. So, there's a certainty that you can get a financial outcome that's not present in option one.
1150

This idea of separating the financial benefit that a claimant might deal from derive from land, from issues in underlying ownership is unusual, but it's not unique in a Treaty settlement context, so in some sense, this is an essentially what the Central North Island Forestry Settlement has done, where the rental streams from the forestry land in that settlement are delivered at a different rate or a different level from the issues from mana whenua and the land. So, as well as delivering a financial outcome to Wairarapa Māori, there is potential within that financial package to deliver – to provide Wairarapa Māori with a tool to address the relationship with Raukawa. And again, this isn't talking about redress for Raukawa's claims against the Crown. This is talking about addressing the relationship between Raukawa and Wairarapa Māori.

So, for example, the Tribunal would be entitled to a view that a certain level of financial outcome should be provided to Wairarapa Māori. That's not part of their redress package, but it's simply a tool to pass on to Raukawa to address harms associated with Raukawa. And the key point at Raukawa with stress is that in doing that the Tribunal should be clear that that would be a level of financial outcome which would not otherwise be available to Wairarapa Māori.

So, that there's nothing coming out of the Wairarapa Māori pocket or the Wairarapa Māori pūtea of redress for Raukawa. This is a separate tool to address relationships between Wairarapa Māori and Raukawa and it's a tool that would enable Wairarapa Māori to enhance their own mana, restore the mana of generations, leadership that were forced into unpalatable options, because it does what we talked about and that tikanga redress session but enables Wairarapa Māori to provide redress themselves to Raukawa. And such an arrangement by providing a tool to Wairarapa Māori to them address the relationship with Raukawa is something that's consistent with Raukawa's own Treaty settlement, and Raukawa's Settlement Legislation, and that's because the recommendations the Tribunal would be making would be concerned with providing an outcome to Wairarapa Māori that addresses the harms the Crown has caused. And that would be consistent with sections 15 and 17 of the Raukawa Settlement Legislation, because these aren't claims about – these aren't claims Raukawa are making.

If that package is then passed by Wairarapa Māori onto Raukawa, that's not a historical claim against the Crown that has been settled by the Raukawa Settlement Legislation either, so that's consistent with section 15 of the Raukawa Settlement Act. And if the Tribunal were to package the recommendations that talked about this under your section 6(3) powers, then, and particularly would recommend that the Crown helps facilitate this, then those recommendations also, they avoid the bar in section 17 of the Settlement Act because that bar only applies to benefits being derived from binding powers under section 8(a).

And Raukawa do note that a recommendation that financial outcomes are provided to Wairarapa Māori to pass on in a non-binding sense, does come with a level of uncertainty that that will actually happen. But Raukawa take comfort from the various statements by the settlement trust suggesting they are bound by their trustee to act in a way that is consistent with their tikanga, and that they are not just simply being driven by commercial advantage and the various

statements that have come in, ‘cos of these proceedings by Wairarapa Māori leaders.

So, can strip apart some of the financial outcomes, what does that do to the resumption of land? So, if we have taken – if we have found a way to sever financial outcomes from what actually happens to the ownership or the underlying ownership of the land at Pouākani and whose name effectively goes on the title, ownership of land is still an issue that needs to be addressed as part of any redress package because of issues of mana whenua, tāku whenua and the historical and the historical pathway that land has taken to end up in Mercury’s hands at the moment.

So, even if we address some of the financial outcomes, there is still a need to address what happens with the land and so, Raukawa are noting the commitments that had been made by the settlement rust that any outcome need to be consistent with tikanga and land returned to Raukawa, but for Raukawa, it’s very important that any return of land that the settlement trust or Wairarapa Māori feel that they might need to make to Raukawa, doesn’t come at a cost to Wairarapa Māori themselves. We need to strip the financial issues from the ownership of the land.

So, we suggest you can do that by ordering the resumption of land to Wairarapa Māori under section 8(8)(ii) and including the various terms and conditions we’ve talked about earlier on where Mercury remain on the land and there’s financial benefits associated with that, but that’s severable from the underlying ownership of the land, so, that there’s effectively no financial benefit that comes from having your name on the title.

Then the Tribunal might go on to recommend under section 6(3) that the Crown and Wairarapa Māori work together so you put in place where Wairarapa Māori maybe hold the land, hold title of the land for say one day and use that as an example. There might be another term that’s appropriate, and then Wairarapa

Māori pass title to the Pouākani lands onto the Raukawa Settlement Trust to hold on behalf of tangata whenua.

And because we've already stripped out the financial issues associated with that title, there's no cost that comes in doing that for Wairarapa Māori, and instead, it becomes a very appropriate way to address some of those underlying issues and a history associated with the ownership of the land.

So, effectively, ownership passes from Mercury to the Crown as part of the resumption. The Crown then transfers it through to Wairarapa Māori who hold it, and there's that recognition there that they were the last Māori owners on the title. Wairarapa Māori would then pass it on to Raukawa, and that's the acknowledgement that Raukawa are tangata whenua or represent tangata whenua and it assists in building the relationship between Wairarapa Māori and Raukawa. And that provision of redress by Wairarapa Māori becomes a mechanism for enhancing the mana of Wairarapa Māori themselves and is a way of unpicking the harms that had been done to past generations of Wairarapa Māori leadership. As we said, that would have financial impact on Wairarapa Māori because we stripped the financial benefits and they're dealing with those separately.

It is an outcome that doesn't conflict with section 17 of the Act, section 17 of the Raukawa Settlement Act, because what it is doing is, it is providing outcomes to Wairarapa Māori and providing them a tool for them to address their relationships with Raukawa.

So, it is an outcome that is consistent with the Raukawa Settlement Act because the Tribunal is addressing claims by Wairarapa Māori and providing Wairarapa Māori with a tool to address the relationship with Raukawa and to remedy the prejudice and the harms associated with past leaders being forced to choose unpalatable options and the relationship that's been addressed there is the one

between Wairarapa Māori and Raukawa and it's outside of the Raukawa Crown relationships that were dealt with under the Raukawa Settlement.

Raukawa would also see such an arrangement as avoiding the conflict and tension within Wairarapa Māori because it is both an option that's consistent with tikanga, but it delivers financial outcomes to Wairarapa Māori as well, 'cos we are trying to separate the two, the two issues.

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For completeness, Raukawa would suggest that as part of package of remedies that the Tribunal might recommend, the Tribunal is also aware of some of the redress that is on the table in the context settlement negotiation between Wairarapa Māori and the Crown, because it would be unfortunate if a remedies application undermines particularly the cultural redress that's on the table.

So, whatever outcome the Tribunal might order, the Tribunal should also recommend that this shouldn't affect some of the cultural redress that is currently on the table and set out in the existing deed of settlement between Wairarapa Māori and the Crown.

In 18.30 simply the point there to note is, there is a financial package that is currently available in the settlement between Wairarapa Māori and the Crown and if the Tribunal was minded to set an overall level of financial value that is sees being provided as part of this process to address claims associated with Wairarapa Māori then it might want to turn its mind to whether that is a value that is separate from what is provided in the deed of settlement already or is this a holistic financial outcome.

If we then turn to thinking about whether that type of approach addresses the prejudice interests in tikanga, Raukawa believes that a more nuances and targeted tailored approach does address the prejudice the Tribunal is tasked with remedying, addressing underlying interest of the party and it is consistent

with tikanga. Clearly it addresses the financial outcomes, financial and economic impact on Wairarapa Māori.

It's a mechanism that can address the mana of Wairarapa Māori and the connection Wairarapa Māori have with the moana particularly if the Tribunal were to reaffirm some of the cultural redress that's currently on the table between the Crown and Wairarapa Māori. It might be also that the way the Tribunal discusses what financial outcomes are delivered to Wairarapa Māori can address specific elements of prejudice. So, the Tribunal might say there is x amount of financial outcome that might be available to Wairarapa Māori but then go a step further and break that down into different pūtea, you would see being applied to address different elements of redress.

So, the Tribunal might say that a particular level of financial outcome should be applied to give Wairarapa Māori the practical ability to exercise Rangatiratanga in more than a symbolic with the moana in Wairarapa. Listening to the claims of Wairarapa Māori, Raukawa were very minded how similar some of those to the experience Raukawa has in terms of the Waikato river and so the type of package the Tribunal might recommend in some of the aims and the outcomes the Tribunal might point to are very similar to what's been included in the co-management arrangements of the Waikato river.

In a similar way the Tribunal could separate out the pūtea from the wider overall top number to specifically deal with some of the internal relationship issues within the Wairarapa Māori claimant community particularly between the incorporation and the settlement trust. Exactly how that would happen are obviously issues for Wairarapa Māori themselves to grapple with, but if there is some benefit in Raukawa provided a perspective from the outside then we feel we should comment on that.

And it does seem to Raukawa standing on the outside looking at what is happening within Wairarapa Māori that effectively you have two wakas' pulling

in very directions and have slightly different passengers and crew sitting on them, so there's different people associated with different groups and they're travelling in different directions. And there's a riff that have open up because those directions are not align and Wairarapa Māori are in the impossible situation, if you can't unwind the fact you have the two waka there travelling in different directions you need to find some way of bringing them together.

Sir Kim Workman seems to have come to a very similar conclusion and he talks to this in some of his evidence, when he's talking about his attempt to mediate some of the issues between the parties. And so, if there is a financial pūtea that's available it might be that the Tribunal is minded to split some of that out and say here is particular pūtea that is available for the settlement trust to enter into joint arrangement with the incorporation.

And if we were to take a very – in an ideal work, how you would absolutely align the two parties together and bearing in mind that there is settlement legislation working the background here with the Crown and the settlement negotiations between the settlement trust. It might be, you could put a pūtea on the table and say that this is fund that would enable the settlement trust to effectively buy-in to the incorporation and use the settlement legislation as a way to facilitate that.

And that could be a way of providing both values for the settlement trust, additional equity into the incorporation and joining the two groups together so that they're re aligned and showing a common interest, and effectively providing some sort of re alignment of the interests within the Wairarapa Māori community, because you have the settlement trust representing interest within the incorporation for the Māori who may have been excluded.

Raukawa's also very aware, is of the view that if we're able to separate financial outcomes from what happens to the land and who's name effectively goes on the tittle then that gets us to a point where we're not again placing

Wairarapa Māori leadership in the position of having to seek a financial outcome that's inconsistent with tikanga and their underlying values and we're not repeating the harm that was done in Wairarapa Māori leadership being forced to explore options that they were uncomfortable with and providing land and potentially a pūtea to Wairarapa Māori to be able to pass that onto Raukawa provides the opportunity for this generation of Wairarapa Māori leaders to unpick some of the harms and the decisions that have occurred in the past.

And it has, some appeal for Raukawa because it effectively reserves the chain of events and we step back through the hands of ownership, back to where the land should be. Raukawa also believe that this type of option provides a strong foundation for building an improve relationship between Wairarapa Māori and Raukawa, this is because it includes both an acknowledge of Raukawa as tangata whenua by Wairarapa Māori through the return of land and addresses the hurtful perception that the land was a vacant wasteland that had been put forward in some of the evidence to this Tribunal. And by including a financial competent passing from Wairarapa Māori to Raukawa without it enticing on Wairarapa Māori themselves, it addresses some of the harm done to that relationship by Raukawa perception that Wairarapa Māori is drawing a financial benefit from the Raukawa takiwā for the last 100 years.

It's also an acknowledgement that Raukawa have met their obligations as tangata whenua during this time, by supporting all Māori in the South Waikato and that they continue to do so and provide services to all Māori including Wairarapa Māori.

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And so, does this option address the underlying interests of all the parties and again, Raukawa says it does, it enables all the parties to act in accordance with tikanga and not trade off tikanga with financial outcomes. It's a way to deliver it and enhance financial outcome to Wairarapa Māori.

It's a way for Wairarapa Māori to achieve a balance redress package that includes cultural, social and economic redresses and doesn't make trade-offs between tikanga and financial outcomes. It provides a sound basis for addressing the relationship between Raukawa and Wairarapa Māori the hurt Raukawa have suffered and continues to provide a way for Raukawa to provide outcomes for all Māori in the Raukawa takiwā.

And it provides some certainty around the Crowns concerns of continuing to have security about the operation of the Maraetai power station, because it's founded of that presence continuing. It also recognises Raukawa as tangata whenua and ultimately and some importantly it's a mechanism for enhancing mana of all the parties. Is it an option that's consistent with tikanga? And again, Raukawa says it is the most consistent tikanga based approach, it's one that goes towards this restoring a sense of *ea,* a sense of relationship between the parties, a sense of balance between the parties and it might not be perfect and get us to the perfect sense of balance, but it goes a long, long way towards doing that.

And of course, the Raukawa connection and some outcomes for Raukawa while achieving an outcome for Wairarapa Māori as well. Its outcome that's focused on achieving, restoring and enhancing all the mana of all of the parties. And it does that through giving Wairarapa Māori the opportunity to provide remedy as well, so Wairarapa Māori are able to receive and provide a remedy and enhance their own mana.

And finally, Raukawa would say that this has now come as tika, as consistent with tikanga, consistent with underlying norms and values, because ultimately it sees the land being returned to those with mana whenua and ensures that what happens to the land and what happens to issues of mana whenua is not confused or polluted with financial considerations as well.

So, there were a number of other questions that are being proposed by the Tribunal as part of the, particularly the 29 August memorandum. They were around issues of who the Māori is that's entitled to any remedy, how do you get to relative shares and what an iterative process might look like. So, who are the Wairarapa Māori that are entitled to any outcome is just largely an issue for Wairarapa Māori themselves to be consent with though, from the Raukawa perspective there is an issue about who the representative is, is linked to some of the underlying prejudice it is to be remedied.

And so, because some of those issues are to do with the relationship between Wairarapa Māori and Waikato Māori, Raukawa do have some views on who the most appropriate representative to hold redress and build those relationships should be. In particular Raukawa is particularly concerned that the incorporation is an appropriate entity to receive redress if we're trying to rebuild a relationship between Wairarapa Māori and Raukawa.

From the Raukawa perspective the incorporations a lasting symbol of the Crowns wrongs and to provide redress again to the incorporation is effectively repeating some of those wrongs or reaffirming some of those wrongs. Ms Eparaima also talked about in her evidence for Raukawa ceding an incorporation as a corporate entity, and it might be appropriate to have commercial relationships with that entity, a tikanga based relationship is one that is between iwi bodies to settlement trust is a more appropriate entity then that sense.

Raukawa were also concern about the way the incorporation has presented its case to date and how they've portrayed their connection with the land, how they've sought to undermined a Raukawa were also concern about the way the incorporation has presented its case to date, and how they've portrayed their connection with the land, how they've sought to undermine a Raukawa position and that hasn't helped Raukawa coming to a view that the incorporation is a body it could work with and restore a relationship with.

And in that sense, it's not just how the incorporation is chosen to present its case in some of the issues it relied on, but it comes throughout the entire breath of this process from the incorporation objecting to Raukawa being involved through the process. The incorporation objected to Raukawa being informed that the application happening have sought to exclude Raukawa and there's been very little communication with Raukawa, ever since. So, it's difficult for Raukawa to see how it can build a relationship with an entity that is deliberately sought to exclude them from having a voice in matters concerning the Raukawa takiwā, an entity that applies tikanga and can't seem to bring itself to acknowledge a Raukawa connection to the area.

Raukawa note there that the incorporation has simply to failed to appreciate or acknowledge the harm it's causing or harm it has caused and so it's very difficult for Raukawa to see how that might change now, and how there's a basis to build a relationship going forward. And I should note too, at this point just for clarity that Mr Mahuika noted yesterday that there had been some correspondents from the incorporation seeking to discuss ways forward with various parties, to be absolutely clear that hasn't been communication with Raukawa my understanding is the incorporation may have communicated or had formal communications with the settlement trust. Raukawa hasn't received any formal communication or any formal approach from the incorporation.

JUDGE WAINWRIGHT:

(microphone switched off 12:17:21 – 12:17:26) point Mr Vertongen, because my recollection of what Mr Mahuika said was that Raukawa had been among the recipients of the letter, I am fairly sure that he said that. Mr Milner can you cast any light on that?

NATHAN MILNER:

Ma'am I don't.

JUDGE WAINWRIGHT:

Here he is.

MATANUKU MAHUIKA:

Sorry, Ma'am I was just doing some re-organising.

JUDGE WAINWRIGHT:

Did you hear that?

MATANUKU MAHUIKA:

I did and it's incorrect to say that the letter that was written and it's referred to in submission was a letter to the settlement trust.

JUDGE WAINWRIGHT:

Okay.

MATANUKU MAHUIKA:

But I can confirm, because if the suggestion is that there has been no approach than Mr Vertongen is aware that I have discussed with him, the possibility of the parties meeting and having discussions. Now, that's not writing in my letter, but it is also flying a flag If you like and creating a possibility for dialogue. As I said yesterday when I was making submissions it is a challenging topic, the reason that I was cautious about what I said is that it's not in my view a useful thing to have discussion about how we might negotiate our way through these issues, through the forum of the Tribunal, the preference of the settlement trust, sorry the incorporation is to try and see if there can be away to discuss these matter.

JUDGE WAINWRIGHT:

Yes, I agree that any settlement negotiations if that's what they could be called would appropriately happen outside the context of the hearing. I was just obviously wrong inferring from what you said.

MATANUKU MAHUIKA:

Yes.

JUDGE WAINWRIGHT:

That the recipients of the letter, which I understood to be flying a flag if you like.

MATANUKU MAHUIKA:

It was, sorry ma'am a letter to the settlement trust.

JUDGE WAINWRIGHT:

Right.

MATANUKU MAHUIKA:

And my reason for not wanting to disclose it, it is what it without prejudice proposition. It did include how perhaps a discussion might start with Raukawa and it will be apparent that there are some – just from my friends last submission tension between the incorporation and Raukawa.

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JUDGE WAINWRIGHT:

We did not need that submission to know that Mr Mahuika.

MATANUKU MAHUIKA:

So, there's some – perhaps, I'm being overly sensitive, but just some sensitivity how we might progress that forward, because – and I think my friend would agree there is a relationship building and development aspect that sits behind that dialogue and as I said yesterday in submissions, there is the strict legal position that we have submitted to Your Honour, but there is also an understanding that whatever the outcome, that there are relationships that exist and will continue to exist. So, for example, whether or not the incorporation of a settlement of the trust was the recipient of any resumption, the fact of the matter is incorporation is there and the owners are there at Pouākani and there would need to be, I assume, some sort of relationship between Raukawa and the representatives of the incorporation.

I mean as Sir Kim and Mr Hemi both said in the evidence, they believe that there has historically been a good relationship. These things wax and wane. I am understand the position of Raukawa and their concerns about the simple fact that the incorporation is there, but as I said, and it is a matter that I try to be as delicate about it as possible because it is a 100 years that the owners at Pouākani have owned that land, and that they have a connection and I don't want to be seen to be selling them short in discussion that connection either because these people develop connections and attachments, and the way that they treat it is, as if it is traditional land.

It is not intended or that comment to disagree with or to diminish how Ngāti Raukawa, or Ngāti Tūwharetoa might feel about it, but there are two sides to that discussion, and there are two sets, if you like, connections to the area that with the passing of time now, have to be addressed as part of any discussions.

JUDGE WAINWRIGHT:

Well, there are – the situation that we all find ourselves in here is completely unique. I mean, there is no equivalent situation that – I mean people have talked about various other scenarios where people have ended up inside other people's ancestral land for various reasons, and surely that is the case, but none seems to me to be on all fours with what's happened here. It's a historical event, a series of historical events that have no parallel. So, and we are in a situation where the jurisdiction of the Tribunal established in the amendments to the Treaty of Waitangi Act in 1987 were not constructed with the situation in mind, because it's a unique one.

So, when the Tribunal was enjoined to return land to the appropriate people for claims, it was in nobody's mind that the land that might be returned would not be the ancestral land of the wider group. So, we are here with certain fixed legal perimeters and we will discuss those with you on – Mr Vertongen because

your endeavour to provide space within which a tailored solution might be arrived at is much appreciated, but none of it is easy and it all has to be legally compliant, because none of us is unaware that what's at stake here makes it likely that there will be other legal eyes that will be trained on whatever we do.

So, you are right Mr Mahuika, that the Tribunal does not need to know what the substance of any positions that people may take, and any other discussions are, is, but we are very interested in knowing that such overtures are being made and will talk to other parties about that too.

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It is unfortunate that Mr Colson's not here, because although you are here Mr Manuel, obviously he has been leading the case for settlement trust, but other pou of the settlement trust are here, so maybe – I mean we have discussed whether the Tribunal and the Crown might appropriately leave some space for these matters to progress before the Tribunal produces its decision or whether the Tribunal's decision is necessary and then for this iterative process whatever that might look like, to take place in that interim period before anything takes effect. Because whatever we do, want to make it as conducive as it can be, to arriving at a solution that is better than what is there now, and not worse, and it is difficult for us to know what the best conditions are that we can construct for discussions to be had, agreements to be arrived at, because obviously we are not party to those.

So, I am just suggesting that in the next day or so, it may be that the parties would like to canvas those possibilities because we do not want to take steps that prejudice whatever might be able to be achieved by agreement if something really might be able to be achieved by agreement and the Tribunal saying something too soon, could prejudice that.

I will just park that there for now, and I think we probably arrived at the luncheon adjournment. Mr Mahuika, you will be aware because your reliable juniors will

have communicated this to you that Dr Hond wants to ask you a couple more questions.

MATANUKU MAHUIKA:

Yes.

JUDGE WAINWRIGHT:

But we will park that until the end of Raukawa's presentation.

MATANUKU MAHUIKA:

Understand Ma'am, and if I could just – two things really. First of all, I hope that my response wasn't interpreted as being rude. I wasn't trying to say, "This is none of your business, keep your nose out of it?"

JUDGE WAINWRIGHT:

No, no-no. Like I do not interpret it that way.

MATANUKU MAHUIKA:

I was really just – the positions of the parties, is obviously in some respects, are quite polarised and we've seen a little bit of that come through in my friend's submissions and probably picked up aspects of it from me. And the approach has really just to be cautious, not wanting to say something which either overstates or understates the position of the – or the position that the incorporation might take in a direct discussion. But also, not wanting to offend any of the other parties, which is part of the reason for my circumspection if you like around what might be disclosed in terms of those discussions other than the fact that there is a willingness to do that and some attempts have tentatively commenced.

JUDGE WAINWRIGHT:

Well, just have a think about what the most propitious timing would be.

MATANUKU MAHUIKA:

And secondly, I also did not mean to be impolite by not seeking leave not to be here.

JUDGE WAINWRIGHT:
We did want you here Mr Mahuika.

MATANUKU MAHUIKA:
Yes, I'm afraid I had a – I am presenting a law society CLE paper on Monday, Tuesday next week which was –

JUDGE WAINWRIGHT:
You can just wing that.

MATANUKU MAHUIKA:
Which was due two weeks ago.

JUDGE WAINWRIGHT:
Oh.

MATANUKU MAHUIKA:
So, in order to – in the interest of reducing the stress levels of the poor people organising this, I have been trying to finish it.

JUDGE WAINWRIGHT:
Right, all right. Well, thank you. On that note, we will take the adjournment and return at half past one.

HEARING ADJOURNS: 12.30 PM

HEARING RESUMES: 13:31

BADEN VERTONGEN:

Thank you, Ma'am I wonder if where we left things before the break then it's probably appropriate just to simply skip through some of the issues about who Raukawa see the appropriate Māori to receive redress are, I think we've covered a number of those point and the points are fairly clear that Raukawa feels more comfortable engaging with the settlement trust than it does the incorporation at this point and largely those are issues for Wairarapa Māori themselves to be dealing with, the only other point that was in those sections was a point Raukawa was making to caution against creating a new body, specifically to hold outcomes from Pouākani and that's simply because the Raukawa experience going through the settlement process and post settlement has been creating new purpose built entity to hold portions of redress.

Creates more harm, more problem than it solves if there's – one of the issues are the moment is there's a number of different bodies pulling in different directions creating a third entity to the mix, just adds to those issues. So, based on the Raukawa experience, Raukawa would caution against providing a new entity to receive outcomes.

And simply for Raukawa to signal that Raukawa is here to do whatever it can to assist Wairarapa Māori and identifying who an appropriate recipient of any redress should be, and whatever Raukawa to do to work with whoever that is, Raukawa will.

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And on that basis, I think that takes us through to paragraph 22 or section 22 and this was the question the Tribunal asked around how to come up with a relative share between different groups, to share of redress and Raukawa seen this from the Raukawa perspectives, so when we're talking about a share of interest we're assuming that means a share of interest between Wairarapa Māori and Raukawa.

Raukawa is uncomfortable talking about framing any outcomes as shares of redress or shares of outcomes. And that's primary because doing it in that way invites parties to carve up from uphill and it becomes quite divisive, it also doesn't capture the nuance nature of some of the interest that were taking about in particular elements of redress, so Raukawa would say there's no relative share of land that's appropriate to leave in Wairarapa Māori ownership.

And at the same time there's not a proportion of financial outcome to address the claims of Wairarapa Māori that Raukawa believe it is entitled to a share of, it's something else. So, we don't want to be talking about relative shares and creating dividends and carving up a pie.

Instead, the approach for Raukawa preferred to take, would be to apply building blocks of outcomes and talk about what it might take to address particular elements of redress and build-up to an overall pool of redress.

And again, when we're saying that Raukawa primarily concern on what the share of the financial or economic outcome are again and that there's not relative share of land in the Raukawa takiwā that would be appropriate to divide up between Wairarapa Māori and Raukawa.

So, in building a way forward, Raukawa want to be very clear that the starting place is for the Tribunal to come to view about what an appropriate financial benefit is to deliver to Wairarapa Māori to address Wairarapa Māori claims and that's the place to start.

And again, exactly what that should be is primarily a matter for Wairarapa Māori to address. Raukawa been very grateful not to have to del into some of the financial and economic evidence and leave that for Wairarapa Māori to address and doesn't want to get bogged down into some of those issues.

But we do – it does occur to Raukawa that if we were to take a restorative approach to redress there's not a lot of helpful information that have come out of the economic evidence to date, it talks about a restorative approach as being very much – the evidence that's being provided is being very much compensatory or what the nature of the loss have been, rather than what would it take to restore Wairarapa Māori back into a position they might have been or what is an appropriate approach to re-establish the dismissed place of the claimants.

And we are, it does appear that we are in a position where the range is unhelpful, so from the Crowns perspective it seems that the Crown are pushing an appropriate outcome maybe in the range of hundreds of thousands from the incorporations perspective where the appropriate range is somewhere over a billion dollars or we could end up anywhere in-between.

So, what Raukawa is really tried to do, when we're getting through to 22.16 is almost provide a way of a reality testing what restorative outcomes might look like, and again it seems to Raukawa that there are a number of similarities between what Wairarapa Māori have been saying they want to restore their position to have been that align quite nicely with the Raukawa experience around the Waikato river.

And so, if the Tribunal was looking for some examples of how-to reality test what restorative outcome might look like, that might be an appropriate example to be looking at, and the outcome there is range – started at a $210 million-dollar base starting point, plus a range of additional payments to the iwi, along the river.

If the Tribunal was trying to benchmark as well, what restorative approach might look like, a reality test or restorative approach than it also occurs to Raukawa that the size of the incorporation today is an appropriate, I think is it touch stone.

Because effectively that does represent the position Wairarapa Māori would find themselves in having retained land in the Pouākani area.

If the Tribunal was looking at a pūtea to provide to build the relationship between the incorporation and the settlement trust, again looking at the size of the incorporation today and it provides a bench size for the size of a pūtea, that could be used as a joint arrangement between the two entities.
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And at 22.1 it does appear to Raukawa that when you get to reality testing some of those outcomes, you are sort of ending up somewhere in the mid-range of the position between the Crown and the settlement trust or the settlement trust two competing positions of no benefit, or 600 million-dollar outcomes and you're in that 300 to 400-million-dollar range of an outcome.

And then the next step from there would be to look at what head room is then left in the value associated with the land and whether that is a tool that could be provided to Wairarapa Māori as a tool to address the relationship with Raukawa,

And again, Raukawa were very uncomfortable talking about that in a dollar's sense. Raukawa hasn't approached these proceeding with any of you about gaining an outcome for themselves other than avoiding further harm and want to be very clear that in talking about a pūtea to pass to Wairarapa Māori to on deliver to Raukawa, Raukawa very focused on it being a way of restoring the relationship between Wairarapa Māori and Raukawa rather than necessarily primarily being about delivering an outcome to Raukawa.

If we were though, to start looking at how do you come up what a pūtea in that sense might look like, we're moving on 22.26 some of the ways you could get a sense of what is appropriate might be looking at a measure of reciprocity.

So, looking at the value that Wairarapa Māori derive or continue derive from their presence in the Raukawa takiwā might weight into what an appropriate outcome for Wairarapa Māori to also be delivering to Raukawa. There might be some relativity and balance with any additional financial redress being provided to Wairarapa Māori from land in the Raukawa takiwā.

Another way you might construct an appropriate outcome for Raukawa would be looking at what does it take to set up an endowment fund for Raukawa to be making a dent in some of the social and cultural issues facing Māori, both Raukawa and Wairarapa Māori in the South Waikato. Tribunal about what that might look like and that might be something for the Tribunal to explore as part of a process.

But it does seem – it does occur to Raukawa that there is enormous opportunity here to effectively deliver an outcome for Wairarapa Māori somewhere in the excessive 300 Million dollar plus, but at the same time to be delivering an outcome to Wairarapa Māori where they are in a position to be able to say to Raukawa they acknowledge the harm that there presence has cause in the Raukawa takiwā and there symbolically returning land and providing a level of value back to Raukawa, so that Raukawa would be in a position as if Raukawa had retained the land in the Raukawa takiwā rather than it being transferred to Wairarapa Māori.

And frankly, that's a stunning and enormously exciting position for us all to be in, if we can find a way to do it.

So, the last question the Tribunal asked in your 29 August memorandum was how to structure an intuitive process. and that's discussed at section 23, it's also set out in the flow char in that addition material that was circulated this morning.

So, to a large extent these have been covered in some of the discussion today, but to summarise where I think we've got to, what Raukawa suggest an intuitive process might look like is at 23.5. The initial step in the process will be for the Tribunal to outline its thinking about what it feels the broad outline of redress might look like, and it would be useful the Tribunal to set out at that stage whether the Tribunal feels that is necessary to resume land and make binding recommendations, irrespective of financial outcomes.

So, these are just whether land is important to address some of the mana whenua and tikanga issues. It would also useful for the Tribunal, that's at this stage to give some guidance about the size of the financial outcome the Tribunal would expect to come out of this process, because as we've already discussed the uncertainty around what the financial outcomes might be for the parties is probably preventing a lot of the discussion that needs to happen.

It would also be helpful for the Tribunal to give a signal early on about the Tribunals thinking around who should be the body to hold redress on behalf of Wairarapa Māori, there's some clarity in that process about who the voices are the discussions that need to happen and how the relationships need to be built to get to that outcome.

Again, as we've said thought, what would be helpful is having set out effectively the framework the discussion needs to happen within is for the Tribunal to be silent on what the mechanism are for delivering, particular the financial outcomes and then leave that for the parties to go away and explore amongst ourselves.

There's also an opportunity at that stage for the Tribunal to request to any further information you feel you need to have in front of you before you proceed to a final decision on recommendations binding or otherwise, and in particular it occurs to Raukawa that there is still some uncertainty around exactly what

land it is we are talking about, and whether tittle would need to be reconstructed and exactly what area any recommendations would be applied to.

So, there's a window there for some of these issues to be work through and further information to be provided to the Tribunal. Our suggestion would be at this stage the Tribunal should be clear that this would be initial thinking and not recommendations under section 8(A) because it would be unhelpful to trigger the 90-day window and force the parties into a fairly limited timetable.

Instead, I think there is a need to provide the parties with that space to have discussions and trying to work through some of the mechanics of how to arrive at an outcome themselves.

Following those discussions they'll be the opportunity for the parties to come back to the Tribunal an update you on whether or not we have been able to find a mechanism to move forward and if we have, at that point the Tribunal would be able to issue recommendations under section 8(A) for the resumption of land to Wairarapa Māori and carve out the financial value from that, and set that within a package of section 6 through recommendations that would enable the Crown and Wairarapa Māori to work together to pass land and potentially some financial benefit onto Raukawa to address the relationship between Raukawa and Wairarapa Māori.

If the parties aren't able to come to a final view on what those mechanisms should be, then as we note there it's open for the Tribunal to make more detailed recommendations about what financial mechanism applying to the land might look like. And particular what other revenue stream being derived from the lands, might be the level it would be set at, the period of revenue stream might be delivered. And that revenue stream is severable from the underlying ownership of the land.

And again, that would happen in conjunction with the ability for Wairarapa Māori to pass the Pouākani land onto Raukawa and no financial land to Wairarapa Māori and potentially for there to be some head room in the financial value delivered to enable Wairarapa Māori to provide some outcomes for Raukawa and address the relationship with Raukawa.

1350

And again, Raukawa stressed the importance of providing that opportunity for the parties to be able to come together and have those discussions and agree the mechanisms for delivering those outcomes ourselves and the importance of being able to disentangle the financial value for misuse associated with mana whenua is particularly important and is, what has the potential to make some of these outcomes work.

So, in conclusion, Raukawa remain of the view that a number of the elements of prejudice that the Tribunal have identified can be addressed by financial redress outside of binding recommendations and through non-binding recommendations, and that the Tribunal would be entitled to come to a conclusion that resumption is not required, effectively the option 1.

And again, the comparison of the options, the various options we discussed today is provided in the supplementary material that's been circulated and how each of those options go to prejudice the interested parties and elements of tikanga. But option 1 remains a viable option for the Tribunal.

Raukawa continue to oppose resumption of land as proposed by either the applicants, what we discussed as option 2. Such an option doesn't address the key elements of prejudice that causes further harm and is inconsistent with tikanga.

Raukawa acknowledge the settlement trust has been largely forced into this option and has shown the desire to address the relationship between Raukawa

environment with Māori but hasn't quite got there yet with its proposals. As a result, Raukawa must remain opposed to both applications, but if the Tribunal is of the view that resumption of land is necessary to address the complex history associated with Pouākani, then Raukawa do believe that it's possible to construct a package of recommendations that has its roots in tikanga while addressing the interests of the parties and the underlying prejudice that the Tribunal has found. And that's what we've set out as our option 3.

And again, the key element of that is by separating the potential financial value of the return of land from the underlying ownership of the land and that allows all parties to avoid having to make comfortable trade-offs between mana whenua and monetary issues.

And in addition, if the Tribunal would firmly set how financial benefits should be delivered on tikanga based principles and the need to address specific prejudice there is enormous potential here for an outcome that enhances the mana of all parties and resolves long-standing division and hurt.

Raukawa also hope that because this type of approach is one that is founded in tikanga, it goes beyond addressing financial impacts and addresses those cultural and spiritual harms that have been identified throughout this process, including during our tikanga redress session.

And this type of outcome as option 3 might not be why any of the parties particularly sought or put in front of the Tribunal, as part of their remedy's applications, but it's one that does appear to meet the underlying interest of everybody and it is within the Tribunal's power to deliver and is one that Raukawa believe is a win/win for all.

And Raukawa also believe that this is the way forward that hopefully answers the challenge that the Tribunal has been putting in front of the parties of finding a win/win solution and a way forward that brings us all together. Kia ora.

JUDGE WAINWRIGHT:

Tēnā koe, tēnā koutou. Mr Vertongen, there's a lot in this and we really appreciate your effort to, well as you said, "Think outside the square." And there are definitely ideas that you have discussed that appeal to us, and that we will work on. However, there are some aspects also that I find myself really struggling with, and I am not sure about the other members in that regard, but because we have not had an opportunity yet to consider it as a group in any detail, the first thing I would like to address is, the premise in option 1 that it is a sort of a substitutable option for the Tribunal to make non-binding recommendations, instead of binding recommendations.

And obviously, the key difference between non-binding recommendations and binding recommendations is that the binding recommendations are binding. And if you look at the report that the Tribunal delivered in 2010, it has already been discussed in this hearing this week.

However, Tribunal recommended that the Crown should reconsider the valuation criteria that it applied, and compensate accordingly, and we know that – well, we have evidence that that simply was not part of any of the discussions, well, any of the decisions. I don't know whether they were part of the discussions.

So, the ability of the Crown to suggest – of the Tribunal to suggest things to the Crown is infinite, but its ability to deliver and to make decisions that then come to fruition, is very limited, and this is an area where the Tribunal has these powers and where the Courts have been fairly categorical now that in the appropriate situation, we have to exercise them.

So, I am just not sure that although you are right that this is something that the Tribunal could do, whether on the circumstances presented to us, is something that we should do or actually in law, and I am thinking now of the approach that the Ngāti Kahu Tribunal took. Where it was faced with a whole lot of really

difficult circumstances, which persuaded it that rather than binding recommendations, it ought to make a package of non-binding recommendations which it did, and it was categorically told that that wasn't available to it in that situation where there were well-founded claims before it. So, I just query whether your option 1 really have legs.

BADEN VERTONGEN:

And we acknowledge as part of that discussion Ma'am that there is that practical difficulties and how confident you can be that option 1 will be something that can be delivered by the Crown, Raukawa acknowledge –

JUDGE WAINWRIGHT:

Well the Crown like the Tribunal, I mean the Crown could deliver it.

BADEN VERTONGEN:

Yes.

JUDGE WAINWRIGHT:

Could deliver whatever it wants to do.

BADEN VERTONGEN:

Whether it will in practise is, yes.

JUDGE WAINWRIGHT:

Yes.

BADEN VERTONGEN:

And that's the key tension in option 1.

JUDGE WAINWRIGHT:

Well that is one of them for sure, but there is also the question as to whether making non- binding recommendations instead of binding recommendations in the face of well-founded claims is actually an option that is available to…

BADEN VERTONGEN:

Raukawa would say it is an option here and it is different from the Ngāti Kahu situation where the key difference here is a set of binding recommendations has potential to do harm to Raukawa, of course, further grievance.

JUDGE WAINWRIGHT:

I do not think that is a distinction, because that is exactly what the Tribunal thought in the Ngāti Kahu situation, because it was faced with a bunch of related people all of whom had different views of things, and it was confident that if it proceeded down that track for Ngāti Kahu, that it would be doing harm? I mean rightly or wrongly, that was its view of it. So, I mean I do not think that is a distinction, is all I am saying. I am not suggesting that Raukawa's view of the harmless role, but I don't think that's a distinction between our situation and Ngāti Kahu's Tribunal situation as they saw it.

1400

Anyway, so that is a query whether that is a path that is available to us for either of the reasons for either of the reasons that I have outlined and then understand your submissions on option 2. I am a bit puzzled about what you say on page 40 when you seem to be saying that Raukawa is worried about Mercury. Really?

BADEN VERTONGEN:

No, not so much worried about Mercury, worried about the position Raukawa would be put in. So, Raukawa's uncomfortable being put in the position where it feels like its leverage is part of a process that leverage is value out of Mercury. It is just –

JUDGE WAINWRIGHT:

How is this a process that leverage is value out of Mercury?

BADEN VERTONGEN:

‘Cos that’s what the settlement trust has proposed is that they would have land returned to them which they would then on-sell to Mercury and pass that land through Raukawa as part of that step, so Raukawa would be somehow engaged and included in the process of the settlement trust going along to Mercury and saying, “We’ll sell you back the land for $600 million.

JUDGE WAINWRIGHT:
Right.

BADEN VERTONGEN:
Raukawa is uncom – what we are signalling there is Raukawa is uncomfortable being –

JUDGE WAINWRIGHT:
Well, that Mercury would get the money from the Crown.

BADEN VERTONGEN:
Yes.

JUDGE WAINWRIGHT:
I mean that has got to be the money go around, doesn’t it because the way that it is structured is that that it is like a compulsory acquisition and Mercury would get the determined value from the Crown’s purchase as a compulsory acquisition.

BADEN VERTONGEN:
And so, so what Raukawa is saying is the preferred option would be to have space for the parties to have discussions about how value is delivered so that rather than it passes through Mercury, and we having to engage with Mercury, the Crown is in a position where –

JUDGE WAINWRIGHT:

Okay. Well, I mean I think we all have to remember that Mercury aren't here for a reason.

BADEN VERTONGEN:

Yes.

JUDGE WAINWRIGHT:

And they have these assets subject to liability.

BADEN VERTONGEN:

Yes.

JUDGE WAINWRIGHT:

And if the liability comes home to roost, they are a commercial entity. They knew what the risk was, and the Crown is going to see them right anyway.

BADEN VERTONGEN:

That's right.

JUDGE WAINWRIGHT:

So, you know, I cannot really see that we need to be too worried about that. But then you come on to this whole thing about a pūtea.

BADEN VERTONGEN:

Pūtea, yes, Ma'am.

JUDGE WAINWRIGHT:

And the idea that somehow the Tribunal is going to be in a position to say how much people should get.

BADEN VERTONGEN:

Mhm.

JUDGE WAINWRIGHT:

I do not see how that arises in our jurisdiction Mr Vertongen. I mean we have talked about how this process is designed to happen, if the Tribunal takes the view that the ownership of the land needs to change, then the mechanism is that the Tribunal changes the ownership by a binding recommendation and consequentially the Crown acquires the land from the current owner and then returns it to whoever the Tribunal says it should return it to.

BADEN VERTONGEN:

Yes.

JUDGE WAINWRIGHT:

And the Crown has paid Mercury for the land, and there could be subsequent arrangements as between those with interests and I except that it may be possible to split – we will look at the possibility that you suggested of splitting the ownership from the income flow that could be derived from the land. But that is a flow of income.

BADEN VERTONGEN:

Mhm.

JUDGE WAINWRIGHT:

Where – who is putting up the pūtea?

BADEN VERTONGEN:

So, I think it's perfectly within the scope of the Tribunal's powers to say you are interested in delivering a beneficial interest in the land back to Māori or delivering a leasehold interest in the land back to Māori, and that is at a particular value of 300, 400, $600 million beneficial interest in the land.

JUDGE WAINWRIGHT:

Mmm.

BADEN VERTONGEN:

And then the process of how that is delivered in the financial outcome is delivered, is for the Crown and Mercury to be discussing around what the value of the interest that the Crown is having to resume out of mercury is.
1405

JUDGE WAINWRIGHT:
Well, clearly the Crown has to – if we make the appropriate recommendation that the ownership of the land needs to change, the Crown needs to get itself in possessing of the tittle that it can pass to whoever that is, but that does not give rise to a pūtea, that give rise to a sale and purchase agreement between the Crown and mercury and then there is an asset that passes and it may be, there could be a different entity that derived benefit from the asset over time and there's a value to that, there's a present value of a future income flow but that is not pūtea.

BADEN VERTONGEN:
No, no, Ma'am and maybe that the phrasing may be wrong. What we're saying is that the Tribunal can give an indication of the value it thinks should come out of this process to Māori.

JUDGE WAINWRIGHT:
Well, really – we have valuation evidence before us, and if we make the decision that Māori whoever we say they are, should get it all, should get the property, should get the benefits associated with the property, the improvements te mea, te mea.

BADEN VERTONGEN:
Yes.

JUDGE WAINWRIGHT:
Then that has a value and we have been told about the value, so we have to be satisfied if the proportionality between the prejudice and the value, but your idea that then we go and say that independently of the assets and whatever

flows from them, we say we want Māori to get enriched by x million dollars, how does that arise from our jurisdiction?

BADEN VERTONGEN:

Well, you don't – the power of the Tribunal is to either order the return of land or return part of the land or return interest in the land. So, it's not you come to a conclusion that all of the land should go back to Māori, you could come to the conclusion that well 300 million dollars' worth of land should go back to Māori as an appropriate level of compensation and that could be either through part of the land or it could be a beneficial interests and 300 million dollars – beneficial interests to the value of 300 million dollars in the land.

It could be a rental stream, as a lease hold interest that's valued at 300 million dollars as an interest in the land, there are a number of ways this Tribunal could get to a position and say, this is the overall value we see being delivered to Māori and then putting it in the hands of the parties to go away and figure out the mechanism for that to be delivered and Raukawa perspective would be, it would be best for that to be delivered as a lump sum from the Crown to the parties, rather than via mercury.

JUDGE WAINWRIGHT:

Okay. The other thing that I struggle with Mr Vertongen and I think perhaps this is something that has risen from the circumstances that Raukawa find itself in as a tribal entity that has settled with the Crown, that they've settled their grievances with the Crown, so they do not feel free to imply that the problems here are the Crowns problem.

BADEN VERTONGEN:

Yes.

JUDGE WAINWRIGHT:

Because, that is the perception that we have as a Tribunal and there is a lot in here that is implying at least that there is hara on the part of Wairarapa Māori

for having chosen this outcome and that it is up to Wairarapa Māori to pay reparations to Raukawa for that hara of Wairarapa Māori.

BADEN VERTONGEN:

Yes.

1410

JUDGE WAINWRIGHT:

And while I understand also the kōrero about the mana involved for Wairarapa Māori in repairing the relationship and that having tools to do that could be a good thing, I think we have to be very careful about implying that this was in any way, manner or form, a situation created by Wairarapa Māori. And that also goes to the characterisation of Wairarapa Māori deriving financial benefit from there – from the Raukawa takiwā over the last 100 years. That is not what our report said.

Our report said that the first dividend that was paid to Wairarapa Māori in respect of land at Pouākani was in 2003, and that for the years between 1916 and 2003, it was pretty hard to spot any benefits, and missing also in this discourse, is that whatever benefits that Wairarapa Māori might have derived from the land at Pouākani was in respect of an enormous loss to them in relation to Wairarapa Moana and the idea that getting back title to the bed of the lake, cleans the slate is again, something that does not reflect what we say in our report, which is that there were 50,000 acres that ought to be have belonged to Wairarapa Māori, which included the lake and the wetlands and the surrounding land, and none of that is available. Nor, the enormous value that other people, Pākehā, have derived from land within the takiwā of Wairarapa Māori.

So, we have to be very careful in how we characterise all of this, because it worries me, and not least for future of discussions that the experience of Wairarapa Māori is characterised in that reductive way. I think that creates a

problem and it is not an account of what happened that we recognise, having heard the evidence. And those kinds of messages are just as obstructive as the kind of message that Raukawa objects to when that tangata whenua flavour comes through in any of the statements made by the people connected with the incorporation at Pouākani. You know, I completely understand why that is a stone in the shoe for Raukawa, but this is also a stone in the shoe, and we need to be really scrupulous about that stuff.

So, it is hard to disentangle your characterisation of the obligation of Wairarapa Māori to heal the relationship from these other strands, which are they benefitted from our land, they're getting everything they want in Wairarapa and then they want this as well, you know that kind of - we need to step through that all very carefully to actually properly characterise what has gone on, and I think your depiction of it, no doubt on instructions, does not capture it. So, I just want to put that to out there, because it worries me.

BADEN VERTONGEN:

Yes, and I think it's important to acknowledge Ma'am that there are a number of positional elements that are coming through and what is presented there is very much a Raukawa perception of the world, rightly or wrongly, it is a Raukawa perception. And one of the challenges in this process, it is not helpful for those positional views to be put forward and I think you are right, we do need to find a way of acknowledging that there is harm on all sides and people were in positions because it was a range of all sorts of reasons, and then talking about, well how do we heal and move forward? And it is important to be clear too that when Raukawa were talking about the ability for Wairarapa Māori to provide some sort of reparations or redress to Raukawa, that that comes after redress has been provided to Wairarapa Māori for their own claims, and so, there is nothing coming out of – there's nothing Raukawa is asking for that comes out of what Wairarapa Māori are entitled to.

What Raukawa were saying is that if there were some head room in the value having come to a view that the appropriate financial outcome for Wairarapa Māori is 'x'. If there is still some value there in the land, then there is space for Wairarapa Māori to have a tool to start addressing some of these harms and these concerns.

JUDGE WAINWRIGHT:

Well, it may be that that is the way to shape it. It may be that at the end of it all, it is (**Missing audio 14:16:22 – 14:17:24)** the Tribunal.

BADEN VERTONGEN:

Yes.

JUDGE WAINWRIGHT:

But yes, it is going to have to be very careful because everyone can say things and it is hard to take them back.

BADEN VERTONGEN:

Yes.

JUDGE WAINWRIGHT:

And obviously, the relationships have become fractured.

BADEN VERTONGEN:

Yes, I think we're very much at that point where we need to acknowledge that this is a Wairarapa Māori perspective and this is a Raukawa perspective and one doesn't necessarily need to mean that the other is wrong. Both can just be different perspectives that co-exist at the same time, and the trick is now to find out how do we move forward and rebuild relationships coming from those different perspectives. Well, the element of what you have talked about today that has real potential I think, and I am not sure how it would work but I think it – and I am not sure that the way that you think that would work, would necessarily be the way that the Tribunal would think it would work, if it ends up

being a decision that we have to make. But the idea of arranging the matter of title so that it can reflect mana whenua is something that we want to work with and deliberate upon. Yes, I think I would leave that there.

DR RUAKERE HOND:

Tēnā koe e te pou kōrero o Raukawa. Kāre āu mō te pātai atu, engari he mihi. Hāunga atu anō ngā kōrero, ngā pātai i tukuna atu ki a koe, engari ko te mea nei kia mau atu. Pai ki āu te mihi i roto i te reo . I te kaha kōrero nei mō te tikanga, engari anō, kua rongo i te nawe i te uauatanga, i te taumahatanga i runga i a Raukawa i roto i ngā kōrero kua takoto ki te pepa me te mōhio tonu mā te kōrero ēnei āhuatanga i te tikanga, ka puta ērā uauatanga. Nō reira, kāti ake kua noho āu, kua rongo i ngā kōrero, e rere ana te mihi ki runga i a koutou i whakaputa kōrero i te rangi nei, mai te ata ki nāianei, tēnā koutou.

[Interpreter: It is just an acknowledgement to you Sir, especially particular the question given to you. You spoke clearly about tikanga, and we have certainly heard obviously the bite, in particular from Raukawa and of course, it's reflected in your evidence. And of course, so as we discuss further about tikanga, and of course, it is very hard. And of course, here I am listening to you, and I do appreciate the evidence that you have given to us, so I just wanted to say that.

BADEN VERTONGEN:

Kia ora.

JUDGE WAINWRIGHT:

Mr Vertongen, despite what i said, I do acknowledge the difficult attempt that have made to put new things into the kete, and we need that, and I am very grateful for what you have done, and nothing I have said, should detract from that.

BADEN VERTONGEN:

Kei te pai.

JUDGE WAINWRIGHT:

All right, that is you done.

BADEN VERTONGEN:

Thank you, tēnā koutou.

(Mic off 14:21:37 – 14:22:32)

MATANUKU MAHUIKA:

…..koutou. I thought I had –

JUDGE WAINWRIGHT:

Kāre, kāre anō.

DR RUAKERE HOND:

Kei te pai.

MATANUKU MAHUIKA:

I escaped the lectern but here I am again.

DR RUAKERE HOND:

Kei te pai. Hoi anō, ko te mea nei he pōhēhē nōku inapō ko te rere te kōrero nei mō tēnei mea te whakakapi i ngā kōrero kāre i whakaaro kua tae ki te wā me tuku pātai. Nō reira, tērā anō kāre i puta tika tētahi o waku pātai. E rite nei ki te kōrero Māori nei kua pūruatia te moko. I te tānga tuatahi o te moko kāre pea kia āta kitea, engari te tānga tuarua ana ka tino māro te kitenga atu o tērā te rere o te moko. Tēnā koe.

[Interpreter: It was my misunderstanding yesterday. Obviously – and of course, at the time when you finished your evidence, I remembered I had to ask questions of you. So, thank you for the opportunity. And of course, through that, you know, we're able to bring us here together, and of course –]

MATANUKU MAHUIKA:

Āe, well rite tonu ki tētahi o aku hapū a Ngāti Rangi. Ko te ingoa o te whare o tērā hapū ko Tūauau, āe, i te mea i tērā o ngā kāinga, ana, tū atu tū mai, tū atu tū mai ngā tāngata, nā reira kei te whakahaere tonu tērā tikanga o rātou.

[Interpreter: And I speak about the other – one of my hapū is Ngāti Rangi and speaks of that exact symptom that you're speaking of, that particular house, and the ability to speak continuously on marae, so I guess that is part of –]

DR RUAKERE HOND:
Tū mai i tēnei wā.

MATANUKU MAHUIKA:
Āe, ka tū mai anō. [Interpreter: And I guess, here I find myself standing here again.]

DR RUAKERE HOND:
Ka hoki anō ki tērā te uaua o wērā kōrero. [Interpreter: So, if I can go back to the essence of that.]

I'd like to just return back to the comments I made around the Wairarapa Moana and that the 139 owners, it is beyond question I think. Really the fact that there isn't the level of detail or precise detail that would give us an understanding perhaps that we would like today. However, the 139 owners, is very much a strong position and the whakapapa base of that sets a very strong foundation of ownership and of connection with Wairarapa Moana.

So, I do not contest that and do not criticise that in any way. If we look at however, when things get changed into shares and the like and you made comments in your closing submissions around the – there isn't any evidence to show how some owners ended up with more shares than others, and that the incorporation is looking to establish a trust and that assets would return back into trust.

My question is really around the nature of who would be eligible for those – for the benefit of that, given for an iwi organisation, beneficiaries is based on whakapapa and the ability to whakapapa back to the iwi. And those are very strong lines, and gain, also made on very strong whakapapa connections. But are you able to share information or a perspective around the eligibility of people to be able to access those?

MATANUKU MAHUIKA:

Yes, so my instructions in relation to the proposal is that it wouldn't just be the existing shareholders. So, it would be those that whakapapa from that 139. So, in all likelihood, it would be a bigger list of people than the three and a half thousand current owners, because I think it is acknowledged that there are perhaps some lines from those tīpuna who did not inherit or where families made particular choices. And so, the idea is to capture the entire grouping of people that descend from those owners, and thereby, because it will be such a large grouping of people, it's believed that it would capture all of those that have those strong links with Wairarapa Moana. That's the nature of the proposal.

DR RUAKERE HOND:

That certainly responded to my question, the way in which those 139 are reflected in today's time, and the ability to whakapapa back to the 139, is it conceivable that it would also include the hapū that are recognised so, not talking about whichever way it goes, whether the 20 hapū or the 14 as Mr Hemi referred to the other day, but are hapū also a way in which people are able to draw connection to –

MATANUKU MAHUIKA:

I'm not able to shed any light on that particular matter, sorry, but it may be that others could do that. I don't understand the – well, there are two aspects. Well, first of all I don't understand sort of the whakapapa of those hapū, and then I also don't understand or don't know whether or not the connections were hapū connections in the sense that all members of hapū had a link to the moana

itself, or whether it was just part of that hapū. The best example I can think of are things, mean even the things such as fishing rights in a particular place.

You might be a member of a particular hapū, but not all the hapū have the right to that place and it's held by a tighter group, although under the mantle of the hapū and you get into that sort of complexity. I mean my assumption had been based on the evidence that those things may have been taken to account in compiling the list of 139 owners, but I am outside an area where I could really elucidate further on how that might work in practise.

DR RUAKERE HOND:

I understand the difficulty in determining that and the fact that, of the 30 or so rangatira, depending on which account you refer to, but they are associated differently with hapū, and the hapū being able to determine that would be helpful perhaps potentially for people who would connect or believe they have a connection to Wairarapa Moana.

MATANUKU MAHUIKA:

Yes, and there is some complexity, as I understand it as well, so the evidence of is it Ms Tuta, or the settlement trust talking about the overlaps, suggests that there is a high overlap for some reason and they don't know why, between the register of the incorporation and the register of the settlement trust. And I'm also not certain, although I gave the 30 - 110 submission yesterday. Actually, I don't know how much overlap there is between the list of hapū in the settlement trust deed and the list that you might associate with, with Wairarapa Moana, and 110 is a big number of hapū for that sort of area. So, I'm also not certain how many of those you might say are active, how many of them are closely related to each other and how the whakapapa between those different groupings were. So, it's a difficult question for me to answer as well.

1430

DR RUAKERE HOND:

And how many were active in 1883?

MATANUKU MAHUIKA:

Yes, that's right and what was the extent of it, you know, or what is the extent of the different hapū connections and interests, because it's apparent that the different rangatira had multiple connections, which is those normal, that they would be connected to more than one hapū, whether or not that means that all the hapū that they belong to, or had a connection with ought to have had an interest in the lake back into title, I'm not sure either.

DR RUAKERE HOND:

I think the main point also I'd like to make is just acknowledge the move by the incorporation to consider the establishment of the trust and to move away from relative shares.

MATANUKU MAHUIKA:

Yes.

DR RUAKERE HOND:

And yes, I think that certainly goes a long way. The other question raised the communications, perhaps it was really me misinterpreting the context of that, but at the same time, my key focus of the question was really supposed to be around the potential for tikanga to be a part of that, that the open – so, if the incorporation is open to these sorts of discussions, the level at which tikanga Māori would be applied in that context, are you able to comment on that?

MATANUKU MAHUIKA:

What I can say is that the incorporation is certainly open to the discussions. The way that I would characterise it is that there are almost two streams of activity occurring. So, one is the request for resumption in the settlement of the claims and I made the argument based on the particular legal framework. So, there is that stream of activity.

The other is that certain area where I think my friend Mr Vertongen was discussing in terms of his submissions about – okay so we have the legal test

– not - agreem with his characterisation, well, characterise in that way. This is the legal confines within which the Tribunal is able to act and make decisions, but then there is a broader set of circumstances within which the parties are able to engage and discuss these sorts of matters. And I made the comment yesterday that I can understand the desirability of that, simply from the point of view that – and as my friend said in his submissions, Wairarapa – the Wairarapa Moana Incorporation and its owners and representatives have perspective.

The settlement trust obviously has a perspective as well, but those are Wairarapa Māori perspectives. They are matters to resolve. There is a Ngāti Raukawa view and perspective and there is a Ngāti Tūwharetoa perspective that I'm sure we'll hear about shortly, but either way, nobody is going anywhere. So, there is, I acknowledge the need for that tikanga process to work itself out, because those relationships will have to co-exist well beyond this process. But just in terms of the approach that we're taken, there is the, sort of restrict Tribunal approach, but an acknowledgement that this other approach ought to happen, and there are some efforts being made. I'm being as I said before, circumspect about what I say because I don't want to be seen by the other parties as trying to either curry favour overly, but also, conduct that discussion through the vehicle of the Tribunal.

I know you're not asking me to do that, but I'm just explaining why I'm being cautious about what I say in relation to that, because that is a discussion that the parties, in my submission, ought to be happening, and are endeavouring to have. Although, as Mr Vertongen said, "There are strange relationships and those things do take a little bit of time to mend." I'm not sure that answered your question.

DR RUAKERE HOND:

I think perhaps also the fact that the legal testing as you refer to, isn't an area of strength of mine, but the other side is obviously where a lot of my interest is

in, and the direction that that would take, whether you are able to present that information now or not, is I don't think is really what my question is.

MATANUKU MAHUIKA:

I think I would probably prefer not to.

DR RUAKERE HOND:

Mmm, that is all right.

MATANUKU MAHUIKA:

We certainly have heard Your Honour's comments about discussion. I can assure the Tribunal that there is a desire to do that, notwithstanding the challenges that I talked about.

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JUDGE WAINWRIGHT:

Can I just come in there?

MATANUKU MAHUIKA:

Yes.

JUDGE WAINWRIGHT:

We have raised the desirability of those discussions outside the Tribunal process taking place on previous occasions, and we are aware simply as observers that the relationships are difficult, and I am aware as a person whose life is substantially taken up in conflict resolution, that when matters are very strained, it is much easier not to broach them, than to jump into the melee.

MATANUKU MAHUIKA:

Yes.

JUDGE WAINWRIGHT:

However, because of the timeframes here, it is not really – if anything is going to happen, it is not available to people after this to go home and for us not to hear anything more for several months, because things will take their course. So, can I ask you Mr Mahuika and other counsel here, to actually talk in the course of this week so that at the end of it, you can tell the Tribunal whether you are going to have discussions or not. Nothing about the discussions, but whether there is actually a plan to have them or whether it is sitting still in the, we should, we might, we could, because we need to know that at this point.

MATANUKU MAHUIKA:

Well, I think I can tell you Ma'am, that it is beyond the we should, we might, we could. There has been the letter that's referred to which put a proposal to the settlement trust, Mr Colson is not here, but representatives of the trust are there, and there have been some – I don't want to overstate them, but there have been discussions with other, and between other counsel. So, it is beyond the not talking at all, but it is a very delicate dance that we are required to do in relation to the speakers.

JUDGE WAINWRIGHT:

Yes, yes.

MATANUKU MAHUIKA:

You don't want to stand on any toes in the process of doing that, and we don't want to, in having those conversations, risk undermining relationships where there are clearly, sensitivities.

JUDGE WAINWRIGHT:

Well, how you manage those is obviously for you, but as far as we are concerned, we just need to know in the broadest possible terms, what's happening and whether that should expect what we have been asked to do.

MATANUKU MAHUIKA:

Yes.

JUDGE WAINWRIGHT:

So, we do need to be firmly in that loop.

MATANUKU MAHUIKA:

Yes, I understand what you're saying Ma'am.

JUDGE WAINWRIGHT:

Yes.

MATANUKU MAHUIKA:

And of course, I think it is fair to say that there has been particularly on the incorporation's part, the focus of this process with the Tribunal has really been on the Crown, and what the Crown did and seeking reparation for that, but conscious in doing so that there are these other things that need to be talked about, which is why I talk about it in two streams.

JUDGE WAINWRIGHT:

Yes.

MATANUKU MAHUIKA:

The process here is about what the Crown did wrong and seeking redress for that, but understanding that in doing so, there is a desire to protect and maintain a series of other relationships.

DR RUAKERE HOND:

Kia ora i ērā whakamārama. Just one last question, is really quite small. Towards the end of your closing, you talked about the whanaungatanga and manaakitanga and in particular talked about sponsoring of events and gifting of land. Are you able to talk about the gifting of land, what is the context of that? I could not remember it in any of the evidence.

MATANUKU MAHUIKA:

I think I jumped over those paragraphs in the submissions when I was going through them, but my understanding is land has been given for, yes, the churches and schools –

DR RUAKERE HOND:

Churches and schools.

MATANUKU MAHUIKA:

– within the Mangakino region and also, there is land that's been provided for the marae.

JUDGE WAINWRIGHT:

Land provided for the?

MATANUKU MAHUIKA:

Well, I thought that the marae –

DR RUAKERE HOND:

The marae –

MATANUKU MAHUIKA:

– is on incorporation land. And that's consistent with the development of a community within that region, and partly explains the position that I tried to, well that I have put about understanding the position of Ngāti Raukawa, understanding the position Ngāti Tūwharetoa.

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There is also a feeling amongst, perhaps not all, but certainly a portion of the owners of the lands at Pouākani but for Wairarapa Moana people that actually they have a connection. They have established a community there, so that's where some of the feeling the other way comes is that after 100 years been told that you don't belong in a place, can be a difficult matter, and I'm not saying at

all, and saying that Raukawa shouldn't feel the way that they do, or that Tūwharetoa shouldn't feel the way that they do.

I'm really just putting the alternative perspective. We are dealing with human beings interacting with each other, and in counsel, those sorts of challenges.

DR RUAKERE HOND:

I just really wanted to get my head around the context in which you used the terms whanaungatanga and manaakitanga so that has explained that.

MATANUKU MAHUIKA:

And those are the contexts and of course, Sir Kim himself was involved in supporting Raukawa's aspirations for recognition within the Pouākani region in his former capacity within the – well, within the Department of Māori Affairs I think it was at that time. So, you know there are relationships. There are things that have happened, and I am sure we will continue to happen within those communities of people that –

DR RUAKERE HOND:

Ka nui tērā. E kore e toia koe kia tuatoru nei tō tū, engari ka pai.

JUDGE WAINWRIGHT:

Coming back to the context of the Tribunal's process and your response to Dr Hond about the possibility that the incorporation now contemplates of establishing for receipt of resumable land and benefits, the establishment of a trust whose beneficiaries would involve, you said, "A bigger list than the 3500 owners." And you noted that some families seem not to have come through from 139 names?

MATANUKU MAHUIKA:

I think what I was saying was that my understanding is that through the process of succession, there is the risk that choices were made as to which members of the family would inherit shares, although you might be a descendant of the

original owners, the process of succession means that you haven't inherited those shares. And I think, if you look at the information that was submitted in relation to the shareholding within the incorporation, what you are starting to see develop, a number of whānau trusts. So, my understanding of those is that in some cases at least they have been used as a vehicle through which to –

JUDGE WAINWRIGHT:
Bring people back in.

MATANUKU MAHUIKA:
Bring people back in.

JUDGE WAINWRIGHT:
Mmm.

MATANUKU MAHUIKA:
Perhaps through some vagary or succession weren't in there, so the idea is to, as I understand the trust concept, is to remove those vagaries and simply for everybody who descends, so there's not a – so, the assumption therefore, is that it could be greater than the 3500 because my assumption is perhaps there are some people that didn't succeed. I don't know for certain, but that is one of the things that the proposal would address. The other is the concerns over relative shareholdings that have been expressed. So, someone doesn't have a large vested proportion of –

JUDGE WAINWRIGHT:
Of that –

MATANUKU MAHUIKA:
– of getting benefit relative to the others. Everybody shares in it and everybody gets the opportunity to benefit from it in the same way. So, if you like, it is also an equalising proposal in terms of interest and any land that might be resumed as a consequence of this process.

JUDGE WAINWRIGHT:

And I think then, you have clarified that the starting point for ascertaining who the beneficiaries of the trust would be is still the 139 names?

MATANUKU MAHUIKA:

Yes, although I wasn't able to answer the question in relation to hapū and whether there was something more, simply because I don't know the answer to that question.

JUDGE WAINWRIGHT:

So, that is really the supplementary question that I had, which is, Dr Hond and I were discussing the evidence last night in reflecting on the snippets of information we do have, such as the settlement trust representing 110 hapū.

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And then Mr Hemi saying, "Well, really it boils down to 14," and then Mr Stirling saying, "Well, it's more like 20-something," and then we have got 30 rangatira and maybe 30 rangatira in the top lake, and 30 rangatira in the bottom lake, if you listen to some of the kōrero in the Court. Has there been discussion thus far, of the process that would be arrived at to ensure as you said that indeed you did capture and I'm quoting you I think, "Capture all those who had strong links with Wairarapa Moana."

MATANUKU MAHUIKA:

Yes. Look, I don't have any instructions about what that process might be and –

JUDGE WAINWRIGHT:

There needs to be one though, wouldn't there?

MATANUKU MAHUIKA:

Well, I just don't want to over or understate what has happened. It is something that the incorporation has been giving some thought to.

JUDGE WAINWRIGHT:

Right.

MATANUKU MAHUIKA:

But there are others who are better able to deal with those matters.

JUDGE WAINWRIGHT:

We are not looking for any answers in terms of what the you know, who the people would be, we are just interested in, if – I mean, it is very useful to know that your instructions are that the desire would be to capture all those who had strong links with Wairarapa Moana and just – well, how you would go about that is not straight forward necessarily, but –

MATANUKU MAHUIKA:

Yes. Well, I wouldn't like to speculate sorry Ma'am, in relation to that. Mr Hemi was very certain in his view that the 139 was, provide your starting point and that's the best evidence that you have of who might have an interest in Wairarapa Moana and therefore, you have this group of three and a half thousand odd people who we know have inherited title from that original list. But beyond that, I would prefer not to speculate and would defer to members of the incorporation to explain how that might work in practise, because I don't want to commit them to something and find out that I was wrong in saying.

JUDGE WAINWRIGHT:

All right, well that may be something that would need to be explored further in the iterative process.

MATANUKU MAHUIKA:

Yes.

JUDGE WAINWRIGHT:

I do not like that word, but still.

MATANUKU MAHUIKA:

That's a terrific process.

JUDGE WAINWRIGHT:

Pardon, sorry?

MATANUKU MAHUIKA:

Nothing Ma'am, I was just being cheeky.

DR RUAKERE HOND:

It will be worthwhile knowing whether there is an intention to do further research around those names and further research around the hapū, whether there is the source of information, whether Dr Horo Durie's' manuscripts have been fully analysed, fit to be able to give a foundation. There is something I do not know enough about but it be worthwhile knowing what the intent is around that, in particular around the trust that will be established, yes.

MATANUKU MAHUIKA:

Yes, the best I could do is probably have a discussion with someone like Mr Hemi too to get an idea of how that might work, but he's more familiar with these matters than me of course, and I don't know how much work is already done –

JUDGE WAINWRIGHT:

No.

MATANUKU MAHUIKA:

– by the incorporation or has been done in the past in relation to that. Yes, I could do them a disservice. It might be quite extensive, so I'm happy to take instructions on that and to provide any further information that the Tribunal might request in relation to it.

JUDGE WAINWRIGHT:

Well, I think for now, your statement that the intention, if, I mean there is lots of "ifs" here.

MATANUKU MAHUIKA:
Yes.

JUDGE WAINWRIGHT:
But the intention, if the Tribunal were to make these recommendations and were to make them in favour of a trust that the incorporations would be amenable to that, and that the desired outcome would be to capture as beneficiaries of that trust, all those who had strong links with Wairarapa Moana.

MATANUKU MAHUIKA:
Well, I think that the – I think it's more than an idea that the incorporation is floating. My understanding is that this is what the incorporation would propose and meant that resumption is ordered,
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JUDGE WAINWRIGHT:
Right.

MATANUKU MAHUIKA:
And the reason when I talk about strong links, I come back to the 139 is that those are the owners, and so, it's consistent with my submission that any redress should be to the owners. So, if it is to a trust, that the incorporation establishes for the benefit of that ownership class, then there is, you know there is consistency in terms of the Tribunal's findings and the persons to whom resumption might occur.

That's the nature of the thinking that sits behind it, so it's not wanting to do any violence to that notion, but it is seeing that there is a way perhaps with dealing with some of the concerns that different parties had expressed in relation to the

suitability of the incorporation without actually necessarily conceding that the incorporation –

JUDGE WAINWRIGHT:

Of course not.

MATANUKU MAHUIKA:

– would be an inappropriate vehicle if that is the inclination of the Tribunal.

JUDGE WAINWRIGHT:

Thank you.

DR RUAKERE HOND:

I suppose we see that partly with the grounds that are made to tupuna marae back in Wairarapa, so there is an indication that there is that connection to those interests further.

MATANUKU MAHUIKA:

Yes, and to those, marae.

JUDGE WAINWRIGHT:

Ko te āhua nei, kua oti ngā pātai. Nā reira ngā mihi anō ki a koe. [Interpreter: So, we'll end our questions at this point of time.]

MATANUKU MAHUIKA:

Ki a koe anō hoki, otirā ki a kōtou. Ma'am, while I am on my – and without wanting to appear rude, I was wondering if I could withdraw just to attend to the other matter that I was intending to, please? But I do not want to go if there are going to be questions that I might –

JUDGE WAINWRIGHT:

Well, you never you see Mr Mahuika, that is the whole purpose of requiring counsel to be present throughout an inquiry.

MATANUKU MAHUIKA:

Yes, I do understand that, although and I wouldn't otherwise ask, except that matter respectfully quite pressing.

JUDGE WAINWRIGHT:

Well, the other – I mean look, you know what the interests are in your being here and not being here.

MATANUKU MAHUIKA:

Yes.

JUDGE WAINWRIGHT:

And *kei a koe te mana*. But I think if you know whatever time you can make available would be well spent in this particular juncture.

MATANUKU MAHUIKA:

I will take that as an indication that I should stay, so –

JUDGE WAINWRIGHT:

You will be burning the midnight oil.

MATANUKU MAHUIKA:

Yes.

JUDGE WAINWRIGHT:

Kia ora. We turn now to you Ms Feint, but I am conscious that we are due to have paramanawa in six minutes time, so it may be that you would prefer to begin after that?

KAREN FEINT:

Yes, I think that would be easier Ma'am.

JUDGE WAINWRIGHT:

Yes.

KAREN FEINT:

I don't think I'll take – I think I've been put down for an hour and a half, but it is hard to see how my submissions could take anything like that.

JUDGE WAINWRIGHT:

Well, that is so good to hear. *Nā reira* –

KAREN FEINT:

I'm predicting half an hour.

JUDGE WAINWRIGHT:

Kia hoki mai tātou a te hāwhe pāhi i te toru.

HEARING ADJOURNS: 2.54 PM

HEARING RESUMES: 3:30PM

JUDGE WAINWRIGHT:

Kia tukuna tā tātou hui kia haere. Nā reira Ms Feint kei a koe te mana.

(15:30) KAREN FEINT:

Kia ora. Kei aku nui, kei aku rahi tēnā koutou katoa. E mihi ana ki ngā tāngata o Wairarapa Moana, tēnā koutou e huihui mai nei hei tautoko tēnei kaupapa. Huri noa, tēnei te mihi hoki ki te haukāinga o Pouākani, kei Raukawa, kei Ngāti Tūwharetoa tēnā koutou. He mihi hoki ki te Karauna, nō reira tēnā koutou e ngā rangatira o Te Rōpū Whakamana i te Tiriti o Waitangi. E tū ana ahau hei māngai mo Ngāti Tūwharetoa, ko Karen Feint ahau, tēnā rā tātou.

[Interpreter: I wish to acknowledge all Wairarapa communities represented, who are supporting this very important – moving forward. Again, I wish to

acknowledge Pouākani, Raukawa and Tūwharetoa. I wish to acknowledge Crown counsel and of course with the estimate company I find myself here with the Waitangi Tribunal. I am the spokesperson for Tūwharetoa, my name is Karen Feint.]

I have filed written submissions, but I don't propose to take you through those apart from to note some refinements, so I plan – given that the legal position has been extensively traverse I plan to send to you instead, on the issue of Ngāti Tūwharetoa mana whenua interest in the Pouākani lands and also to address any questions, of course as we go through.

So, my primary submission is that Ngāti Tūwharetoa stance is one of opposition through the resumption applications that have been made by the Wairarapa moana people and they say this as a matter principal, instinctively it's contrary to their tikanga to see their ancestral land returned to others, who do not whakapapa to it.

And I want to qualify that submission by saying, notwithstanding that Ngāti Tūwharetoa do have simply for the position that Wairarapa Māori find themselves in, there's no doubt that they've been treated shabbily by the Crown and that they're deserving of redress but nonetheless Tūwharetoa says that the Tribunal ought not to repeat the mistakes of the past, by ordering resumption of this land.

So, I've been instructed by Te Kotahitanga o Ngāti Tūwharetoa, there acting on behalf of the hapū who have mana whenua in these lands. Te Kotahitanga is the post settlement governance entity of Ngāti Tūwharetoa and when the settlement was done, so the settlement was done in 2017 the deed was signed, and the settlement legislation was passed in 2018 and if you look at the deed of settlement, which is available online one of the pou in the settlement is the whakatauki, *"ko Tūwharetoa te iwi, Tūwharetoa te hapū."* [Interpreter: "Tūwharetoa the people, Tūwharetoa the sub-tribe."]

And that was used as one of the pou around which the settlement was constructed because one of the objectives was to resurrect and strengthen the mana of hapū and so Kotahitanga was established with no less than 27 trustees. There's one appointed by the Ariki of Ngāti Tūwharetoa and then there are 26, which are appointed by the hapū, one for each of the 26 hapū of Tūwharetoa, including, the Mōkai hapū who have mana whenua at Pouākani.

So, the approach of Te Kotahitanga is very much to take a hapū centric approach and to support the hapū in advancing their Kaupapa. So, although I'm instructed by Te Kotahitanga they are liaising with the hapū and indeed those hapū are represented on Kotahitanga and are able to instruct me directly.

So, as you'll recall Tūwharetoa intervened at the outset of this inquiry, they filed seeking interested parties' status in July 2018 and they haven't played an active role until now. And I think, if I tried to explained why that is, I think it's a combination of factors, I think at one level there's some discomfort at the idea of intervening in order to oppose the redress that other iwi are seeking for grievances that they have against the Crown, but on the other hand Tūwharetoa has also been going through a very intensive phase of building post settlement, as well as getting Kotahitanga itself up and running there were other statutory bodies that are in the settlement, that needed to be developed and established.

And I forgot to say, also in the submission the Mōkai Wharekai burnt down a few years ago and so rebuilding that has been another thing that the hapū of Mōkai have been otherwise engaged with. So, it wasn't until we saw the Tribunals directions of 29 August that acknowledged that there needed to be a role for mana whenua, that there was thought of re-engaging with this process and I think those directions were interesting because Tūwharetoa have been thinking about this inquiry as a binary kind of, alternative choice for the Tribunal to make, either to resume the land or not. And Tūwharetoa had indicated their

view is that, you should not order resumption. But they hadn't conceived of there being a role for mana whenua in that process.

And i suppose they may have been thinking that because the Crown wouldn't ordinarily acknowledge tangata whenua when they're thinking about redress in this way or be as sensitive and attuned to the interests of mana whenua as the Tribunal has been. But in any event, we are where we are, and in given the tenure of those directions in my submission it's important for all tangata whenua interests to be represented in order for a tika and just solution to be found.

So, I just wanted to turn now to the question of Ngāti Tūwharetoa mana whenua status, which I think is common ground but I can also offer some evidence that is a matter of public record and I just wanted to note I the submissions at footnote 4, I referred to the Tribunals equatorial powers under both the Treaty of Waitangi Act and the Commissions of Inquiry Act, I should of also added there that under the evidence that 2006 section 128 acknowledges your ability to take judicial notice of matters of public record, which includes Waitangi Tribunal reports, of course.

So, I thought the simplest way to explain Tūwharetoa interests are to look at some of the historical maps. So, there maps were taken from the National Park inquiry Map book Wai 1130 A(48) and they show the Taupo-nui-a-Tia block of 1886. And if you also turn to the appendix's in the submissions the appendix's in the submissions shows the map that's the area of interest, the Ngāti Tūwharetoa area of interest in the deed of settlement between Tūwharetoa and the Crown and that boundary that's set out in the area of interest is based directly on the 1886 Boundary from the Taupo-nui-a-Tia block. 1540

So, if you look at the first map which is the -

JUDGE WAINWRIGHT:

Did you say the 1886 Boundary?

KAREN FEINT: (CONTINUES)

Yes. So, If you look at the first map which says on the bottom right hand side, plate 35, Map of the Taupo-nui-a-Tia block, the 1886 external boundaries, this was the map that was submitted to the Native Land Court in 1886, and it showed the Tūwharetoa Rohe and you see a red line which traces the boundary of the Tūwharetoa Rohe and that's the same boundary that is used in the area of interest map today.

Now, when that map was submitted with the application, the Court said, "Well, some of that land has been through the Court already", it was mainly the land to the east of the lake and so they proceeded to hear the interests of Tūwharetoa and the land that had not been inquired into and that block called the Taupo-nui-a-Tia block, and that's set out in that second map which is plate 36.

And so, it's a little bit hard to see, but you can see the area to the north and western south of Taupo Moana is in a faint pink wash and that whole block was the Taupo-nui-a-Tia block which the Court found was owned by the descendants of the tupuna, Tūwharetoa and Tia. So, the Court made that determination shortly after the application started and then it proceeded to subdivide the blocks and you can see the – if you look at those blocks at the very north of that map, you can see, if you've got the got the **(inaudible** 15:42:20) side it says, "Pouākani", and it's got No.1 block which is that one at the very tip, the northern tip of the block.

So, that was part of the land that was awarded to descendants of Tūwharetoa and Tia. And I've noted in a footnote in my submission that the naming of those tupuna at the outset caused some difficulties, particularly in this northern region because when Hitori Te Paerata attempted to claim parts of that block through

his Raukawa whakapapa he was not able to and he had to reformulate his claim and that was a matter of some controversy.

And Ngāti Tūwharetoa's historical account notes that that caused some lasting harm to inter iwi relationships.

JUDGE WAINWRIGHT:
As between Raukawa and Tūwharetoa?

KAREN FEINT:
Yes, and also Ngāti Maniapoto. So, there was a – I think the full history is set out. It's certainly set out in the CNI report, but it's probably also set out in the Pouākani Report, that there was a rehearing of what's called the Taupo-nui-a-Tia West block and yes, controversy that went for some years with petitions to Parliament and so and so forth.

But, suffice to say, there's no doubt that Tūwharetoa have interest in that land because they were awarded interest by the Court –

JUDGE WAINWRIGHT:
On this map, Ms Feint, it is the very top one that is Pouākani No.2, isn't it?

KAREN FEINT:
That's right.

JUDGE WAINWRIGHT:
Right.

KAREN FEINT:
And you see there's that four blocks that say, Pouākani, it's got number 1, number 2.

KAREN FEINT:

Right.

(15:44) DAME MARGARET BAZLEY:

That is a further block that is below number one, Ms Feint?

JUDGE WAINWRIGHT:

Yes, there are four.

DAME MARGARET BAZLEY:

Thank you.

KAREN FEINT:

And you can just see also, at the very top it says, in very small letters, Waipapa, referring to the Waipapa Stream which is the boundary of that block.

JUDGE WAINWRIGHT:

Is it possible to see the Waikato river on here?

KAREN FEINT:

Yes, it's that northern boundary off those blocks.

JUDGE WAINWRIGHT:

That is the river?.....

KAREN FEINT:

Yes.

JUDGE WAINWRIGHT:

Right.

KAREN FEINT:

So, the other element of Tūwharetoa's interests that I was instructed to raise are specifically the Waikato River and, on the basis, that this application affects the awa as a taonga of Tūwharetoa.

JUDGE WAINWRIGHT:

Sorry, I am just going to ask you something else before you move on.

KAREN FEINT:

Mhm.

JUDGE WAINWRIGHT:

Ask you to give evidence from the bar, Ms Feint, although these are arguably legal matters. So, you have said that those blocks were awarded to the descendants of Tūwharetoa and Tia and that this was controversial and that Maniapoto And Raukawa had issues with that. So, was the ownership of Pouākani No.2 changed in the Native Land Court?

KAREN FEINT:

I'm not sure about that. I would have to – my understanding was that it didn't change the tupuna or the block did not change but I think it was part of the Taupo-nui-a-Tia block.

JUDGE WAINWRIGHT:

All right.

KAREN FEINT:

I think that history is set out in the *Pouākani Report*.

JUDGE WAINWRIGHT:

We can look at that, thank you.

KAREN FEINT:

The other good resource is Bruce Stirling's nineteenth century report that was filed in the CNI Inquiry. I can go and look that up if that would be helpful to you, I just can't recall off the top of my head.

JUDGE WAINWRIGHT:

Well, if you are able to find specific references that just enabled us to run that down, that would be very helpful.

KAREN FEINT:

I will do – I'll certainly will do that. So, moving on to the Waikato River, Tūwharetoa's interest in that are recognised in the Tūwharetoa/Raukawa/Te Arawa Iwi River Act, of 2010 and also –

JUDGE WAINWRIGHT:

What is that Act called?

KAREN FEINT:

I think that's what it's called, it's called the Tūwharetoa Raukawa Te Arawa Iwi River Act 2010.

JUDGE WAINWRIGHT:

That is catchy.

KAREN FEINT:

Yes, I preferred to –

JUDGE WAINWRIGHT:

Tūwharetoa Raukawa Te Arawa Iwi River Act.

KAREN FEINT:

Waikato River Act, yes, it's referred to in paragraph 12 of my submissions.

JUDGE WAINWRIGHT:

Thank you.

KAREN FEINT:

And there's also reference in the historical account in the deed of settlement to the grievances Tūwharetoa had in connection with the use of that taonga in the Hydro-Electric schemes at Maraetai and up the dams along the Waikato River and the Crown apologised that those power generations scheme constructed for the benefit of all New Zealanders have come at great cost for Ngāti Tūwharetoa.

So, at paragraph 11 of my submissions, I've set out the hapū who whakapapa to Mōkai Marae, and who are also named as hapū of Ngāti Tūwharetoa in the Tūwharetoa Claim Settlement Act, and there he named those as Ngāti Wairangi, Ngāti Moekino, Ngāti Hā, Ngāti Te Kohera, Ngāti Tarakaiahi and Ngāti Parekaawa.

And I'm instructed to say at that is stage, because those hapū worked through the process of working out precisely which hapū have mana whenua in the subject area of this application to refer simply to the hapū as the Mōkai hapū that have mana whenua.

And if – I mean, I'm proceeding on the assumption that the Tribunal will not need to make a determination of mana whenua for the purposes of this remedies inquiry. But, if you are going to do so, then I would seek leave to file evidence on mana whenua.

JUDGE WAINWRIGHT:

Say that again, Ms Feint.

1550

KAREN FEINT:

I'm apprehending that for the purposes of the Tribunals remedies inquiry you do not need to determine precisely which hapū have mana whenua in the

subject area of the application, because I think it's common ground that Tūwharetoa and Raukawa are recognised, but if you were going to want to drill down into who those hapū were then we would need to seek leave to file evidence in that regard.

JUDGE WAINWRIGHT:

Well, you have heard the submissions of Raukawa today and my understanding of their position in this inquiry is that they have mana whenua in Pouākani too, is that a matter that you have – that you client has discussed with Raukawa?

KAREN FEINT:

They have in the past, but I am not at liberty to give evidence on that, of course. The way I would put it is, if you turn to 18.1 of my submission I've noted there that to a great extent we're actually talking about the hapū, because those hapū have both Tūwharetoa and Raukawa whakapapa and since I've filed these submissions my instructions have been to refine what is said at 18.1, to say yes we recognise those hapū have both Raukawa and Tūwharetoa whakapapa but from Tūwharetoa perspective those hapū are in the Pouākani land through their Tūwharetoa whakapapa.

So, to that extent they have a different perspective from Raukawa, but they would prefer to deal offline, directly kanohi ki te kanohi with Raukawa about that.

JUDGE WAINWRIGHT:

So, just to take that a little bit further. So, you heard Mr Vertongen suggestions to the Tribunal about who it could usefully return tittle to the original owners of the land prior to the Taupo-nui-a-Tia purchase. And what I have taken from that is that in doing so, the Tribunal would be recognising Raukawa has having that tittle, the underlying tittle.

So, in light of the information you're giving here from your clients is that something that you they will be discussing with Raukawa?

KAREN FEINT:

Yes, they will need to. So, what I've suggested there is that one way around that, rather than having a debate between Tūwharetoa and Raukawa if you acknowledge the hapū in the whenua then, because they're the same hapū there wouldn't be an issue. But that needs to be the subject of discussion.

JUDGE WAINWRIGHT:

Yes, yes because Mr Vertongen, when he gave evidence said that, " Raukawa has tended to prefer an iwi emphasize rather than a hapū emphasize and distinguish that from the approach that he sees Tūwharetoa taking, so I suppose – I mean from the point of view of the Tribunal if we were minded to look at distinguishing the interest of mana whenua for tittle purposes, it would be important for us to be confident about the identity of the parties who would be able to characterize themselves as having mana whenua in the subject lands.

So, yes, I guess what comes out of that Ms Feint, is that there is a lot of discussion today about hui that need to take place in the near future and this is another one.

KAREN FEINT:

I think that's exactly right and that's what Tūwharetoa have said to me too, that the first thing they need to do is go and have a hui with Raukawa. So, I suppose the first preference would be for there to be agreement reached on who would be described as mana whenua in that land if that agreement can't be reached than yes, maybe it becomes the Tribunal problem.

JUDGE WAINWRIGHT:

Well, even if there is a difference in perspective it would be important for the Tribunal to understand where it lies as far as the contending parties are concerned. You mentioned that Maniapoto were also involved in disputing the Native Land Courts award of ownership to the descendants of Tūwharetoa and

Tia, but I am inferring that as far as Pouākani two is concerned the relevant parties are from Tūwharetoa point of view – Tūwharetoa and Raukawa?

KAREN FEINT:

Well my recollection of what the Pouākani report said was that, "it was an area where the interest of Ngāti Maniapoto, Tuwhare and Raukawa intersected. And that those interests are reflected in the Pouākani trust." So, I'm not totally sure about that, that's something I'd need to check up on as well.

JUDGE WAINWRIGHT:

Well, to the extent that the Maniapoto interest are represented by the Pouākani trust, I think the position of that trust to date, anyway is that the Tribunal should not be making any binding recommendations because of the uncertain tittle they say, to the bed of the Waikato River. So, we have not heard from them other than as to that.

But presumably you are in communication with Ms Sykes, since you were kind of her proxy yesterday. This is all very getting later in the piece, but we do not want people popping out, it would work any later than absolutely necessary. So, perhaps you could discuss this conversation with Ms Sykes just to make sure that – well I think the Pouākani trust is on our distribution list, isn't it?

All right, so –

KAREN FEINT:

I relied to Ms Sykes our conversation yesterday and her response was, given that they weren't granted leave to deliver their submissions they wanted to record an appearance, but she wasn't intending to appear during this hearing.

JUDGE WAINWRIGHT:

Yes, well they have made submissions in writing to which the Tribunal has responded, but this is a different issue is it not?

KAREN FEINT:

Yes, I am in contact with them about that river issue, so I will relay this conversation to them as well.

JUDGE WAINWRIGHT:

Well, Ms Sykes or Mr Mallard will get a copy of the transcript because they are on the distribution list, but that will not be immediate. So, I think it would be prudent just to cover off that issue, if you felt comfortable to have that conversation and obviously, Ms Sykes or Ms Mallard can make application if they see fit.

KAREN FEINT:

I will do, Ma'am and I should say I'm not intending to suggest that there are other interest that are not represented, because from Tūwharetoa point of view you've got the right people before you now, but I just flag that as an uncertainty because I do recall the Tribunal conclusions in its report.

JUDGE WAINWRIGHT:

Well, we will look at it. Thank you.

KAREN FEINT: (CONTINUES)

So, turning now to the resumption application I just wanted to offer some views on the applications has made in what Tūwharetoa interests are in relation to those, so Mr Mahuika said yesterday that Tūwharetoa no longer have live claims and of course that's right, from a historical claims perspective, but nonetheless Ngāti Tūwharetoa do have live rights and interests from a Treaty of Waitangi perspective, because as Moana Jackson says the Treaty is not settled, and those rights to exercise mana and Kaitiakitanga in relation to traditional lands in on-going. And the passage of time doesn't erase the mana whenua of Ngāti Tūwharetoa.

So, we say that when the Tribunal's exercising its statutory powers of resumption it's uncombed upon the Tribunal to take account of the rights and

interest of tangata whenua, and that those rights are relevant to the Tribunals exercise of its power and that, on the proper construction of your statutory powers you should exercise them consistently with both the principles of the Treaty of Waitangi and also with tikanga. Bearing in mind that tikanga is part of the values of common law, as the Supreme Court reminded us in Takamore.

So, we call upon the Tribunal to exercise the sensitivity that it has demonstrated in its recent directions, in order to avoid repeating the wrongs of the past, where Wairarapa Māori were put into the ancestral lands of Tūwharetoa. And I don't see this as a historical treaty issue at all, because I think it creates a fresh grievance if resumption powers return the land to Wairarapa Māori today and that that's a fresh issue.

JUDGE WAINWRIGHT:

Can you just stop there, because this is actually a matter that I had in my mind to discuss with Mr Vertongen but did not? Because he also was suggesting that there are post 1991 implications from the Tribunals process in relation to these applications. But how does – what effect is that from a practical point of view, Ms Feint in that say that we say that hypothetically mana whenua parties could bring an application to the Waitangi Tribunal or bring a claim to the Waitangi Tribunal, a modern claim about the effects on them of the Tribunals exercise of its statutory powers, in fact there are no such claims and there are no findings, as a result in relation to that.

So, from the point of view of the Tribunal, exercising its jurisdiction under section 8(A) which requires us to take into account claims which have given rise to a decision as to well-foundedness neither Raukawa nor Tūwharetoa are in that position, they do not have well-founded claims because they do not have claims. So, what consensus can the Tribunal take of the fact that notwithstanding their settlements they could hypothetical make such a claim?

KAREN FEINT:

Well, I think it could buy in two ways. The first is that it could be a reason for declining to order resumption of the land to Wairarapa Māori on that basis it would be a breach of tikanga to return that land to them. And the second way I say could bite is if the Tribunal is minded to order resumption against the objections of tangata whenua then it might be a matter which forms part of the terms and conditions upon which you order resumption, which is an issue that Mr Vertongen canvas with you earlier today.

Now, he said I just wanted to offer a slightly different perspective from what he said. So, at 18.25 of his submissions this is where he –

JUDGE WAINWRIGHT:

Taiho for a minute. So, you said that if we were inclined to order the resumption notwithstanding the objection of mana whenua groups, we could use the terms and conditions – what to take to account of their positions, is that what you're saying?

KAREN FEINT:

Yes, to find some arrangement like the option three that Raukawa have put forward, where you find a way of splitting the interest in the lands so that the land ends up in the ownership of mana whenua rather than Wairarapa Māori.

JUDGE WAINWRIGHT:

All right, and then you were going to go on and give another perspective?

KAREN FEINT:

Yes, so at paragraph 18.25, so when Mr Vertongen talked about his option three, which I think his option three resonates with Tūwharetoa as well. And I was just looking at how he thought that could work in terms of the legal mechanisms and he is suggesting that you would need to first of all, I agree with him you'd need to resume the land to Wairarapa Māori under section 8(A)(2) and then he said put various condition in place to ensure that that land can be used for power generation. And then he says, you could also make a

non-binding recommendation under section 6(3) that there then be a gifting to mana whenua.

And it just occurred to me that I think you could do that under your section 8(A) powers and the reason why I say that is because I know that in the settlement legislation for Tūwharetoa in Raukawa it says that "your powers can't be exercised for the benefit of Tūwharetoa and Raukawa." But it seems to me, in these unusual factual circumstances, where you have a group who are not mana whenua applying for the return of land, that you can say that a proper construction of the settlement legislation in section 8(A)(2) is that the settled iwi can't apply in their own right for that land to be returned to them as redress but you are not returning it for their benefit, you're returning it for the benefit of Wairarapa Māori and in order to do that in a tikanga consistent way and to act consistently with the principles of the Treaty, you need to do that in a way that prevents harm to those mana whenua iwi, given that unusual juxta position of their being different ancestral interest from the previous ownership of Wairarapa Moana Incorporation.

1610

So, I think you could say that that was – on the construction of section 8A that as a condition of returning it, you say you have to ensure that the ownership of the land is in mana whenua's ownership even if the financial benefits flow to Wairarapa Māori and that's the purpose for which your exercising your power.

JUDGE WAINWRIGHT:

So, you are saying that that construction would get around section 17 of the settlements acts?

KAREN FEINT:

Yes, because it seems to me you are not – you're not saying that – you are not returning that land as redress for historical claims, you are returning it in order to prevent a fresh grievance arising, which is part of the flow on consequence

of what happened to Wairarapa Māori their historical claims. I mean, I acknowledge it is convoluted but that's a historical reality.

JUDGE WAINWRIGHT:
Yes, all right, thank you.

KAREN FEINT: (CONTINUES)
So, I just wanted to finish up by saying – so, I started off these submissions by saying the position of Tūwharetoa is one of opposition from a matter of principle, but acknowledging that there may need to be a need for pragmatic solutions have turned to look at the very constructive proposals that Raukawa have put forward and if the Tribunal is minded to grant resumption than the Tūwharetoa interest, they say they are very much focused on the taonga, so the whenua and the awa and from their perspective, the issue that wrinkles with them is ownership of the land, their not particularly interested in commercial solutions but they want their mana whenua recognised.

In terms of – So, it seems to me that the option 3 that Mr Vertongen put forward as – and that resonates with Tūwharetoa interest because it focuses on the ownership of the land.

In terms of the process in how this might happen, my instructions are that Tūwharetoa want to see a tikanga based process centred Mōkai Marae and they want to meet and discuss this face-to-face with the both Raukawa but also in time with Wairarapa Māori and I can't really take it much further than that at this stage other than to say, I apprehend that through the iterative process there will be an opportunity to advance these matters in the way I've been involved with the Mangatū Remedies Inquiry.

And the way it worked there was that the Tribunal gave an indication that it was minded to return the Crown Forest Land to the claimants and then it sent the claimants away to mediation which was faintly conducted by Judge Stone and

through that mediated process discussed a mediated solution that meet everyone's interest.

So, we apprehend that something like that should – could occur here but I certainly acknowledge your encouragement, Judge, for us to go away and start talking immediately and not let things lag.

JUDGE WAINWRIGHT:

Well, it is really this that in discussing differences, there are sometimes moments to be ceased and I don't know whether the moment to be ceased, in this instance, is now or as you say "it happened in Mangatū", after the Tribunal has made an indication, but I think the parties who better apprehend what the issues are between them then we do, are in the best position to indicate to the Tribunal what they think the best staging of these matters is, to achieve the best outcome.

So, it is really to that end that I invite people now to start thinking about how to maximise the chances of a good outcome and whether that's to start talking about these issues of which there are a good number now or whether parties would prefer the Tribunal to take its deliberations to the next stage and, I do not know, get a heads up after the closing submissions and then allow people to take that for discussion or mediation or whatever it turns about to be.

We do not have a preference. So, we are just inviting people to consider what would probably work best in the views of the participants.

KAREN FEINT:

Well, certainly I met with the Mōkai hapū last week and then they had another hui just this Monday, and now that they are ceased of the issues, they are keen to advance them right away. So, I think their preference would be to act now and have the discussions they need to have with Raukawa and with Wairarapa Māori and then see where we get to.

JUDGE WAINWRIGHT:

All right. Well, I mean, obviously you need to speak with the other counsel and whatever, whatever po of the various points of view are also going to be involved in that and that's something that hopefully can be arranged while we are all here.

KAREN FEINT:

Kia ora. **(inaudible** 16:19:12)

JUDGE WAINWRIGHT:

Kia ora.

KAREN FEINT:

So, that concludes my submissions. I'm available for questions if you have any further.

JUDGE WAINWRIGHT:

All right, Ms Feint, I think we have appreciated – Well, I know that we have appreciated your contribution and the picture is rounding out and everybody is contributing to it and thank you for attending and providing your always thoughtful submissions and we do not have any more questions.

KAREN FEINT:

So, I'll go away and do my homework by reading the reports concerning what happened with the Pouākani Block with a memorandum.

JUDGE WAINWRIGHT:

Yes, I think that might be useful for us, thank you. I think you are likely to be closer to those sources from the point of view of Tūwharetoa than any of us. And, so yes, if you can bring that back to us that would be good.

Ināianei, ko te āhua nei kua tae tātou ki te whakamutunga o te nohonga o te Taraipiunara i tēnei rā, nā reira ka hoatu ahau i te rākau ki tāku hoa.

[Interpreter: I will adjourn matters for the hearing is coming to a close for this day, so I will pass matters over to my friend.]

DR RUAKERE HOND:

Kua heke te haora, kua heke te rā, kua heke te kōrero, ngā wānanga, ngā kupu, ngā kōrero i tīmata atu i te karakia, me pērā anō te whakakōpani, engari anō, he rā anō āpōpō, kia hoki mai anō ki te ea o ēnei kōrero. Ka tuku atu te mauri karakia ki a koutou, Raukawa, ana, kei a koe.

[Interpreter: And with the arrival of the hour, arrives the person in particular the evidence that we have heard. And of course, I will lead us in prayer. And of course, tomorrow we shall recommence. And of course, to Raukawa, I will pass the rākau to you, sir.]

MIHI (KAUMĀTUA)

KARAKIA WHAKAMUTUNGA

HEARING ADJOURNS: 4.22 PM

HEARING RESUMES ON THURSDAY 14 NOVEMBER 2019 AT 09:01 AM

(09:01) DR RUAKERE HOND: (MIHI)

Manawanui mai ra tātou, me kī he manawanui tēnei te piharau, pēnei anō te tītī, he rerehua anō tēnei, anā ko te rangi whakamutunga o tēnei wiki. Ka mihi kau atu ki a tātou e rūpeke ana i runga i te whakaaro ko koutou ngā maia, kua kōanu haere i roto i te wiki, engari anō e whakakanohi nei i ō koutou iwi, ō koutou karangatanga, otirā ki te aroaro o te Karauna, e ngā roia tēnā e rarau mai nei. Anā, ka tuku atu e au he karakia ki runga ia tātou ki a rere pai ai a tātou kōrero, tae noa ki te whakakōpanitanga nei o to tātou rangi. Nō reira, e mihi kau ana ki a koutou i haere mai tāwhiti, otirā, anā ki te Karauna e noho nei ki runga i ēnei tūranga, tēnā koutou, tēnā koutou, tēnā tātou katoa.

[Interpreter: Again, warm greetings to all present and then we are present here representing many faces of birds, in particular focus for this week and of course, there's no doubt that there are a lot of things to consider and weigh upon. But it is great to have you here still and of course our Crown counsel who are present, and from there I will lead us into prayer then we can commence our hearing accordingly. And it's a big day for the Crown with them giving evidence.]

KARAKIA WHAKATUWHERA

DR RUAKERE HOND:

E rarau tātou ki roto i ngā kōrero i te wānanga i rere ana. Tēnā tātou katoa.

[Interpreter: Again, welcome and I wish to commence matters from here I will hand over to our Judge.]

JUDGE WAINWRIGHT:

He timatanga pai rawa atu tena. Tēnā anō tātou, ka huri tātou ki a koe ināianei Mr Irwin, kōrero ai. [Interpreter: Great way to start our day. We will move immediately to Mr Irwin. Thank you, Sir.]

(09:03) ANDREW IRWIN: (MIHI, CLOSING SUBMISSION #J103)

Tēnā rawa atu tātou katoa. Mōrena, mōrena e ngā Mema o Te Rōpū Whakamana i te Tiriti, tēnā hoki koutou katoa e whakawā ana i ēnei kerēme kei mua i a kōtou, nā reira te mihi. Me kī hoki, tēnā rawa atu hoki koutou ngā kaikerēme, e Kingi mā. Tēnā koutou te Kaporeihana o Wairarapa Moana.

[Interpreter: Thank you, and again I wish to acknowledge the greetings expressed here too as well and of course the task ahead of you of giving weight and consideration to all evidence. And of course, our claimant community groups here, the incorporation of Wairarapa moana.]

0905

Otirā, ki a Ngāti Kahungunu ki Wairarapa Tāmaki-nui-a-Rua, e Robyn, koutou hoki o tō rōpū tēnā hoki koutou katoa. Otirā, Raukawa tēnā hoki koe Vanessa me tō putanga mai ki tēnei hui a Te Rōpū Whakamana i te Tiriti, tēnā hoki koutou Raukawa, Tūwharetoa tēnā hoki koutou. Otirā te whare, ana kōnei te Karauna te mihi atu ki a tātou katoa i tēnei rangi.

[Interpreter: Ngāti Kahungunu ki Wairarapa collectives and the claimant groups you represent and of course Raukawa, Vanessa and of course your presence here is always welcome. Again, Raukawa, Tūwharetoa. Again, I wish to acknowledge you and across all those present in this house, I represent the Crown for today.]

Ma'am today is the day for me to present the submissions of the Crown, the document is #J103 and before we launch off into that, there's just a couple of

things to mention. One is, it wouldn't be Waitangi Tribunal proceeding with Andrew Irwin without a vast bundle of document being filed, so that's what I've done and that is only to help and not hinder, and it's given to you in that spirit.

And so, there are some documents there that I just want to refer you too, it's easier if I hand them up, instead of having us fish around.

JUDGE WAINWRIGHT:

Indeed, no that is very helpful. Thank you, Mr Irwin.

ANDREW IRWIN:

So, that's the first thing. The second thing is, in terms of the timetable we have timetabled this hearing to finish at the end of today and for this day to be for the Crown submissions. Originally the hearing was set down for Friday as well and no doubt people including the Tribunal may have made some plans for Friday and I did hear Dr Hond's say this morning that this is the last day of the hearing.

JUDGE WAINWRIGHT:

Indeed, I thought that was a little previous myself. Are you expecting that we will go till tomorrow?

ANDREW IRWIN:

Well, of course I'm in your hands. I look at my table of contents and I've roughly tried to work out how I could fit this presentation into the day.

JUDGE WAINWRIGHT:

Look, Mr Irwin I do not want you to scrim I think it is really important that we hear fully from the parties at this juncture as far as I am aware we have given all the parties thus far, all the time they needed and the same applies to the Crown. So, if you need to go into tomorrow, koira te āhuatanga o te ao.

ANDREW IRWIN:

Thank you for that indication Your Honour. In which case I will now turn to my submissions unless there are any other housekeeping matters for the day. So, my document is #J103 and still even with the table contents, which is helpful in itself that shows you a roadmap of the submissions I'm going to take you through.

The first heading is an introduction and to be as helpful as possible I've crystalized and summarised all the submissions the Crown wishes to make, into that section, and all the detail for all the proposition in that section are in the body of the document, it maybe I will take questions whenever they arise, of course. It may be that the questions are better addressed in the detail of the document, but that is of course over to you.

There's a general section where I make comments as my learned friends have about the jurisdiction and I will take you through some of that. There's a brief summary of the evidence called, by the Crown we're later in the document, I think the evidence is relevant to the points I'm making, I take you to that evidence, anyway. So that section is really just intended to be, what it is, is a summary of the evidence that was called by the Crown, some of that detail I prefer to address in the body of the document.

And then we come to the heading, should the Tribunal make further recommendations under section 63 in respect of the Wai 85 claims and there's a large section there, the headings quite intentional any recommendation made under section 8(A) is to be included in section 63 recommendation and so that is why the heading quite intent ally only refers to section 63, but within that section of course the Crown addresses the issue around should the land return, to Māori ownership in terms of section 8(A).

At the end of – the next section address to whom the land should return, if it is to be return in respect of the Wai 85 claims. And I mention here that the focus was quite designed to be on the Wai 85 claim for that section of the submission

and I'll address this briefly later, but the intention is to put your focus on the Wai 85 claim the prejudice associated with that claim, to work out what part of that claim was well-founded and therefore what action should the Crown take to compensate for or remove the prejudice of that claim.

And then separately, to address the other claims and that is what the next section of the submissions does and so, it's at the next section of these submission I address the application made by the Ngāti Kahungunu Settlement Trust, the claims that they referred to and other claims that the Tribunal has also referred to in that section.

And so, that was quite intentionally, to put first of all the focus on the Wai 85 claim and the focus on the other claims. And then to look at the question of other groups and question has been posed by the Tribunal to what extent can recommendations be made in favour of other groups and then to address the intuitive approach. So, that's the road map for the entire submission.

So, turning to my paragraph one and actually before I do start much of the submission I will read, and I think that's important but much of it I will take you to other documents and I will interpolate and some of it, I will be asked to have taken as read.

READS CLOSING SUBMISSIONS #J103

"In 1949, the Crown compulsorily acquired 787 acres of unapproved land at Pouākani under the Public Works Act for $510 pounds the Tribunal found the process by which the Crown acquired these acres that is the consultation and the compensation paid to be inadequate and in breach of the principles of the Treaty of Waitangi in this way, the Crown found this – sorry, the Tribunal found this aspect of the Wai 85 claims to be well-founded. Because those well-founded claims relate to memorialized land the Tribunal must consider whether or not its recommendations should include a recommendation that the land be transferred to Māori to compensate for or remove the relevant prejudice.

The Tribunal is not required to make that recommendation, the Tribunal has broad discretion to make such recommendations as it considers fair in the circumstances.

After acquiring the land, the Crown built two hydroelectric generating power station with related infrastructure and those power stations are currently used, they've been described as being nationally significant infrastructure and they've been described as operating within a broader network of national significant electricity generation. The land on which the power stations are located is owned in the power's stations are operated by Mercury Energy.

Because the land has a memorial under the State-Owned Enterprisers Act that means it is subject to this Tribunal's powers to make potentially binding recommendations that the Crown resume the land from that private ownership and return it to Māori ownership.

The value of the total resumable land is One billion and forty million dollars in the values of the resumable land on the Pouākani side of the river is Six hundred million dollars.

Two parties seek the resumption of the land worth $600 million dollars.

1) The Wairarapa moana Incorporation through its chair Mr Kingi Smiler, who is the Wai 85 claimant and the Ngāti Kahungunu ki Wairarapa 2)
2) Tāmaki-nui-a-Rua Settlement Trust through claims including Wai 97, 1023 and 1050 for which the settlement trust holds a mandate.

The incorporation seeks the return of the resumable land at Pouākani without conditions as redress for the prejudice associated with the Wai 85 claims that relate to that land, and the Crown apposes that request.

The settlement trust, first and foremost, asked the Tribunal to decline the incorporations application, so that the Treaty settlement negotiated with the Crown can proceed, the Crown supports that first position, only in the alternative does the settlement trust say, if the Tribunal considers the land should return to Māori ownership, that the settlement trust is an appropriate recipient of the land subject to conditions. The Crown opposes the settlement trust's alternative request for resumption.

0915

The Raukawa Settlement Trust and Te Kotahitanga o Ngāti Tūwharetoa oppose both applications for resumption.

In these submissions, the Crown addresses the matters that I have already set out, that is the Tribunal's remedial jurisdiction.

- Whether the Tribunal should make further recommendations for action to compensate for or remove the identified prejudice that follows from the Wai 85 claims that relate to the resumable land,
- whether the claims relied on by the Ngāti Kahungunu ki Wairarapa Tāmaki nui-a-Rua Settlement Trust relate to the land, and to the extent that some do, or further recommendation should be made,
- and the iterative process.

The Crown has focused on the different claims at issue to assist in focussing attention on the matters that statute requires the Tribunal to consider.

- What are the specific details of the different well-founded claims on which the incorporation and settlement trust rely?
- What is the specific prejudice that was caused by the Crown acts that this Tribunal found to be in breach of the Treaty?
- How do the different well-founded claims actually relate to the resumable land? What is the most appropriate action the Crown could take to

compensate for or remove the specific prejudice caused by the Crown's acts found to be in breach of the Treaty?

- What has this Tribunal already recommended in its 2010 report
- and are further recommendations necessary or desirable?

Turning to **the Wai 85 case for resumption**, the Crown understands the Wai 85 case to be this.

- The Wai 85 claimant asks the Tribunal for one thing, a recommendation under section 8A that the resumable land at Pouākani that was formally in the Pouākani No. 2 Block be returned to the incorporation subject to no terms and conditions.
- Of the four Wai 85 claims that are well-founded, it is the claim for the Crown's 1940's acquisition of the land that relates to the resumable land.
- The acquisition of the land caused prejudice to the claimants. The prejudice was the loss of potential income to them. That prejudice has been assessed. The Wai 85 claimant say conservatively by Dr Meade, as being the range of 850 million to one $1 billion 450 million dollars.
- The Tribunal should award the maximum compensation available, being the current value of the land and improvements. The return of the land would be proportionate to the prejudice suffered, because Dr Meade's losses based an economic base estimate both exceed the value of the land."

I think, sorry to put that more fairly, I think what they really say is that it is because the value of total resumable land exceeds Dr Meade's ranges, that there's proportionality between the prejudice suffered and the return of the assets.

"Following the Supreme Court's *Haronga* decision, the Wai 85 claimants says, he has a right to the Tribunal's adjudication as to the remedy for the specific prejudice that followed from the Crown's acquisitions of the land in the 1940s."

And just to add here in oral submissions, counsel for the Wai 85 claimant has said, “At one point, there is a presumption that the land should return,” and I think my learned friend backed away from that slightly to say, “There is almost a compulsion under the legislation that the land should return.” So, that is the case as the Crown understands it for the Wai 85 claimant.

0920

To summarise the Crown’s response to that case, the Crown submits that the starting point is not whether or not the land should return to Māori ownership, of course that is question we have to address, it’s just not the starting point. The starting point is to identify what specific claims relate to the land, what specific prejudice was found to have resulted from the Crown’s actions or omissions that were found to be in breach of the Treaty and then to consider whether any recommendations ought to be made.

“The Tribunal found that the Crown’s inadequate consultation and inadequate compensation, the £510, which the Tribunal described as niggardly in the extreme.

The Tribunal found that those matters caused prejudice and were in breach of the Treaty principles. The Tribunal found that the Crown should compensate for or remove that prejudice by reassessing the compensation that was paid. The Crown says, no further recommendations are necessary.

If the Tribunal considers a further recommendation is required, the Crown says, ‘That recommendation should logically be to provide more clarity on the Tribunal’s existing recommendation on the reassessment of compensation. The Crown rejects the damages assessment produced by the Wai 85 claimant of the level of compensation for prejudice resulting from the Crown’s inadequate consultation and compensation which the witness calls Dr Meade, to describes as being in a conservative range of 850 million to 1.45 billion.’

The Crown submits there are critical problems with that approach at a high level and critical problems with the details of the method followed in the calculations that were made.

The Crown submits that the Tribunal has the discretion to determine and should determine compensation that the Tribunal considers to be proportionate to the prejudice suffered and which is fair in the circumstances. The Crown considers that Dr Yeabsley provides an objective basis for deriving that amount and I will take you through that later.

The Crown submits that the Tribunal should not make any recommendation under section 8A, potentially requiring the Crown to resume the land and transfer it to Māori ownership to compensate for or remove the prejudice associated with the Crown's inadequate consultation and inadequate compensation in acquiring those 787 acres of land and these are the reasons.

- The prejudice caused by the Crown's process failures do not require the return of land.
- The transfer of a $600 million asset to Māori ownership would be wholly disproportionate to the prejudice caused by the Crown's inadequate consultation and inadequate compensation.
- The land is still required for the purpose for which it was taken and includes nationally significant infrastructure and operates within a broader network of nationally significant electricity generation.
- The group of Māori seeking resumption have no cultural connections to the land sought.
- Tangata whenua, that is Raukawa and Ngāti Tūwharetoa, object to the transfer of their ancestral land to Wairarapa Māori.
- The Tribunal found that the 1916 grant of this land to Wairarapa Māori, which is the very lands sought, was granted in breach of the Treaty for reasons that included that it was not the ancestral land of Wairarapa Māori."

So, now I set out the Crown's understanding of the Ngāti Kahungunu ki Wairarapa Tāmakinui-a-Rua Settlement Trust's position.

"The first position of the Settlement Trust is to ask the Tribunal to decline the incorporations application so that a Treaty settlement negotiated with the Crown can proceed.

Only in the alternative does the settlement trust say, if the Tribunal considers that the land should return to Māori ownership, that the settlement trust is an appropriate recipient of that land subject to certain conditions and those conditions include:

- that the settlement trust would return the land to its current owners, Mercury Energy on payment of a sum amounting to 90% of the lands value, including improvements together with interest;
- and that the other essential condition being the return of the land to Mercury would occur by Raukawa through a process that Raukawa neither supports nor agrees to.

0925

By way of summary, the Crown – of the Crown's response to that case, the Crown agrees with the settlement trust's first position, that is to decline and incorporate the Wairarapa Moana Incorporation's request that the land return to it. The Crown opposes the settlement trust's alternative position or request for the land for the following reasons.

- The settlement relies upon three specific claims and utter unspecified claims.
- The Crown accepts that one of the Wai 97 claims insofar as it includes and repeats the allegations of the Wai 85 claim concerning the manner in which the Crown acquired the land at Pouākani. It does relate to the resumable land at Pouākani.

- In respect of that claim, the Crown says the Tribunal should not make further recommendations for all the reasons why the Crown submits the Tribunal shouldn't make recommendations of that kind for the Wai 85 claim.
- In addition, the settlement trust has told the Tribunal it would be inappropriate and inconsistent with Ngāti Kahungunu ki Wairarapa Tāmaki-nui-a-Rua's tikanga for Wairarapa Māori to hold this land. Wairarapa Māori do not have a cultural connection to this land and the settlement trust does not want to acquire further land in the customary rohe of other groups.
- And the Crown does not otherwise accept that the Wai 97, 1023 and 1050 claims relate to the resumable lands.
- If the Tribunal considers that a claim within the Wai 1023 statement of claim concerning the exchange of land at Pouākani does relate to the resumable land, the Crown submits that it would be irrational to recommend the return of resumable land at Pouākani to compensate for or remove the prejudice associated with that claim, especially where the settlement trust continues to say it would be inappropriate for Ngāti Kahungunu ki Wairarapa Tāmaki-nui-a-Rua to acquire further land at Pouākani.
- The Crown submits that the other claims referred to in the closing submissions of the settlement trust such as those relating to the leasehold economy, Crown purchase practises, the Native Land Court and landlessness in the Wairarapa District, cannot logically be said to relate to the resumable land at Pouākani.
- And the Crown submits that the Tribunal could not lawfully make a recommendation under section 8A of the kind that is proposed by the settlement trust, and I refer there to those conditions that the settlement trust has suggested."

So, that's the broad summary of the Crown's submissions. And I now turn to the first section which is to make some general submissions about the

jurisdiction that we're in and I wish to emphasise certain points, and the starting point is to focus on specific claims and identify prejudice.

"While this proceeding has focused on the Wai 85 claimants' request or application if we can call it that, for resumption under section 8A, the starting point is not a decision whether or not the resumable land should be returned to Māori ownership.

The Crown submits that the starting point is to identify the specific claims and the prejudice associated with those claims", which I do later in these submissions.

And it is worth restating some of the more basic propositions around the jurisdiction we are in.

"A claim under section 6, is a claim that is a particular allegation or a set of allegations that one or other of the particular actions/omissions or things listed in section 6(1) is causing or is likely to cause particular prejudice to the claimant or claimants and was inconsistent – and was, sorry, or is inconsistent with the principles of the Treaty.
Claims are located in statements of claim. The statute doesn't require statement of claim of course, but the Tribunal practises to do so.

The Tribunal must turn to those statement of claim and identify what aspects of those documents set out claims that relate to the resumable land? and which claims were found to be well-founded?

The claims are not the Tribunal's findings of course. The claims are what instigated the Tribunal's inquiry.

The Supreme Court has said that in introducing provisions to empower the Tribunal to make binding recommendations, Parliament like the Court was

concerned to protect claims on an individual basis, is my emphasis. The purpose of the amendments in 1988 was to protect claims in respect of the land transferred to state owned enterprises, not to protect claims in respect of other land. Logically it follows that some claims would relate to memorialised lands and some claims would not."

And I am certain there are quote from Hansard and that quote can be located in the bundle of documents, which I won't take you to, but I've included the Hansard references in the bundle of the second reading of the bill, and if you are interested to note, it's at page 260 of my bundle. I won't take you there, but I'll just give that reference.

And this is Sir Geoffrey Palmer. At the start of his speech in introducing – sorry, in the second reading of the Bill, and he says, "The Right Honourable, Sir Geoffrey Palmer says:

> The Bill reflects the spirit embodied in the Treaty of Waitangi. It gives effect to an agreement reached between the Government and New Zealand Māori Council and the iwi represented by it. That agreement as it is embodied in the bill enables the Crown land to be transferred to State enterprises and then to be on-sold by State enterprises, the third party. At the same time, it establishes a system that protects present and future claims to the Waitangi Tribunal in respect of that land but no other land."

And so, I guess the simple point I'm really wanting to make is that it was designed to protect some claims that is the claims to those lands, not Crown Forest Lands of course. That wasn't an issue in 1987, 1988. That is something that happened later. There is a separate regime in respect of Crown Forest licensed land. This regime was about the lands that the Crown wished to transfer to State-owned enterprises and so what it was doing – what Parliament was doing was protecting the capacity of Māori to make claims and receive

those lands claimed through the process of the Waitangi Tribunal despite the transfer by the Crown to those State-owned enterprises. And so, I draw from this.

The point I'm really wanting to reinforce is that some claims will relate to this land, some will not. It's a simple broad point, and that's what I say at paragraph 34.

Paragraph 35, "Counsel for the settlement trust has characterised the Crown's position and other enquiries on what it means for a Crown to relate to resumable land as being narrow. Counsel has suggested that the Crown's position is that there must be a direct relationship between the claim and the land.

The Crown's position is that there must be a logical connection between the claim and the resumable land, such that it can properly be said that the claim relates to the land for the Tribunal to have jurisdiction under section 8A to recommend its return as a remedy to the claim.

It is difficult, and perhaps unhelpful to engage in an abstract discussion about what claims generally must be like in order to be said to relate to certain land. It is far more helpful in my submission to discuss whether a particular claim relates to particular land that is resumable and the Crown addresses that specifically later in these submissions.

0935

And of course, the Crown accepts that some of the claims here do relate to the land of course."

JUDGE WAINWRIGHT:

Mr Irwin, there is a lot to get through and we will have questions in relation to matters that you have raised. I am conscious that if we delay our questions to

the end, we may end up with a substantial reprise of the material that you are going through, and I think I would prefer it if we ask questions as you proceed, unless you would find that off-putting?

ANDREW IRWIN:

No, not at all. I ask for that. Sorry, what I was saying before is that when I have an introduction section –

JUDGE WAINWRIGHT:

No, I understood that.

ANDREW IRWIN:

I jump in there.

JUDGE WAINWRIGHT:

Yes-yes.

ANDREW IRWIN:

Politely, I'm suggesting that, but no, please do –

JUDGE WAINWRIGHT:

But we are through that now, aren't we?

ANDREW IRWIN:

We're through that, we're into it.

JUDGE WAINWRIGHT:

Right, right. Well, this matter of what relates to means, in the context of the legislation, is obviously a very material one for the exercise of our jurisdiction, and I accept your characterisation of the Crown's position as being less narrow than logical, but the legislation doesn't say, and interestingly, neither does Sir Geoffrey Palmer, that what the intention of the legislation was, was to protect claims to the land. It claims that – well, he says, "In respect of the land," and

the legislation says, “Relates to the land.” Now, you will be aware of the – well it is dicta really, I mean to the extent that the Tribunal approximate the Court, but the views expressed fairly generally by the Muriwhenua Tribunal as to how the binding recommendation jurisdiction might apply in that inquiry. And we do not have much to go on, do we, as regard, relate to because in Tūrangi, the nexus between the claims and the particular land was immediate and direct so that the question of, relates to, did not arise. There was no broader position to consider.

In Muriwhenua, the Tribunal did not come to apply the jurisdiction but the then chairperson really approached the possibility with and expressed some ideas arounds how that might go.

Now, his idea at the time was that they were looking at prejudice that arose from claims pre-1865, so there was no possibility that the specific prejudice arose in respect of the Crown’s compulsory acquisition of land for instance, because they’re all post-dated 1865. So, he was conceding of the very great prejudice to the Muriwhenua people that Te Hiku Iwi arising from the Crown’s purchase policy really, up to 1865, and that being compensated by resumable property.

So, he was approaching it as the Crown having retained certain properties. This is my interpretation. He did not express it exactly, but my interpretation of what he was saying is that we have got these Crown assets that were arbitrarily retained. We have got an enormous amount of prejudice and the claims in that inquiry were shared by everybody, because it was the Muriwhenua Rūnanga at that time, that all of that prejudice relates to land of which there is a small amount left and that should be utilised for the benefit of everybody. That is my loose interpretation of what he said.

Now, when we go to the way in which you have applied the language here, I’d say that that is sort of at the other end of the continuum of possible meanings

of what relates to means, but I would like to tease out with you somewhere in the interim on the continuum because you seem to be rejecting the possibility that relates to includes the Crown's breaches of the principles of the Treaty that related to Wairarapa Moana more generally.

So, the way that we express it in our memorandum was that there was a you know unbroken continuum of Treaty breaching conduct that culminated in the compulsory acquisition, but that there was a cascade of Crown conduct that the Tribunal characterised as having breached the principles of the Treaty, and you have as relating to Wai 85, restricted of the four claims that they mention that you refer to, only the one that related to the compulsory acquisition of the land, not the leases at Mangakino for instance, the other sort of related difficulties that the Tribunal identified. And you also do not seem to be contemplating the possibility that the other claims that the settlement trust referred to which are wider claims that it says relate to the subject land because they include the conduct going back to dealings with Wairarapa Moana. Can you address those matters please?

ANDREW IRWIN:

Yes, well I do. I do in the document and you would like –

JUDGE WAINWRIGHT:

So, you do not want to talk about it now. You think it is best to wait?

ANDREW IRWIN:

Well –

JUDGE WAINWRIGHT:

I mean honestly, this is a key thing, and if you want –

ANDREW IRWIN:

Yes. The submission I am making to you now is at a broad level and it simply – there are some claims that will relate to some lands, and some claims that

will relate to other lands. And the Crown submits that you do need to look at the claims themselves, and that is what I do later on, and there is naturally any dispute I think between the Wai 85 claimant and myself as to the parts of the claim that relates to the land. And to just follow on very briefly on that, the Wai 85 case is all focussed on the evidence of Dr Meade, which itself is all focussed on the Crown's compulsory acquisition of the 787 acres. And so, everything is focussed on that claim that was well-founded, and there is no argument.

So, at a high level I'm saying some claims relate to some lands, but in my respectful submission, the Tribunal ought to accept logically some claims relate to other lands and other things. And the Crown doesn't – the Crown respectfully submits that it's not enough to say in a very broad generalised way, there is an asset here that could provide a remedy for a well-founded claim. It is not – and therefore, we will look at returning it.

0945

It is not good enough, the Crown respectfully submits to say, "Well, it is in the rohe of the group concerned, and therefore, we look at returning it," but even that's not the case here. Rather, what the Crown says is that the statute does ask you to look at the claim and look at the relationship of the claim to the land sought and so I go through that exercise.

JUDGE WAINWRIGHT:

Yes, okay well as I said, the proposition that you have outlined is at one end of the continuum and the proposition that you have described I would characterise as being at the other end. I am asking you to talk about claims about the land at Pouākani that I am not limited simply to the compulsory acquisition in 1949. So, you know we all know the story of how Wairarapa Māori came to be in possession of land at Pouākani and it did not start in 1949.

So, the whole thing was not Treaty compliant for a whole range of reasons that the Tribunal identified. I am struggling with the idea that that whole cascade of activity that was not Treaty compliant did not relate to the land at Pouākani which was the end point of it.

ANDREW IRWIN:

Mmm, and I think at a high level, what I am saying is that just because an end result is the grant of land at Pouākani, and just because there is a – we can look back through history and see how Wairarapa Māori were gifted that land, does not mean that claims about events prior to that gifting concerning Wairarapa, relate to that land at Pouākani. And so –

JUDGE WAINWRIGHT:

All right, we will stop there.

ANDREW IRWIN:

Yes.

JUDGE WAINWRIGHT:

I am not talking about events prior. I am not talking about the wider purchase policy and stuff like that. I am talking about the Crown's activities that were all to do with the position of Piripi Te Maari and the other leaders at that time who rejected the Crown's arguments about where the high watermark and the low water mark were and what that meant or what Māori retained by way of land ownership and how that played into a long period of dispute. You know the story. You know the Royal Commission, the promises that the Crown made around gift, all of that. How can that not relate to the lands at Pouākani?

ANDREW IRWIN:

So, if I could take you to page 84 of my submissions? And so, here I address here the specific claims referred to by the settlement trust and these include the claims that I think Your Honour has just mentioned. And so, I look first at the Wai 97 claim and I have also included these claims – these statements of claim

in the bundle. I think it'll be sufficient for us just to look at my written submissions though.

So, at paragraph 239, I look at the Wai 97 claim and the Wai 2023 claim. They were made part of a joint statement of claim, and at 24 – at my paragraph 241, the settlement trust refers to a particular claim within that, and that concerns the acquisition of 1500 acres of land at Te Pouākani Block which includes the 787 acres that we are talking about in this case. And the Crown accepts that is a well-founded claim that relates to the land at Pouākani.

0950

The settlement trust points to then the Wai 2023 claim and I set out there the quote from the statement of claim that they point to. I think the date in that quote must be wrong. It can't be 2015.

JUDGE WAINWRIGHT:
'16.

ANDREW IRWIN:
I think that is 1916 or 1915.

JUDGE WAINWRIGHT:
Mmm.

ANDREW IRWIN:
And that refers to compensation. This is the claim. The claim is that on that as compensation for the failure to make a reserve, an order was made vesting the Pouākani Block in the southern King Country in the names of the descendants of Māori who had been identified by the Native Land Court in 1883 is the onus of lake Wairarapa. And the Crown says in my paragraph 244, "the Crown does not consider that the claim about the inadequacy of the grant of land at Pouākani is compensation for the failure to find suitable reserves in the vicinity

of Wairarapa Moana can properly be said to relate to the 787 of acres of land that was later compulsorily acquired for the hydro electricity purposes. While there is mention of the land and the claim, because there is, it mentions the Pouākani Block.

The Crown submits that the claim relates in substance the Crown's failure to provide suitable reserves around Wairarapa Moana as promised. In that sense, the claim more properly can be said to relate to land at Wairarapa Moana.

JUDGE WAINWRIGHT:
All right.

ANDREW IRWIN:
And while we're here, I then go on to look at the next claim pointed to by the settlement trust Wai 1050. That statement of claim expressly says that it concerns the lower value of South Wairarapa. The one claim that mentions the Pouākani lands in parenthesise, is the claim that the later acquisition by the Crown of Lakes Wairarapa in theory, was wrongful and a breach of the Treaty, and there are certain particulars.

So, it is clearly a claim that relates to the land concerning Lakes Wairarapa Onoke in theory. The particulars include the statement, "The Crown failed to keep promises which induced the deed to set aside reserves in the Wairarapa and did not satisfy any reserves for 19 years. And so again, that relates to land at Wairarapa.

In brackets or parenthesise with a particular say when it acquired the Pouākani blocks in the King Country, and so there's a literal mention of the Pouākani land. And again, the Crown says, "This claim does not relate to the subject plan that is the land at Pouākani for the same reasons that I gone through.

JUDGE WAINWRIGHT:

Mmm, right. Well, I mean there is obviously different ways in which one can construe the words relate to and how open textured they were intended to be. Your characterisation of how we should use those words seems to me to be more conflating relate to as two, so that you are really – the Crown's position seems to be that the claim must be to the land, not merely relating to the land, whereas it seems to me that there would be arguments that the use of relate to, which is quite loose language, must be taken to allow the nexus to be less direct than a claim to the land, because otherwise that is the language that Parliament would have used.

So, how much less is obviously a matter for this Tribunal to resolve and your submissions are on point, and I think you for them.

ANDREW IRWIN:

Good, and really – I mean please take away from what I am saying, get into the detail of the statements of claim.

JUDGE WAINWRIGHT:

Well, that is helpful, thank you.

ANDREW IRWIN:

Yes, and so, we will do that. Later on, perhaps we will return again. I do think it is a little unnecessary to have an abstract debate about is it a direct nexus, is it an indirect nexus. That statute doesn't use these terms. It says, "Relates to." So, look at the claims. They're in the statement of claim, and ask the question, does an individual claim relate to the land?

I was at my paragraph 38, so just turning back to that paragraph. Respectfully, the Crown disagrees with a submission made by my learned friend for the Raukawa Settlement Trust where that submission said, "It is not necessarily the claims that require a nexus with the memorialised land in question," but this issue is better seen as it being the prejudice, the Tribunal has identified as requiring a connection to the land. And respectfully the Crown says, "Well, no,

the Act does require a connection between the claims and the land." And so, the Crown agrees with this Tribunal panel, which has said this Tribunal must decide on the connection between a claim and the subject land.

Having identified well-founded claims that relate to the land in question, the Tribunal must consider the prejudice it found was caused by the Crown's Acts that gave rise to the claim. The Tribunal must identify that prejudice because under section 8A, the next is for the Tribunal to consider what action is to be taken under sections 63 to compensate for or remove that prejudice. So, you need to know what the prejudice is to make a recommendation to the Crown to remove it or compensate for it. And in this way, the Crown submits that the Tribunal is very much bound by the pleadings so to speak. The statute requires the Tribunal to match well-founded claims that relates to resumable land with the prejudice caused by the Crown Acts and omissions in breach of the Treaty. Then the Tribunal can consider what action should occur to compensate for or remove the identified prejudice.

In the next section, I have adopted the heading used by the Tribunal in its direction 29 August this year where you sought some submissions on some points that you were thinking about, and –

JUDGE WAINWRIGHT:
Can I just go back to your –

ANDREW IRWIN:
Yes.

JUDGE WAINWRIGHT:-
– submission that the Tribunal is bound by the pleading? I wonder whether that is the case. None of the legislation requires there to be pleading. The Tribunal for its administrative purposes to enable it to identify who the claimants are, what their relevant claims are and how the hearing process is to proceed, but

once the inquiry is in process and we are a commission of inquiry, such that we are the determinants of our own process in the inquiry.

If matters come before us in the course of the inquiry, upon which we report, our sense of the claims and their well-foundedness, comes out of the inquiry, not out of the pleading.

ANDREW IRWIN:

In response to Your Honour, in my paragraph 41, those critical words in this way preface that statement. So, what I'm submitting is that you are bound by the pleadings, and by pleadings, I mean the claims, and the statute requires a claim to be made.

JUDGE WAINWRIGHT:

Yes, well, pleading is a very specific word, I mean that is the claim as pleaded.

ANDREW IRWIN:

Yes.

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JUDGE WAINWRIGHT:

And the question I have is whether it is the claim as claim as pleaded or the claim as inquired into by the Tribunal in the course of its inquiry, because as you know, nothing is set in concrete by the pleadings that once the inquiry is underway, the Tribunal goes where the claimants lead it. The adequacy or otherwise of the pleading do not limit the way in which we proceed.

ANDREW IRWIN:

There may be a distinction between the past practise of the Waitangi Tribunal and also, what really the Act requires a Tribunal, but put it as politely as that, the claim frames the inquiry and that is what the statute says.

A statute provides a Standing Commission of Inquiry and the function of the standing commission of inquiry is to inquire into the claims, and so the statute sets out a section 6 what a claim must be about, and that is the focus of your inquiry.

I accept that of course, as a matter of procedure, the Tribunal as told by parliament may regulate its procedure in its inquiry into those claims, and the Tribunal reports on those claims.

Of course, the Tribunal cannot refer things to itself. The Tribunal cannot think, "I think you missed the real point claimant. There's another claim you're missing out on, it's this, and it's entire separate to what you put in your claim." That is not the function of the Tribunal to do that. the function of the Tribunal is as the statute says, "To inquire into the claims."

JUDGE WAINWRIGHT:
At the time when claims are filed and registered with the Tribunal, very often the research into them hasn't been undertaken.

ANDREW IRWIN:
Yes.

JUDGE WAINWRIGHT:
So, as expressed by claimants in the early stages, they are often extremely general, and even at the time when parties plead, or the evidence is not necessarily before the Tribunal, certainly in the past it never was.

ANDREW IRWIN:
Yes.

JUDGE WAINWRIGHT:
That all sort of happened in the course of the inquiry. So, I am just trying to understand what you are saying, "The claim is that limits what the Tribunal can

do." If we are not limited by the pleading, how are we limited by the claim. I mean the claim is what the claimants tell us in the inquiry that –

ANDREW IRWIN:

Well, the claim is what is made under section 6(3) and to talk about practise, typical practise. If we look back over the history of Tribunal, was to file a very broad document that setup very broad claims. But they are claims and they are claims under 6(3). In the scope of this inquiry, amended statements of inquiry were filed and I would characterise these as claims. They are claims under section 6(3), but the Act doesn't provide amended statement of claim. It is something that lawyers have used and put forward as a process.

I am not even sure off the top of my head, I can't remember if the Tribunal's guide to practise and procedure talks about amended statements of claim. I am not sure, and in a sense, it doesn't matter. I would accept these are all claims as made under section 63. And until a certain time in our history, there was no cut-off date for then to be made, and so, as time went by, and people got closer to hearing, the attention was focussed, the evidence was provided and amended statement of claim were filed, and these particularised the claims, but they were claims and they were proper claims made under section 6 of the Act, and so there is no issue from the Crown about that.

And so, what I am saying in this section of these submissions is that you opposed in your direction where we're questioning the extent to which we are bound by the pleadings and you suggested you weren't. And in some ways, of course I accept you are not bound by the pleadings in some senses, but when we come to the resumable jurisdiction of Tribunal, the thing to take away from I'm saying is, that you are bound by looking at the claim as made under section 6(3) and to check that it does relate to the land. And if I could put it as bluntly as this, in my respectful submission the Tribunal would be in error were it to say, we think the claims really are something different than the claimants

put to us, they really were about something else and we say that something else relates to the land in question.

And I don't even think that that arises here, because I'm sure you won't be saying that, and you don't need to, there are claims that relate.

JUDGE WAINWRIGHT:
Thank you.

ANDREW IRWIN: (CONTINUES)
At my paragraph 44, "The Crown accepts the Tribunal has discretion as to matters of procedure that discretion must plainly be exercised within the confines of the Tribunal statutory jurisdiction in light of the purposes for which that jurisdiction was conferred and in accordance with natural justice. And I think that's well understood by everybody, the Tribunals jurisdiction to make binding recommendations was deliberately circumscribed by Parliament, it was ring fenced.

In particular, in the present case the Tribunal would be acting outside of its jurisdiction if:

- it recommended the return of land to compensate for or remove prejudice associated with claims that have not been made, that would be wrong or for claims that have been well-founded, again that would be an error.
- The Tribunal would act outside its jurisdiction if it recommended the return of land to compensate for or remove prejudice associated with claims that do not relate to the land,
- and the Tribunal would be acting outside its jurisdiction if it recommended return of land for the benefit of groups, whose claims have already been settled and in respect of which the Tribunal jurisdiction has been removed.

So, to avoid any doubt the Tribunal broad discretion and power to regulate its procedure does not of course, permit the Tribunal to step beyond the claims as the Tribunal has said the statute requires the Tribunal to identify the connection between a well-founded claim and the resumable land for the claim to relate to that land.

I turn then to consider the discretion that this Tribunal has, I'm just looking at Your Honour, to check that - "

JUDGE WAINWRIGHT:

Yes, I was just – just to clarify then your position would be that option three, that Mr Vertongen and Ms Feint addressed yesterday is not an option available to the Tribunal?

ANDREW IRWIN:

That is correct, I would respectfully submit that would you in error of law and I do come to address that at the end.

JUDGE WAINWRIGHT:

Thank you.

ANDREW IRWIN: (CONTINUES)

"The Wai 85 claimant essentially submits the following in terms of the discretion that you have,

- Section 8(A) as the Court of Appeal found in terms of section 8(B) is a controlling provision,
- The Tribunal may not have regard to all the circumstances of the case in deciding whether or not to return the land under section 8(A).
- The choices available to the Tribunal are very limited, you must decide whether the land should be returned or not and clear the land from liability to resumption.
- Logically, the Wai 85 claimant says, the return of the land would remove the prejudice.

- The return of the land is not disproportionate to the prejudice.
- The Tribunal should therefore, recommend under section 8(A) that the land should return to Māori ownership."

And as I mentioned earlier in oral submission my learned friend that there – at one point he said, "There was a presumption that you should return the land."

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I took him to take one step or half a step back from that to say, "There is almost a compulsion on you to return the land, and respectfully, the Crown disagrees, and I'll take you through this.

"Once the Tribunal has found that a claim relates to the resumable land is well-founded, the Tribunal must consider whether it should include in its recommendations under section 6(3), a recommendation for return of that land to Māori ownership, but the Tribunal is not required to make that recommendation."

And if I pause there, you do need to make a decision under section 8A(2)(a) or (b), whether the land should return to Māori ownership or whether that is not required. You do need to make that decision, but you are not required to make the decision under section 8A(2)(a) that the land returns to Māori ownership.

The Supreme Court has stated that the Tribunal is not obliged to recommend resumption. It expressly said that in the passage that I referred to, and that was in the context of course of section 8A(b) which refers to the Crown Forest license land and the same would apply to section 8A. My paragraph 50, section 6(30 and 8A give the Tribunal a wide discretion to consider what recommendation to make in the circumstances. Either the land in whole or in

part should return under 8A(2)(a) or that that return is not required, and the land should be cleared from liability under 8A(2)(b).

And again, just to pause here, that is the decision you must make in this proceeding, and that is where the Tribunal has of course, fallen into error. So, the Courts have told us in other cases where the Tribunal has avoided making that decision under one of those two provisions of the Act.

So, in this case, the expectation is that you will either decide that the land we are talking about will return to Māori ownership, or it won't, and it will be cleared from liability for further resumption.

"The Crown agrees with the Ngāti Kahungunu ki Wairarapa Tāmaki-nui-a-Rua Settlement Trust and the Raukawa Settlement Trust, who I understand both submit that you return a very wide discretion in these matters.

The Crown submits that the Tribunal retains the discretion to decide the most appropriate action to compensate or remove the prejudice which may or may not include the return of the land. Matters that are relevant to the exercise of this discretion include the nature of the Treaty breach and level of prejudice, whether there are other suitable or appropriate forms of redress, the Tribunal could recommend other than the transfer of the land in question. And ultimately, what the Tribunal considers is the best way to address that prejudice in a manner proportionate to the breach."

Could I ask you to delete my paragraph 53 in the quote, having rethought about that I think the quotation is unnecessary and potentially problematic. It doesn't change any of the submissions I'm making, but I would like that removed.

My paragraph 54, "When the Tribunal comes to consider, should the land return to Māori, section 8A, necessarily gives the Tribunal broad discretion to consider what is the most appropriate redress that will compensate for or remove the

identified prejudice, the Tribunal is not restricted to one possible remedy, the return of the land or nothing at all. Both sections 8A(2)(a) and (2)(b) necessarily give the Tribunal discretion to consider alternatives to the return of the land, and that is particularly so because of three reasons:

- To consider under section 8A whether the land should return to Māori ownership implicitly requires the Tribunal to consider what action the Crown should take to compensate for or remove prejudice.

- Under 8A(2)(b), which is premised on the return of the land not being required, that anticipates that there might be an alternative to the return of the land that is more appropriate action to compensate or remove prejudice and any recommendation under section 8A is to be included in a recommendation under section 6(3).
- Section 6(3) provides for the Tribunal to make recommendations other than the return of the land to Māori ownership."

And so, in the Crown's submission, there is no presumption in the statute or the case law that you should return the land. The legis – and I'm interpolating here, the legislation was not drafted to say where there is a well-founded claim that relates to the land, the land will return unless there is a good reason otherwise. That would be a presumption and that is not in the legislation.

And in the case law, no case has, in my submission, suggested in any way, that there is such a presumption, rather the Supreme Court has been clear you retain a discretion to decide whether or not it should happen in accordance with the statute.

I thought Your Honour, I might address a passage in the Court of Appeals *Haronga* decision that you discussed with my learned friend Mr Mahuika. That is a little problematic and I've been thinking a little bit about it.

JUDGE WAINWRIGHT:

Good okay, yes.

ANDREW IRWIN:

And that – we will see where that takes us to. It might take us to the break. So, I will take you to my bundle, and hopefully you have got tabs. It is tab 3.

JUDGE WAINWRIGHT:

Mhm.

ANDREW IRWIN:

And the paragraph is paragraph 64 for that decision, and so, I'll just take you through this. So, the other Court of Appeal says, "Within this context, those words I will return to." Within this context, we are satisfied that where the claim is to Crown Forest Land, the reference in section 6(3) to the Tribunal's power to recommend if it thinks fit having regard to all the circumstances of the case, applies only to the threshold inquiry contemplated by that provision into whether the Crown should act to compensate for or remove prejudice.

The phrase, "All the circumstances of the case," does not extend the statutory discretion to the next stage of the inquiry into the approached remedy, section 8H(b)(1) or in this case section 8A(2) then becomes the controlling provision.

So, just to unpick this, the first words of this paragraph within this context, coming back just one page, the context here is that the Court of Appeal has gone through the different appeals of the different parties, and under the heading Roman numeral (iii) Mangatū, this is where the Tribunal – this is where the Court of Appeal is at. So, this is the context.

And here, the Court of Appeal says, it agrees with the High Court's identification of the two main but erroneous grounds upon which the Tribunal in the Mangatū case dismissed the Mangatū claim. There were two grounds.

The first, the impact of schedule 1 compensation on what the Tribunal regarded as necessary and appropriate to compensate for or remove prejudice suffered by the Crown's wrongful act, by comparison with the Crown's settlement policies. So, in other words, that first issue was there – the Tribunal was concerned that the return of the land and I think the minimum compensation under the regime. The Tribunal was concerned that that was out of sink or out of whack or proportion to the quantum of the Crown's proposed settlement.

So, that's the first problem, and then there's the second one, and the Court of Appeal says, "Well address each ground accordingly," and then at paragraph 62, first in our judgment, they address that first issue that I mentioned. "Tribunal erred taking into account the downstream consequences of an interim recommendation relative to the Crown's settlement policies.

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And that's that part of the decision through to paragraph 66, and at paragraph 66, the Court of Appeal then turns to that second issue, which is another issue. So, the context of the Court of Appeal's decision is around this issue of the Tribunal taking into account the downstream consequences of an interim recommendation relative to the Crown's settlement policies.

Now, if we come to paragraph 60 .

JUDGE WAINWRIGHT:

Hang on a second.

ANDREW IRWIN:

Yes.

JUDGE WAINWRIGHT:

Thank you.

ANDREW IRWIN:

So, coming to paragraph 64, within this context, the Court of Appeal is saying, "Within the context of considering the lawfulness of taking into account the downstream consequences of the recommendation on Crown settlement policies, the Court of Appeal says, 'that is where we think the Tribunal fell into error and we agree with the High Court in that regard,'" and in that sense, all the circumstances of the case, which would allow that kind of consideration to be made under section 63, cannot be made under 8A.

JUDGE WAINWRIGHT:

So, in that context, what is the threshold inquiry?

ANDREW IRWIN:

Well, I'm still unsure about that.

JUDGE WAINWRIGHT:

Mmm, yes, I think that is tricky.

ANDREW IRWIN:

Yes, and I mean, it is very tricky, but what I wanted to really say to you is that where under section 8A, the Court of Appeal is telling us in all the circumstances, the words or the circumstances of the case do not apply. The Court of Appeal is telling us that means you shouldn't be taking into account the downstream consequences on a Crown settlement.

JUDGE WAINWRIGHT:

Yes, yes. I think that is clear, but they are saying that at the point where the Tribunal is satisfied that there is a well-founded claim, and that in that sense it has embarked upon its inquiry as to whether it should make binding recommendations?

ANDREW IRWIN:

Yes.

JUDGE WAINWRIGHT:

It cannot at that point have regard to wider contextual circumstances like the Crown's Treaty Settlement policy to say, "Oh, no, even though these criteria are met, we just don't think we should."

ANDREW IRWIN:

Because, there is a standing Crown settlement or offer there, for instance.

JUDGE WAINWRIGHT:

Yes.

ANDREW IRWIN:

Yes. And in that sense, the resumption provisions become controlling. As I said earlier, you must decide whether to return the land or not and clear for liability.

JUDGE WAINWRIGHT:

Yes, I think that is clear as well. I just think there is some ambiguity in that paragraph.

ANDREW IRWIN:

And the real reason I am bringing you here is to say, and so that does not mean there is a presumption of return.

JUDGE WAINWRIGHT:

No, I agree, yes.

ANDREW IRWIN:

At my paragraph 55, our Courts have found that resumption is not an option of last resort. I feel somewhat guilty here because I submitted to the Ngāti Kahu Tribunal first time round, that resumption is a matter of last resort and I swear I was only relying upon Tribunal dicta to that effect, and of course, I was wrong, so the Courts have said.

JUDGE WAINWRIGHT:

Well, you were not wrong, you were just making a submission.

ANDREW IRWIN:

I was and unfortunately, it may have led the Tribunal into error, but that Courts have said, "That resumption is not a last resort. You are not to, in this inquiry, put it at the end and think of all redress that could compensate for or remove the prejudice first, and only as a last resort.

JUDGE WAINWRIGHT:

There is nothing in the statute to suggest that, is there?

ANDREW IRWIN:

No.

JUDGE WAINWRIGHT:

No.

ANDREW IRWIN:

But the corollary I say is that that does not mean that resumption has become the first or only resort. The question for the Tribunal remains, what is the most appropriate action for the Crown to take in the circumstances of the case to compensate for or remove the prejudice caused by the Crown's breach of the Treaty principles?

And so, what I am submitting is you still should be thinking, what should happen now? Sure, return the –

JUDGE WAINWRIGHT:

But you are talking about non-binding recommendation.

ANDREW IRWIN:

I'm talking about binding recommendations, because when I say, "I'm talking about binding recommendations," I'm talking about section 8A(2)(a) and (2)(b), and they pose the questions, should the land return? Or the return is not required, and within that decision-making you should be thinking, "I respectfully submit, what is the most appropriate thing that should happen?" Sure, return of the land is one option, but it's not the only option you have, because you might think there's an entirely different way that is more appropriate to compensate for or remove the prejudice that we've identified and it's not the return of the land. And therefore –

JUDGE WAINWRIGHT:

Well, Mr Irwin, I have read these submissions, and can you help us with how you say, well you have already made recommendations.

ANDREW IRWIN:

Yes.

JUDGE WAINWRIGHT:

And I guess, it might be suggested that if the Crown had followed those recommendations, we wouldn't be here.

ANDREW IRWIN:

It might be suggested that.

JUDGE WAINWRIGHT:

So, when you say, "Well, we don't have to make binding recommendations. We can just make other recommendations," and you say, well you have made recommendations, and we are looking at claimants and their desire for there to be a remedy in line with the Tribunal's powers, what possible confidence could we be – could we have that non-binding recommendations to the Crown would be followed?

ANDREW IRWIN:

It is something that address later, but there are two questions. The first question is to what extent should you in this inquiry be concerned about whether the Crown follows section 63 recommendation or not? That's the first question. Is that a relevant consideration for you? To what extent can you even have that concern? And the second question is, well, if you're going to go down there, what has the Crown done in accordance with your recommendations in 2010? So, two different questions.

And the way I have addressed – I haven't addressed that first question in these written submissions. What I do not say in terms of a reason not to return the land through resumption, I haven't submitted a reason not to do that is because we, the Crown's complied with your 2010 recommendations. I haven't said that, and you're not to read into that or infer, "That's because the Crown hasn't."

Yesterday, I heard Your Honour in a discussion with one of my learned friends say something to the effect that the evidence appeared to indicate the Crown had not complied with the particular recommendation to reassess the compensation, and again –

JUDGE WAINWRIGHT:

Well, that was the evidence before us from the Wai 85 claim.

ANDREW IRWIN:

In the Wai 85 claim, and of course the Crown says something else, and the evidence of the Crown is otherwise, and I will point you to that evidence.

JUDGE WAINWRIGHT:

All right.

ANDREW IRWIN:

Just come to 10.30 Your Honour.

JUDGE WAINWRIGHT:

Good, okay. Thank you for the reminder, and it is exactly 10.30, nā reira, kia hiki tā tātou hui ināianei, tae atu ki te 11 karaka.

KAREN FEINT:

Ma'am just before you rise, may I please seek leave to withdraw?

JUDGE WAINWRIGHT:

Yes, you may withdraw.

KAREN FEINT:

Ngā mihi, kia ora tātou.

JUDGE WAINWRIGHT:

Thank you, Ms Feint.

HEARING ADJOURNS: 10.31 PM

HEARING RESUMES: 11:03AM

ANDREW IRWIN:

Your Honour, I was at, I think paragraph 56 of my submissions. At my 56, I say "It does not matter that the Wai 85 claimant has not expressly asked the Tribunal to make section 6(3) recommendations, the Tribunal is no restricted to the relief sought by the Wai 85 claimant. And so, the Tribunal could make recommendations under section 6(3) in this process.

As such, the Tribunal is able to and the Crown says should, consider what is the most appropriate action that would compensate for or remove the prejudices. Alternatives to the return of the land would generally include the following, a payment of money, something particularly appropriate where the prejudice suffered was purely financial, such as the underpayment of money by the Crown. Money provides successful claimants with numerous options,

including for instances whether to buy other land of assets that are not land based.

And apology and some other form of action designed to remedy the prejudice caused to relationships, such as for instance requiring the Crown to engage with the claimant community on an on-going basis. The tribunal is able to make recommendations for these alternatives. The Crown submits that in deciding whether or not the land should be transferred to Māori ownership, the Tribunal should consider what is the most appropriate action that would compensate for or remove the prejudice. If I can just make a slight amendment and delete the words “and what” and insert “from”.

From the range of actions that are reasonable open for the Crown to implement. This case is not therefore an all or nothing situation where the Wai 85 claimant receive the transfer of the memorialised land they seek or nothing at all.

JUDGE WAINWRIGHT:

Just addressing these arguments again, Mr Irwin well not the same ones. But you properly make the point that the Tribunal did make remedial recommendations and then since then, the process has moved on. So, one can infer that the recommendations that these applicants seek is not the same recommendations that we have made before because we have already made those, and they are seeking something different, and If we have a look at the context of this jurisdiction where it was provided as settlement for legislation where the Crown was proposing to transfer land, the State Own Enterprises.

It would have been available for the settlement to make the Tribunal able to make non-binding recommendations in relation to that land, which was what its jurisdiction usually did –

ANDREW IRWIN:

Was at the time.

JUDGE WAINWRIGHT:

But in fact, I think we can infer that the negotiators of the settlement wanted something more and presumable that was because they did not have confidence or certainty no certainty that any non-binding recommendation that the Tribunal might have made that related to the land in question, the Crown would follow.

So, here we have claimants who have had non-binding recommendations and they're coming back to the Tribunal saying, "now we want you to use those binding powers." So, what would the Tribunal be doing if it were to say, no we are not going to exercise our binding powers that you have asked us to do now having had non-binding recommendations we're just going to make more non-binding recommendations.

ANDREW IRWIN:

So, a few matters in that Your Honour. One is, and I do address this later in my submissions about what the Wai 85 claimant does ask the Wai 85 claimant ask that the other recommendations you've made about some other things, please remind he expressly says, "those are fine." And one point in this proceeding I understood the position to be the Wai 85 claimants would generally participate through a settlement in respect of their wider claimants, including some of the more specific claims that relate to the Wai 85 claim, but there's one claim that relates practically to the land, that's resumable and is an add on to all of that they seek the binding recommendations. So, just to be clear that is.

JUDGE WAINWRIGHT:

Well, that is the Wai 85?

ANDREW IRWIN:

Yes. And –

JUDGE WAINWRIGHT:

But the other applicants have also had the benefit of the Tribunals general and non-binding recommendations and they are asking for something different.

ANDREW IRWIN:

And what they say is, this is my reading of their very expressed words and actions is Waitangi Tribunal please let the settlement that we negotiated with the Crown happened, that's our first position a mandated entity, the Kahungunu ki Wairarapa Tāmaki-nui-a-Rua Settlement Trust negotiated a settlement with the Crown that includes all of the claims of Ngāti Kahungunu ki Wairarapa Tāmaki-nui-a-Rua it includes the Wai 85 claims. The Wai 85 claimants are saying, "yes, we are happy with that settlement and our claims being it in, so far as it relates to all of our claims except for the resumption part of our case. and their first position is, please that settlement happen as our first position."

And so, in this proceeding the apposed the Wai 85 request for resumption and more latterly in the preceding the changed their position to being to fold first and literally foremost, please let the settlement happen, we do not want resumption only in the alternative if you think that you are required to return to this land to Māori ownership, return it to us because we are more of an appropriate recipient than the incorporation. So, that's their perspective.

JUDGE WAINWRIGHT:

In light of the comments of the Court of Appeal that we were just discussing, do you think it is available to the Waitangi Tribunal to say, we are not going to make binding recommendations because there is a draft settlement?

ANDREW IRWIN:

I think you're getting into difficult territory, when you are in your decision-making process under section 8(A)(2)(A) and 2(B) and the decision-making is, should the land return or not is essentially. You must make that decision, if you say under those two provisions we don't think the land should return because there's a Treaty settlement waiting nearby that is difficult.

JUDGE WAINWRIGHT:

That is the position of the settlement trust that you agree we should prefer.

ANDREW IRWIN:

That is there case, I am just saying that you asked – you said to me that they are coming, asking for resumption and I was just setting out my understanding of their case.

JUDGE WAINWRIGHT:

But you have said that the Crown supports that positions and, in this way, the way I frame it is this, when we are in the decisions making under 8A(2)(a)(ii)(b) should the land return or is that not required to return. I think you are getting into very difficult territory if a reason for not returning is because of the Treaty settlement that is waiting there.

The Crown respectfully submits that you should not defer to that, a standing settlement it's not a 100 percent given that you are absolutely precluded from having regard, to that settlement in that context. But the concern the Crown has is that you are more – you are likely to reach a decision that will be reviewed in that Courts if you go down that path.

JUDGE WAINWRIGHT:

Well, as you pointed out that is a path that previous Waitangi Tribunals have effectively gone down?

ANDREW IRWIN:

Yes.

JUDGE WAINWRIGHT:

That has been summarily rejected as a basis for declining to exercises this jurisdiction on the basis of a well-founded claim.

ANDREW IRWIN:

Yes, and to be quite particular about it, my understanding is the Mangatū Tribunal did not make the decision under the equivalent 8(h)(b) provisions, they avoided making the decision that the land should return or not because of their concern, partly about the downstream consequences that the compensation would have on the Treaty settlement. And so, they avoided making a decision and so –

JUDGE WAINWRIGHT:

But, what about Ngāti Kahu?

ANDREW IRWIN:

So, well in Ngāti Kahu the Tribunal there decided – they don't accept my submission it was a matter of last resort. And again, they failed to make the decision both under – there was both Crown forest license land and also memorialised properties and so the Tribunal did not make the decisions under section 8(A) and also section 8(H)(B) either to return or not.

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And the bit that didn't do is clear the lands from liability, so again it failed to make the decision that the statute required of it, because it considered it was a last resort and it could of avoid making that decision. And so, what I have submitted this morning is, you do need to make the decision under 8(A)(2)(A) and 2(B) it's either returning or it's not and I'm always saying, if in that decision making you take into account your concern about the effect your decision would have on the Treaty settlement you're getting into dangerous territory, you are making the decisions and that would be a point of difference.

JUDGE WAINWRIGHT:

But it is not a relevant consideration?

ANDREW IRWIN:

I'm not sure that it is in 8A.

JUDGE WAINWRIGHT:

Well, it seems that that is what the Court of Appeal is taking.

ANDREW IRWIN:

Yes, which is why I'm saying you're getting into very dangerous territory and the Crowns concerns is we're just back before the Courts in that situation. What you can do legitimately and lawfully is in 8A consider what should happen, what is the best way the Crown could do something that would address the prejudice, that would compensate or remove it. We've identified the prejudice and if we're talking about Wai 85, we are talking about – essentially, we're talking about the Crowns negligence payment of 510 pounds back in the day. What's the best way the Crown could remedy the prejudice associated with it?

JUDGE WAINWRIGHT:

But we are not just talking about Wai 85, are we? Because we have just done around here, where I think you have agreed that the settlement trusts primary submission, which is do not make these binding recommendations because we want the settlement, but that is not available to the Tribunal legally or probably not available to the Tribunal legally. So, saying that you support – that the Crown supports that submission does not – because you have just said, you support the submission but Tribunal you could not make the decision on the basis of the reasons that you've been asked to make it. So, Taiho.

ANDREW IRWIN:

Yes.

JUDGE WAINWRIGHT:

That is, I think the exchange that we have just had Mr Irwin so that then delivers us to the alternative submission, which is okay Tribunal if you are not going to do that, not make the decisions because we like the settlement better than we want you to make binding recommendations like this, so we are not just looking at the Wai 85 preferences, we are also looking at the settlement trust preferences around binding recommendations.

ANDREW IRWIN:

Yes, I am happy to accept that we're looking at those other claims and what is the most appropriate action to recommend to the Crown to provide action, to compensate or remove the prejudice associated with those other claims.

JUDGE WAINWRIGHT:

And you are saying that the most appropriate action is for the Tribunal to make non-binding recommendations?

ANDREW IRWIN:

Well, no I'm not because part of the context here of course, that complicates it all is that you've made recommendations and you did that nine years ago, and I think the reason we're having this hearing today is because nine years ago you didn't finish your inquiry into the claims that do relate to the resumable land, you didn't make that decision under 8(A)(2)(A) or 2(B) and that is what we're doing in this day and age. And so, to complicate it we already have a sweet of recommendations that you made nine years ago.

JUDGE WAINWRIGHT:

So, from your submission all the Tribunal should do now is simply say no, that we should not make the binding recommendations because –

ANDREW IRWIN:

The binding recommendations are not required, the return of the land is not required as an action to compensate for or remove the prejudice and so under 8(A)(2)(b) that is what the Crown is saying.

JUDGE WAINWRIGHT:

And why is that not required – why is that so?

ANDREW IRWIN:

For a whole host of reasons that I go through in the submissions.

JUDGE WAINWRIGHT:

So, you have talked about those already.

ANDREW IRWIN:

Yes.

JUDGE WAINWRIGHT:

You listed them. So, it is not required – so we would simply be saying to the applicants who have come to us for binding recommendations, no we are not going to make the binding recommendations there not required.

ANDREW IRWIN:

Yes.

JUDGE WAINWRIGHT:

And we have already made non-binding recommendations so see you later.

ANDREW IRWIN:

Yes.

JUDGE WAINWRIGHT:

Okay.

ANDREW IRWIN:

And perhaps, that a little bit of pejorative way of putting it.

JUDGE WAINWRIGHT:

But that's what it amounts too?

ANDREW IRWIN:

But I think in essence that is what it amounts to.

JUDGE WAINWRIGHT:

Yes.

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ANDREW IRWIN:

And so, I think later on I will just return to the suggestion to which the Crown has not yet complied with the recommendation about providing a reassessment to the compensation that it paid in respect of the Wai 85 claim because I have something to say there. But I think the way I'm trying to contextualise the decision-making in front of the Tribunal, Your Honour, is to say, "When you are in section 8A(s)(a) and (2)(b) and you're deciding should the land return or that's not required," and bear in mind that's not required because the claim is still well-founded, something should happen.

It's just that it's not the return of the land, that's the decision-making that you're in. When you're in that space of decision-making there is certainly no presumption that the land should return, and you are able to think, "Well, just with an open slate a whiteboard what would be the best way?" What would be the most appropriate way for the Crown to do something to remove or compensate for that prejudice? Let's identify the prejudice and then let's think what is the best way to bring that to an end? That kind of thinking is within the scope –

JUDGE WAINWRIGHT:

But that's not available to us, you think?

ANDREW IRWIN:

It is available to you.

JUDGE WAINWRIGHT:

But we can't do anything about that. You're saying we have already made our non-binding recommendations so we have got nothing more to say there?

ANDREW IRWIN:

No, I'm not saying that. I'm saying that you're in that space and you're in –

JUDGE WAINWRIGHT:

What do we do in that space?

ANDREW IRWIN:

You're in that space in the section 8A(2)(a) and (2)(b). That's the kind of decision-making that should be going on in that space. And if you –

JUDGE WAINWRIGHT:

But that's all the decision-making behind the scenes, isn't it? I mean, what can the Tribunal say that's not a binding recommendation or a non-binding recommendation?

ANDREW IRWIN:

Well, before we talk about binding and non-binding, what you should be thinking is, "What is the best way to bring this to an end?" To focus on the Wai 85 claim as an example, the Crown paid miserly amount in the 1950s, underpaid what it should have. The Crown should reassess the way it did that and it should pay more, and it should pay more today. To whom should it pay? That's a question that the Tribunal hasn't made a recommendation about. But if we had a whiteboard about identifying, "What is the prejudice associated with that claim," and then, "What are the most appropriate ways to address it," another option would be return the land. And so let's think about that and let's think about all the pitfalls and problems with that including, "Is there proportionality between doing that and the actual prejudice that we've identified?"

So before you are even thinking binding recommendation or not, you are just thinking, "What should happen. What is the best action, the most appropriate action," and you are not thinking, "Ha, ha, I can force the Crown to do something through a binding process," or, "I potentially can't force the Crown to do something through another process." You should just be thinking, "What is the appropriate thing the Crown should do?" Having thought that, and I say that is

legitimate thinking within section 8A(2)(a) and (2)(b) because they necessarily ask you, “Should the land return,” or, “Even though the claim is well-founded that’s not –

JUDGE WAINWRIGHT:

So, all this thinking that we’ve done would, in your submission, be part of the reasoning for why we did not make the binding recommendations? I mean, I am just –

ANDREW IRWIN:

Yes.

JUDGE WAINWRIGHT:

I mean you are saying, you know, have these thoughts and I am thinking for the applicants, “To what end?” I mean, if at the end of the day we simply say, you know, “No, we don’t think it’s necessary for us to order the resumption of the land?”

ANDREW IRWIN:

Well that might be the end process. That might be the outcome.

JUDGE WAINWRIGHT:

Well, what is all the thinking matter then?

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ANDREW IRWIN:

Well, sorry, the thinking might be, again with my example Wai 85 a payment of money is the best way to account for that and, in fact, it should be this amount not just reassessment. It should actually be a distinct amount and furthermore, it should be paid distinctly to somebody. That might be the top of your list, it might not be. And so you might think under 8A(2)(b) – look, the return of the land is not required to remedy or compensate the prejudice that we have

identified, in fact, there is something else that should happen. That is your function. That is what you should do if that's what you think.

JUDGE WAINWRIGHT:

You mean we should simply say, "We don't like that option the return of the land. We think it would be better if instead this happened?"

ANDREW IRWIN:

Yes. You might think –

JUDGE WAINWRIGHT:

But that is simply part of our reasoning because we're not making -

ANDREW IRWIN:

Yes.

JUDGE WAINWRIGHT:

- the binding recommendation because that's not what should happen. What should happen is this other thing –

ANDREW IRWIN:

Yes.

JUDGE WAINWRIGHT:

- But we do not have any power to make any recommendations binding or otherwise about that.

ANDREW IRWIN:

Well, the Crown would have a concern if you have a concern about this distinction between binding and non-binding powers. And if I can address for me is possibly an elephant in the room, if the Tribunal is concerned in this way, if I could articulate it, "We're concerned that we can force the Crown to do

something and for a distinct outcome to happen through one process the binding recommendations process.

But we are really concerned about the section 6(3) process because we have these general concerns about the way in which the Crown goes about things when it receives recommendations from us. We know we can force and outcome here, but we can't force and outcome there.

Furthermore, in this situation, some of the claimants clearly are dissatisfied with what the Crown and a mandated group did with our section 6(3) recommendations and they have come here and asked for a resumption, so we are minded to go this way." It would be of concern that that was your kind of thought process in this regard because you are starting to build into your thinking your concerns about downstream consequences about what the Crown is doing with your recommendations.

If I can put in this way, if in 2010 there wasn't a remedy's hearing I don't think for this inquiry. Closing submissions were heard, the report issued and there were recommendations. Well, they were recommendation and they were all under section 6(3) and part of the recommendations were negotiate an outcome to this.

JUDGE WAINWRIGHT:

And also, you know, not insignificantly there was a focus on the Public Works Act –

ANDREW IRWIN:

Yes.

JUDGE WAINWRIGHT:

- And the Crown's use of the Public Works Act for these kinds of purposes and the Tribunal in that report and in others expressed its view about that breaching the Treaty fierce where full on breach of the Treaty and that the exercise here

was of that nature. Now I am not aware that the Crown has ever accepted that those views are correct?

ANDREW IRWIN:

I don't have any instructions on that. I didn't understand that the Crown's response to that part of the 2010 recommendations were something I needed to provide a response to.

JUDGE WAINWRIGHT:

Well, it's just that I mean we have had evidence about what the Crown was prepared to apologise for in relation to Wairarapa Moana and –

ANDREW IRWIN:

I'm sorry, I'm thinking about something different. I'm thinking about what the Crown has done with the Public Works Act since these examples of takings back in the mid-20th Century. Of course, legislation has changed and I'm thinking more in terms of policy development and legislative change. I haven't taken instructions on that for the purposes of this inquiry. That's what was going through my mind.

JUDGE WAINWRIGHT:

Right.

ANDREW IRWIN:

But sorry what I was posing was, it's counterfactual, back in 2010 say we had a remedy hearing instead of just going straight to the report. Of course, now because we have the benefit of the *Haronga* decisions and the Supreme Court decision came out in 2011. It was after your report. This consideration would have been had then. So in 2010 you would have had well-founded findings presumably. We would have had those. We would have had claims well-founded findings and we would be thinking, and you would be thinking, "What recommendations should we be making now to the Crown to remove or

compensate for the prejudice?" In an open way you would be thinking, "Well, what is the most appropriate redress for this or for that, or for this or for that?"

It would be fair to say that Tribunal practice by and large has been to actually not do that and simply say and encourage the parties to negotiate an outcome which has been part of the landscape of our business I think by the Tribunal, the claimants and the Crown for the past few decades. But if we were to step back into 2010 the kind of decision-making that you would be having is, "Let's look at all of the claims and let's work out what is the best action that the Crown could do to remove or compensate for the prejudice," and in this inquiry we're really focusing on just a few of the claims, we're not looking at all of the claims. Your Honour posed in your direction in the end of August some other claims, but even there we're not looking at all of the claims at all. And so back in the day, this is the point I'm coming to, the Tribunal would think, "This ends our inquiry.

Our function having inquired into and found claims to be well-founded," and some claims not to be well-founded it should be said, "We would now recommend the following happen and we stop," that is your function brought to an end. Back then you would not be thinking, "Look, we're terribly concerned about whether some action we can compel through a binding recommendation and some we can't compel," because of whatever reason and I don't know the reason that would cause you to have that thought. But you wouldn't be thinking that you would be thinking, "What is the most appropriate thing the Crown should do," and what I'm saying is that now I submit respectfully we are not in a materially different setting. In this regard is that, "I encourage you to start your thinking in that way," putting aside whether we can force the Crown to do it or not, just what is the most appropriate –

JUDGE WAINWRIGHT:

Well, I'm not sure that it is the ability to compel that is really front and foremost for us and I agree that it wouldn't have been then. We would have been looking

I think at the great swathe of Treaty breaches and the fact that Parliament decided to make available certain properties by way of binding recommendations of the Tribunal and we would be thinking, well there is a significant amount of value available to improve the situation of Wairarapa Māori, why would we not do that?

ANDREW IRWIN:

Well and you might be looking at Crown forests and thinking.

JUDGE WAINWRIGHT:

Exactly, well we are looking at Crown Forests.

ANDREW IRWIN:

You might be thinking there are claims to those forests, there are claims that relate to those forest and they might address the prejudice that we have identified.

JUDGE WAINWRIGHT:

Well and that all goes to the scale of the prejudice and the scale of the resources.

ANDREW IRWIN:

You might be thinking about a whole lot other recommendations that have nothing to do with land, for example the Crown should be doing something in terms of Te Reo Māori, the Crown should be doing something in terms of socio- economic issues, the Crown should be amending the Public Works Act there could be a whole lot of other things, that you could be thinking, and you did.

JUDGE WAINWRIGHT:

Well we did, I suppose.

ANDREW IRWIN:

And you might be thinking, but why on earth would we compound the breach associated with this land at Pouākani? Why would we be returning that to Wairarapa Māori when we've identified as prejudice, the very gifting of that land to Wairarapa Māori wouldn't we be repeating the prejudice if the purpose is to remove the prejudice and the prejudice was the giving them the land in the first place it would irrational to give it back to you, we're not going to do that you might think.

DR RUAKERE HOND:

Sorry, I'm stuck with the view that what you're explain sounds very similar to downstream consequences in thinking through those the similar argument that was used again – sorry, within the appeal. So, we are thinking about what the consequences of our decision in relation to the settlement are.

ANDREW IRWIN:

Yes, Sir what I was engaging with the Judge about was, there's no settlement, we're back in 2010.

DR RUAKERE HOND:

Yes.

ANDREW IRWIN:

And you're thinking what should happened and I was posing, and the Judge and I were discussing that there are certain things that could happen in the absences of any Treaty settlement and so there's no thinking about that Treaty settlement and I was trying to make the point, Tribunal members that you sought not to be concerned about bossing the Crown to do something through a binding recommendation or something through a section 6(3) recommendation that isn't binding on the Crown, you should just be thinking what is the most appropriate thing that should happened and that what you should have been doing back in 2010 and I mentioned you were.

JUDGE WAINWRIGHT:

Well, it is not quite right is it Mr Irwin because it is a not a green field situation, we have got a situation where we have parties before us?

ANDREW IRWIN:

Yes.

JUDGE WAINWRIGHT:

Asking us for binding recommendations. And in this situation, we have already looked at the broader situation and made some recommendations.

ANDREW IRWIN:

Yes?

JUDGE WAINWRIGHT:

When the applications are before us and we have got the well-founded decisions having been made and parties have said, that is what we want, that is what we think.

ANDREW IRWIN:

Yes.

JUDGE WAINWRIGHT:

Will address the prejudice, is it our job at that point to go, "in all the world, what could be best for Wairarapa Māori or is it our job to go this is what they have said they want, is that proportionate to the prejudice?'

ANDREW IRWIN:

It's the former, but it's not in the world could we do, as I put it in my written submissions from the range of reasonable available options open to the Crown from returning the land, from paying money, from doing something else altogether you should be thinking, of all of these reasonable options what is the most appropriate? And that's where we are at today and so coming to today and given the context you have one claimant, the Wai 85 claimant who was

dissatisfied with the Treaty settlement and instigated this process and that has forced you to complete your inquiry into the Wai 85 claim to start with – that's how this proceeding commenced.

And so, you must complete your inquiry, you must decide in terms of Wai 85 should the land return to remove or compensate for the prejudice of that claim or not? Is there some other option that should happen in respect of that claim? that's what you're forced now to do, to complete your inquiry into Wai 85. And now of course, because part way through this proceeding the settlement trust has now made an application, you should also consider the other claims that they have pointed too, that they say relate to the resumable land and complete your inquiry into those claims.

And the Crown says, and I'll deal with this later, "there are no other claims that relate to the land, so there's nothing else in that sense to complete." So you have your recommendations – we have them, you made them to the Crown nine years ago and despite that you do need to complete this inquiry as I've just said, and you do need to consider whether you should return the land or not for the distinct prejudice that identified for the distinct claims that have been identified as relating to the land.

And In that decision making, I'm saying you still should consider from a range of reasonable available options, what's the most appropriate because you might think it's just inappropriate to return this land to Wairarapa Māori in any way, subject to any form of condition that is lawful and that other actions should be taken to remedy the prejudice, and you're not bound by what the claimants say.

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JUDGE WAINWRIGHT:

No, no I think we understand that submission. Thank you.

ANDREW IRWIN:

I'm at my paragraph 61 and I think I've covered that.

JUDGE WAINWRIGHT:

Yes.

ANDREW IRWIN:

In the spades. I turn then to a general section on the Tribunals restorative approach to date, and I don't intend to read this out Your Honour I think we can make up some ground here, this will be very familiar to Your Honour, I think in particular I wanted to instead just interpolate four main points that I am doing in this part of the submission, but what we did was to look back at past Tribunal doctored around the restorative approach and to look at the whakapapa of that, of that doctored if I can blend Latin, English and Māori and these are the four points I really wanted to make.

In this evolving doctored the Tribunal has clearly issued a damage like approach and that's clear in my submissions and in these quotes that I refer to. Second, proposition in this doctored the Tribunal has looked to what is called the restorative approach to looking at remedial jurisdiction which seeks to restore tribes to an economic base, and I take from this and from the Muriwhenua example in respect of all of their claims.

JUDGE WAINWRIGHT:

What do you mean in respect of all of their claims?

ANDREW IRWIN:

The way I take it is this, is that we have finished an inquiry into a lot of claims, claims about everything about the land loss in the 19th century, pre-1866 Crown purchases and everything else. And you look at the situation that the people are in today, I took the Tribunal to be saying, our approach is not to, in a forensic way to assets damages as a Court would, but rather to look at what it would take to restore that Tribe to an economic base today.

And part of the reasoning, no doubt is that it is difficult to draw a direct nexus between a socio-economic position today and all of these claims and problems, Treaty breaches that occurred generations ago and a century or so ago. And that's what I take the Tribunal to be saying through this jurisprudence.

Three, the third proposition I wanted to distil from this is that the recommended action to the Crown to compensate for Treaty breaches should be proportionate to the prejudice and that's accepted as I understand it, in this proceeding.

And four, that the recommended action should not create fresh grievances. And I'm going to point to one very short sentence in the middle of a quote on my page 20, this is the Tūrangi township remedies report and the paragraph begins counsel for the claimants profess to her discussion and counsel then for the claimants said nor is the Treaty a contract and I just wanted to point that out.

JUDGE WAINWRIGHT:
That was gold.

ANDREW IRWIN:
It was and it's going to ring out later on in my submissions and so you will pick the bit where that will speak to you, even with more gold. That's that section of the submissions.

JUDGE WAINWRIGHT:
Thank you.

ANDREW IRWIN:
The next section of the submissions under the heading broader or academic literature consistent with the restorative approach what the Crown has done there is in these cases, in the '49 case, in this case and in the Mangatū case the Crown has been referring a broader literature, I wanted to bring it out of the footnotes and actually make it speak to you – I'm not going to go through it, but

what I've tried to do there is contextualise it chronologically just to show how some of the broader academic thinking about how to restore – sorry, how to address historical losses for aboriginal peoples

And so, there's a New Zealand take on this through Jeremy Waldron and then there's a more international perspective as well.

JUDGE WAINWRIGHT:

What context do you put that in though, Mr Irwin? Because it was Parliament that decided that the Tribunal should be able to make binding recommendations about asset, some of which are worth a lot of money.

ANDREW IRWIN:

Yes, so the question as to you know, how far back should we go, why restitution should be small is a policy matter, a philosophical matter that New Zealand has answered for us, in particularly for our Tribunal.

ANDREW IRWIN:

Well, we say Parliament has answered it for us, through your Tribunal. Parliament has said, you have the discretion to think about what you should recommend to the Crown, it should do to compensate for or remove the prejudice and the reason I've put this before you is to show that there has already been thinking about these issues.

Dr Yeabsley for example, wasn't alone in thinking about at a more abstract level, well what are some of the problems and pit falls and issues that we go through, and this doesn't give an answer, it doesn't say – this literature does not say you should make smaller wards? That's not what I say, and that's not what I'm saying it says at all. It's simply broader context, it is relevant, and I invite you too, I encourage you to read through my submissions on those points.

JUDGE WAINWRIGHT:

Indeed.

ANDREW IRWIN: (CONTINUES)

My page 24, under the heading **summary of the Tribunal restorative approach to date**, if I could have para 79 taken as red. The Crown draws the following principles from that approach that I've gone through in the written submissions and the Crown has sought to be consistent here, this is what the Crown has submitted in the Mangatū situation as well.

These principles are that any recommended action must be propositioned, the recommended action must be practical, the recommended action must be fair, and the scale of the recommended action should reflect its overall purpose, which seeks to acknowledge breaches and restore the relationship rather than punish the transgressor.

But I think this Tribunal has taken further, which is where I go to next and that was the session we on – the wānanga session on the tikanga of redress and quite respectfully with some trepidation I step out what the Crown had taken from that session but I'm really putting down in paper what I took Tribunal Hond in particular to be saying from the transcript at that sessions.

But this is what the Crown discerned from that session and the sub paragraphs 84 *Kawa* is a set of core principles those principles include, he kawa ora and he kawa tapu.

Those principles informed tikanga, the practises that are used in how we engage and relate to one another, *ea* or balance in this context is about how we maintain relationships *ea*, is therefore, about tikanga. Restoring *ea* is about identifying what it takes to achieve certain states or āhuatanga. The states that we are seeking to achieve are he āhuatanga ora and te āhuatanga whai mana, restoring and enhancing mana can result in the restoration of relationships in those states.

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And so, returning to the four principles that the Crown are discerned from the Tribunal's own restorative approach, the Crown recasts them in this way. Any recommended action must be proportionate taking into account the relative seriousness of the breach. Over compensating does not restore *ea* rather it perpetuates the state of imbalance.

The recommended action must be practical, that is the language of the statute. This requires consideration of the broader public interest in financial and other constraints on Government. It also requires consideration of what it actually takes to restore relationships. The recommended action must be fair in all the circumstances taking into account other redress, monetary or otherwise in respect of the wrong as well as tikanga. And the scale of the recommended action should reflect its overall purpose which seeks to acknowledge and restore the relationship, such that he āhuatanga ora or he āhuatanga whai mana can be achieved rather than punish the transgressor.

I set out next a summary of the Crown's evidence, and evidence that was called by the Crown I should say. I didn't intend to read out the section. I will come back to it though, because no doubt you will have some questions about some of this evidence, but I thought I would come back to this, as I go through the reasons why I say for instance, resumption shouldn't happen.

I thought, I might at this point though, just turn to Mr Fraser's evidence, because there's a question mark as to its relevance, and the relevance of the evidence was challenged by the Wai 85 claimants and the Tribunal issued a direction which is 2.629 and that addressed the issue and paras 13 to 15 in particular were about the relevance of Mr Fraser's evidence, and the Tribunal said, "Material in Mr Fraser's evidence about the Crown's ideology of compensation is useful in a context where there is otherwise no benchmark. The Tribunal needs to know about other thinking that has been done on this topic. Evidence

about the Crown settlement processes is much less relevant, however. So, the Crown had understood there was some relevance.

I think I've been clear already, but I am going to repeat it for the avoidance of doubt that the Crown submits that in terms of section 8A the Tribunal should not defer to what the Crown has negotiated with the mandated representative of the claims. And I also submit in that context, section 8A, "The Tribunal should not consider itself in anyway constrained by the quantum that was reached."

In these submissions Your Honour –

JUDGE WAINWRIGHT:
Is that stated anywhere or is that an oral submission?

ANDREW IRWIN:
That's an oral submission. I think I've already made that, expressed in oral, in earlier proceeding, probably in the opening submissions.

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I don't want to go over ground but – So, the Crown has submitted you're in the space of section 8A and you are considering should the land return or should it not. And the Crown has also submitted in these submissions, you can make other recommendations under section 6(3), and as we discussed earlier, Your Honour, the Court of Appeal's decision in Horanga was to the affect –

JUDGE WAINWRIGHT:
I am sorry to take you back, I had understood that you said, Mr Irwin, that we could not make up a section 6(3) -

ANDREW IRWIN:
That's what I – No, no-no, no I'm saying –

JUDGE WAINWRIGHT:

- recommendations.

ANDREW IRWIN:

- I'm saying you can, you can make section 6(3) recommendations and sorry, I'll come back to the point I was going to make a bit later. Let's address that now.

JUDGE WAINWRIGHT:

I thought that you were saying in – when we have – when we engaged before that your submission was that we had made the relevant recommendations and we did not need to say anymore.

ANDREW IRWIN:

Well, yes, I am saying that, but I have to accept that it is open to you to consider making new recommendations under section 6(3).

JUDGE WAINWRIGHT:

Okay, I misunderstood that.

ANDREW IRWIN:

I say you don't have to, what you've done is sufficient, but I do accept that you could if you considered it helpful make more section 6(3) recommendations.

JUDGE WAINWRIGHT:

Okay, good. Thank you.

ANDREW IRWIN:

When you're in the space of section 6(3) and you are considering all the circumstances of the case, I think I would have to accept that you could look at what the Treaty Settlement is doing because if you are thinking in all the circumstances of the case, what should – what's the best thing that could happen bearing in mind we did make recommendations, and bearing in mind

we have evidence of what the Crown negotiated with a mandated entity representing the claimants.

Do we need to make any further recommendations or not? And so, I have to accept in that space that you could look at the Treaty Settlement and you might think, well, nothing further is required, and you might not, you might think something further is required but that would be in the space of section 6(3) considering all the circumstances of the case.

JUDGE WAINWRIGHT:

That is quite difficult though, isn't it?

ANDREW IRWIN:

It's very difficult.

JUDGE WAINWRIGHT:

Because, so you are saying, we cannot look at the settlement with purposes of determining whether we make section 8A recommendations, but we can look at it for the purposes of section 6(3) recommendations.

ANDREW IRWIN:

That's what I'm saying.

JUDGE WAINWRIGHT:

I think you are dancing on the head of a pin there.

ANDREW IRWIN:

Well, the pins weren't my choosing and I'm rationalising what the Court of Appeal were saying in that paragraph –

JUDGE WAINWRIGHT:

Yes.

ANDREW IRWIN:

- where it was saying, “Look, all the circumstances of the case, that phrase isn’t in section 8HB, and so it’s not in section 8A”.

JUDGE WAINWRIGHT:

No, but if we are looking – I mean, the idea that the Tribunal has entirely distinct cognitive processes for recommendations under section 6(3) and recommendations under section 8A, it does not seem to me to be a real-world proposition. I just do not – the idea that when we are looking at all the circumstances of the case for the purposes of section 6(3), we can look into the settlement, but we cannot have regard to that when we consider whether we make section 8A recommendations, really? I mean, if we are thinking about making recommendations which – and you have said we need to look at the world, you know, all together and not limit ourselves to thinking about the options under section 8(A). So, how would we compart mentalise that, that is not how the brain works?

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ANDREW IRWIN:

Well, if I can say what I’m not saying, I’m not saying as a reason not to resume the land, take into account the Treaty settlement, I’m not saying that I’m saying you can disregard the Treaty settlement.

JUDGE WAINWRIGHT:

So, what are we looking at it for then?

ANDREW IRWIN:

Well that’s a good question. You could legitimately say I think, bearing in mind you did – I read out part of your direction where you said -- you referred to a benchmark in the settlement is helpful in that regard. You might look to it in that regard, you might say look our job is just to recommend to the Crown what it should do and had we done this in 2010 it would have been a whole lot easier,

because there's no Treaty settlement in front of us, but don't consider it out job to be the police of what the Crown does in terms of our recommendations, rather our function is to recommend.

And so, we made recommendations that the Crown return Wairarapa moana and reserved around it, and that it does more things to improve the decision making that happened in terms of the environment and ecology of Wairarapa moana. And those recommendations speak up to us with as much logic today, as they did in 2010. We don't need to remake those recommendations and actually if the Crown has complied with that, through a negotiated settlement or not doesn't matter that's what we think should happened. And that would be a legitimate approach for you to take, because you would be complying with your functions.

JUDGE WAINWRIGHT:

But, you have not answered the questions of why we are looking at the settlement.

ANDREW IRWIN:

I'm sorry, I have, you said in your direction you would look at it in terms of benchmarks?

JUDGE WAINWRIGHT:

No, I said that the Crown's policy views on levels of compensation might inform our thinking about how you arrive at an appropriate level of redress because there's not very much in that space, so we know that one of the parts of our society that has thought about that is the Office of Treaty settlements. So, when Mr Fraser was coming to talk to us I said we would listen to what the thoughts that the office had had about how you come up with an appropriate package for claimants. I did not say that this draft settlement was relevant.

So, and I think you have just said that in our section 6(3) cogitations that we could look at that settlement, but not in relation to whether to make

recommendations under section 8(A) and I am saying, what is the context for our looking at that settlement under section 6(3) which we're not allowed to look at under section 8(A) because I'm not sure what that space is.

ANDREW IRWIN:

And sorry, possibly you've answered your own question, Your Honour but what I've said is that, in the space of section 6(3) you've made a suite of recommendations that's part of the context, those are part of the circumstances of this case, that's where we find ourselves today there is a Treaty settlement, do you need to make other recommendations?

ANDREW IRWIN:

What does the Treaty settlement got to do that, that is what I am asking you?

ANDREW IRWIN:

Well, you might think the Crown has – the settlement addresses what we recommended there's no need for us to make any further recommendations, and so under section 6(3) you might be thinking it stops because if you have in your mind claims about Wairarapa moana.

JUDGE WAINWRIGHT:

Hang on a second Mr Irwin that just does not make sense, because if we go, we have looked at our recommendations, we have looked at the draft settlement that meets the situation, so therefore we are not going to make section 8(A) recommendations. Surely, that is where that leads us?

ANDREW IRWIN:

No, I'm not saying that.

JUDGE WAINWRIGHT:

I know you are not saying it, but I am saying that is inevitably where that leads us if we are looking at the settlement under section 6(3).

ANDREW IRWIN:

Look, as far as I can take this point I think my position is this, you are in difficulty territory as I said earlier.

JUDGE WAINWRIGHT:

Yes.

ANDREW IRWIN:

As we discussed in terms of section 8(A) looking at the Treaty settlement and I'm not asking you to look at the Treaty settlement in that context.

JUDGE WAINWRIGHT:

Okay. Are you asking us to look at the Treaty settlement –

ANDREW IRWIN:

I'm not really putting it before you, look if I can be completely honest with you, one part of these submissions was the Crown complied with your recommendations and we took that section out because we found some difficulty with how it actually did fit, when we thought about your jurisdiction here and how that's properly construed.

JUDGE WAINWRIGHT:

And I think where you are now, in this interchange is sliding around the edges of that, because I think that is leading you into the same difficulty territory for consistence with the rest of your submission.

ANDREW IRWIN:

Yes, and so, in the rest of the submission I don't point to, as I might have done in an earlier draft I don't point to the settlement and say, we did it, don't worry.

JUDGE WAINWRIGHT:

Yes.

ANDREW IRWIN:

So, I'm not saying that.

JUDGE WAINWRIGHT:

Okay.

ANDREW IRWIN:

There was one point though Your Honour and I feel obliged to mention this and let me just raise it and we'll see where it is, I understood you to say yesterday that you said, the evidence was the Crown had not complied with your recommendation in respect of re-assessing the compensation that was paid for the taking of the land in the 1950s.

JUDGE WAINWRIGHT:

Who gave evidences, I think it was Mr Hemi?

ANDREW IRWIN:

Yes.

JUDGE WAINWRIGHT:

Who gave evidence about how the incorporation wanted those specific matters to form part of the kaupapa of the settlement and that they had not succeeded in bringing those on to the agenda, that was my understanding of his evidence.

ANDREW IRWIN:

And what I wanted to say, was Mr Fraser's evidence deals with the extent to which compensation was provided for the Wai 85 aspect of the claims in the Treaty settlement that his evidence at paras 41-43.

JUDGE WAINWRIGHT:

All right. I am not sure what we could do with that.

ANDREW IRWIN:

I'm not sure either, but I felt obliged to mention it because of what Your Honour had said yesterday.

JUDGE WAINWRIGHT:

Yes, yes. No, yes. Okay.

ANDREW IRWIN: (CONTINUES)

I think I can turn now, members of the Tribunal to the next main section of my submission on page 34, which is the heading **should the Tribunal make further recommendations under section 6(3) in respect of the Wai 85 claims**. And just sticking with the heading any recommendation under section 8(A) is included in a section 6(3) recommendation, so that's why I refer to section 6(3) in the heading.

And so, I look at **what are the relevant well-founded Wai 85 claims that relate to the land**, and I don't think there is dispute in this case between myself and my learned friend for Wai 85 claimants. But looking at the statement of claims which I do, there were three elements that related to the Pouākani block between 1916 and 1940s the beneficiaries of the block were unable to use, enjoy or take advantage of the land. Secondly, there was little and inadequate consultation when the Crown deprived them of the land through the Public Works Act.

1210

And thirdly, there was in adequate and untimely compensation, and the Tribunal found those claims to be well-founded, and I set it out there. The Tribunal found the Crown offered Wairarapa Māori land at Pouākani that was vastly inferior in quality to the farm land in the vicinity of Wairarapa Moana, and unsuitable in every way being absurdly far away, without road or access, undeveloped and incapable of development by people who lacked Māori.

Critically for Māori people, it wasn't their ancestral land, and so they couldn't take advantage of it.

Coming back to the claim, the first claim was the Crown gave them land that they couldn't really use, or that's what you found, and that was part of the prejudice, it was so far away. But there were problems that you found in relation to that as well, including critically for Māori people, it was not their ancestral land.

In terms of that second claim you found that the notice that the Crown gave for the taking of the land was inadequate. I don't think I need to go through that.

"106.3, the Tribunal found the process for assessing and paying compensation was poor, with many years of delay and unnecessary stress to the owners. It was niggardly in the extreme, and this finding was the basis in which the Tribunal found that the compensation principles applied, allowed the Crown to pay a price that was discounted, because it hadn't provided road or rail access to the lands since 1916, and because the only betterment that had occurred came as a result of the hydro works.

Now, the Crown accepts that these three claims relate to, for the purposes of section 8A(2), the land sought by the Wai 85 claimants. These are the well-founded claims that give rise to the Tribunal's jurisdiction to make, potentially, binding recommendations.

Further recommendations are required in respect of these claims. Indeed, the Wai 85 claimants appear to accept this is so. Mr Smiler summarised his position in his evidence of July last year as being this. He addressed the Wai 85 claims under three headings, the compulsory acquisition of the land, the power line corridors and the Mangakino Township.

He noted the recommendations you made in 2010. He concluded by saying the remedy he sought was a binding recommendation returning the land at Pouākani. He also said, and I quote, "In addition we seek further recommendations that the Crown comply with the earlier recommendations to compensate the incorporation directly for breaches."

The Crown understands this to mean the Wai 85 claimants seek resumption of the land at Pouākani in respect of the claims that relate to the resumable land, and otherwise ask the Tribunal to confirm the section 63 recommendations it made in respect to the power line corridors in Mangakino leases, and I don't understand my learned friend for the Wai 85 claimants has said anything to the contrary.

So, what was the prejudice that followed from these actions? And this is an important section of the submissions, and I want to make some preliminary comments before I get too far into it. Your report did not make a clear and precise assessment of the prejudice that flowed from the specific breaches at issue, and I think in saying that, what I am really saying is that you did not say that prejudice was ex amount such that the Crown should pay Wai amount. I think that's what I mean in saying that.

1215

JUDGE WAINWRIGHT:

Can I just clarify? So, that the reason that we are focussing on these claims is because these are the only claims that the Crown says relate to the land in question. So, these are the only claims in respect of which we potentially have jurisdiction.

ANDREW IRWIN:

So, the Crown says.

JUDGE WAINWRIGHT:

Yes.

ANDREW IRWIN:

Yes.

JUDGE WAINWRIGHT:

Okay.

ANDREW IRWIN:

And I'm also focussing on the Wai 85 claim. Later when we look at the other claims, we accept – I think the only thing that we accept insofar as they relate to the land to the extent that they repeat the claim, that is the Wai 85 claim.

JUDGE WAINWRIGHT:

Right.

ANDREW IRWIN:

So, this is really it, as far as the Crown is concerned.

As noted above, the Tribunal did not find that the Crown's compulsory acquisition of the land per se was in breach of the Treaty. It found the consultation undertaken and the compensation paid, were in adequate and in breach of the Treaty.

So, in terms of thinking about what the prejudice is, this isn't the situation where the Tribunal said, "The prejudice was actually the taking of the land. The prejudice was associated with the consultation and the compensation paid," so the Crown didn't pay enough money. That was the claim that you found to be well-founded, and so, obviously the prejudice is a financial one.

So, the preliminary comments I wanted to make is first context is all important of course, when looking at prejudice.

Secondly, 114.2 the context here was that the land was taken in the national interests and in saying that I of course, do not relegate any of the finding of the tribunal, the findings are a given and we're just trying to work out what should happen as a result of the findings. But part of the context is the land was taken in the national interests, and I address in that paragraph the evidence of Mr Parker that provides more context to the way in which the land was taken, and also the evidence of Dr Meade that is consistent with that notion that the land was taken for a national purpose. I don't think I need to read through that.

My paragraph 114.3 and part of the context is that the Crown did have alternatives and I'll discuss those a little bit more, but in short it could have constructed another power station Whakamaru at its original planned highest capacity of it could have followed treasuries advice to increase electricity prices to curb demand at the time.

JUDGE WAINWRIGHT:

Just to take you back to the reasoning of the Tribunal in relation to this, Mr Irwin as you know the Tribunal position on Public Works takings was that – is that the Treaty of Waitangi does not permit the Crown to compulsorily acquire Māori land, because there is that basic premise that Māori keep their land until they wish to sell it.

ANDREW IRWIN:

Yes.

JUDGE WAINWRIGHT:

And so, there is a tiny window where if there is a national exigency and the Crown has explored all the other available option then there may be circumstances in which the Crown could justify taken Māori land.

ANDREW IRWIN:

Yes.

JUDGE WAINWRIGHT:

So, in this case it was not clear that the case for the national exigency was made out, this kind of evidence was not actually before us.

ANDREW IRWIN:

Yes.

JUDGE WAINWRIGHT:

Nor was there evidence that the Crown had exhausted all their other possibilities, because again the Crown did not bring evidence about the national exigency or whether there were alternatives that it had explored. So, because we could not make a determination about those things we said, well we are not sure about that, but we do know that it is a very high bar for the Crown when it is taking Māori land compulsorily and it could only justify itself, if it could take this land and no other.

1220

ANDREW IRWIN:

Yes.

JUDGE WAINWRIGHT:

No, other land would satisfy it and its needs at the time, and therefore, the Crown cannot have it both ways. It cannot say, "This was uniquely suitable, and we are going to pay hardly anything for it." Those two are mutually exclusive. So, we said, "If the Crown can dress up its actions as being necessary because of the unique circumstances of the land, and because no others were as good, is got to pay a lot for it, because it is meeting a unique need.

So, to go on and say, "The Crown could have had cheaper alternatives," defeats that argument, because if the Crown could equally have taken other land, then it was not justified in taking the land at Pouākani for these purposes.

ANDREW IRWIN:

So, the Tribunal found the Crown's actions to be in breach of the Treaty, and that's a given, that stands, the Crown's actions were in breach of the Treaty?

JUDGE WAINWRIGHT:

Well, that was the argument.

ANDREW IRWIN:

Yes, yes.

JUDGE WAINWRIGHT:

You know, that is how our argument proceeded, yes.

ANDREW IRWIN:

Yes, yes, and I'm – please do not take anything from what I'm saying is to relitigate or not. I think quite appropriately, given you did not make findings about – and you did not have that evidence about the extent to which it was taken in the national interest and options, I think quite appropriately in this inquiry you have received evidence about those two issues, and the evidence doesn't change your finding, and I'm not suggest that at all. But it goes towards how we assess the prejudice and that's the purpose of these submissions.

And so, and just to focus on options, because if the Tribunal's position is that the taking is in breach of the Treaty unless the Crown can show it is taken in the national interest and as a last resort, there is nothing else it can do.

This evidence suggests, yes there was a national need for this land to be taken. This evidence suggests there were other options open to the Crown, but what the evidence does not say is that the Crown had one option, just this land and –

JUDGE WAINWRIGHT:

But you understand what I am saying?

ANDREW IRWIN:

Yes, yes, well –

JUDGE WAINWRIGHT:

Because if the Crown is now saying there is evidence that there were other options available for the Crown, then we now have evidence that would allow us to make a finding that the taking of the land breached the principles of the Treaty.

ANDREW IRWIN:

Well, I don't understand this process to be one where you go back, and you make new findings of Treaty breach. I don't understand that to be this process.

JUDGE WAINWRIGHT:

Well okay, well if that is not the process, then it must be that you have to proceed on the basis of the premises of – that were established by the evidence that were before the inquiry. I do not think you can have it both ways.

ANDREW IRWIN:

Well, I'm not trying to have it both ways Your Honour. There was no finding made about whether it was taken in the national interest, and what options the Crown had available to it. Those, as you say, were not in evidence, and what I'm respectfully submitting is that you are entitled to look at the circumstances of the Crown's acquisition and put it in its proper context because otherwise, it is to put it in an improper context, which is silly. We should be able to work out what was the real prejudice? What was really going on? How much should the Crown have paid for the land? And that's what I'm about to get into, because that issue of – so, it doesn't go towards Treaty breach or not. It does go towards how much money should the Crown have paid.

JUDGE WAINWRIGHT:

Mmm, I'm struggling with that Mr Irwin, it seems to me that if you are not leading the evidence in the inquiry to enable us to make a finding of Treaty breach, for

you now to be leading the evidence to say that the damage to the claimants who were affected by the Crown's actions, is less. That is – it is kind of like ESTOPPEL.

ANDREW IRWIN:

Well, I don't see it in that way Ma'am. And the way I see it is this, is that you had your inquiry. You reached a finding of Treaty breach. There were certain premises to that finding and it was on the basis of the evidence before you.

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Now, you are in the process of considering what actions should take to remove the prejudice or compensate for it. It is relevant to look back at the circumstances of the Crown's acquisition in question because we need to know what is the scale of prejudice. You didn't reach any final or firm or precise view as to what that was, and so, to be helpful, the Crown has looked at – in the evidence that has happened in this inquiry, has been to look at all of the circumstances around that taking, to work out what the actual prejudice was. Evidence was led by the Wai 85 claimant through Dr Meade that went through issues of what options were –

JUDGE WAINWRIGHT:

No, I understand that, I understand that.

ANDREW IRWIN:

So, I was hoping –

JUDGE WAINWRIGHT:

I am just - address it by all means.

ANDREW IRWIN:

But that's the concept.

JUDGE WAINWRIGHT:

But I am just conscious that if this evidence had been available in the inquiry, the Tribunal's finding would have been that the Crown's breach was greater, because it had available other land that wasn't Māori land that it could have taken to fulfil its needs and that wasn't there then. So, it seems to me that there is a difficulty with it coming before us now in this other context, to undermine the scale of the breach. But I am signalling that Mr Irwin, but feel free to –

ANDREW IRWIN:

I think the thing that I just want to say to cap off this discussion Your Honour is, I am not trying to undermine the breach or the prejudice through doing this. I'm trying to assess what is the prejudice that is associated with your finding, and that's where I see these submissions going, and that's what I see my role to be.

JUDGE WAINWRIGHT:

All right.

ANDREW IRWIN: (CONTINUES)

My paragraph 114.4:

"Any assessment of the scale of the prejudice must take into account the fact the land had little economic value at the time it was taken. The Tribunal found that the land at the time it was granted, so some decades previous, was vastly inferior in quality to the farm land in the vicinity of Wairarapa Moana and completely undeveloped. The Wai 85 amended statement of claim states, 'that the Pouākani land was of now benefit to the beneficial owners until the development of the hydro-electric scheme, and its associated infrastructure.

And Judge Harvey (who assessed the compensation) noted in 1946 that the 'area [had] been practically worthless and valueless by reason of there being no access".

The compensation actually paid (£510) was premised on the land's value at the date of entry on to the land, being 1945. That was before the Crown had constructed a road providing access.

Had the former owners been able to sell the 787 acres of land in an open market at the time, it is reasonable to assume they would have received something between what they were awarded in compensation and what they asked for at the time."

And I am going to come back to that, because there's a lot in that, and I want to make further submissions about that.

Perhaps if I can just 114.7 to be taken as read, and 114.8.

"114.9 It is uncontested in this proceeding, I understand, that the land held no spiritual or cultural value to the former owners at the time the land was taken."

And again, I address that later.

"Finally, it must be acknowledged that the former owners of the land could never have built a power station on the land. This is something I will come back to later. They lacked the capital and legal ability to do so."

And note the evidence of Dr Yeabsley and also Dr Meade in that regard. That brings me to an exciting section that I have been looking forward to going though and it is a great shame that we have also come to the lunch adjournment time, but I wondered if after lunch, Your Honour, we might start at my page 41. It is truly exciting, I'm really looking forward to that.

JUDGE WAINWRIGHT:

All right, well we will try and keep our excitement in hand, while we are having lunch. Engari e te whānau, tae atu ki te hāwhe pāhi i te tekau mā tahi karaka.

HEARING ADJOURNS: 12.30 PM

HEARING RESUMES: 1.31 PM

ANDREW IRWIN:

Kāti, tēnā rawa atu anō ngā mema a Te Rōpū Whakamana i te Tiriti me kī tātou katoa.

I promised high expectations for this next section, so I must deliver, and I would like to depart from the written document just a moment, but where I'm at is page 41, the heading **compensating for the land's hydro-electric potential**.

CONTINUES CLOSING SUBMISSIONS #J103 FROM PAGE 41

"And I say there that the Tribunal made a recommendation and that was that the Crown should reassess the compensation paid to the owners for the land taken in light of new, Treaty-complaint criteria, including two things:

(a) Compensation for the unique qualities and hydro potential of the land;

(b) And to compensation for all 'betterment' effected by the hydro works."

What I would like to do here, Your Honour, is to provide you some assistance with evidence that is relevant to those two things. How much should the Crown have paid for the betterment effected by the hydro works? Indeed, what do we just mean by that? And so, I would like to take you there first because that's actually relatively easy.

The second thing is, of course, very hard and that is to work out how the land should have been valued in terms of its characteristics and hydro-electric potential, that's very difficult but I'm going to take you there and see how the evidence can help us with both of these two things. And the head space I'm in Your Honour, is trying to help you assess the prejudice and what compensation should be given to the prejudice. So, that's what I'm trying to do.

So, I would like to just depart from the written document, I want to look at some evidence around betterment. And I'd like to take the Tribunal to document #J26, it's not in my bundle, I'm sorry, but it is of course on the record and I'm sure it will be able to be put in front of use. This is the evidence of Mr James Parker – should say, James Brent Parker and in particular to paragraph 41. Mr Parker's evidence –

JUDGE WAINWRIGHT:

Just say again – it was #J what?

ANDREW IRWIN:

#J26.

JUDGE WAINWRIGHT:

Thank you.

ANDREW IRWIN:

And I am looking at paragraph 41 and before we get there, Mr Parker's evidence went into providing some context for the taking and he went through the taking itself, he looked at the *Gazette Notices* , the manner in which it was taken, the acres that were taken and also, he looked at the compensation that was paid and that's what I would like to look at and at paragraph 41 Mr Parker says, "The Crown's valuation" – and if I just pause there. So, I think we know there was a valuation process, the Crown had its valuers and the owners had their valuers and they came up with different valuations for the 787 acres and the Māori Land Court determined what the compensation was to be.

"So, the Crown's valuation was based on the value of the land at date of entry in late 1945." Now, the date of the valuation mattered, it really mattered because at that point there was no access. Mr Parker says, "that meant the valuation was for the land before access had been constructed by the Crown in the period following that." And so, that meant the land had a lower value.

If we just turn over the page at para – at Mr Parker's paragraph 43, Mr Parker says, "In contrast, the valuations provided by the witnesses for the former owners were based on the value of the land at the taking, that's in 1949 and 1950. And that meant their valuations were based on the land having access." So, a road had been constructed and it provided access and so the valuations were higher.

From a legal perspective, this was all determined by the Finance No.3 Act of 1944 and I've put that in the bundle and I might take you there shortly but in a nut shell, as Mr Parker says in the second to last sentence in paragraph 44, "There was some discussion during the compensation hearing n when the specified date was, and it appears the Court accepted that it was late 1945."

What the legislation did is it said, "You determine the value of land at the specified date and that under the legislation was the first date of entry and the Court determined that that was in 1945, before a road had been constructed, meaning the value of the land was going to be lower.

If we just turn the page in Mr Parker's evidence, at paragraph 46, he helpfully sets out a table showing you the different valuations and the Court award in that table and the column we are interested in is the freehold area, that's the area of the 787 acres. The columns, particularly the leasehold area, that relates to other acres.

So, the Crown's valuation was at the low end, 515 based on the date, before access had been provided. The owner's valuation were at the higher end, £1800 and £1965.

Now, if we just pause there and think about betterment, the Crown's valuation did not take into account every betterment because it was at a date before the road had been constructed which added value to the land. The owner's valuations did, they took into account, betterment, that is, the value of the

increase by way of access. Their valuations are valuations of the land at a certain point in time, which is 1949 and 1950, including betterment.

The only reason why that was not the right thing to do in terms of the law was because of the 1944 legislation, it said, "You assess it at an earlier date." And so the Court award was at the lower end. Indeed, it was £5 lower than what the Crown valued it at, £510. And so, the Courts' award did not take into account any betterment. If we were to ask how much should the Crown have paid, taking into account your recommendation that the compensation be paid for all the better affected by the hydro-works. We can look at the valuations provided by the owners in that table and we can say that the – let's say the higher end of the two, 1965, is a land valuation that takes into account the betterment that had been affected at the time the land was taken. That makes sense?

UNIDENTIFIED SPEAKER: (13:40:19)
Yes.

ANDREW IRWIN: (CONTINUE)
The second part of your recommendation was to look at compensation for the unique qualities and hydro potential of the land and that's a far more difficult assessment as this hearing – this proceeding has showed, in the evidences It's showed. And I want to take you through some of the evidence in relation to this aspect of how much should the Crown have paid.

At my paragraph 171, I make the point that the Crown paid compensation under the Public Works Act regime that reflected the value the land had – sorry, the reason the Crown did not pay compensation that reflected the value the land had as a potential location for hydro-electric power was because really if the 1944 legislation and it might help Your Honour If I briefly take you to that legislation I can show you, why that was the case.

JUDGE WAINWRIGHT:

That's alright you do not need to do that.

ANDREW IRWIN CONTINUES BOE #J100 PAGE 42:

Okay. If we were to go back in time and remove the 1944 legislation and ask the question how would compensation have been determined and I'm departing from interpolating here to my written submissions. The situation would have been this, and I'm going to take you to a case that helps to illustrate this.

There would have been a market value assessment of the lands of value, that valuation could have taken into account the potential the land had as a location for a power station. The only reason that couldn't happen was actually because of the 1944 legislation expressly stated that you couldn't take into the account the purpose for which the land was being taken. So, if we remove the '44 legislation the assessment could have happened. How would it have happened?

I'd like to take you to a case to show you how this kind of thing did happen, it's in my bundle. It's at TAB four? And this is a decision of 1914 of the privy council and by of interest their essential facts of this case were that a company, the seed as rapids manufacturing and power company had been given the statutory authority to acquire land compulsorily, so this is case about a Public Works Act taking.

It wanted to take land and a river the Saint Lauren river. It wanted to take three pieces of land for the purpose of a hydroelectric power scheme. Two of the pieces of land were Islands in the river and one was a prominent tree.

If i turn the page to my page 47 in the bundle, simply by way of interest you'll see in the second bottom paragraph the amounts of money that the company offered to pay for these three pieces of land and the river. They offered to pay $2800 dollars, 2 hundred dollars and seven teen hundred dollars. Now the owners didn't accept that, they thought that they should be paid more money

for the taking of their property, and there was a process for arbitrating an outcome.

And at the next paragraph, the case says, “the evidence adduces by the appellants before the arbitrators took into the account only the agriculture and residential value of the properties. So, if we just pause there and draw and analogy to this situation the values that the company was then offering were kin to the value that the Crown paid in this case, that is valuation based on the Agricultural and residential value if there is a for the land.

And as I say, the owners didn’t like that. The evidence that the adduced about how much they should be paid, is really what the case is about and that’s what I want to talk to you about. So, over the page in the decision at the top of my page 48, it states the evidence that given for the respondent was mainly directed to the value the appellant company of the lands and writes x appropriated and the expenditure which they would save by acquiring them and it says, at the end of that paragraph this was described further in the judgement and it’s that description that I want to take you too, because it’s important.

The judgement of their Lordships was delivered by Lord Dunedin, his Lordship decision starts at my page 50, but I wanted to take you to my page 54 where he describes the evidence that was led and near the top of the page there’s a paragraph beginning there Lordships of sort and vein and it’s the next sentence, that describes the evidence all the testimony is based on the fallacy that the value to the owners Is a proportional part of the value of the realised undertaking, by undertaking they mean the realised power station, as it exist in the hands of the undertaker that is the acquiring authority, and that’s what the evidence was that the owners sought to lead and it’s described further down the page.

In the middle of the page his Lordship describes the evidence by sighting it, he refers to some evidence from an engineer and near the bottom of that

paragraph the engineer describes his own evidence in this way, he sought to determine a value that the owners should receive in advance a compensation based approximately upon the net earnings of the power development and the ratio of the head controlled by these two properties to the total head capable of being developed.

In other words, the evidence was from an ex ante point of view, how much will this power station be worth to the acquiring authority and let's work out a proportion of that as being the compensation that should be paid to the owners. That is the approach that Dr Meade took in this case, and I don't think I need to take the Tribunal to it, I'm going to read just a short sentence from his well it won't be short but a sentence from his report. In his report #J37 at paragraph 29?

1350

JUDGE WAINWRIGHT:
#J?

ANDREW IRWIN:
37.

JUDGE WAINWRIGHT:
37.

ANDREW IRWIN: (CONTINUES)
Here Dr Meade describes his losses-based assessment as being this, "I estimated the incorporation's Maraetai related losses as the fair share of the net social benefits that the Maraetai Scheme was expected to create, which the incorporation was never paid."

And so, Dr Meade has done the same thing that evidence did in the case that I referred you to. He's looked at what the expected value of it would be in the

hands of the inquiring authority and he's worked out a proportion of that as being how much should be paid to the owners.

Coming back to the – there are some other references to his evidence that would help just to cement in that notion of what he was doing.

I'll just two brief references to the transcript of Dr Meade's evidence, so this is document 4.12, which is a transcript of an earlier hearing at page 255.

On this page, "Your Honour asked him some questions about his approach and you said near the top there: 'I understand that what you're valuing is a fair share for the incorporation, the difference between what was derived from utilising the opportunity to have the power station and the next best alternative, yes."

So, that is not – that's valuing the opportunity rather than the land, isn't it? If I would say formally, you would say and 'Yes,' and I am not a land valuer, so I'm not trying to value the land. So, Dr Meade did not try to value the land. He was doing something else.

And then he talked about his ticket to a nightclub analogy and he goes on to talk about that on the rest of this page and over the page, and he makes the point here. If you think it as an entry ticket, they have got this fantastic nightclub that you could only get into with the entry ticket. Yes, and so, what are they going to do to get paid for this entry ticket?'"

So, what I take him to be really saying is, what is the Crown going to pay to enter the nightclub so to speak. And he goes on to explain that over the page. And the reason I just refer to that nightclub analogy is Dr Meade was looking at it from the point of view is of what was the value to the Crown in all of this, and therefore, how much of a proportion of that value should it have paid to the owners, is fair compensation?

Coming back into the decision of the Privy Council in my bundle at my page 54. Two paragraphs down. His Lordship, Lord Dunedin says, "For the present purpose it may be sufficient to state two brief propositions . The value to be paid for is the value to the owner as it existed at the date of the taking, not the value to the taker." That's one proposition.

1355

And the second proposition is, "The value to the owner consists in all advantages which the land possesses, present or future, but it is the present value alone of such advantages that falls to be determined."

And this His Honour's decision goes, or His Lordship's decision goes on to say the approach taken by the owners was wrong, because they were looking at it from the future perspective of the owners, the acquiring authority and working out a proportion of that that should be paid to the owners, and the decision goes on to say that that was – that had difficulties over - on my page 55, it says, "Moore honey combed by fallacy."

And the effect of the decision was to send it back to the arbitrators to work out the proper valuation, not based on just the land value as agricultural and residential land, not in the way that they had done and had regard to evidence of a proportion of the value in the hands of the inquiring authority, but simply just to go back and say, "What is the land's value taking into account something more than just the agricultural and residential value that the land had." In other words, take account of the hydro-electric potential the land had and value it accordingly, but not in the way that you did. It is a market value; the decision effectively says.

JUDGE WAINWRIGHT:

Where is that Mr Irwin?

ANDREW IRWIN:

I am just looking – sorry, it is a different version of the decision. I marked up another version. There's reference to there being I think an imaginary market where this is taken into account, and that's the quote that I'm looking for Your Honour.

JUDGE WAINWRIGHT:

I think – I just noted on the final page it says, "There was a probability of a pitch to who was looking out for special advantages being content to give this enhanced value in the hope that he would get the powers and apply the other rights that were necessary for a realised scheme.

ANDREW IRWIN:

Yes, so that's part of it. So, what they are saying there is that you assume that if there was a market, that somebody else could bid for the land how much would they be willing to pay. And coming back in the decision to my page 53, there's a paragraph that begins, "Where therefore, the element of value over and above the bear value of the ground itself starts."

JUDGE WAINWRIGHT:

Mhm.

ANDREW IRWIN:

"And consistently, adaptability for a certain undertaking. The value was not a proportional part of the assumed value of the whole undertaking but is merely the price enhanced above the bear value of the ground, which possible intended undertakers would give." And here's what I was looking for. "That price must be tested by the imaginary market which would have ruled that the land being exposed for sale before any undertakers obscure the powers." So –

So, the law in New Zealand at the time – this is a decision the Privy Council and I think it commences by saying, "This is consistent with the Law of England, and no doubt consistent to also with the law of New Zealand.

1944 what the finance number 3 Act did, was expressly remove the potential to have regard to the purpose for which the land was being acquired, and so it removed this kind of consideration, and what was that consideration? It is to say how much is the land worth to the owners? It's as simple as that. Had they actually been able to sell it in a market for anything, including a potential bidder for the hydro-electric scheme, how much would they have got?

1400

But what you do not do is work out the value to the inquiring authority and work out a proportion of that.

JUDGE WAINWRIGHT:

Well, the way that I have always approached these Public Works matters and argument Mr Irwin is to start from broad principle in a Treaty context, so that if we look at what the Treaty provided prima facie compulsory acquisition of Māori land by the Crown breaches the Treaty, breaches the principle – the second article of the Treaty. But typically, we know that at the time when the Crown was contemplating these activities, the Crown didn't in mind the need for it to be Treaty compliant. So, generally speaking, what we do is say, "Well prima facie what the Crown did breached the Treaty," but then look at the next layer down is that given the legal constructs of the Crown for the purposes of acquiring land from Māori, did the Crown follow its own rules? So, none of it is Treaty compliant, but in the alternative, did the Crown at least apply the same rules to Māori proceed really in value wise that it applied to other people.

And in this case, we were able to see that the procedural steps were particularly wanting, and it was unlikely that that level of procedural thinness would have applied had the vendors that compulsory vendors not being Māori.

So, your analysis here about what the appropriate level of compensation might have been absent, the Finance Act, sits at that second layer right? Which is, yes Treaty – non-Treaty compliant but within its own terms, how did the Crown do?

ANDREW IRWIN:
Yes.

JUDGE WAINWRIGHT:
It seems to me that Dr Meade's analysis of all these topics deals in the area of a counterfactual world in which everybody is seeking to be Treaty compliant. So, in order for the Tribunal to work out what Māori lost, by virtue of the breaches of the Treaty, we say, "Well, what would have happened? What would a proper approach to this have involved?"

So, I can see your analysis of this case encapsulating you say, a then current approach to compensation. That approach differs from the approach that Dr Meade's took, but I wonder whether that is an apples and pears comparison, because I do not think that Dr Meade was trying to tell the Tribunal what the Crown should have done to comply with the then, current common law understandings of Public Works compensation. I think he was trying to say, "What was the real value here, Tribunal for you to assess as an indication of loss for those who own the land?"

ANDREW IRWIN:
Yes sure, of course, and what I'm trying to do is to help you to work out the reasonableness of his analysis.

1405

Because one of the things that I submit is that Dr Meade's analysis is a historical. It just – it wasn't an approach that was applied at the time.

JUDGE WAINWRIGHT:

No.

ANDREW IRWIN:

And even if we unpick the Finance Act of 1944, which could have allowed that assessment to have taken place, it still would not have been the approach that Dr Meade took and that is the simple point that I am making here.

JUDGE WAINWRIGHT:

Yes, well I mean the Tribunal cannot just sit with that though, can it? It cannot say they would never have complied with the principles of the Treaty, because it just was not in their heads to do so, and therefore, we should just sit with the law as it applied on the day, because that is historically what happened, because our jurisdiction says, "How did the Crown do in relation to the compliance with the principles of the Treaty of Waitangi?" So, we are delivered to consider a Treaty compliant counterfactual, aren't we?

ANDREW IRWIN:

There are two things I'm trying to do here. One is to show that the approach taken by Dr Meade is recognised as an approach that just was not taken in the valuation of land when land was taken in a Public Works Act regime and an account was taken for the hydro-electric characteristic of the land was relevant, impermissible. Even then Dr Meade's approach just wasn't the right approach and our case was that. So, that's the first point I'm trying to make.

The second point I am trying to make is that on way to look at the prejudice that wā caused and what compensation should be made, is to ask the question. Well, what would the market value of this land have been, had – if the owners could've taken in – put it another way. What would the value have been if the Māori Land Court as the decision-maker as to how much the compensation was to be.

If the Māori Land Court had been able to take into account they hydro-electric capacity of the land, its potential for that, what kind of value would we have got? And that's where I want to go to next, and that is a Treaty consistent analysis because it's asking, well what should the owners have got.

Your recommendation was that we should reassess the compensation for those unique qualities, and I'm simply trying to help you with assessing how much should we be paying for those qualities.

I don't wish to go through the rest of my paragraph 117, and I don't need to address, I think, 118 either. There I did provide an extract from the transcript where Your Honour discussed the approach that Dr Meade had taken with Dr Meade and you said at that time, "I don't think we had in mind the kind of reassessment that you set out here."

119, Dr Meade said in essence, he was asking what the highest and best use for the land in question was, which was as a power station. He referred to Mr Reid's valuation of the power station in that regard.

Mr Reid's evidence was because no profit was made from Maraetai, the highest and best use of the land may have actually been farm land. He said that if he was asked to provide a retrospective valuation of the land 1946, he would have valued it as farm land to such. I am just saying this is how – what I want to do in this section is just go back through some of the evidence in the interchanges that occurred to remind us of those.

Might just skip over to my paragraph 122. There was an interchange between Your Honour and Dr Meade where you said, valuing the power station and the land on it today does not give you a fair compensation for compulsory taking back in the day, and he said, "Yes." And he's saying, "Yes, that's a different amount."

1410

And to put another way the Crown compulsorily acquired undeveloped land from the former owners and it then build power station or two on it and the compensation the Crown should have paid shouldn't take into account the value of the power station, because that wasn't on the land when it was acquired.

It should have according to the Tribunal's 2010 recommendation taken into account I say, what the owners should have received in a market that allowed consideration of the potential of the land to be used, as a location for a power station.

JUDGE WAINWRIGHT:
Say that again?

ANDREW IRWIN:
I'm just inserting after my words, taken into account.

JUDGE WAINWRIGHT:
Yes.

ANDREW IRWIN:
I'm inserting the words, what the owners should have received in a market that allowed consideration of the potential value of the land to be used a location for a power station.

Your Honour discussed this again and I've provided a quote at my paragraph 123 discuss this with Dr Meade and the Crown, you know agrees with the concern going through Your Honours mind in the middle of that quote you say, "If someone had sat down at the time and thought about what would be a fair amount for the Crown to pay for this compensation. Somebody in 1949 would not have been going, "let's work out what the next best option for the Crown

would be in establishing a power station and how much the differences these owners should get."

And the Crown agrees with that, they're trying to assess what would have been a fair value, would not have involved the kind of economic analysis that Dr Meade conducted that is determining of proportion of the value - the net societal value of the power station by reference to counter factual, including what alternatives were open to the Crown.

JUDGE WAINWRIGHT:

I think it is fair to say that in the context of the remedy's inquiry, all of this has been subject to a level of analysis in discussion that simply was not there in our inquiry.

ANDREW IRWIN:

Of course.

JUDGE WAINWRIGHT:

So, our thinking around this has developed as a result of that and what we do with that, in terms of our understanding at the end of that inquiry and our understanding at the end of this process and the differences between them, I am not sure that is something that we are going to have to reflect on. But these options these ways of thinking about alternative value was simply not for us and I think that some of the things that I thought and wrote about in 2010 have moved on since then and none of the counsel broached these matters – I mean none of us were apprised of it, so it is an unusual situation.

ANDREW IRWIN:

I'd like now to look at the evidence of Dr Yeabsley and to unpack a bit of a discussion that Your Honour had with Dr Yeabsley about this very issue, how do we put a value on the compensation that should have been paid for the hydroelectric potential the land had.

And this is at paragraph 125 in the following sub paragraphs. And in mentioning this the reason I'm mentioning it Your Honour is that I actually found this helpful just to go back and look at your discussion and it's not to hold you to it, but it helpfully distilled some of the issues that were going on in the thought processes.

So, you noted that the Tribunal had found that the exclusion of the land unique hydroelectric potential was unfair and in breach of the Treaty and you said that 510 pounds paid was at the lower end of the spectrum and because the land was for farmland the compensation was always going to be at that lower end.

Dr Yeabsley said the unique value of the land depended on what would have otherwise had happened, meaning one was back to the world of these counter factual what people would pay for the land in a market for hydroelectric potential would have depended on how many other ways the hydro electric potential could be satisfied. While there is no denying that this was a good spot for building power station Dr Yeabsley said the Crown had other options.

And I've set out there in the next sub paragraph the options that he noted and those were essentially constructing Maraetai at its originally planned lower capacity and constructing Whakamaru at a higher capacity which was originally planned. The other option was delaying the decision to construct Maraetai and constructing a larger Whakamaru dam which is very similar.

And also, following Treasury's advices of the time to decrease – sorry to increase electricity prices to curb demand, and these options are based in the evidence, these were options that were before the Crown at the time.

JUDGE WAINWRIGHT:
I do return to that Treaty analysis.

ANDREW IRWIN: (CONTINUES)

Of course, Your Honour. Interpolating at this point, given the options that were available to the Crown they're would have come a point that had the Crown been required to pay the kinds of sums posited by Dr Meade for the 787 acres of land at Pouākani the Crown would have chosen not to acquire the land at all, and instead implement an alternative option.

Your Honour said, that taking into account the lands hydroelectric potential is inherently difficult and contestable. And Your Honour also mentioned that your expectation was that the assessment of the compensation would result in a figure that was plausible and feasible. Your Honour said, your instinct was that the figure must be at least as much again as the land Agri-cultural value because it was for farmland it was a good hydroelectric site, Dr Yeabsley agreed it would likely be more than the lands value as farmland.

Your Honour opposed purely as a hypothetical, instead of the land being valued at say two thousand pounds, a fair value would have been double that. Your Honour and Dr Yeabsley discussed the notion that whatever counter factual was used would be subject to criticism of course, because there are an infant number of counter factual and Dr Yeabsley said that one could still look for a counter factual that was reasonable likely.

And then following the hearing in Your Honour request to him, Dr Yeabsley produced what he described as his own plausibly and viable numbers and it's these that I really want to pay some attention to. He said his approach deliberately avoided a conventional damages approach, he said his evidence was that while the land was obviously useful as a base for a significant dam there were a variety of other sites and stations and other ways of dealing with power shortages those are the options that he was referring to and Dr Yeabsley that that undermined the unique and special attributes of the land, in terms of just working out of value, what Dr Yeabsley saying is that because the Crown had some alternatives that could turn too that had an effect of decreasing the value of this land.

This meant in practice Dr Yeabsley said the value of the land involved to its owners had to be seen as determined by what it could produce as farmland and I want to unpick a bit more of what he says. He assesses the land value as five thousand pounds and the quote I've given there is how he works that out. He says, what might such a figure be – he says say the higher of the owners valuations discussed at the time of 1965 pounds as seen as being driven down by a combination forces, these might include on the one hand trying to be realistic and the negotiation on the other hand having farming options could tell by factors of shortages of vitally available capital allowing for these in a fairly heuristic way, might produce an estimated actual value of, perhaps, £5000."

1420

The £1965 was the higher of the two valuations given by the owners, and we know it took into account betterment, which is why it wasn't used at the time for that reason. But if you were to say that is the – if the Crown had paid that sum, the Crown would have paid compensation for the betterment. I would have addressed your first part of your recommendation, the first part of your recommendation which was pay compensation for the betterment. But that is the value of the land excluding its capacity to generate hydro-electricity would be a site for a potential dam.

And so that figure of £1965 does not take into account the hydro-electric capacity or characteristic of the land, and so what Yeabsley has done, following his discussion with you is he said, "Well, if I'm going to give you a figure, and I'm going to take into account the other options that the Crown had, and if I'm taking into account the fact that there would come a tipping point where the Crown would say, "Sorry, we're not going to purchase this land at all, let's increase that to £5000." And so, £5000 does not and cannot amount to the lands value as farmland. Nobody assessed it at that incredibly high level in the

time. That's more than double its value as farmland. That the value as farmland at the time at most was £1965.

Now, my learned friend wasn't here today, but my learned friend for the Wai 85 claimant has noted that in cross-examination of Dr Yeabsley, he put it to him, "You've really rated the value hydro-electric capacity is zero, haven't you? You've essentially just valued it as farmland?" And the transcript will show as my learned friend has pointed out that Dr Yeabsley said, "Yes, that's right." But in my respectful submission, that cannot be the case. Dr Yeabsley's figure of £5000 can only be seen as a component of the value of the land as farmland plus betterment which brings it to £1965 plus the amount that Dr Yeabsley has given for its hydro-electric capacity, which brings it up to £5000.

Returning then to my written document 126.6 on this on this.

"On this analysis, after deducting the actual amount paid (£510), the amount associated with the wrong says Dr Yeabsley is £4490.

Dr Yeabsley gave a modern-day equivalent of that sum being $376,451.192

Dr Yeabsley maintained that an apology should be given.

Dr Yeabsley considered a further $380,000 roughly twice the earlier amount to provide for the degree of temporal compensation.

In this way, Dr Yeabsley proposed a value for what the Crown should have paid in compensation that:

- is over and above the land's value as farmland;

If I can just insert just another sub para here:

- Can be said to include the betterment effected by the hydro works

Just repeat that, “Can be said to include the betterment effected by the hydro works.” Carrying on with my written document.

- “can be said to reflect the land’s hydro-electric potential;
- is nearly ten times higher than the amount actually paid

1425

- in that sense, it cannot be said to be niggardly.
- certainly, it cannot be said to apply a damages-like approach to determining compensation
- and it can be increased be increased by a further amount, which Dr Yeabsley gave us 380,000 to recognise payment should have been a long time ago without turning the figure into an exponentially high sum.

In a later hearing, Your Honour discussed the issue of how to value the lands, hydro-electric potential again with Dr Yeabsley.

- Dr Yeabsley said if a retrospective valuation had to be done to take that potential into account, one had to take into account the fact that these are the options.
- Dr Yeabsley said if the Crown knew there was the faintest possibility it might have to compensate for that value, it might have looked for another site. That, Dr Yeabsley said, was the key argument: “You’re changing part of the world and not the rest of it.”

And if I can just add in here, and I’ll come back to these facts again later, but there is some other context just in terms of the tipping point where the Crown might not have taken this land at all.

I just want to note that – I’ll come back to this evidence later and it’s footnoted later in the evidence, in the submission.

There was an estimate in 1944 for how much the dam was going to cost. The estimate itself was based on an estimate from the 1930s, but in 1944, the estimate was £5.74 million. That was the estimate to construct the Maraetai number 1 dam – power station sorry, but there is also evidence that by 1947, the Crown – and the official concern was Mr Kessel, in particular knew that that estimate was well out of date. It was based on a 1930s assessment, and he knew that the true cost or estimate had almost – would have doubled by that stage, doubling 5.74 million takes us to over £10 million. That was the expectation in 1947 as to how much it was going to cost to actually construct the dam and in fact, the actual construction cost was 9.4 million.

So, the expectation was similar to the actual outcome, and the reason I mention it here is that that is the context the Crown's working in. it has got an estimate in its own mind as to how much it is going to take to actually pay for this power station, and it needs to take into account of course, the reasonableness of the figure that we say the Crown should've paid needs to take into account reality and the reasonable situation the Crown was in. there would have come a tipping point where the Crown would have said the kind of payment that Dr Meade is suggesting of about 3.8 to £5 million I think is what he was suggesting the Crown should've paid at the time, was just far too much. It was unaffordable. The Crown just would've looked at another site. It would've implemented another option.

JUDGE WAINWRIGHT:

It is a strange secular argument, isn't it, Mr Irwin, because I think the Tribunal's analysis would have been, well a Treaty – in a Treaty compliant world, arguably that is what the Crown should've done is found another site, because if they had – well, they shouldn't have made a compulsory acquisition. They should've treated with the owners of the land, and if the owners of the land said, "Look, the value to us is, I don't know, £3 million, and the Crown went, "oh, nah, that's too much," then that's a Treaty compliant world. Those are the people who own

the land and they're entitled to get the value out of it that they think is coming out of it.

1430

But we end up in a kind of a not virtuous loop I feel because we got a situation here where the Crown didn't take into account its Treaty duties. It took the land, it paid too little for it. So, now we go, "Well, what was that really worth?" And then the response is, "Well that can't be the amount because if it was really that amount, the Crown would never have done it." So, it's like – it's almost like the Crown is saying, "Well, being Treaty compliant would be just too expensive." So, it would never – you know I don't know.

ANDREW IRWIN:
No, Your Honour, I –

JUDGE WAINWRIGHT:
It all sort of construction upon constructions.

ANDREW IRWIN:
Well no, because that would be – that is premised on the notion that Dr Meade's assessment is the correct assessment as to what it would've been a Treaty compliant thing to do.

JUDGE WAINWRIGHT:
Well, no, I don't think that's necessary the case, because Dr Yeabsley also talked about amounts less than Dr Meade's, but amounts that he said would be unpayable, and I'm just not sure that our analysis can do that, because it did happen, and so we do have to come up with an agreement.

I guess your argument is the amount has to be an amount that could feasibly have been payable if the Crown were being Treaty compliant in 1949.

ANDREW IRWIN:

Absolutely, and furthermore, the Treaty and Treaty principles are to be applied reasonably, and in the reasonable context of the time. The Privy Council has been clear about that in the broadcasting assets case.

So, treaty principles would not have required the Crown to have paid an amount in 1955 that was unreasonable. What you found that the amount paid was unreasonable and the question before is, well then how much is a reasonable amount? And my submission is Dr Meade's assessment of what the Crown should've paid is not a reasonable assessment. It's not a reasonable figure. It would've tipped the balance. The wouldn't purchase the land.

And so, the reason I mentioned it would have tipped the balance. I mean, what if the Crown should've paid £100 million in 1955, that's absurd. Nobody suggested that, and so we dismiss that figure as being unreasonable and unpalatable. It is unreasonable and so how – when we start sliding a scale down to something that is reasonable, where do we land? And that is what I am trying to help you with.

JUDGE WAINWRIGHT:

Yes.

ANDREW IRWIN: (CONTINUES)

The next – under the next heading, I set out the Crown's assessment of what the prejudice was and what the reasonable compensation should have been paid.

"The Crown accepts Dr Yeabsley's assessment that to compensate for or remove the prejudice in this case would amount to:

- a payment of $376,451 to right the wrong;
- an apology; and

- and a further payment of $380,000 to provide a degree of temporal compensation."

In 1955, the Crown paid £510 and that was wrong and in breach of the Treaty. It was too low.

The Crown says today, it should pay that much and that would remove or compensate for that prejudice.

"And the Crown considers this approach:

- is consistent with the Tribunal's established approach of not assessing compensation in a damages-like way;
- it is proportionate taking into account the relative seriousness of the breach – it does not overcompensate for the prejudice suffered;
- is practical;
- is fair in all the circumstances; and
- can be said to be restorative of relationships if the payment is not targeted towards the Wairarapa Moana Incorporation, but instead is returned to the broader group, that is the iwi that is Ngāti Kahungunu ki Wairarapa Tāmaki-nui-ā-Rua.

So, that's the Crown's assessment of the prejudice and what it takes to compensate for it or remove it. And what I turn to do Your Honour and members of the Tribunal is to look at Dr Meade's assessment of the prejudice.

And the reason I'm looking at Dr Meade's evidence of course is because he was the witness called by the Wai 85 claimant to produce evidence about what the level of prejudice was and what it would take to compensate for it. So, that's why I focused on Dr Meade, and for no other reason.

1435

Dr Meade of course, asserts something different to what the Crown says, and Dr Meade has reached two essential conclusions about the scale of the prejudice suffered by the Wai 85 claimants:

- The first was that the economic losses to the Wai 85 claimants were in the range of $850 million – $1.45 billion. This was calculated by determining that the 1947 net societal value of the Maraetai power station was in the range of £38.5 million to £52 million. His view was that the former owners of the land acquired for the power station were entitled to 10% of that value, in other words, they should've been paid £3.85 million to £5.2 million, instead of the £510 they were actually paid. Dr Meade says this range is conservative and, as such, the Tribunal can have "considerable comfort" in recommending the return of the resumable land. The resumable land is valued at $600 million.
- The second conclusion was that, following the Tribunal's restorative approach, conservatively it would take in the range of 500 million – to 1,000 billion to put the Wai 85 claimants on a sufficient economic base. The required base might, however, be as high as $3,000 million.
- And Crown disagrees with these conclusions.

And submits there are critical problems at both the high-level and also with the detail. And these submissions now address those high-level concerns and also the concerns with the detail.

The first is to note that at the high-level, Dr Meade's "economic loss" model is another name for a damages approach applied by our Courts in tort and contract cases in certain circumstances. Indeed, Dr Meade described his economic losses approach as such. He said, "Okay, so economic losses, is my first approach. That is if you like, if you were in a standard Court, a breach of contract," and that word 'contract' will ring out and you'll remember that I referred to that word earlier, yes. that is if you like if you were in a standard Court, a breach of contract or something like this, you would go for what are the losses, let's numerate them.

And he describes his approach as both familiar and different. In the following quote he says, "It is familiar in the sense that Courts do routinely look at things like breaches of contract." Your Honour said to him, "But there's a statute of limitations, right?" And so, the Courts have not been in the business of redressing losses that go back over generations, and that's where Dr Meade says that he was going to get to the differences.

The Crown submits, the damages approach is directly at odds with the Tribunal's established restorative approach to considering remedies for well-founded Treaty claims, as noted above. The Tribunal has never recommended that an equivalent of damages should be awarded or assessed.

Don't need to go through all of this. I may just take the next few paragraphs taken as read, and come to my paragraph 139, simply to say:

"The Crown accepts that the claim and prejudice here are of a kind such that the appropriate compensation should be a payment of money."

And at the end of that paragraph:

"The point is that the Tribunal has not suggested generally or otherwise that this kind of claim should be treated as a damages-like case.

Dr Yeabsley was clear that Dr Meade's damages approach - Dr Yeabsley considered it was fundamentally wrong.

Dr Yeabsley said that Dr Meade's "basic investment banking / finance approach" looked at the world "in terms of a financial lens", which Dr Yeabsley considered inappropriate, as that quote says.

1440

Paragraph 142 can be taken as read. I come onto another high-level concern. There is no widespread support within the economics profession for Dr Mead's approach.

"Drs Coleman and Yeabsley agree that there is not widespread agreement in the economics profession that Dr Meade's approach or that his approach is the best or only way to approach the problem." And I set out a relevant quote there, the evidence. The next heading is:

There are Difficulties with Counterfactuals and I set out there some concerns about the counterfactuals that were – that Dr Meade relied upon.

Perhaps if we can have some of this taken as read Your Honour. in fact, if I could come to my paragraph 148 and have those other paragraphs take as read?

The Crown submits that Dr Meade's counterfactual is inherently unrealistic. This is the counterfactual of assessing the 1947 net social benefits of the power scheme and providing a proportion to the former owners. That relies upon a payment of, as I said, between 3.85 million to £5.2 million being made by the Crown to the former owners for 787 acres of undeveloped land.

In commenting on Dr Meade's counterfactual, Dr Coleman noted that, that in 1947, New Zealand was making a transition from the war-time economy and many economic decisions were being made in the national interest. Dr Coleman doubted that in the context of the immense costs that the Crown would have thought it fair to have offered the sum suggested by Dr Meade, which Dr Coleman described as a "*very* large sum to the Wairarapa Moana hapū for land which in their eyes would have little alternative value:" those are Dr Coleman's words. Implicit is his comment is the notion that Dr Meade's assessment of the land's value is unrealistic.

Dr Coleman noted that, in 1947, there were 32,840 sales of urban property in the whole of New Zealand at an average sales price of £781 and a total sales price of £25.7 million. £5.2 million (which is the upper-end of the range Dr Meade says the Crown should have paid) would therefore have been enough on average to buy 6500 urban properties or approximately amounts to 1% of all urban properties in New Zealand in 1947.

The Gross Domestic Product of New Zealand was £429 million in 1947, that is £235 each for the 1,823,000 people living in New Zealand. £5.2 million is 1.2% of Gross Domestic Product.

By way of further context, the average price paid in New Zealand for rural land (that is "country" properties as opposed to "town and suburban" properties) in 1947 was £11.34 per acre. Dr Meade's figure would amount – would mean that the Crown – Dr Meade's figure would amount to the 787 acres acquired by the Crown as having a value of between £4892 - £6607 per acre, some 431 - 582 times higher than the average price paid per acre for country properties.

Indeed, with that kind of sum, the Crown could have purchased between close to 340,000 acres and 458,000 acres of rural land in New Zealand in 1947.

So, that is just provide some context to the kind of figure that Dr Mead was suggesting, and the Crown submits that context shows that the amount proposed was unrealistic.

1445

Had the Crown been required to pay the kind of sum suggested by Dr Meade the Crown might have realistically not chosen to acquire the land, the Crown had other options. It's reasonable to expect there would have been a significant impact to the country on the cost involved in acquiring the land, well for the cost

of acquiring land for public works of national significance at all, indeed for any public works. Dr Meade confirmed he did not asses what effect his model, if payment would have on the ability of the New Zealand Government to acquire land for electricity generating purposes, or for public works more generally.

It is of course, extremely difficult to predict what would have happened at a nationwide level had the Government required to make these kinds of payments for lands, for public works. There are fundamental problems the Crown submits with the way in which Dr Meade compounded interest and that's addressed in the next section. I didn't intend to read through that Your Honour, If I can have that section taken as read.

Perhaps just to interpolate here, the issue with compounding is that Dr Yeabsley and Coleman noted that Dr Meade hadn't provided for consumption in his compounding which is just one the issue I think they had with his compounding. My learned friend in his submissions for Wai 85 has said – Dr Coleman accepted that if you went with a conservative, a rate of compounding say 3.5% instead of 7% that would take a count of consumption. Are you with me Your Honour?

JUDGE WAINWRIGHT:
Yes.

ANDREW IRWIN:
Yes, and indeed Dr Coleman in cross-examination did make some comments to that effect. But there are still problems respectfully it's not sufficient to justify the compounding model that was chose and say it was intentionally put at a low rate that took account of consumption and because as Dr Coleman says in his evidence, you read in the cross examination he explained you really have to actually say that that's what you're doing.

So, the first criticism is Dr Meade didn't say that's what he was doing, he didn't account for consumption at all and Dr Coleman says, "Well if you're going to do, if you're going to make a discount for consumption you need to tell us that because there are different ways that you could go about doing that and it might produce different results. "

I'll simply give you a reference to the transcripts for where Dr Coleman says that it's the transcript 4.15 at pages 190-191. And there is still another problem with that response and that's this, is that if Dr Meade says his approach is a truly conservative one in fact, it's the most conservative to give you as much comfort as possible, well then you would build in consumption as a deduction from your conservative compounding rate, you wouldn't say " I've taken it into account, but I haven't told you that." You would make a further deduction again and that would make it even more conservative because as I understood it that's what Dr Meade said he was trying to do provide the most conservative approach.

The next high-level concern is Dr Meade starting point and, in this section, I've already addressed much of this and I will speak to it very briefly. The starting point being the 1947 Net Societal benefit of the station and the Crown submits that that is with respect to a wrong starting point, it's an archaistic and I refer back to that case which showed that that wasn't even the kind of approach if you were going to go about trying to assess the value of the land for hydroelectric purposes you wouldn't have done it in this way, so our Courts have told us.

It's neither plausible nor realistic and I've gone through those reasons. At paragraph 157.3 it bears no relationship to other land values as I've shown the context shows that this would have been an incredible purchase of land by the Crown, with respect it is anything but conservative as Dr Meade suggests.

Then I turn to the final high level concern with the losses based approach, Dr Meade asserted that his approach was conservative and he said that in his written evidence, he referred to the very material conservativism incorporated into his assessments and when he explained this to the Tribunal he said, so why is this conservative, why can I say this is like a bedrock estimate, it's not sky high estimate – I mean these are not small numbers clearly, there not small numbers. What I'm saying is that these numbers are low compared to what could have been had a I not been so conservative, and I want to emphasize just how conservative I've been.

Your Honour, intervened and so your conservatism is around compounding and he explained a whole range of assumption Ma'am compounding rates, he used were he said were conservative compounding rates but there were a whole bunch of other assumption he said, I made that would deliberately biasing my numbers downwards not upwards and I say this conservative, because I am acting for the claimants and so the claimant wants big numbers, so If I'm biasing my number downwards I'm being conservative, of course for the Crown it's the other way around if the Crown is arguing for numbers that are lowers that's the opposite of conservative because the Crown wants lower numbers that would work out better.

Crown doesn't want the incorporation to have big losses and principle it should want the incorporation to have no losses and that then means there's no case to answer and why you don't need to do anything about it. So, yes, I am just emphasizing that because I am acting for the claimant if I'm biasing my numbers downwards and that is what I call conservative.

And there's another interchange where Dr Meade explains essentially the same thing and in that next passage the final paragraph of that Dr Mead says – you asked the question why? And Dr Meade says, "Well to try and give you a higher degree of confidence with a higher degree of confidence that my numbers are an all probability low and not to high, because if I rock in here and I say Ma'am

the numbers a hundred billion, but you can be 99% sure that's to high you're not going to actually get much use out of that figure, but if I give you a figure that says, well it's 500 Million and it's you know, 75% probability that's to low it's probably a more useful figure for you. "

And so, he explained the end there. So, my point is if on a conservative basis I can demonstrate losses that are at least as great as the value of the assets than it's not disproportionate to resume the assets. So, that is how Dr Meade conceived a **(inaudible 14:54:33).** And the Crown does wish to express some concern at that approach that Dr Meade considered he was acting for the claimants, perhaps I'll take the majority of this paragraph as read, possibly in the interest of time.

And the point being made is that there was a deliberate intention through the methodology to derive a figure that would be proportionate to the assets at stake and the intention was to give you more comfort to resume that assets. And in the next paragraph, again I'll have that taken as read perhaps, but the point is that I think if an independent expert was operating truly independently and objectively there wouldn't have been a biasing upwards and downwards there just would have been this is the outcome of our methodology logically it derives this full stop and that's not what happen.

See if I can get through the next section before our adjournment. The next section of these submissions concerns Dr Meade's economic base model and it just goes over the page. Dr Meade's evidence is that to provide the incorporation with an economic base conservatively requires between 500 Million and 1 billion dollars. There is no correlation however, between that assessment and the relevant prejudice that is the inadequacies of the Crown's consultation and under payment of compensation for accruing the 787 acres of land at Pouākani.

Dr Meade's economic assessment is actually based extensively on the broader prejudice suffered by all Wairarapa Māori most of which relate to 19 century claims. And so, I actually took him through this in cross-examination but when you looked at his report and the claims and the prejudice that he was relying on it wasn't the Wai 85 claim at all, it was a vast array of other claims relating generally to things like land loss and other things and he therefore derived the notion to restore the Wai 85 claimants to their economic base for all of those claims it would take this amount of money and the point I'm making is that's not an assessment of what it takes to compensate for or remove the prejudice of the Wai 85 claim concerning the 787 acres land and the Crown acquisition of that.

And perhaps I can have taken as read my paragraphs 165 to 167 where I discuss these points and at 167 I set out some more detailed issues with the methodology of the economic base approach with Dr Meade. The next section deals with more of the detail and I see we're coming up to nearly 3 o'clock Your Honour?

JUDGE WAINWRIGHT:

Yes. So, how do you think we're going in terms of the likelihood of our needing to reconvene tomorrow. Quite a bit in the last few pages, the summary is it not?

ANDREW IRWIN:

Yes, yes – look to be honest I think there is a good chance we would be reconvening tomorrow.

JUDGE WAINWRIGHT:

Okay.

ANDREW IRWIN:

If you like Your Honour I can try and get through it?

JUDGE WAINWRIGHT:

We'll have a look over the break and I do not want you to scramble so you know, make your reasonable assessment of whether in te Couse of the day we've addressed your main points or not and if not, we can convene tomorrow.

Engari ināia tonu nei kia hiki te hui tae atu ki te hāwhe pāhi i te toru.

HEARING ADJOURNS: 2:59PM

HEARING RESUMES: 3.30 PM

JUDGE WAINWRIGHT:
Tēnā koe, Mr Irwin. Pēhea ōu whakaaro?

ANDREW IRWIN:
A penny for my thoughts. In terms of timing, Your Honour, I think it's likely we might be coming back tomorrow –

JUDGE WAINWRIGHT:
Right.

ANDREW IRWIN:
- if I can say that, I would like the chance just to take you through the submissions at an even pace. I will not – I don't want to repeat myself, there will be parts taken as read. I can't help but think that there might be some questions or interchanges that just might take a little bit longer and we haven't yet got to the settlement trust's application.

JUDGE WAINWRIGHT:
All right. Well, let's plan for that then. All I can say about that is that Dr Hond needs to be in Waitara at five and I have said that even if we reconvened

tomorrow, I cannot imagine that that would be a problem. So, we might be looking at a couple of hours in the morning?

ANDREW IRWIN:
I think at most, yes.

JUDGE WAINWRIGHT:
All right. Well, perhaps we could convene at 10 in the morning and plan to finish at lunch time.

ANDREW IRWIN:
That's leisurely, that sounds sensible.

JUDGE WAINWRIGHT:
All right.

ANDREW IRWIN:
I am at page 62 and the heading near the bottom of my page, **Critical problems with the detail of the calculations,** that's where I'm at.

CONTINUES CLOSING SUBMISSIONS #J103 FROM PAGE 62
And at my paragraph 168, "Even if one were to apply Dr Meade's damages-based approach, there are critical problems with the calculations.

Dr Yeabsley's evidence is that the net societal benefit of Maraetai is overestimated if the costs of generating electricity from Maraetai are underestimated. Under cross-examination, Dr Meade agreed with that proposition. Dr Meade agree that the 1947 societal benefits of Maraetai is overestimated if the capital cost of building it is underestimated. And in the Crown's submissions, it is clear that Dr Meade underestimated the capital cost of building Maraetai."

And I set out there in some subparagraphs as to why that is. So, going through the evidence, I am not going to read this out but the two points I wanted to make is that the evidence shows that the actual cost of constructing Maraetai was more than Dr Meade had relied upon. He had relied upon an estimate of the cost as I mentioned earlier, that was from 1944 but in itself, relied upon a 1930s assessment and the actual cost was a lot more than that.

And so, the Crown submits he underestimated how much it was going to take to build the power station. And in addition, and I am now near the end of my paragraph 169.5, "In any case, Dr Yeabsley showed that the relevant official at the time who was making the estimates for the construction costs (that's Mr Kissel) was clearly aware by 1947 that the pre-war estimates were out of date and overall needed to be doubled."

So, if – Dr Meade asserts that the correct approach is his ex-ante approach. That is to look at what would the expectations were, well, when we actually look at the expectations, they were twice what he said they were.

My paragraph 169.6, "Dr Yeabsley concluded that by repeating Dr Meade's calculations, but using actual construction costs, the estimated new societal value of Maraetai drops from £52.2 million as assessed by Dr Meade to £38 million in 1947 prices."

In addition, Dr Meade underestimated how long it would take to build Maraetai and I set out the evidence for that there. In fact, it took longer and at my paragraph 170.3, "Dr Yeabsley showed that by 1947 Mr Kissel knew the dam was not going to be completed on time and would instead be completed at a later date 1952. In fact, it took even longer again."

1535

So again, using an ex-ante approach of what the expectations were, unfortunately Dr Meade's assessment was inaccurate, because the expectations were different to what he said they were, and in the real world, they were different too. It took a long time to construct the dam.

My paragraph 171:

"The Crown submits that "Dr Meade over-estimated the cost of constructing an alternative oil-fired power station:

- So, part of Dr Meade's assessment was to think, well if the Crown wasn't going to build a power station on the Waikato River at this time, what would it have taken for it to have built an oil-fired power station that would have the same output, that would produce the same amount of electricity?

And Dr Yeabsley have some concerns with that approach, and if instead of reading out the detail, if I can just briefly explain that one of Dr Meade's assessment was he looked and found some actual data around oil-fired power stations and found that they had an outage rate that is, they weren't used for much of the time. Their outage rate was 81% I think, and that means 81% of the time, they're just not being used.

And Dr Yeabsley pointed out in his evidence was, well that's because they are really expensive to run, different to a dam. You just have water streaming through with an oil-fired power station. You've got to have some oil to burn.

And the problem was Dr Mead though well because they have this outage rate, you'd have to construct a bigger oil-fired station because it's going to be turned off for 81% of the time. But what Dr Yeabsley simply says is, "No, you don't turn it off for 81% of the time. You actually just keep it on and it can be at the same size. It just operates for more hours of the day and that means you don't

have to spend more money building a bigger oil-fired station. So, that's the point being made there.

My paragraph 171.7

"Dr Yeabsley's evidence is that by repeating Dr Meade's calculations, with the construction and fixed operating cost of a 180 mega-watt oil-fired generation plant, as opposed to a much larger one that Dr Meade suggested, that would further reduce the estimated net societal value of Maraetai from an already reduced £38 million to £18.1 million in 1947 prices, that's more than halving it."

My paragraph 172.

"What Dr Yeabsley's evidence does is to show there are critical problems with the calculations that Dr Meade makes. His "conservative" 1947 net societal value for Maraetai, having an upper limit of £52 million, just was not conservative at all."

And so, I very quickly summarised and left the detail in my written document for the concerns the Crown has at the detailed level of Dr Meade's assessment.

So, I come to the question what is the most appropriate action to compensate for or remove the identified prejudice? What action should you recommend, should happen, to compensate for, remove the prejudice that followed from the Crown's inadequate compensation and consultation in acquisition those 787 acres of land.

And I look at what you've already recommended. I turn to those, my paragraph 174 and we've already looked at those. You've already recommended that the Crown should reassess the compensation to take account of the betterment and to take account of the unique hydro-electric characteristics of the land. And

you prefaced that recommendation by noting, “The owners will never get back the land that is under the dam and under the town.”

1540

The Crown submits that nothing compels the Tribunal to make any further recommendation. The Tribunal has already recommended the Crown take certain action to compensate for or remove the prejudice that arose from the Crown’s inadequate consultation and compensation.

For completeness, the Crown submits that this is a case where you can and should make a decision under section 8A(2)(b). That is, the land is not required to be returned to Māori ownership and it can be cleared from liability to memorials.

My next heading is, if the Tribunal should make further recommendations under section 6(3), what should those recommendations be, bearing in mind that any recommendation made under section 8A is included in section 6(3)? If the Tribunal considers a further recommendation is required, the Crown says that recommendation should be to provide more clarity on the Tribunal’s existing recommendation on the level of financial compensation that should be paid. That clarity follows logically from the Tribunal’s 2010 recommendation that the Crown should reassess the compensation that was paid in the 1950s noting that the land would never be returned.

I now turn to the reasons why the Crown submits the Tribunal should not make a recommendation under section 8A(2)(a).

The Crown does oppose the making of a recommendation under that section that the land be returned to Māori ownership. The Crown does so for the following reasons.

The first is, and it's quite short in this document but it is in my submission quite important, the transfer of the land is not required to remedy the prejudice. The prejudice was the Crown's inadequate consultation and inadequate compensation, not the acquisition of the land itself. The return of the land is not required to compensate for or remove that prejudice.

The Tribunal's 2010 recommendation that the land would never return to Māori ownership and that the Crown should reassess the compensation that was paid, strongly indicates that the Tribunal did not consider in 2010 that the return of the land was required to compensate for, or remove the prejudice associated with the Wai 85 claim.

JUDGE WAINWRIGHT:

I'm just going to say Mr Irwin, I just don't think that that comment takes account of how the Treaty landscape has changed since 2011. Because I think at that time our Tribunal and others had assumed that the then current way of settling Treaty claims which was, as you described earlier, which is that the Tribunal would make general recommendations and then hand over to the Crown to deal with claimant groups and negotiate a settlement. We were assuming that that would continue and that in that context the Crown wasn't going to return to Māori land underneath the power station. To take from what we said that that was a normative comment is mistaken. We weren't implying that it shouldn't happen or wasn't necessary to happen. We just didn't think it would happen.

ANDREW IRWIN:

Thank you, Your Honour. And so I accept what Your Honour has said in terms of an explanation as to what the Tribunal was saying in the 2010 report. The point being made here is a very simple one. It is, when you identify what that actual prejudice is and when you think, "Well, what does it take to remove that or to compensate for it," and the Crown says, "You don't have to return the land in this case to remove that prejudice or compensate for that prejudice."

JUDGE WAINWRIGHT:

Understand that.

ANDREW IRWIN:
Yes.

JUDGE WAINWRIGHT:
Yes.

ANDREW IRWIN: (CONTINUES)
And there are other reasons. The next is about proportionality. It does not appear to be contested in this proceeding that any action recommended by the Tribunal must be proportionate to the prejudice suffered. In saying that, I think it is accepted that there must be proportionality between the asset that is sought and the prejudice that was suffered.

I set out there what I understand the Wai 85 claimants position to be in that regard. I don't think I need to discuss that. I'll just have those paragraphs taken as read.

I come to my paragraph 187. "The Crown submits that the return of the resumable land would be wholly disproportionate to the prejudice suffered.

In 1955 the Crown paid compensation of £510 for 787 acres of unimproved land. Since then the Crown built two nationally significant hydro-electric power stations on that land. The value of the total resumable land is now over a billion dollars taking into account those power stations and the value of the resumable land on the Pouākani side of the river is $600 million which includes the infrastructure associated with Maraetai No 2. These values are exponentially higher than the prejudice that was suffered.

The Crown agrees that in Dr Coleman's viewpoint that in these circumstances the compensation should not include the value of the structures put on the land

since the acquisition of that land. There is a quote there to Dr Coleman and if I can just read the second sentence,

> So to have a parable Dr Coleman said, "If someone buys an urban section at a compulsorily ridiculously low price and then builds a shack on it or builds a multimillion-dollar mansion on it, I would say the compensation should be independent of the structure that is being built on it. It should be dependent on the value of the land but independent to the value of the structure."

So the simple point that I'm extrapolating is this, as I've said, the Crown took land that did not have two power stations on it. It put two power stations on the land and now this land because of those power stations is incredibly valuable and that value is disproportionate to the prejudice that was suffered.

"For the detailed reasons set out above, the Crown

- rejects Dr Meade's assessment that the prejudice suffered is in the range of $180 million to $1.5 billion
- and the Crown accepts Dr Yeabsley's assessment that the prejudice suffered can be properly compensated by the payment of a sum of $756,451.

The comments of then President of the Court of Appeal, Lord Cooke, in two cases from 1989 are apposite to the situation. In the *Forest* cases His Honour said:

> Partnerships certainly does not mean that every assert or resource in which Māori have some justifiable claim to share must be divided equally. There may be national assets or resources as regard which, even if Māori have some fair claim, other initiatives have still made the greater contribution.

This is a situation where Māori do have a claim that relates to the land on which a nationally significant power station now rests, but the prejudice suffered that gives rise to the well-founded claim does not match the level of value now associated with the nationally significant power stations which was provided by somebody else's contribution.

The second comment of Lorde Cooke comes from the Tainui Māori Trust Board case and it is this:

1550

> Both the history and the economy of the nation rule out extravagant claims in the democracy now shared and both partners should know that a narrow focus on the past is useless. The principles of the Treaty have to be applied to give fair results in today's world.

In a sense that doesn't suggest or say anything other than we have to be fair and reasonable and sensible and that's what I say essentially."

JUDGE WAINWRIGHT:

Can I just ask your comments on this? That this legislation quite purposefully does not limit the Tribunal's recommendatory powers to the value of the land alone, it purposefully includes improvements on the land and, at the time when the legislation was passed everybody knew that some of the land had very valuable improvements on it. If your premise is correct which is that the words 'relate to' mean specific claims in respect of the specific land on which the specific assets are located, what kind of claims would have given rise to a binding recommendation by the Tribunal that that land and those improvements should go back to Māori?

ANDREW IRWIN:

There could be numerous claims. And bear in mind that this was the whole scale transfer of assets that were to become owned by state-owned enterprises. So it wasn't just dams that we're talking about –

JUDGE WAINWRIGHT:

No, no.

ANDREW IRWIN:

– and so a vast array of properties that the Crown was divesting itself of. So for example there could be land that was taken under Public Works Act for some sort of purpose say for a school that is no longer required but was in the Crown's ownership and has since been divested or the provisions that relate to the Education Act apply because those relate to that kind of land. I mean there just could be numerous claims and numerous types of land.

JUDGE WAINWRIGHT:

Well clearly, you know, that the school situation might arise if that had been transferred in the enterprise as property. But Mr Irwin I am inviting you to just confront the fact that Parliament knew that some of this land had very significant improvements on it and it appears that the negotiators of these settlements managed to get the Crown to agree that the land and the improvements could all potentially be the subject of binding recommendations involving many millions of dollars.

So, I'm asking you if you have got land with improvements worth millions of dollars, which were amongst the assets that Parliament thought the Tribunal could potentially be returning to Māori claimants, what specific claims to specific land would enable to the Tribunal to be exercising that jurisdiction in the Crown submission?

ANDREW IRWIN:

Well I think, well the level of generality, if there was a claim to land, it could be any kind of land with infrastructure or improvements of the scale of millions of dollars. If the claim to that land was well-founded, and the Tribunal's assessment of the prejudice was "This was incredibly high," it matched the value of the land and the improvements, that's – I mean that is the potential that the Parliament gave you to make a potential return through section 8A of that

kind of land to Māori ownership. But the issue still remains, doesn't it, about proportionality, is that there must be some assessment of proportionality.

The fact that you have a discretion that Parliament has given you, does not mean that Parliament intended every land that was to be transferred to a state-owned enterprise, would be the subject of a section 8A recommendation.

1555

JUDGE WAINWRIGHT:

No, but conversely, it may focus our attention back on those words "relates to" and contemplation of whether the intention was for "relates to" to be construed in the narrow way that you suggest because the likelihood may be that if you have got these very valuable land assets and there was in contemplation that they would be going back to entitled Māori, that the focus of the Tribunal would not be merely on situations where there was a specific claim relating to the specific block, but that relates to, enabled the focus to be broader.

ANDREW IRWIN:

Well possibly, I say, "Possibly." I don't accept the proposition that the relationship between the claim and the resumable land can be anything less than logical. That is what I say. There must be a logical connection.

It is entirely possible that what Parliament in mind in enacting these provisions was that common sense would come to bear, the Waitangi Tribunal would exercise a very mature and serious judgment and discretion about what kind of return would happen under section 8A(b) – sorry, under 8A(2)(a). And Parliament – we can also infer that Parliament knew that you would exercise that judgment and discretion very carefully in deciding when the return of land was not required, because as equally as there are section 8A(2)(a), there is 8A(2)(b), what kind of claims to resumable land that are well-founded would fit

under section 8A(2)(b), that's the provision where you decide the return of land is not required.

JUDGE WAINWRIGHT:

I know.

ANDREW IRWIN:

And the Crown submits that this is that example par excellence. There are so many reasons why it would be – try to find the correct adjective. There are so many reasons that suggest why you should not recommend the return of this particular land, and that you should find under 8A(2)(b), that the return is not required. This is one of those perfect examples, and Parliament's given you that opportunity to say that.

JUDGE WAINWRIGHT:

Yes.

ANDREW IRWIN:

So –

JUDGE WAINWRIGHT:

Clear, that is so. I am just wondering on the basis of your analysis, which very valuable land with very valuable assets on it, the Crown would think was the perfect example to be returned to entitled Māori, because presumably we have to infer that Parliament also intended that that situation would arise.

ANDREW IRWIN:

Possibly, and we're just talking about hypotheticals. If the Crown had not built the power stations on this land, and it had taken it for one purpose, and this I think has happened in our history where land is taken for one purpose. The purpose has either come to an end, or the infrastructure has not been built, but the land has remained in Crown ownership, and then possibly passed on somehow into private ownership.

Now, if that were the case and that land had a memorial on it, and there had been nothing more done to the land, then to follow Dr Yeabsley's approach, which is, "Look if you can return the land, return it," it would be difficult for the Crown to say in those circumstance that the land shouldn't return. That seems to be a classing example where the return of the land –

JUDGE WAINWRIGHT:
But you seem to be saying that where there were improvements on the land, that would not be a classic example.

ANDREW IRWIN:
Well, no I am not saying, "Just because there are some improvements on the land, it makes it inappropriate to return."

JUDGE WAINWRIGHT:
You could not argue that, could you, because the legislation specifically says the opposite.

ANDREW IRWIN:
Well, the legislation specifically gives you the discretion to make a decision about it.

1600

It doesn't say you return land where there are improvements on it. It is open for you, the Waitangi Tribunal, to make a decision that the land should return, and the land has improvements on it since the Crown took it. But sorry, what I was trying to say was, but there still must of course be, the question of proportionality, because what has the Crown done since then?

In my counterfactual, the Crown did nothing with the land. The return of that very land would remove the prejudice because the prejudice was the taking of

the land, but in this situation the Crown built two power stations on it, and its value is all tied to those power stations, and it is still required for that purpose. So, you are in a very, very different situation.

So, these aren't absolutes, just because it is open to you on the legislation to return the land, doesn't mean that of course, doesn't mean that you should, or you're required to or there's a presumption. Parliament must be taken to have considered that there would be cases where there was land being transferred to state-owned enterprises that did have infrastructure on it, that the Tribunal would recommend as returned for well-founded Treaty claims. I don't think I can take it any further than that, except to say, and we'll come back to this because I've just asked my learned friend to look for quote, and it might take a wee while to find it.

We did come across as passage in Hansard for the 1988 amendments, where a comment was actually made about dams and I think the comment was to the effect of, "But they wouldn't be getting back the dams." And I haven't put that before you because look, Hansard is a very tricky thing. If we are trying to divine the intention of the Parliament, it is very difficult to take one statement from one Member of Parliament.

JUDGE WAINWRIGHT:
Well particularly, as you know that is not what the legislation says.

ANDREW IRWIN:
Yes.

JUDGE WAINWRIGHT:
So, I mean, it would have been available to the negotiators of the deal that got the withdrawal of the case in the Court of Appeal to identify certain kinds of infrastructure that would not be on the table, that would not be able to be returned to Māori ownership for a whole host of reasons, some of which you have enunciated in this case, but that did not happen.

ANDREW IRWIN:

That's correct and so as I say the Parliament has said it's the Waitangi Tribunal who needs to give careful consideration to all of these," and in the context of the wholesale transfer of numerous properties to – by the Crown to state-owned enterprises. The Parliament considered that you have the appropriate discretion to decide whether some of those lands should return, but I don't know that it goes much further than that Ma'am in the sense that we can't infer that Parliament thought, "Well, we're sure the Waitangi Tribunal will exercise that discretion to provide the return of nationally important infrastructure such as a power station for a claim, the prejudice of which is really quite much smaller than the value of that property. We certainly cannot infer that from there mere fact that you have the discretion.

JUDGE WAINWRIGHT:

No, and that is not what I am suggesting.

ANDREW IRWIN:

No. And so, the reference I have – I'm only giving you this by way of completeness Your Honour, seeing as we've discussed this issue. It's in my bundle of documents at 283. So, this will be in the second reading of the 1988 bill.

1605

And it's a comment by the Minister for state-owned enterprises in fact the Honourable Richard Prebble who said well, part of this I am going to read. Okay, I will start with the word "water". If you can see that Your Honour, I'm near – I'm but a third of the way down the page.

> Water is not covered by the bill, but he, (that's a former member), proceeded to make a speech about it. If for example the member had taken note of the ratings powers' bill, he would have realised

> that dams are regarded by the Court as machinery, rather than part of the land.

And so, there the – this is simply for your interest and by way of completeness, the Minister for state-owned enterprises considered that through this – through these amendments to the Treaty of Waitangi Act, dams would be treated differently.

JUDGE WAINWRIGHT:
Well, he needed to talk to Crown Law, didn't he?

ANDREW IRWIN:
So, the point I've made is about proportionality. Yes, of course you have the discretion, but the Crown says, "If we call a spade a spade, this land is just far more valuable now than it was when we took it, and that value is disproportionate to the prejudice that you identified."

The next reason the Crown points to is on page 71 of my submissions, "The land is still required for the purpose for which it was acquired."

JUDGE WAINWRIGHT:
I think we grasp that point.

ANDREW IRWIN: (CONTINUES)
Excellent. I wanted to – I'm very grateful for Your Honour's indication that you grasp that point. I did want to make one additional point that comes out of this. I didn't read out the summary of Mr Williamson's evidence earlier, and I did want to draw out a point from an earlier paragraph of my submissions at page – so if I could come back – well, if I can just very briefly speak to my paragraph 195.2, and the evidence was that:

"There would be significant consequences if the Maraetai operation was transferred to a third party, and we've summarised the evidence there in four main significant consequences and those are there.

(1) The hydraulic management of the Waikato Hydro Scheme would be complicated, the likely result of inefficient outcomes and the waste of renewable energy for the country.
(2) There would be increased risk of environmental damage and impact because of the Waikato Hydro Scheme's critical role in managing flood flows and drought.
(3) The National Grid would face greater disruption because of synergies between Mercury and Transpower would be lost; and,
(4) In the event that there was a permanent or temporary halt in generation of electricity at Maraetai, there would be risks to security of supply and increases in electricity prices."

I wanted to add to the third point there, which comes out of my summary earlier on of Mr Williamson's evidence.

Mr Williamson's evidence was that if another entity were to own Maraetai, there would be complications around who owns and maintains the fixtures and the connections within the switch year. But just pausing to focus on who owns and maintains the fixtures?

It has not really been addressed or raised in this inquiry, some of the consequences of a return of this land including its infrastructure to Māori ownership.

1610

Who pays for maintaining the power stations? Presumably the landowner, and so there is significant cost involved in that you can infer, but you don't have

evidence about actually how any of these issues that Mr Williamson has identified would in any way be addressed or met through recommendations that you make, and it's not simply a case that we can come back to this later on and say, "Well, let us think about what's in terms and conditions might be." It's a far more fundamental point than that. Each of the reasons that I've very succinctly summarised at my paragraph 195.2, is a reason not to return this land to Māori ownership.

JUDGE WAINWRIGHT:

Well, hang on a minute Mr Irwin, I understand these arguments, but Mr Mahuika proceeded on the basis in his closings I think, and he will tell me if I have misapprehended this, that there would be some kind of – he envisaged that there will be some kind of lease arrangement between Mercury and any subsequent Māori holder of title, and surely, there could be terms negotiated of any such arrangement that would meet these potential difficulties.

ANDREW IRWIN:

Well, maybe, maybe not, and that's the problem that you're in, and first of all, what I'm saying is, there's a fundamental problem, your decision-making around should the land return, and each one of these issues goes to that question, should it return at all? Even if you were to get through that thinking and say, "Well, okay, we have no real evidence as to how any of this would play out."

JUDGE WAINWRIGHT:

But we did have evidence that it would be possible.

ANDREW IRWIN:

We have evidence that it is theoretically possible to, for Maraetai to be operated independently of Mercury owning the land, but that's as far as it went. That is what Mr Williamson did accept in cross-examination, but it's really gone no further that and anything is possible, but how is it possible? I mean you have no evidence before you whatsoever about how any of this could happen in a

way that would address any of the concerns that Mr Williamson has identified, and with respect, it isn't good enough for us to say, "You should merrily recommend, decide, let's return the land, and we'll put off for another day how that would actually happen with terms and conditions because we are sure that terms and conditions could cover this." That really is the position from my learned friend.

So, it's really just not good enough in my submission to say this can be addressed through terms and conditions, in fact every one of these reasons why a nationally important dam and power station is still required for its very purpose. Each of those reasons and concerns raised by Mr Williamson, is a reason why you should be very seriously thinking about alternative forms of compensation, because you have no surety that these can be addressed. Maybe they can, maybe they can't.

How much money will the incorporation have to pay in the next financial year for maintaining the dam and the power station and the next year, and the next year? You don't know, you have no evidence about that.

How will it impact on the electricity that is generated there, bear in mind the outcome that my learned friend seeks for the Wai 85 claimant is a reserve subject to no conditions, which means what, that Mercury Energy is then forced, or somebody else is forced into negotiating a lease back?

What if Mercury says, "Sorry, we're not interested. This is just a step too far for us. We'll bank the money the Crown paid us for resuming the land. We'll look elsewhere." What happens? We don't know, and you can't compel Mercury Energy to do any of this. You can make a recommendation to the Crown about the resumption of the land subject to terms and conditions. All of that uncertainty should be of grave concern to you and goes towards your decision-making about should the land return at all, or should we sensibly be thinking about an alternative?

JUDGE WAINWRIGHT:

Dame Margaret was just suggesting *sotto voce* that if we were worried about this that the feasibility could be something that we obtained a report on as part of the iterative process.

ANDREW IRWIN:

Yes, but does – by that, does that mean the Tribunal has already made a decision that the land should return?

JUDGE WAINWRIGHT:

Well, I think – well, that is a question as to what the iterative process would look like, but I think that the Tribunal could potentially, and I do not myself see these obstacles that you have outlined as being as insuperable as you characterise them as being. However, if it were a matter that we felt that we need more expert advice on, if the security of the national grid were in jeopardy, we could potentially indicate our desire to proceed down a certain path, if we could be reassured that the necessary arrangements could be entered into to ensure that the difficulties that you outlined could be overcome.

ANDREW IRWIN:

Yes, and just to make a couple of comments, I think the security of the national grid is at issue, and that is Mr Williamson's evidence in the return of this land to a third party.

JUDGE WAINWRIGHT:

We do have to take into account that Mr Williamson is not disinterested in this. I mean, if we were to – I mean, of course, the energy companies are going to want to maintain the status quo if at all possible. I mean it is in the nature of their interest in all of this. It may be that the Tribunal would be able to get an opinion from a party knowledgeable about the matters that you earmark for us, who was not going to be affected by whether or not it went forward.

ANDREW IRWIN:

Yes, I mean just think about that practically. I mean that may or may not be able to be done by somebody independent of Mercury Energy who knows how the power station is run and operated, and furthermore, how it actually fits within not just I think the Waikato Hydro Scheme in total, but also how it fits within the national grid, so to speak.

JUDGE WAINWRIGHT:

But it must be possible to get this information, Mr Irwin. I just cannot see that it would be available to the Tribunal to say, "Well, we are not going to make these recommendations because it is too hard to find out how difficult it would be for Mercury Energy." I mean that doesn't seem evincible does it? I mean I know that you are objecting to our making the binding recommendations on many other facies, but that one alone must be something that we can overcome.

ANDREW IRWIN:

Or not, and the real concern –

JUDGE WAINWRIGHT:

Well, no-no-no, wait a minute. The problem may not be able to be overcome if the way that you pitch it is correct, but it must be possible for us to get a good opinion on what the problems really are and how suitable or otherwise they are.

ANDREW IRWIN:

That may be able to be done, yes. Sorry, what the concern that was going through my mind was at which part of your decision-making does that happen?

JUDGE WAINWRIGHT:

Mhm.

ANDREW IRWIN:

Because if it is happening after you have already decided to return the land, then I think you're in real difficulty.

JUDGE WAINWRIGHT:

All right, well, we take that on board, thank you.

ANDREW IRWIN:

I'm just turning now the next reason, there is no cultural connection between the applicants

CONTINUES BOE #J103 FROM PAGE 72, PARA 197

"There is no Cultural Connection Between the Applicants and the Land

In opening submissions ,the Wai 85 position was that, 'Despite not having customary interests,' in the resumable land at 1840, the claimants have since developed associations with the land and have dealt with the land as if it were customary. Counsel for Wai 85 interpolated, while making this opening submission, that the Wai 85 claimants do not say they are mana whenua in the area of Pouākani.

In closing submissions, under the heading, 'The relevance of whakapapa or other tikanga association with the land,' the Wai 85 position is that the 'closeness of whakapapa or other tikanga with the land' is not 'determinative' of the application for binding recommendations. In making this submission, the Wai 85 claimant appears to concede that the cultural connection that people may have to the land *is* indeed a relevant consideration for the Tribunal to take into account in deciding whether or not a recommendation should be made under section 8A. It is just that he does not say that it determines the case.

The Crown submits the Tribunal can, and should, have regard to the cultural connection between the group seeking the return of the land and the land itself.

In this case there is no clear – sorry, in this case it is clear there is no ancestral connection between the Wai 85 claimants and the resumable land.

In its 1993 *Pouākani Report*, the Tribunal found that Ngāti Kahungunu ki Pouākani did not have ancestral rights to the land: So, it's 1993 and as a reference there where the Tribunal said, 'Ngāti Kahungunu ki Pouākani do not hold any ancestral rights on Pouākani lands.

The Tribunal noted the occupation of Pouākani lands had put Ngāti Kahungunu ki Pouākani in an 'uneasy relationship' with tangata – with local tangata whenua, and there's quote there to that effect.

The Tribunal concluded this discussion noting those granted the land at Pouākani in 1916 were a section of a tribe that did not traditionally belong there and there's the quote to that effect.

The link between Wairarapa Moana Māori and the land at Pouākani stems of course from the 1916 grant. In 2010 the Tribunal criticised that grant as being 'unsuitable in every way,' including for the reasons that it was 'absurdly far away and critically, for Māori people, not their ancestral land but the ancestral land of others not of their iwi or even their waka.

The Tribunal also said the grant of land jeopardised the relationship between Wairarapa Māori and Waikato Māori. There's a quote there to that effect.

By 1947 Wairarapa Māori had not occupied their land at Pouākani. The first Wairarapa owners travelled there in late 1948.

As such, by the time the Crown acquired the 787 acres in 1949, Wairarapa Māori had had no time to develop any cultural associations with the land.

The Crown agrees with the submissions of counsel of the Raukawa Settlement Trust:

Wairarapa Māori have had no time to presence on the land that is actually subject to the application. If any connection to the whenua can be said to have grown (much to Raukawa's discomfort) it is with land that remains in Wairarapa Māori ownership or that they have elected to sell. Sir Kim Workman, when questioned on his evidence, agreed that this was case;

And I refer there to a statement again by Sir Kim to the effect he acknowledged that Ngāti Kahungunu, not tangata whenua or mana whenua at Pouākani.

The land sought in resumption appears to hold no special cultural significance to the Incorporation.

The next reason for not ordering the resumption of the land is:

Tāngata Whenua Object to The Return of the Land to Wairarapa Māori
The Tribunal has described the source of the customary interests held by tangata whenua at Pouākani as:

- the take whenua kite hōu of Te Arawa;
- the take whenua kite hōu of Tainui;
- the take raupatu of Raukawa; and
- the mana of Te Heuheu o Ngāti Tūwharetoa.

And the reference is there to the *1993 Pouākani Report.*

The question in front of the Tribunal is whether or not it should recommend the return of that land to a group (Wairarapa Māori) with none of the above customary interests, in circumstances where tangata whenua groups oppose the return to Wairarapa Māori.

Organisations representing both Raukawa and Ngāti Tūwharetoa have both objected to the return of the resumable land to Wairarapa Māori."

I set out my understanding of the Raukawa position and the Tūwharetoa position in the next sections there, and it –

JUDGE WAINWRIGHT:
We probably do not need that.

ANDREW IRWIN:
I don't need I need to read that out, it's their position. It's my understanding, I footnoted everything.

JUDGE WAINWRIGHT:
Yes.

ANDREW IRWIN:
So, I think that's all clear, isn't it?

JUDGE WAINWRIGHT:
Yes.

ANDREW IRWIN:
And the clear theme I submit is, this is not a case where they support the return of the land to the incorporation or generally to Wairarapa Māori.

I would note though, because I do not think I have expressly noted it, at the end of the section on Tūwharetoa's position, I understood my learned friend Ms Feint to say in addition to those four points I've made there that the return to Wairarapa Māori would create a fresh grievance.

JUDGE WAINWRIGHT:
You have said that there.

ANDREW IRWIN:
I have, have I?

JUDGE WAINWRIGHT:

Yes.

ANDREW IRWIN: (CONTINUES)

Very good, I did too. Sorry, I wrote that down in the margin because of what my learned friend said this morning, or yesterday so. The next reason the Crown submits why the land should not be returned is that:

"The Grant of the Land to Wairarapa Māori in 1916 was Itself in Breach of Treaty Principles

So, the Tribunal has already found that to be the case. The very land sought in resumption was granted in in breach of the Treaty for reasons that it included it was not the ancestral land of Wairarapa Māori. That, in itself, is a reason not to recommend the return of that land to Wairarapa Māori."

And then I summarise the reasons I have taken you through. The reasons why the Tribunal should not make an interim recommendation under section 8A(2)(a).

The land is not required. It is disproportionate to the prejudice that's suffered. To do so would be inconsistent with the fact the land is still required for the purpose for which it was taken. The return is not justified by virtue of any cultural connection that Wairarapa Māori have to the land.

Tangata whenua oppose the return of the land and it is inconsistent with the Tribunal's finding that the grant of the land in the first place to Wairarapa Māori was itself in breach of the Treaty.

But what if the Tribunal thinks otherwise? And so, this next part of the submission goes on to consider that question under the heading:

To Whom Should any Land be Returned in Respect of the Wai 85 Claims?

If the Tribunal considers the land should be transferred to Māori ownership to compensate or remove the prejudice associated with the Wai 85 claim, the Tribunal must consider to whom the land should be transferred.

"The **Wairarapa Moana Incorporation** is the next heading.
The incorporation holds title to the lands by virtue of the Crown's purchase of Wairarapa Moana. However, the incorporation is not and does not equate to the group that once held communal customary interests in Wairarapa Moana, and I realise that that is really a matter at issue as between the Wai 85 claimant group and the Ngāti Kahungunu Settlement Trust Group.
1630

The incorporation is the corporate entity that comprises some of but not necessarily all the descendants of the individuals who were granted individual land interest in Pouākani in 1916 in exchange for the Wairarapa moana."

I just wanted to remind Tribunal members of one piece of evidence here, sorry this isn't in my bundle, it's #J38 which is a bundle of documents that I put to Mr Smiler in cross-examination and there's a letter in that bundle on page 1 of that bundle, there's a letter dated 22 March 2016. And this is a letter written by Mr Smiler to the Crown and I simply wanted to draw the Tribunal's attention to some statements made in the second paragraph Mr Smiler says, "The named Māori who were given shares in Pouākani land were the owners of interest in and are joining the Wairarapa lakes with shares being allocated by the Native Land Court dependent upon there degree of attachment to an economic benefit arising from the lakes and other interest. "

They and I think Mr Smiler agreed or said in cross examination that by then, he means the shareholders of the incorporation were associated with a number of Wairarapa hapū, however they, being the shareholders of the incorporation now constitute a distinct ownership group kin to, but independent of any Wairarapa hapū. And so, I simply wanted to draw that to your attention because

that is why in which Mr Smiler has described how the current day incorporation relates to, if you like the hapū who had interests in Wairarapa moana.

My paragraph 200 – I could also note that in my cross examination of Mr Smiler and the reference here to the transcript is 4.12 at pages 81 to 82 and Tribunal staff I don't think we need to bring this up on the overhead. But Mr Smiler agreed with me that the incorporation had not sought a mandate to represent hapū and Mr Smiler agreed that the incorporation had not sought a mandate from the hapū mentioned in the Tribunal report where there was mention of the hapū who had interest in Wairarapa moana.

At my paragraph 221, "the return of the resumable land to the incorporation would benefit individual shareholders according to their proportionate shareholding through the payment of annual dividends, the shares are not held equally," and I don't need to take the Tribunal through my sub paragraphs there, but I just set out there how disproportionate the shareholding is and what that would actually mean as assets in any way were returned and how disproportionate that return would be as amongst the shareholders.

So 222, "It does follow that the return to the incorporation of any redress would be enjoyed by the shareholders disproportionately", for what it's worth and I make this submission suggesting to the Tribunal that you do pay attention to what the Crown does in this regard because of the reasons why. So, for that it's worth the Crown does not support incorporations as mandated entities to represent claimant communities in negotiations for these two reasons incorporations have shares which can be transferred and held unevenly and shares can be held by people who are not those to whom the claims relate.

And so, it's a general proposition the Crown has discomfort with incorporations as being the recipients of redress for those reasons. The next point I wanted to make, and I think I explained myself in opening submissions about this. I put some questions to Mr Smiler about the way in which the incorporation had spent

its money, particularly in it's charitable – the way it had transferred money to its charitable trust and the reason for doing this is not to say pejoratively, they're not paying enough. Rather it is good to see the incorporation is able to make the transfer of money to charitable—it's charitable arm and also to pay dividends to its shareholders that's good in itself and in absolutely no criticism about that so the submission is, well if the incorporation is saying look don't worry we're a good recipient of redress because we provide money through a charitable purpose.

You are able to look at how it does that and to what extent it does that visa vee how much it pays in dividends to its shareholders.

JUDGE WAINWRIGHT:

Well, can I just stop you Mr Irwin. I am a bit confused by this because the Crown in these submissions has been pains to get us to focus on the narrow way in which the incorporation has expressed its application as relating to the particular aspect of our recommendations namely the inadequate compensation paid for the 700 and however many it is, takers.

And the thrust of all of what you have said has been, look at that, look how limited it is, look how limited the prejudice is it is not justified to make –

ANDREW IRWIN:

Yes.

JUDGE WAINWRIGHT:

Binding recommendations to return that asset and then you come in paragraph 220 and you say that the incorporation is not and does not equate to the group that once held communal customary interest in Wairarapa moana, well the incorporation is not seeking the return of this asset on the basis of the claims that relate to how the owners of the communal customary interests in Wairarapa moana were affected by the activities of the Crown it is taking itself forward to

the 1940s and looking at one discrete activity of the Crown that effected only the then owners of the incorporation.

1640

Now the Tribunal has said in its memorandum and directions that that narrow characterisation of where the hara lies and where the group lies in all of that is a matter of difficulty for us, but the Crown has been going all along, look narrow group, narrow prejudice cannot do it. And now when you come to say, "Well who should benefit if the Tribunal wants to make binding recommendations you say," Well it is not the incorporation."

ANDREW IRWIN:

Well I think you've really called me out on this one and I have to accept that. that this is a hangover our cases we opened and we're put a bit more thought into it, I thought this would be an issue and I think you're right look, if we're look – if we are to follow what I'd suggest you do follow and I do erroneously submit that you followed the process of look at the particular prejudice, look at the claim about that, look at the distinct prejudice be careful about that and then think about how best to recommend action that would compensate for or remove that, that distinct prejudice.

There's a disjoint with this part of my submissions, I accept that.

JUDGE WAINWRIGHT:

Okay.

ANDREW IRWIN:

And I think that where this submission becomes relevant is if you are thinking about other claims, if you are you did pose other claims in your direction, if you are thinking that there are other claims that relate to the land, and of course the Crown's case is those claims to don't but if you say, those claims that relate to

Wairarapa moana, do relate to this resumable land then the submission becomes relevant.

JUDGE WAINWRIGHT:

Yes, and we address that in our memorandum of direction?

ANDREW IRWIN:

Yes.

JUDGE WAINWRIGHT:

Yes.

ANDREW IRWIN:

Yes, and so, I think I have to accept that and really, I think this should have logically been placed in another part of these submissions where I address that part of the case.

JUDGE WAINWRIGHT:

All right, thank you.

ANDREW IRWIN:

But returning to the point seeing as I'm there now Your Honour. I was making the point that the incorporation.

JUDGE WAINWRIGHT:

Yes, but what does this have to do with anything. I mean, that was really my point that if the incorporation is a commercial entity that owns certain – well owned certain assets which were compulsorily acquired from them and they've made arguments about the prejudice to them from that. If they are indeed the body that was prejudice the fact that they don't give money to people what does that have to do anything?

ANDREW IRWIN:

Well, I think that has really something to do with it because of this, if you think that the claims that relates to all of this is really about Wairarapa moana.

JUDGE WAINWRIGHT:

No but you are going to the wider question now. I mean I completely agree that if relates to, takes us all the way to Wairarapa moana and the cascade of events since. It's very hard for us to understand that the names who are on the incorporation list are the only people who are affected particularly, and you have drawing that point out helpfully in proportion to the shareholding. But if you proceed logically with your submissions which is that the only people in the frame are the people from whom the compulsory acquisition happened because that is the only recommendation we are looking at.

The incorporation is the only body that can be in that frame, I mean you have said that they should not have been for a whole lot of other reasons but not surely, because they do not give enough people.

ANDREW IRWIN:

No and so, sorry I was trying to say seeing as I was talking about this now, at this part of these submissions and we're addressing the issue just to complete this on the premise that you think that there may be way of well-founded claims that relate to Wairarapa moana in that context.

JUDGE WAINWRIGHT:

Okay, it is not them.

ANDREW IRWIN:

This is an issue?

JUDGE WAINWRIGHT:

Yes.

ANDREW IRWIN:

And it should be a concern, it's not just the proportionally it's the disproportionality between – I guess the issues this is that if there a border community that should benefit from a broader Wairarapa moana community that should benefit from redress and the incorporation says to you, "Well look we're a great vehicle return redress to us. despite the fact that our shareholding is no disproportionate." There's another issue and that is they can't realistically say don't worry we have a charitable arm and we'll make sure that the wider group benefits through that.

JUDGE WAINWRIGHT:

I think we have moved on a bit, have we not? Because I think, well I took from Mr Mahuika in his position during the course of the week in fact, seem to develop because he started out saying, you know push comes to shove they would consider the possibility that they could establish a trust and the it seem to me in his most recent responses to questions it had gone beyond that and the incorporation was willing to establish, willing and had accepted that it would need to even establish a trust that would not be relative to shareholdings and would enable the participants in that process to identify other interest holders who should properly receive benefits.

So, I am not sure that it is helpful to sort of stick exactly, I think you need to move on to where the arguments arrived.

ANDREW IRWIN:

Excellent. I am happy to move on and I come to a new major section of the submissions and I do actually wonder Your Honour, of course In your hands but I am not about to address these settlement trust applications.

JUDGE WAINWRIGHT:

Kua pau te hau.

ANDREW IRWIN:

Pretty much, pretty much and there's not a chance of getting through this.

JUDGE WAINWRIGHT:

Well, I think though there is, you are not going to take more than a couple of hours in the morning looking at this in relation to what you have already got through. So, I am comfortable for us to adjourn now and reconvene at 10 because people have been hanging in there all day with a lot of arguments that especially, to people who do not think in the limited and convoluted way that lawyers think is just all pretty difficult to understand.

So, I think that is fine Mr Irwin let's stop there. Are you looking pregnant Mr Mahuika?

MATANUKU MAHUIKA:

I certainly hope not. Ma'am and I accept that I wasn't here for a large proportion of the day, unfortunately because of the way of the fixture was initially arranged I have made another committee tomorrow. Mr Milner and Ms Hauraki will be here tomorrow, but and I should ask with your leave I am afraid that I have to return to Gisborne.

JUDGE WAINWRIGHT:

Kei te pai.

MATANUKU MAHUIKA:

For that committee on the first flight in the morning, Air New Zealand is not very accommodating with flights to Gisborne.

JUDGE WAINWRIGHT:

Indeed. And you are teleporting is not up to scratch.

MATANUKU MAHUIKA:

No, not yet we're working on it.

JUDGE WAINWRIGHT:

All right no, that is fine.

MATANUKU MAHUIKA:

Thank you, Ma'am.

JUDGE WAINWRIGHT:

I am hoping that the other moving parts of our inquiry however are able to be here at 10 in the morning, perhaps against an expectation that we might not have needed to convene tomorrow, I think we should. So, koira.

(16:49) DR RUAKERE HOND: (MIHI WHAKAMUTUNGA)

Ka pai, kua eke te wā takiwā ana i kōnei, e rere tonu ana te kōrero o te Karauna, āna, nō reira e te pou kōrero, e te rōia mihi kau ana ki a koe, me te karawhiu o te kōrero i te roanga o tēnei rangi. Kua torengi te rā, engari anō kāore anō kia torengi te kōrero. Nō reira, kei te hiahia au ki a mihi ki te whare, anā, noho tonu ana ki roto i ēnei kōrero, hei te ata āpōpō ka hoki mai. Nō reira, ka tuku atu ko tēnei karakia hei whakakōpani i a tātou mahi mō te rā nei, te tūmanako ko te kite atu i a koutou anō , hei āpōpō me tēnei anō te ia o te kōrero. Tēnā koutou, tēnā tātou.

[Interpreter: Certainly, we have heard from the Crown today, so to you Sir thank you very much. Certainly, your evidence has certainly given us much to think about, but no doubt it does continue but again to all those present. And again, tomorrow morning we shall reconvene, I shall complete our day with a prayer with a hope that we will return refreshed and ready again tomorrow. I will let the Koroua Dr Hond complete his karakia.]

KARAKIA WHAKAMUTUNGA (DR RUAKERE HOND)

HEARING ADJOURNS: 4:51 PM

HEARING RESUMES ON FRIDAY 15 NOVEMBER 2019 AT 10.02 AM

(10:02) DR RUAKERE HOND: (MIHI)

A te mōrena rā ki a tātou katoa i roto i tō tātou piringa i te rā nei. Te āhua nei ko te kōangiangitanga o te tangata tēnei, ana kei te hiku mutunga o tō tātou hui i tēnei wiki, nō reira ka mihi ki a koutou ngā māia, te manawanui, otirā ngā whakaaro ki ngā karangatanga katoa kei te kāinga e aro mai nei ki ngā kōrero i te roanga o tēnei rangi. Otirā te Karauna, ana kei a koutou hoki ngā kōrero whakakapi i tēnei wiki, nō reira e mihi kau ana ki a tātou e noho tahi ana. Kei te whakaaro ake māku pea te karakia hei wāhi atu i ā tātou mahi mō te ata nei, ana kātahi ka huri ki ā tātou kōrero, ana kia tutuki pai ai, tēnā koutou tēnā koutou, tēnā tātou katoa.

[Interpreter: Top morning to everyone who have gathered here this morning. So this, as you can hear through my voice, and as we come to the ending of our hearing for this week, and certainly there have been a lot of thoughts and expressions that we do need to consider. And again to the Crown, and of course you will have time to complete the evidence you have before us, to us who are gathered here today. So I will lead us in prayer to ensure things run smoothly and then we'll pass matters over to my friend to yonder there and he shall continue on, but thank you very much

KARAKIA TĪMATANGA (DR RUAKERE HOND)

(10:04) ANDREW IRWIN: (CONTINUES CLOSING SUBMISSION #J103)

A kāti tēnā rawa atu tātou katoa i tēnei rā, ā, tēnā koe Tākuta Hond mō tō tātou kaikarakia mō tēnei rā, me kī, tātou katoa te whare, mōrena.

[Interpreter: Thank you very much, and again acknowledgements to all present, and of course thank you Dr Hond for leading us in prayer, and of course those gathered here in the house.]

Now, I am grateful to members of the Tribunal and of course everybody else for coming back today so that I can finish these submissions. I will commence, unless there is anything that needs to be said before I do that? Don't think so? No.

I am at page 81 of my closing submissions, that's the document #J103, and I am turning here to the Ngāti Kahungunu ki Wairarapa Tāmaki Nui ā Rua Settlement Trust's position and application for resumption.

CONTINUES CLOSING SUBMISSIONS #J103 FROM PAGE 81, PARA 229

So at my paragraph 229, "The settlement trust has consistently opposed the Incorporation's application for resumption.

The settlement trust's preferred option is unchanged: first and foremost, it commends to the Tribunal the settlement it has negotiated with the Crown and asks that the Tribunal decline to grant the application by the Wai 85 claimants.

On 23 August 2019, after evidence was heard and as the parties were preparing closing submissions in respect of the Wai 85 claims, the settlement trust filed its own application for resumption in reliance on three claims. About a week later, the Tribunal indicated the possibility that the Tribunal was contemplating whether further claims might relate to the land including claims relating generally to the leasehold economy, Crown purchasing, and the operation of the Native Land Court in the Wairarapa. As a result, the settlement trust's closing submissions now seek to rely on numerous further claims across 18 Wai claims that have not yet been specifically identified."

Turning to the settlement trust's first position which we did discuss a little yesterday, that is to reject the Incorporation's application.

"The settlement trust strongly opposed any form of resumption in its opening submissions and evidence. In opening, the settlement trust submitted that the "remedy for Crown breaches should not include the return of land in Raukawa's takiwā to Wairarapa Māori because it should not create further grievances". Their first objection to the application was on the basis of tikanga."

And just to be very careful and precise about this in the opening submissions which is, for the settlement trust, which is document #J84, at paragraph 5.3, it was said, "Seeking land at Pouākani would be inconsistent with the tikanga of Ngāti Kahungunu ki Wairarapa Tāmaki Nui ā Rua."

"In evidence, the settlement trust provided several compelling reasons why the settlement trust did not seek return of land at Pouākani," and I note here the evidence of Mr Te Whaiti:

> We need land back in our customary rohe — not at Pouākani. I would estimate that we have ownership of less than 2% of the land in our customary rohe whereas the Pouākani land reserves provided by the Crown remain substantially intact. I would estimate we retain close to 98% of our land at Pouākani.

Mr Potangaroa also emphasised that it is in Ngāti Kahungunu ki Wairarapa Tāmaki nui-ā-Rua's traditional rohe that they have "suffered the most losses and that is where those losses need to be put right".

The grant of the Pouākani land in 1916, so far away from Ngāti Kahungunu ki Wairarapa Tāmaki nui-ā-Rua's rohe, that it caused division. Mr Te Whaiti explained that "to have sought further land at Pouākani would have compounded the Crown's breach". Mr Potangaroa also considered that seeking commercial or cultural redress in Pouākani would "just reinforce or embed those wrongs".

Ngāti Kahungunu ki Wairarapa Tāmaki nui-ā-Rua's tikanga does not allow them to take land which is within another iwi's rohe. As Mr Te Whati noted:

> We knew that seeking land in this area would be detrimental to us and to our people living in Mangakino, and their relationships with Raukawa and Tūwharetoa."

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Which was reiterated in the opening submissions that I referred to just before. And in the memorandum where the settlement trust filed the application for resumption, counsel for the settlement trust noted two principle reasons why the settlement trust did not initially file an application for resumption:

1. first, the observation of tikanga with respect to Raukawa's interests; and
2. secondly, reference there to the deed of settlement with the Crown.

And it occurred to me, Your Honour, you of course have this difficulty that we discussed yesterday, to what extent can you take into account the settlement deed that's been negotiated, and it occurred to me that what you can properly take into account is the settlement trust is saying to you, "We don't want the land as our first position and we have reasons for that," and they've provided the reasons, and the two principle reasons are: Tikanga – it would be contrary to their tikanga to receive this land at Pouākani; and there's another reason, it's the deed that they've negotiated, and you are properly entitled to take into account the fact they are saying to you, "Please don't give us this land back." And in effect, their reasons, their first reason is certainly a compelling one. Their second reason you can take it face value. You don't need to go into the detail of the deed to assess, "Well, is it good enough? Does it address our recommendations? Is it a good enough reason?" You can properly take into account the fact that they are saying to you, "Please, we have a reason not to receive these lands."

And as I mentioned yesterday, and we discussed the Crown does support that first position, and I don't think I need to mention the detail of paragraph 235.1 and 235.2, and so I turn to their alternative position which is for resumption, and the Crown does oppose that.

And so in the submissions I go through the same process that was gone through with the Wai 85 claimants, it's to look at the claims, to identify the prejudice and then to pose the question, "Well if these claims do relate to the land, well then what is the most appropriate action that you should recommend?", and the settlement trust has pointed to three specific claims, and as I mentioned, also relies upon other unspecified claims, and the Crown does accept that an aspect of the Wai 97 claim, it does relate to this land.

I mentioned this yesterday, and at my paragraph 241 and over the page, that is a quote from a statement of claim. I think I mentioned this yesterday and took you to it, the Crown accepts that relates to the land. It's essentially the Wai 85 claim. And so that's not really the issue, I think the issue is, 'What about all the other claims?'

So, one thing we did in the bundle was to provide to you the statements of claim, and I would like to go through some of the statements of claim to see the extent to which they can be said to relate to the land if they do. And before I go there, actually, I'd like to come back to an issue that we discussed yesterday, Ma'am, where you said effectively the Crown is saying the Crown's approach to this is to say there needs to be a claim to the land, and so those words relate to really mean there needs to be a claim to the land. And to repeat, the Crown's position doesn't change. The Crown says, as it did yesterday, there must be a logical connection between the claim and the land. But what we've done overnight is to just have a look at the manner in which our Courts and the Tribunal and some other people have described the memorial scheme and also the kinds of claims that were being protected by the memorials.

So I would like to take you to some of these, and this isn't mentioned in the written document, and I think this is directly relevant to the notion that we were discussing yesterday.

So the first document is an interim report of the Waitangi Tribunal and this was referred to in the *Lands* case, that set out the Tribunal's concern I think about the State-Owned Enterprises Bill whereby it was proposed – the Crown was proposing to divest itself of ownership of lands to the SOE's, and there wasn't a protection mechanism in place, and the Tribunal raised a concern about that in this document. We only have a few copies, so I will provide Your Honour with perhaps two copies, and I don't have enough for all of my learned friends, but I will see how I go if that is okay? And the extract in this document that I did want to take you to is on page 3, and it's the final sentence of the paragraph beginning, "The Treaty of Waitangi affirmed a special relationship between the Crown and the Māori people," and at the end there it says, "We do not think in particular the Crown should dispose of lands…" and these are the words that we used –

JUDGE WAINWRIGHT:

Sorry, where are we?

ANDREW IRWIN:

The paragraph begins, "The Treaty of Waitangi affirmed a special relationship…"

JUDGE WAINWRIGHT:

Okay, yes.

ANDREW IRWIN: (CONTINUES)

The final sentence, "We do not think in particular the Crown should dispose of lands…", and these are the words used, "…that are the subject of claims, and risk thereby some prejudice to the claimants' position." So that was one way in

which people were thinking about what are the kinds of claims that ought to be protected, and the way the Tribunal articulated or described those claims was to say these are – well, the lands that needed to be protected were the lands that are the subject of claims. So…

JUDGE WAINWRIGHT:
This is the same Tribunal that expressed those views in the *Muriwhenua Report*, aren't they?

ANDREW IRWIN:
I think so. It's dated at Te Hāpua.

JUDGE WAINWRIGHT:
Yes, they were.

ANDREW IRWIN:
Yes.

JUDGE WAINWRIGHT:
This is that Tribunal, yes.

ANDREW IRWIN: (CONTINUES)
The second document I'd like to take you to is the Supreme Court in the *Haronga* case and that's in the bundle that I provided yesterday.

JUDGE WAINWRIGHT:
So we should give a numerical appellation to this page – effectively it is a supplement to your bundle of documents, isn't it?

ANDREW IRWIN:
Yes.

JUDGE WAINWRIGHT:

So that was J10(a). This should be J103(b)?

ANDREW IRWIN: (CONTINUES)

So now in my bundle of documents which was J103(a), I'd like to take you to tab 5, and the particular paragraph in the decision is 62 which is, in the page numbers at the bottom, 83.

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REFERS TO #J103(A) FROM PAGE 83, PARA 62

So at paragraph 62, the Supreme Court says – it refers to the proceedings brought by the New Zealand Māori Council at the time of or possibly just after the interim report of the Tribunal that I just referred you to. And it says, "These were removed to the Court of Appeal," and it refers to their judgment and that judgment is of course known as the *Lands* case, and the Supreme Court says in its judgment, "the Court of Appeal held that s 27 did not sufficiently address the risk that Crown land the subject of claims…", those are the words used to describe the lands at issue, "…Crown land the subject of claims…". So that repeats the description used by the Tribunal in that earlier document. So the concern was, it was that kind of land that was subject to claims was not being protected.

And just to carry on in this one paragraph, the Supreme Court says, "The Court…", that is the Court of Appeal, "…decided that it would be inconsistent with Treaty principles for the Crown to implement a series of land transfers without giving consideration to the possibility of claims to the land and a reasonable opportunity for those possibilities to be investigated." So there, I would underline the words "claims to the land". So the Supreme Court was describing the types of claims at issue as being claims to the land.

And then at paragraph 66, so just over the page, the Supreme Court has discussed the amendments that followed, and in paragraph 66 it says,

"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." So I would underline "claims to the land", those are the words I'm drawing your attention to. Those are the claims that were being protected through the Act. And then the next sentence, "Implicitly…", and this is a passage I drew your attention to in my written submissions, "Implicitly, Parliament, like the Court, was concerned to protect such claims on an individual basis." "Such claims", being claims to the land, "on an individual basis". And so again, I draw those words to your attention.

The Court of Appeal in a decision of 2009 referred to the scheme as well, and I'm sorry but in the flurry of activity this morning we didn't have time to get copies of this decision, but we'll do that. This is the Court of Appeal's decision in *Attorney-General v Te Kenehi Mair* [2009] NZCA 625 at [136]. And the heading before paragraph 136 says 'The effect of the settlement legislation', and the paragraph reads, "The statutory terms on which the *Lands* case and the *Forests* case were settled were intended to safeguard Māori with claims to land transferred to or vested in state enterprises and claims to Crown Forest Land." So we will certainly provide the Tribunal and my learned friends with a copy of that decision as we can.

JUDGE WAINWRIGHT:
Thank you.

ANDREW IRWIN: (CONTINUES)
Now there were some references I thought I should draw your attention to just to be complete. This is in *Hansard*, the first references I want to draw your attention to, unfortunately they're not in our bundle, and again we'll certainly provide these as quickly as we can to everybody, this is in *Hansard* to the Treaty of Waitangi State Enterprises Bill of 1988, and this is at the introduction of the bill, and the bill was introduced by the

Right Honourable Sir Geoffrey Palmer, the Minister of Justice, and the member said, "The State-Owned Enterprises Policy involves the transfer of vast areas of land from the Crown to the new corporations. The Government was aware that some of those lands were the subject of claims before the Waitangi Tribunal." So again, that just repeats the language that the Tribunal had used. And carrying on, he said, "Accordingly, s 27 of the State-Owned Enterprises Act provided that those lands should continue to be subject to claims." And then just a little bit later, Sir Geoffrey Palmer said, "The Court…", and he's referring here to the Court of Appeal's *Lands* decision, "The Court directed the Crown to prepare a scheme of safeguards protecting existing or foreseeable claims against lands and waters intended to be transferred to State-Owned Enterprises."

JUDGE WAINWRIGHT:
Prepare a system of protections, is that what you said?

ANDREW IRWIN:
"…to prepare a scheme –

JUDGE WAINWRIGHT:
Scheme.

ANDREW IRWIN: (CONTINUES)
– of safeguards protecting existing or foreseeable claims against lands and waters intended to be transferred to State-Owned Enterprises."
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In the second reading of the Bill there were some – there were two other references, three references to draw to your attention, these are in our bundle. So, the tab is Tab 11 and the page at the bottom that I would like to refer you to is 260 –

JUDGE WAINWRIGHT:

Yes.

ANDREW IRWIN:

And on this page, this commences the second reading of the Bill, you can disregard all the pages of that tab up until that point, they don't relate to that Bill. But here we have, "The Right Honourable Sir Geoffrey Palmer (The Deputy Prime Minister) moving the second reading of the Bill." And I refer to you to this first extract yesterday.

It's the – I referred you to the two final sentences of that first paragraph, "At the same time it, being the Bill, establishes a system that protects present and future claims to the Waitangi Tribunal in respect of that land but no other land. It has no effect on land that is at present in private ownership, none at all."

And then down the page, to this – the penultimate paragraph, Sir Geoffrey said, "The proposed new section 27A which is introduced by clause 10 of the Bill, ensures the purchasers from State enterprises have knowledge of the claims that could be brought in respect of that land." So, the language there used is, "In respect of that land", "and that would result in the return of the land to Māori ownership."

Over the page and at about the middle of the page there's a paragraph that begins, "The proposed new section 8C is another important section." and then Sir Geoffrey says, "It lists those persons who have a right to be heard as a party to the Waitangi Tribunal hearing regardless of claims to land transferred to or vested in State-owned enterprises." So, there, the words do underline claims to land.

Now, there were two other references to the forestry agreements and I thought I would draw Your Honour's attention and members of the Tribunal, your attention, to these statements in this proceeding and the context that of course we will be coming to the forestry aspect of this soon but also I think it is irrelevant

to look at the language used in the forestry agreements because essentially in the statute, the words are the same today under section 8Hb, the reference is to claims that relate to the land and there are some words in the forestry agreements that I would like to draw your attention to in this similar kind of way that are relevant.

And I think we can use those, certainly in terms of the Wai 429 part of this proceeding which we will come to later in December, but I think it would be incomplete of me not to refer to these now and I think they are relevant still to section 8A.

So, there are two agreements, one is – and they are both on the record of inquiry, I think I can just simply refer to the first document without us actually going there although if people want they are more than welcome to. The second document is the really, possibly the important one.

The first document is #J81 and this is the agreement dated 20 July 1989, between the Crown, the New Zealand Māori Council and the Federation of Māori Authorities, I think it's commonly known as the forestry's agreement and you will have seen it before.

Somebody has brought it up on the screen that's excellent, thank you. I would like to go to clause 6 of that agreement and the language used there is relating to. And so, it says, "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.

And of course, this follows, doesn't it, the amendments already made in respect of the State-Owned enterprises land and the language used in the statue which relates to and so it's repeated that language relating to.

The next and final document is #J81(a) and this was a deed of clarification to the July agreement and – it's magical, I say things and they appear on the screen, thank you very much to whoever put that up there – this is dated 17 October 1989 and I would like to go to clause A which is the first clause and that says, "On 11 September 1989, the Government decided that the Crown Forest Assets Bill will be amended to provide protection for, and these are the words to underline, Māori Customary land claims to Crown Forest Land." And so, the words to underline Your Honour, were claims to Crown Forest Land.

JUDGE WAINWRIGHT:

It is actually – the use of the word customary there is interesting.

ANDREW IRWIN:

Yes, it is. And so, you have – I'm not putting anymore citations to you, I think these are all helpful and all relevant and they show that the concern was, the Crown was going to be devesting itself of ownership of land that was subject to claims to the Waitangi Tribunal. Either the made by 1988 or foreseeably to be made and there are a number of references that say that what Parliament was concerned about was where there were claims to those lands that were to be devested from Crown ownership that the capacity to return those lands to Māori ownership should be retained. Food for thought.

JUDGE WAINWRIGHT:

Thank you. So, what is the document number for this? We have it already, it is #J81(a)? Kia ora.

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ANDREW IRWIN:

I am back in now into my closing submission and I am at paragraph 243, and there the Crown has referred to the claim identified by the settlement trust for the Wai 1023 claimants and I've incorrectly cited it there that the date of course,

as I said yesterday, it shouldn't be on 22 January 2015, it should be on 22 January 1915.

CONTINUES CLOSING SUBMISSION #J103 FROM PARA 243

There is that claim and the claim was, "…as "compensation" for the failure to make a reserve…", so this was a quote from a statement of claim, this was the claim that, "…as "compensation" for the failure to make a reserve an order was made vesting the Pouākani block containing 30,486 acres in southern King Country in the names of the descendants of the Māori who had been identified by the Native Land Court in 1883 as the owners of Lake Wairarapa."

And in that paragraph that follows, the Crown says that it does not accept that just because there is mention made of the land at Pouākani does not mean that this is a claim that relates to Pouākani. This is not a claim to that land. There is no logical connection between the claim and the land in the sense that it can properly be said that this claim relates to that land. Rather, this is a claim about land at Wairarapa and it's a claim relating to that land at Wairarapa.

I wanted to just pay a bit more attention to the statement of claim and go to it. There are numerous statements of claim for the claims and as I look back through them they were amended as time went by, and in this situation there were – by "this situation", I mean this proceeding in this inquiry district, there were a number of individual statements of claim that were then aggregated into joint statements of claim if I can call it that, and I don't understand the reason why that happened, but that doesn't matter.

REFERS TO #J103(A) TAB 17, PAGE 324, PARA 2

The document I would like to take you to is in my bundle at tab 17. And while you're going there, this is one of these aggregated statements of claim. It's the fourth amended statement of claim on behalf of Ngā Hapū Karanga, and it's part A, there was also a part B, and there were other iterations and other amended claims, but I think it's sufficient for our purposes to look at this as a

good example of the claim. This one is dated 6 October 2003. And as we turn the page, we can see on whose behalf the claims were filed, and at paragraph 1.8 it makes reference to the Wai 1023 claimant. So, this is a claim also on behalf of Wai 1023.

If we come to paragraph 2 of the statement of claim, there is a statement, “The claimants…”, at paragraph 2.1, “…are and represent the descendants of the tūpuna, the people in those hapū and whānau who were and are the tangata whenua of and who continue to exercise rangatiratanga within the claim area set out in the map attached to this amended statement of claim and marked "A" ("the claim area").” And we can go to the back of the document and you will see that map.

And it’s identified with a big “A” at the top and it says, “Ngā Hapū Karanga claim area”, and it’s focussed clearly on the Wairarapa, and the land at Pouākani is of course not shown on this map, it couldn’t be shown on this map, but it’s to the north of this map.

JUDGE WAINWRIGHT:
This is the district inquiry boundary, isn’t it?

ANDREW IRWIN:
I do not know, Your Honour.

JUDGE WAINWRIGHT:
I think it is.

ANDREW IRWIN: (CONTINUES)
Coming back into the statement of claim at paragraph 2.2, it says, “The Claimants note that the claim area does not purport to constitute the tribal boundaries of the constituent groups of ngā hapū karanga or any other iwi, or hapū, nor the extent of influence and rangatiratanga of any iwi or hapū but is a

boundary solely for the purposes of the Wairarapa ki Tararua consolidated claims (Wai 863)."

So I read that as meaning, I mean, it presumably is the inquiry boundary for that inquiry. But at the start, this claim is clearly about that area. And if I can quickly go through some of the – go through the claims: The First Cause of Action – the failure to protect land base and other resources. The first sentence at paragraph 5 of the claim refers to, "…from 1853 the Crown actively facilitated and/or permitted the transfer of land belonging to Wairarapa Māori being ngā hapū karanga o Wairarapa so that the land remaining in the ownership of ngā hapū karanga was insufficient for their present and future needs." And I read that as being a reference to land within the claim area and being a claim about that land.

If I can go over to page 10 of the statement of claim and to paragraph 7 of the statement of claim. The Second Cause of Action – being leasing and the failure to provide alternative to sale. The claim there commences with these words, "From 1844 ngā hapū karanga controlled 'and facilitated settlement within the claim area," and on it goes and provides particulars in respect of that, and that is clearly a claim about the Crown's actions in terms of leasing in the claim area.

And I go to the Third Cause of Action and the Fourth Cause of Action and the Fifth Cause of Action and the Sixth Cause of Action and the Seventh Cause of Action and I draw the same inferences that can be reasonably drawn that these are claims to the claim area. In fact, this is part A of the statement of claim and it doesn't expressly refer to Pouākani at all. Part B does in the paragraph that we saw. But the Crown submits that these are claims about Wairarapa land, these are claims that relate to, generally speaking, lands in Wairarapa.

JUDGE WAINWRIGHT:

Where's the mention – is there mention in these statements of claim about Wairarapa Moana?

1050

ANDREW IRWIN: (CONTINUES)

Yes. So, if we come into tab 18 and you will see that this part B and this is the amended statement of claim on behalf of Ngā Hapū Karanga, and it is part B. The document I was taking you through was part A. And if we come over to page 4 of that statement of claim, there are precisely the same references to the claim area and to the map.

JUDGE WAINWRIGHT:

And then we've got these Treaty breaches pleaded in paragraph 10 about the Crown's purchase of land around Wairarapa Moana in the Turakirae Block?

ANDREW IRWIN:

Are we on the same page?

JUDGE WAINWRIGHT:

Page 367?

ANDREW IRWIN:

Yes, and so there's a heading "Treaty Breaches. Between 1 September 1853…"?

JUDGE WAINWRIGHT:

Yes.

ANDREW IRWIN: (CONTINUES)

Yes. "…the Crown acquired title to the Wairarapa Moana Riparian Lands and assumed ownership of Te Puata," yes. So there is a claim and relating to Lake Wairarapa in the manner in which the Crown acquired that.

JUDGE WAINWRIGHT:

And then in paragraphs 22 following Wairarapa Moana and Pouākani?

ANDREW IRWIN: (CONTINUES)

Yes. And so on page 9 of the statement of claim at paragraph 22 there's a heading "Wairarapa Moana & Pouākani", and there is a claim, and over the page there's paragraph 27 which is the claim that I referred to before.

JUDGE WAINWRIGHT:

So is the Crown's argument then, Mr Irwin, that because Wairarapa Māori are located in their rohe and if claims were about their rohe, that they're not making claims in respect of Pouākani?

ANDREW IRWIN:

If I can rearticulate that, the Crown says that these are claims to land at Wairarapa and the way in which they have been framed by the claimants is to describe a claim area and to describe their rohe, and they have articulated their claims against the Crown to its actions vis-à-vis that land.

JUDGE WAINWRIGHT:

Well to be fair, it was the Waitangi Tribunal that articulated the district inquiry area.

ANDREW IRWIN:

Yes.

JUDGE WAINWRIGHT:

And who was it, Mr Irwin, that created a connection between Wairarapa Moana and Pouākani?

ANDREW IRWIN:

The Crown granted land at Pouākani, yes.

JUDGE WAINWRIGHT:

That is right. So the connection between their claims that relate to land in the Wairarapa, the connection between those claims and the relationship between those claims and Pouākani was created by actions of the Crown. So I am surprised to find the Crown now saying for the claimants to be making connections between their claims and land at Pouākani is the subject of analysis by the Crown that precludes our acknowledging that connection.

ANDREW IRWIN:

There are connections of course, and of course the historical facts are the Crown granted land at Pouākani. The Crown did so because of the 1896 Deed. That of course happened, and the question before you is what claim relates to the land at Pouākani, and in a careful way my submissions have been directed at just teasing out and testing precisely which other claims that do relate to the land at Pouākani.

JUDGE WAINWRIGHT:

If you do that by reference to the district inquiry boundary though, it is inevitably the case that because the Tribunal divided the country up into districts and inquired into each of those, that the claims that the claimants made were in respect of that inquiry district within that district inquiry. However, the anomalous situation for Wairarapa Māori was the Crown connected them with land at Pouākani. That, however, was not in within their district inquiry boundary, but that cannot be a basis for the Tribunal to say, "We cannot acknowledge that connect because it is not within the district inquiry boundary."

ANDREW IRWIN:

That's not what I'm saying. I'm not saying because the Tribunal created an inquiry district that you're precluded from providing redress at Pouākani, in fact, I've conceded that you are able to do so because there are claims that relate to the land at Pouākani and they were made and tested in your inquiry, those are the Wai 85 claims, and also that aspect to the Wai 97 claim concerning the Crown's acquisition of land at Pouākani. So I am not saying that it is because the Tribunal – that you're precluded from resuming – ordering the resumption

of land at Pouākani. As I said before, I'm looking at the claims and I'm testing, "To what extent can it properly be said that these are claims that relate to, in the sense that they are, to land at Pouākani." And I accept there is a claim, the Wai 85 claim, to that land, but the Crown's submission is that the claim concerning the exchange of land, the gifting of land at Pouākani in accordance with the deed of 1896, that that is a claim about the Crown's acquisition of Wairarapa Moana. It is a claim to land at Wairarapa.

JUDGE WAINWRIGHT:

And, well that's – further to your analysis that relates to does not connect those claims to Pouākani?

ANDREW IRWIN:

Yes.

JUDGE WAINWRIGHT:

Okay.

ANDREW IRWIN: (CONTINUES)

In my document under the next heading **Wai 1050**, the Crown sets out its submission concerning that claim and its connection, and the same submission I think is made – I don't think I need to go through this. The Crown submits that that claim does not relate to the land at Pouākani for the same reasons that the Wai 1023 claim does not relate.

JUDGE WAINWRIGHT:

Yes.

ANDREW IRWIN:

Then the Crown addresses a broader unspecified claims. I don't think I need to take the Tribunal through this. You have it in writing and no doubt you've already read it, I'm sure that submission is clear, and it's the –

JUDGE WAINWRIGHT:

Well it is the same submission.

ANDREW IRWIN:

The same point and the same submission being made.

JUDGE WAINWRIGHT:

Yes, yes.

ANDREW IRWIN:

REFERS TO #J100 FROM PAGE 91

If I bring members of the Tribunal to page 91 of my written submission, I have the heading "**What was the prejudice that resulted from the Crown's actions that were found to be in breach of Treaty principles?"**. And so as I did with the Wai 85 claim, what the Crown is doing here is looking at, well, what is the prejudice that was associated with those claims, and if we start with the Wai 97 claim, that's the same prejudice, it's the same claim that the Wai 85 claimants make, so it's the same.

If we turn to my next heading and we look at the Wai 1023 and Wai 1050 claims and these were about the exchange of land at Pouākani, the Crown says of course, as I've said and submitted, it does not accept that those claims do relate to the resumable land, but if the Tribunal does consider that those claims "relate to", then what was the prejudice? And it's relevant to note that the Tribunal found that the prejudice associated with those claims included that the land at Pouākani was:

- "vastly inferior to the farmland in the vicinity of Wairarapa Moana and … otherwise unsuitable in every way.
- It was absurdly far away for people with few transport options and little money; and

- critically, for Māori people, not their ancestral land but the ancestral land of others and not of their iwi or even their waka.

The Tribunal also found:

The relationship between Wairarapa Māori and Waikato Māori was jeopardised by the grant to Wairarapa Māori of land in the southern Waikato, where they were not tangata whenua.

1100

And clearly the Tribunal found that that grant of land to Wairarapa Māori was itself a breach to the Treaty and caused prejudice to Wairarapa Māori.

So, in terms of, if we just think about the exchange of land, the prejudice was and included, I should say, giving – the Crown giving Wairarapa Māori land in somebody else's traditional rohe, that was prejudice.

In terms of the Crown's acts and omissions relating to Wairarapa Māori and it's Wairarapa Moana and it's failure to provide suitable reserves. Again, if the Tribunal considers that those claims relate to the land at Pouākani, the Crown notes, "That the prejudice found by the Tribunal to have been caused by the Crown's conduct in respect of Wairarapa and it's failure to provide suitable reserves in the vicinity of Wairarapa Māori was as follows:

- Their mana in and around Wairarapa Moana, and their spiritual connection with the moana was, if not lost, then dramatically undermined.
- This loss of mana affected their status and identity.
- The costs many decades of conflict brought about by the Crown's conduct were high and included the emotional and spiritual costs of the stress of participating in a dispute on a long-term, relentless basis.

- Because the Crown did not grant reserves beside or near Wairarapa Moana, Wairarapa Māori had no base there for fishing or other hapū or tribal activities. Their connection with their ancestral lakes has thereby been reduced and diminished.
- And finally, their traditional leaders were undermined by the unavailability, as a result of the Crown's conduct, of options that would really promote the welfare of Wairarapa Māori".

And I don't need to read the rest of that out. But that's the prejudice that was identified as being associated with that well-founded claim.

"What action has the Tribunal already recommended to compensate for or remove that identified prejudice?

The Tribunal made many recommendations in 2010 as a result of its inquiry into the claims. That is on the basis of these recommendations that a settlement was negotiated and what the Crown says is that these recommendations are as appropriate and logical today as they were in 2010.

None of the Tribunal's recommendations in 2010 gave any indication – This goes to the point I think Your Honour discussed with me yesterday – So, the Crown has said None of the Tribunal's recommendations give an indication that the Tribunal found then that any of the actions recommended should include the return of memorialised land at Pouākani. The Crown submits that these recommendations indicated that the Tribunal in fact considered that the return of Pouākani was not required."

And I think Your Honour said to me yesterday, essentially that was because the issue wasn't addressed, I think.

"**Recommendations in respect of claims relating to Wairarapa Moana and the Crown's failure to provide suitable reserves.**

So, I'm just going through what the recommendations of the Tribunal were.

The Tribunal's first recommendation in respect of Wairarapa Moana was that the Crown should return to Wairarapa Māori the ownership of the bed of Wairarapa Moana.

And that the Crown should gift to tangata whenua any land in Crown ownership adjacent to either of the two lakes, or anywhere in their vicinity." And that follows logically from the deed – from the agreement of 1896 itself.

"And the third recommendation was that the Crown should work with tangata whenua to design a special arrangement for the management and control of these very important water ways."

And as I've said, the Crown says, these recommendations are sensible, logical and as logical today as they were in 2010 and these address the prejudice that you identified in your report concerning those claims to Wairarapa Moana.

And then I go through the **recommendations in respect of the claims relating to the land at Pouākani other than the 787 acres of land that was compulsorily acquired.** So, these are some other recommendations, and these are the recommendations that the Wai 85 claimants asks you to confirm.

1105

And then I note the recommendations in respect of the claims relating to the actual resumable lands. So, I'm noting this in the context of Wai 97 because it was a claim about this, and so we've gone through this all yesterday.

And then I have a heading,

"**Reasons why the Tribunal should not make any further recommendations under s 6(3)**

"The Crown submits that the question of what, if any, further recommendations the Tribunal should make under section 6(3) to compensate for or remove the identified prejudice must take into account what the Tribunal has already recommended. Nothing compels the Tribunal to make further recommendations.

The Crown says that the Tribunal's 2010 recommendations continue to be appropriate in respect of the claims considered by the Tribunal and that no further recommendations are required." And the one caveat of course, as I said yesterday, this is a situation thought where you are required to make a decision under s 8A(2)(a) or (2)(b), and the Crown submits that the decision you should make is that the land is not required to be returned to ownership. So that is – and that actually instigates a recommendation by the Tribunal that the land be cleared from liability. So where I say there are no further recommendations, I say that subject to that caveat.

If I could just turn to my paragraph 281, "The Crown submits that the most logical and appropriate actions to be taken to compensate and remove the prejudice caused by the Crown's acts and omissions relating to Wairarapa Moana and the Pouākani exchange is the return of the lake and the provision of reserves around Wairarapa Moana as recommended by you in 2010."

And then there's the submission that, "**Returning the land at Pouākani as well would be inconsistent with the 1896 agreement**". And the point being made is that the 1896 agreement was the Crown was – to purchase the lakes, it was to provide money and land in the vicinity or in the district. It failed of course in providing land in the district. If it were to return the ownership of the lakes as well as lands in the district as well as the land at Pouākani, it would be overcompensating, and that's not what the agreement contemplates –

JUDGE WAINWRIGHT:

Can I just ask you, Mr Irwin, to look at those recommendations, those findings of the Tribunal that you quote in your paragraph 269? I understand your submission that in the Crown's conception of what "relates to" means, none of those sufficiently connects the claims and the prejudice to the land at Pouākani. However, those breaches listed there were at least as important in the Tribunal's conception as any other relating to the history of Wairarapa Moana, and indeed, if one were to imagine a situation where the Crown had acted in a Treaty compliant way in the late 19th century and had recognised the proper boundaries of the deeds had allowed the full extent of the Moana to remain as Māori wanted it to, had continued – had allowed them to continue to exercise rangatiratanga over the moana and the opening to the sea such that the land remained in the condition that suited them traditionally. That's a whole counter factual that arguably would have been Wairarapa Māori in an entirely different position in the southern Wairarapa then what happened as a result of colonisation and assimilation.

1110

So, we made no specific recommendations in relation to that because as I said, at the time nobody brought to the Tribunal's attention the binding recommendations, we were not considering the possibility of making them and it was obvious that the Crown was not going to put itself in possession of those 25,000 acres that were now in private hands, to enable that land to go back to Wairarapa Māori.

But if that had been at all possible, it would have been the subject of recommendations. So, it was not that the Tribunal felt that the whole situation could be remedied by those recommendations alone, it was that the course of history had removed everybody from the possibility of that situation being remedied.

So, we have to be careful I think with conceiving of what happened as being entirely addressed by the recommendations that the Tribunal made, the Tribunal in that period and up until the present still put's these negotiations about the whole sweep of Crown breach in the hands of the claimants and the Crown to negotiate an amount that in some way relates to, the sweep of prejudice that the Tribunal has identified.

So, your contention that there is nothing left to do to remove or compensate for prejudice does not capture the position from the Tribunal's point of view because the return – I think you were saying, that the return of the lake and the provisions of reserves, we had no idea whether there was land in the Crowns hands that would at all be available and I still do not know that.

But even if small reserves were able to be provided that does not relate to that whole loss of rangatiratanga that was occasioned between 1883 and the early 1920s and that continual arousing of Māori authority in that whole area.

ANDREW IRWIN:

And so, if I can just make a few comments Your Honour, you were also precluded of course from making recommendations for the return of private land, so the Act prevents you from doing that and still prevents you from doing that the memorial scheme is an exception.

JUDGE WAINWRIGHT:

Exactly.

ANDREW IRWIN:

So, you couldn't have made that recommendation. And in fact, second thing to say is, you know I think I mentioned it in my opening submissions either in this case or the 429 case that you did actually recommend or at least your report – I think it was a recommendation, it was clearly in your contemplation as expressed in the report that there would be a negotiation and some illicit in that is that there would be a negotiation between the Crown and a mandated group

or groups for the claimants to agree to a settlement of all of all of the claims and you provided particular recommendations, and in some chapters I think, you expressly said we are not providing recommendations in respect of these.,

I think for example, the Native Land Court, I think that was a chapter where you said we're not giving recommendations and I think implicit in that is the notion, well look I mean, what could you have recommended the land is mostly presumably private land and if there is Crown land there will be a negotiation, there will be the return of some lands no doubt through that process and so, a number of your chapters I think were premised on the notion of that.

JUDGE WAINWRIGHT:
Yes.

ANDREW IRWIN:
Of that happening. I'm not saying though that there would be, if the Crown were to return Wairarapa moana and reserved around the lake and it provided some new mechanism that address decision making about those taonga, those lakes today. I'm not saying that if the Crown complies with those recommendations nothing more needs to be done? and we're not talking about what the Crown has done in compliance of your recommendations, because clearly more needs to be done I think as we've discussed the 19 century breaches is where it all began I guess with the land loss of Wairarapa Māori to vast area of their traditional rohe.

And that created prejudice and so, of course that prejudice needs to be address and should be addressed and there are certain ways that being redress. For example, dare I say it – the return of some Crown land in Wairarapa in the traditional rohe and the return of some significant money to give Wairarapa Māori real rangatiratanga to be able to make some decisions of an economic nature for themselves.

JUDGE WAINWRIGHT:

Sure. I just have difficulty with this paragraph, it looks – I mean for one thing referring to the agreement of 1896 the Tribunal's characterisation of that agreement was one made under enormous pressure that the idea that that expressed what Wairarapa Māori wanted at that time, is very – a historical. I mean it was an agreement under duress.

So, to say that if the Crown did more than that it would be you know, going beyond what the parties would have wanted. I do not know how that could be so.

ANDREW IRWIN:

Sure, I take that point. I was quite careful bearing in mind I was not involved in the inquiry, but it was careful to go through your report where you discuss the arrangement of 1896 I think the word agreement was used in your report and that's why I used it. I think I heard Your Honour refer to a tuku rangatira in describing the report during these hearings. I didn't actually find it in the report, so I didn't refer to it in that way, but I totally accept Your Honours comments about the duress that was associated with that arrangement and in itself, it think you concluded that that caused prejudice and was a breach of the Treaty.

And sorry, the final comment to make just at this point, is that when I do look back at the prejudice that you identified as I have sighted in paragraph 296, and the submission I've just made in my paragraph 282 and when we do look at the prejudice about all of these claims, and we think well okay the Crowns lawyer is saying, you should think what is the most appropriate action the Crown should take to compensate for or remove this prejudice, and what the Crown submits.

JUDGE WAINWRIGHT:

When you say this prejudice, you mean the compulsory acquisition of the 787,000 –

ANDREW IRWIN:

No, I am meaning here – I'm meaning broadly.

JUDGE WAINWRIGHT:

but you don't accept that the broader prejudice relates to the link at Pouākani?

ANDREW IRWIN:

No, I don't, and so these submissions are cast in the alternative way.

JUDGE WAINWRIGHT:

So, this is in the alternative?

ANDREW IRWIN:

This is in the alternative.

JUDGE WAINWRIGHT:

All right.

ANDREW IRWIN:

And I'm looking at particularly the exchange, the land that was given at Pouākani, that exchange for land at Wairarapa, and at my paragraph 283 the Crown submits that when you do look at this kind of prejudice it would be irrational the Crown says to return this land, given the prejudice that you identified because the prejudice was the very giving of the land. And I'd focus particularly on my paragraph 283.3, "critically, for Māori people, not their ancestral land but the ancestral land of others…". And so if that is the prejudice and we're looking at ways to address that prejudice, respectfully the Crown submits it would be irrational to return that land. It wouldn't remove that prejudice or compensate for it. It would repeat that prejudice.

1120

JUDGE WAINWRIGHT:

Well the prejudice cannot be undone though, can it? Unless – because we are only talking about 787 of 30,400 and whatever acres and that situation, ownership by the Incorporation of that whole area will continue, whatever the

Tribunal does. So Mr Irwin, I understand the submission and I do not think it is wrong, but I think it is much more complicated than that because we are 100 years down the track from that exchange. So part of what the Crown has done by putting Wairarapa Māori in that situation has created a whole other complicated raft of connections to land that is not in their rohe, and the kinds of evidence that the Incorporation has put up about, you know, various characterisations of the connection of Wairarapa Māori people to Pouākani, which I think perhaps I could encapsulate in them saying that they wanted to treat it as if it were their traditional land because their traditional land had been taken. So that creates a whole other chapter of wrongfulness, which Wairarapa Māori are the subject of.

So, to now say, "Well that was bad in the first place," so even though they want to have the benefit of the gift restored to them, they should not because the first thing was wrong. You know, it is just, it is everyone is right about this, you know, Raukawa are right, the Incorporation is right, the Trust is right, you are right, the Tribunal is right. There is a part of right in all of it, but it is so complicated because of the intersection of what history has done to tikanga and how Māori people want to treat land that is effectively a tribal estate when they are in possession of it. They want to confer ancestral kinds of connections with it.

When I was the Judge in the South Island dealing with SILNA, that was land where under the South Island Landless Natives legislation, Ngāi Tahu people were given allocations of land that had no reference to what their whakapapa connections with the land were. And in very similar ways, I would have people coming to Court, objecting to people who were not in the whakapapa of their family being buried in the SILNA land to which they had no whakapapa connections. And it was, I mean, I think a very similar example of people whose landlessness had been recognised by the Crown and putting them into land which wasn't their ancestral land, not the ancestral land of the particular people who then came into ownership of it, but there they were in a Māori Land Court

saying, “It would be a breach of tikanga for those people to be buried in our SILNA land,” and my brain would be going, “How is that tikanga?”, but they had created their own new tikanga relating to this land that they’d been granted by the Crown.

So, for me, that is part of the web of problems that confront Wairarapa Māori and Raukawa and Tūwharetoa and by necessary association the Tribunal.

ANDREW IRWIN:
I thought you were going to say the Crown.

JUDGE WAINWRIGHT:
Well you are allowed to draw that inference.

ANDREW IRWIN:
Ma’am, perhaps I should move on. I think you understand where I am coming from on this submission.

JUDGE WAINWRIGHT:
I do, I do, and I hope you see that there is a whole other thing.

ANDREW IRWIN:
Of course I understand where you’re coming from. And I do wonder if I can move a bit more quickly now through the remaining pages. There’s a heading on my page 97, “**Damage to relationship**”, it’s a similar point that’s already been discussed.

JUDGE WAINWRIGHT:
We have had a lot of that and it is all true.

ANDREW IRWIN:

And I don't think I need to just read through that submission, perhaps I can have that taken as read, and I can come over to perhaps my page 99 where we discuss the settlement trust's proposal.

CONTINUES CLOSING SUBMISSIONS #J103 FROM PAGE 99, PARA 289

So the Crown submits, "The Tribunal cannot lawfully make a recommendation under section 8A that would include the conditions proposed by the settlement trust.

The settlement trust has set out in its closing submissions draft undertakings that it would offer to the Tribunal as a condition of any resumption in its favour." And these are the ones that I list off at my paragraph 290, and essentially they're suggesting that they would undertake to return the land back to Mercury upon payment of 90% of the value of the land and they would ensure any return of those lands occurs via Raukawa and they would establish a trust with some of the money which would involve Raukawa, and they would use all reasonable endeavours to ensure some amendments to the deed that relates to the description of the harm caused to the relationship between Kahungunu and Raukawa and they would contribute some money to the Incorporation.

And I set out some reasons why the Crown submits that this would be unlawful for you to make these recommendations with these terms and conditions. There are at least three reasons why.

The first is that those recommendations would provide a benefit to Raukawa, and if Tūwharetoa was also involved in that arrangement, the same problem would arise. That kind of recommendation would be contrary to the settlement legislation for both Raukawa and Tūwharetoa.

I don't think, Your Honour, I've put in the bundle some of the provisions of the Raukawa Settlement Act, not the Tūwharetoa Settlement Act, but the provisions are essentially the same, but I think, would I be right, Your Honour, you

understand the sections at issue there? It's particularly sections 15 and 17 of the Settlement Legislation.

JUDGE WAINWRIGHT:
Indeed.

ANDREW IRWIN: (CONTINUES)
And the second reason would be that, "There is no basis for the proposed payment by Mercury to the settlement trust. It would be irrational, the Crown submits, for the Tribunal to recommend such a payment occur, and indeed the Tribunal cannot of course bind Mercury."

JUDGE WAINWRIGHT:
No.

ANDREW IRWIN: (CONTINUES)
It would be – the third reason, "It would be contrary to the scheme of the Act for the Tribunal to resume land, that is recommend its resumption from its current owner Mercury to a group of Māori for the very purpose of that group of Māori returning it immediately to its current owner for a monetary return."

And following on from that, "The purpose of the statutory scheme is to restore land, where appropriate, to Māori ownership: the purpose is not to provide the land to a particular group for the purpose of selling back immediately to the current owner for a monetary return. If the appropriate compensation in respect of claims relating to the Pouākani land is financial, the Tribunal should recommend financial compensation."

The Crown submits that, in the next section, that the "**Proposed undertakings do not overcome potential to cause further grievance**".

1130

And the Crown submits, "The settlement trust is well aware that there is the potential for the return of the subject land to create fresh grievances. Even if it were lawful for the Tribunal to make recommendations on the conditions proposed, the draft undertakings would not address the objections of tangata whenua to resumption of the land to a group with no take whenua." And I don't understand that that position has changed following the submissions of my learned friend for Raukawa and Tūwharetoa, my understanding is, "Tangata whenua continue to object to the return of land to Wairarapa Māori," as proposed by both the Wai 85 claimants and also the settlement trust. And I set out there the Crown's understanding of the Raukawa position. I don't need to go through that. My learned friend has already, and I haven't set out there the position of Tūwharetoa, I have elsewhere in the submissions, it's simply a matter of timing, the submissions for Tūwharetoa I think came in just a little bit later.

My paragraph 295, "The Crown notes that neither the Tribunal's recommendations nor the settlement trust can bind Mercury…" a point I've already made, "…to the terms and conditions proposed," which is a fundamental point.

And then I address the extent to which the Tribunal can make recommendations in favour of other groups other than the claimants, and what I'm addressing here is the position of Raukawa and Tūwharetoa, and also, I do address the proposals that Raukawa in particular put forward.

"The Crown agrees with the Wai 85 claimants that it is not permissible as a matter of law for the Tribunal to make recommendations designed to benefit Raukawa." To put it in the terms that I did yesterday, the Tribunal would be in error of law if it were to make recommendations that did or were designed to benefit Raukawa.

And I say there, "The Tribunal cannot, as a matter of law, make binding recommendations for the benefit of settled groups." And I refer there to the provisions of the Treaty of Waitangi Act, subject to the settlement legislation, and I refer there to the Raukawa Settlement legislation.

And actually, just for completeness, Your Honour, I should note also s 6(8) of the Treaty of Waitangi Act 1975, a copy of it is in my Court bags so I'm speaking off the top of my head and memory here, but I think that provision refers to a schedule, the third schedule to the Act, and I think it says something along the lines of this Act is subject to or this provision is subject to that schedule, something along those lines, and the schedule lists settlement legislation. So just simply for completeness, I note that as well. And I will just simply read my 297.3, "In respect of Raukawa, the Raukawa Claims Settlement Act 2014 is clear that it would be unlawful for the Tribunal to make binding recommendations for the benefit of Raukawa. Section 17 of the Raukawa Claims Settlement Act explicitly provides that section s 8A to 8HJ of the Treaty of Waitangi Act 1975 do not apply "for the benefit of Raukawa or a representative entity"," and the same follows for Tūwharetoa.

And, "Nor can the Tribunal make non-binding recommendations in respect of Raukawa's historical claims. The Tribunal's role under section 6(3) is to recommend the actions the Crown should take to compensate for or remove the prejudice caused to by the Crown's acts and omissions found to be in breach of the Treaty in respect of the well-founded claims that relate to the land. As acknowledged by Raukawa, Raukawa's historical claims against the Crown are settled and the Crown has no further liability and the Tribunal has no further jurisdiction in respect of those claims." And I think I can have paragraph 299 taken as read.

And if I can just interpolate here, you had a discussion I think with my learned friend Ms Feint for Tūwharetoa and I took my learned friend to be submitting that the essential proposal that I think Raukawa was suggesting, well, it wasn't

necessarily particular to what Raukawa was suggesting, it was in respect of all of these proposes that might in some way involve Raukawa and Tūwharetoa, and I think she was saying, "No, it would be for the sole benefit of Wairarapa Māori." For instance there might be a proposal whereby the land would be transferred, and whilst it might be held in part at least by Raukawa and Tūwharetoa, the real benefit would be to Wairarapa Māori because it would be providing redress for their claims and also that would be done in their terms because this is the way they're asking for it to happen, and also the financial benefits she said would not flow to Raukawa and Tūwharetoa, but under the proposal would flow more directly to Wairarapa Māori, and the Crown submits that even so, this is still conferring benefits on both Raukawa and Tūwharetoa, and that is inescapable.

I turn then to the Iterative Approach. At my paragraph 300, "The Crown submits the Tribunal is now in a position to determine the Wai 85 and the Wai 97 claims to the extent those include and repeat allegations in the Wai 85 claims concerning the manner in which the Crown acquired land at Pouākani…", that is a long sentence, that didn't need to be that long. The next sentence is far better. "The return of land is not required.

The Crown submits that none of the other claims relate to the Pouākani land…" in the manner that I've described this morning, and, "so section 8A does not apply. In particular, the Crown submits that the claims relating to the Crown's 19th century actions in the Wairarapa in respect of the leasehold economy and other things cannot logically be said to relate to the land at Pouākani."

So what the Crown is saying is that when we come to the end of all of this, the Crown says you have before you claims that do relate to Pouākani, and you do need to complete your inquiry into those claims, and that's what I said in the introduction yesterday, you do need to make decisions under 8A(2)(a) and (2)(b) and you need to decide should the land return or the return of the land is not required. You do need to make that decision. Please don't avoid making

that decision. The Tribunal has fallen into error where it has avoided making that decision. So that is something you do need to do now, and the Crown says the claims that do relate to that land are the Wai 85 claim and part of the Wai 97 claim. And you are in a position now to either decide the land returns or decide no it doesn't, and it is cleared from liability.

"If, however, the Tribunal is inclined…", and of course the Crown says for all of the reasons that I've gone through, the return of the land is not required and shouldn't happen. "If, however, the Tribunal is inclined in its deliberations to recommend return of some of the land, the Crown submits that the Tribunal does not yet have sufficient evidence to make an interim recommendation under ss 8A and 6(3).

The Tribunal has received submissions on the issue about whether the claims relate and whether those are well-founded and the prejudice and whether the Tribunal should recommend the return of the land.

1140

There appear to be at least three areas where the Tribunal would need to call for more evidence before making a formal recommendation under section 8A(2)(a), that would be:

- the workability, practicalities, and detail of any proposed interim recommendation; and
- the workability and lawfulness of any proposed terms and conditions that the Tribunal would attach to recommendations. No proposal before you is presently fit for purpose; and
- you should receive further evidence about the appropriate representative entity to receive the land.

Because the proposal before you is a, with respect, a very vague one I think, and by that, I mean the proposal is that there, I think the proposal is, there might be a new trust established.

JUDGE WAINWRIGHT:

Well I think that is a proposal. When you talk about making interim recommendations, you are meaning the interim recommendations formally in terms of the legislation?

ANDREW IRWIN:

Yes, I am.

JUDGE WAINWRIGHT:

Yes. Well I think that we are in agreement with the Crown on that. Not only do we not think that we are in a position to do that, but we do not think it would be desirable to do that, not least of all because of the timing over the, you know, Christmas period and so on. So, you put this under the iterative process which is a little bit confusing because the Mangatū Tribunal coined this phrase for the toing and froing between the Tribunal and the claimant community about what the Tribunal might do in relation to its binding recommendation jurisdiction, and we've borrowed that terminology to talk about what kind of toing and froing might happen here, and our conception which I hope was expressed in our memorandum and directions was that that would take place before any interim recommendations would happen.

So, in my conception, there is an iterative process and then interim recommendations and then presumably another iterative process that wouldn't involve the Tribunal. Because once the Tribunal makes its interim recommendations, it sets everybody on a path that's in accordance with the statute, doesn't it?

ANDREW IRWIN:

Yes, the 90-day path.

JUDGE WAINWRIGHT:

Yes. So it is the iterative process in my conception is what happens between now and when that happens.

ANDREW IRWIN:

Yes, and that was my conception too.

JUDGE WAINWRIGHT:

Yes.

ANDREW IRWIN:

And so yes, I think we're of the same mind.

JUDGE WAINWRIGHT:

Right.

ANDREW IRWIN:

And so I think quite logically I've just made these points that –

JUDGE WAINWRIGHT:

So you are really saying helpfully that these are matters that, in your submission, the Tribunal would need to sort out in the course of the iterative process?

ANDREW IRWIN:

Yes, yes, exactly.

JUDGE WAINWRIGHT:

Yes.

ANDREW IRWIN:

And so before you make an interim recommendation, you could though, in my submission, is you are in the position to make a decision under s 8A(2)(b) –

JUDGE WAINWRIGHT:

Yes, I understand that, Mr Irwin.

ANDREW IRWIN:

– that we're at a point where we can say –

JUDGE WAINWRIGHT:

"No we do not need to make any binding recommendations."

ANDREW IRWIN:

There are just some inevitable problems with all of this for good reason, we need to say now that the return of the land is not going to happen, and you're in a position to say that now. But I think we're of agreement that there are other things to work through before any interim recommendations are made under 8A(2)(a), yes.

And not the least of which was the discussion we had yesterday about just the workability of this vis-à-vis Mercury Energy.

JUDGE WAINWRIGHT:

Yes.

ANDREW IRWIN:

So that would be, that comes within the umbrella of what I've set out in my paragraph 304 that there clearly are going to be some issues there.

JUDGE WAINWRIGHT:

Well yes, and to be fair, the production of hydro-electricity does not sit four-square within the expertise of any members of this panel, and that is obviously a live issue if we were to make binding recommendations. So yes, the desirability of obtaining from a suitable person or persons independent advice on those issues may indeed be something we need to consider.

ANDREW IRWIN: (CONTINUES)

At my paragraph 306 I say there that, if you are minded to take a different view on the concept of what it means to "relate to" in terms of the unspecified claims, the Crown respectfully submits that the Tribunal would need to, as a first step, or perhaps as a next step, identify the particular claims that do relate to the land at Pouākani in this way.

The things I have in mind here are the issues about the leasehold economy and so and so forth that were discussed in your direction.

JUDGE WAINWRIGHT:

Yes.

ANDREW IRWIN: (CONTINUES)

We would need to identify which of these claims are well-founded; and also what the prejudice was associated with those.

It would be fair to say that, no party in this inquiry considered the possibility that those claims did relate to the land, prior to your direction of 29 August because nobody raised it. So the Crown submits that we should be afforded, as a next step, a further opportunity to make submissions about the extent to which those claims once identified relate to the land.

JUDGE WAINWRIGHT:

Yes, I think that that is a reasonable point, Mr Irwin, because of the way the applications for binding recommendations unfolded before us, those wider issues were not squarely addressed in argument.

ANDREW IRWIN:

That really does end my presentation to members of the Tribunal. Are there any questions before I finally close?

DR RUAKERE HOND:

Heoi anō, he kōrero, I just wanted to make a note, in a number of occasions you're talking about overcompensating and in particular earlier on you made the statement around our tikanga when we had the wānanga on tikanga and the idea of compensating for a wrong, really making a note that overcompensating is part of restoring balance as well. So balance isn't just about finding an equal amount for both parties, but to demonstrate the apology appropriately, there needs to be a proportion of overcompensating to demonstrate. Do you understand what I'm saying?

ANDREW IRWIN:

I understand what you're saying.

DR RUAKERE HOND:

Yes, and that is part of a tikanga approach and definitely was discussed in the tikanga wānanga.

ANDREW IRWIN:

I think, Dr Hond, that the Crown's position is, is that there should not be overcompensation in this situation and in this context. The Crown would submit that would be to provide something disproportionate, and the way the Crown would conceive is it – is to restore balance is to provide compensation. But the way I put it in these submissions is that there's imbalance, there's no overcompensation. So that is the position of the Crown.

DR RUAKERE HOND:

Yes. I suppose there are levels of overcompensation, it depends on where we see the proportionality of that.

ANDREW IRWIN:

Yes, I would express some caution to you in going ahead in your deliberations in writing your report. I think it would be problematic if you described your task as being one where overcompensation is permissible and appropriate. I would caution against that approach and also describing it in that, for the reason that

I don't – I'm not actually sure that that's – that's certainly not what the Crown is submitting to you should happen, and I would be concerned that you would be putting yourself in – If I've used the phrase -

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DR RUAKERE HOND:

I can understand the context I think of what you're describing that I think really understanding how tikanga is described as really the point that I'm making.

ANDREW IRWIN:

Thank you.

DR RUAKERE HOND:

And not wanting to let the comments about over compensating is not a tikanga approach.

ANDREW IRWIN:

And possible a way in thinking about it, in terms of the Treaty and this is a good way to finish. The Treaty was about honour and the Crown's got to be honourable whatever it does, and so when we look back at the detail of what the Crown did, and you said the Crown was niggly in the extreme compensation it paid that was your finding, it was that was your finding.

It looked at ways of discounting and discounting and as you say, that was edgily it wasn't honourable it was against the Treat. And so, the issue becomes what is – another way of conceiving of the issue is what does the honour of the Crown require of the Crown today and that's your task to recommended action that is honourable to the Crown to take now and to provide compensation that is honourable.

DR RUAKERE HOND:

Yes, I think that's what I'm saying as well. What is conversation that is honourable, restores honour?

ANDREW IRWIN:

Yes, yes and there's been a lot of focus about the restoration of relationships in this proceeding particularly the restoration of relationships between the Māori groups concerned, possibly less discussion about the restoration of the relationship between the Crown and Wairarapa Māori and I don't think we should lose sight of that either, because that is what this process is about restoring that relationship between the Crown and Māori and restoring the honour of the Crown, and your task is to tell the Crown what to do in that regard.

DR RUAKERE HOND:

Kia ora.

JUDGE WAINWRIGHT:

Further to that kōrero and thinking about you know the Tribunal asking parties to participate in a kind of a wānanga on tikanga matters, I think for me Mr Irwin it evokes that idea that the Treaty is always speaking. I do not think that he Tribunal probably would have convened that kind of workshop ten years ago. And that when we're talking about the honour of the Crown, maybe that involves the Crown's committing to an evolving perception of what the principles of the Treaty require of it and what that means, in terms of its understanding of tikanga in a Māori way.

So, that if the proper Māori view is that *ea* is what needs to be arrived at and that *ea* in certain circumstances requires the wrong doer to demonstrate their remorse by giving more that may be an undermine of the wider situation that the Crown has to move to.

ANDREW IRWIN:

I like to think that the Crown's conception of the principles that relate to your jurisdiction – the Crown' s conception has moved forward and in these

submissions the Crown did move them forward by specific reference to the wānanga session that we had, and I think that's a very positive thing for the Crown to have done.

And sorry, just to think about this in terms of over compensating in – another way to think about it and I'm getting back to the detail I'm sorry to do that. If the Crown paid 510 pounds back in the day, and it should've paid let's say, 2000 pounds back in the day the Crown shouldn't be returning the balance 1500 pounds and an equivalent amount in today's terms today. Nobody suggesting that, the Crown isn't it should pay more than that, it should pay a fair amount, an honourable amount and in my submissions have gone through that.

So, in that sense it's got to do more and so in that way if we're talking about over compensation in that kind of way I can see that and understand it.

JUDGE WAINWRIGHT:
Is that you then Mr Irwin?

ANDREW IRWIN:
That's me. *He kōrero whakamutunga hei whakakapi i ēnei kōrero pea. Otirā tēnā rawa atu koutou katoa e noho mai nei i ēnei rā e rua, whakarongo ai ki tēnei roia hōhā a te Karauna. Tēnei te mihi ki a koutou te kaha hoki o ō koutou taringa, tēnā koutou ngā rōpū o Te Wairarapa, ō Pouākani hoki. Me kī, hoki koutou ngā mema o Te Rōpū hei whakamana i te Tiriti o Waitangi tēnā rawa atu koutou e whakarongo mai nei, ki a ahau me aku kōrero. Me kī aku hoa kei te noho mai nei, noho puku nei, ā, tēnā kōrua ngā mahi hei tautoko i ahau, kia ora. Ka oti.*

[Interpreter: And just to conclude, i certainly want to acknowledge everyone who have sat patiently here through these last several days, and of course and this Crown lawyer batting on away. And of course, I have to thank you for your

enduring patients and all the communities of Te Wairarapa, Pouākani, and of course, the esteem members of the Waitangi Tribunal and thank you for being available to hear my evidence. And of course, my learned friends to my side thank you two very much appreciate your support.]

JUDGE WAINWRIGHT:

Tēnā koe. Tēnā koutou me kī.

(11:56) DR RUAKERE HOND: (MIHI WHAKAMUTUNGA)

Tēnā koe e te rōia ehara i te mea māku he rōia hōhā, engari nāu anō i whakaputa tērā kōrero, ehara i te mea ko te rōia te take, engari ko te āhua o te Ture. Te uaua anō, te wewete i ēnei here kua roa e pīkau ana, e utaina ana ki runga i ngā pokohiwi o te iwi o runga anō i te whenua. Nō reira, ko te mea nui nei, āna kua whai wāhi nei kia tutuki pai ai te katoa o ngā whakaaro i horaina ki runga i ngā pepa.

[Interpreter: Thank you counsel it's not for me to say that you have a view of your skillset, it's not about the lawyer itself it's certainly how you interpret the law and how it becomes relevant to all people here, in particular those involved with their claims. And of course, with what we have in hand we'll certainly consider all that has been said.]

Nō reira e mihi kau ana ki a koutou e noho mai nei ki runga anō i te tūranga o te Karauna, e tautoko katoa atu ana au ki ngā kōrero i utaina atu ki runga i ngā iwi, ngā hapū, ngā mana, ngā mauri, ngā tapu o runga i ngā whenua i te mea koinei anō ko te aronga nui, nō reira he pērā anō taku kōrero ki a koutou i noho roa nei ki roto ki ēnei kōrero.

[Interpreter: And of course again, to your learned friends of the Crown and of course the evidence that you have shared amongst, in regard to the lands what it holds, what it means and how we try and focus on how we can find a way with these advents.]

Anā, arā anō te nui anō o te wawata o te tūmanako, engari i tēnei wā kei konei anō kia puta i roto anō i tērā te pō uriuri, te pō auau, te pō kaikaha ō roto i ngā uauatanga, ngā taimahatanga o te wā. Nō reira, kua mōhio tonu ko tērā anō e ruku ana i te pō, anā, ka tae ko te wā ka puta ki te whai ao, ki te ao mārama. Nō reira, tēnā koutou, tēnā koutou, tēnā tātou katoa.

[Interpreter: There's certainly is a lot of things we need to do, to capture the aspirations and desires in however there are a lot of matters that need to be considered. And the depth and magnitude of what this hearing. But again, we will endeavour to find that space where we can see some completion.]

Kua hiahia atu kia whakakōpani atu i a tātou kōrero i te rangi nei mō muri mai ana ka tuku atu, kāore ahau i te mōhio mehemea hiahia nei ētahi ki te kōrero, ki te kore ka whakakōpani atu, māku te karakia whakakapi hei te mutunga rawa ō ā tātou kōrero i te rangi nei. Nō reira tēnā koutou, e ngā mana, e ngā whenua i runga i ngā maunga, i ngā awa e rere tonu ana i runga i te whenua ahakoa te aha. Tēnā koutou, tēnā koutou, tēnā tātou katoa.

[Interpreter: I'm not too sure if anyone else wish to add, but however I'll take it upon to lead us in prayer and to ensure that we complete. Again, to all the representatives of the mountains, hill, rivers, waterways thank you very much for your presence.]

WAIATA WHAKAMUTUNGA

DR RUAKERE HOND:

Anā, he kupu karakia anō i roto i te waiata. Te pū, te more, te aka, te rea, anā he kaupapa tipu tēnei, e tipu ana tēnei i te rūnanga – Te Rōpū Whakamana i te Tiriti o Waitangi kātahi anō ka rongo, he mea tupu anō kei ngā tau kei mua i te aroaro. Nō reira kōtou, tēnā tātou. Anei whakautu, ki te kore, anā, ka whakakōpani. Ka pai, ehara i te mea e kī me pēra, nā waiho anō mā te ngākau hihiko, engari anō e tika ana kia huri atu ki te karakia, te āhuatanga i tīmata mai

ai tō tātou rā , otirā i tīmata ai, i te tīmata o te wiki. Nō reira ko ngā kupu katoa ki te wāhi ngaro e iri tonu ana i runga i a tātou, otirā i a tātou e puta atu ana i runga i te rori, kia tae pai ai ki te kāinga , ki ngā whānau ki a rātou katoa e tatari ana ki a tātou. Nō reira tēnā koutou, tēnā tātou.

[Interpreter: This you'll see captured the words of a prayer which talks about growth and is, I guess it sort of reflects on us as the Waitangi Tribunal. So, again I wish to thank you. If there are people who wish to say something, please. So, with that I wish to lead us in prayer just to complete our day. And of course, we all go back to the initial prayer which set us forward on the Monday and of course we do wish you safe travels back home to families waiting at home for us. Let us pray.]

KARAKIA WHAKAMUTUNGA (DR RUAKERE HOND)

DR RUAKERE HOND: (MIHI)
Mauri ora rā ki a tātou katoa.

HEARING CONCLUDES: 12:01PM