THE TĀMAKI MAKAURAU SETTLEMENT PROCESS REPORT

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WAI 1362

WAITANGI TRIBUNAL REPORT 2007

The cover photograph by Craig Potton shows Auckland City, with Maungawhau (Mount Eden) visible on the left. The design by Cliff Whiting invokes the signing of the Treaty of Waitangi and the consequent interwoven development of Māori and Pākehā history in New Zealand as it continuously unfolds in a pattern not yet completely known.

Photographs of the key participants in the inquiry have been reproduced in this report where those people have agreed to their inclusion.

The photograph of Michael Belgrave on page 94 by Chris Barton appears courtesy of the *New Zealand Herald*.

National Library of New Zealand Cataloguing-in-Publication Data

New Zealand. Waitangi Tribunal.
The Tāmaki Makaurau settlement process report.
(Waitangi Tribunal report)
Includes bibliographical references.
ISBN 978-1-86956-290-8
1. Treaty of Waitangi (1840) 2. Ngāti Whātua (New Zealand people)—Claims. 3. Ngāti Whātua (New Zealand people)—Land tenure. 4. Maori (New Zealand people)—New Zealand—Auckland—Claims. 5. Maori (New Zealand people)—Land tenure—New Zealand—Auckland. 6. Land tenure—New Zealand—Auckland—History. [1. Tiriti o Waitangi. 2. Mana whenuā. 3. Kaitiakitanga.] I. Title. II. Series.
333.208999442—dc 22

www.waitangitribunal.govt.nz
Typeset by the Waitangi Tribunal
Published 2007 by Legislation Direct, Wellington, New Zealand
Printed by SecuraCopy, Wellington, New Zealand
11 10 09 08 07 5 4 3 2 1
Set in Adobe Minion Pro and Cronos Pro Opticals

Downloaded from www.waitangitribunal.govt.nz

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References to papers and documents in the notes to the text of this report refer to the Wai 1362 record of inquiry, a copy of which is available on request from the Waitangi Tribunal. ('Wai' is the prefix used with Waitangi Tribunal registered claim numbers.)

Four document banks filed by the Crown are referred to frequently in this report. Their document numbers are A38(a), A58, A66, and A67. Particular documents within each document bank are cited using the prefix DB and a number (eg, doc A38(a), DB4). Document A38(a) contains DB1 to DB206; document A58 contains DB207 to DB242; document A66 contains DB243 to DB261; and document A67 contains DB1 to DB51.

When the Crown filed the 51 documents in A67, it numbered them A1 to A51. The Tribunal has changed their prefix so that they are cited as DB1 to DB51 (eg, doc A67, DB10). This is because the DB prefix denotes that the documents are part of a document bank and to avoid confusion with documents already numbered A1 to A51 on the Wai 1362 record of inquiry.

The Honourable Parekura Horomia
Minister of Māori Affairs
Parliament Buildings
WELLINGTON

The Waitangi Tribunal
141 The Terrace
WELLINGTON

12 June 2007

Tena koe e te Minita

Ka riro rā te momo tangata
Ka memene ki tawhiti
Tēnei a Matariki e huihui ana mai
I te ata o Pipiri
Ko koutou pea ēnā
Kei ngā nohoanga rūnanga
Koutou a Nukuteariari
Koutou ki Tūpaengarau
Nukutemāharahara
Tātou ki Tūteaomārama.

E mihi ana kī ngā mātāpūputu, ki ngā mātātahi, ki ngā kauae mua, ki ngā kauae muri, ki ngā muringa ki ngā mutunga o ngā moka o ngā whaitua, o ngā pānga ki Tāmaki Makaurau, tēnā koutou katoa. Kua poroporoakina ngā tōtara kua hinga. O tātou tio kua pae ki te kōpū o Papatūānuku, okioki mai, okioki mai koutou. Tēnei anō te mihi ki te Karauna mōna i whakaae mai kia wherawherahia ngā kōrero, kia kitea ai he whakamahu mo ngā mamae me ngā whakahaehaetanga a te wā i ngā kaitono Māori e tangata whenua ana a rātou take kokoraho.

Tēnei kua rārangi ngā kupu o te whakataunga a te Taraipiunara ki a koutou ki nga uri o te kāhui kua huri ki tua o te kōpare ā te pō. Tēnei anō hoki ngā āta whiriwhiringa ki te Karauna, ki ngā kaitono whai takunga kī, hei āwhina i te katoa e taka ana ki roto ki ēnei whakahaerenga taro ake nei.

He iwi whai i ā rātou tikanga ngā iwi Māori. I roto i tā mātou whakataunga e whakahau ana mātau i te Karauna kia aronui ki te wāhi ki a ia. Ko te take kia hora ai te marino ki te motu, kia pono ai te Karauna me ngā iwi Māori ki a rātou anō, otirā, kia kitea he ara poka e kore ai ngā tikanga a te Māori e tahia noatia kia tau wawe ai te take.

Ko tā te Māori, me mau ki te tikanga, kia kaua e whāia ko te whakahau ā te whakataukī nei, 'Tūtohu ahiahi, whakarere hāpara'.

Enclosed is *The Tāmaki Makaurau Settlement Process Report*, the outcome of an urgent hearing in Auckland from 12 to 15 March 2007.

The report concerns the process followed by the Office of Treaty Settlements to arrive at a Treaty settlement with Ngāti Whātua o Ōrākei. Our inquiry focused especially on how the Crown dealt with the numerous tangata whenua groups in Tāmaki Makaurau other than Ngāti Whātua o Ōrākei. We conclude that, as regards those groups, the Crown's policy and practice has been unfair, both as to process and as to outcome.

Our primary and strong recommendation is that the proposed settlement with Ngāti Whātua o Ōrākei not proceed at this stage. Instead, the Office of Treaty Settlements should now work with the other tangata whenua groups to negotiate settlements for them. Once that is done – and not before – it will be possible to arrive at a situation where appropriate redress (both cultural and commercial) is offered not only to Ngāti Whātua o Ōrākei, but to all the tangata whenua groups in Tāmaki Makaurau. Then, the mana of all would be upheld, relationships would be restored, and reconciliation would be possible.

Kia tau ki a koutou katoa te tāwharau mutunga kore a Te Wāhi Ngaro.

Nāku iti nei

Nā Judge Carrie Wainwright
Presiding Officer

1 INTRODUCTION

This Urgent Inquiry

This inquiry was the latest in a number initiated by groups with whom the Crown is not yet settling. This time, the disputes have arisen in Tāmaki Makaurau (Auckland),[1] where since 2003 the Crown has been engaged in negotiations with Ngāti Whātua o Ōrākei to achieve full and final settlement of their claims under the Treaty of Waitangi. The interests of other tangata whenua groups in Tāmaki Makaurau are affected by the agreement in principle between Ngāti Whātua o Ōrākei and the Crown that was released in mid-2006. The other tangata whenua groups are unhappy about how they have been treated. They point to what they say are process failures, highlighting their very late entry into discussions about customary Māori interests in Auckland. They are also upset about the content of the draft settlement. They say that some of the assets and opportunities on offer to Ngāti Whātua o Ōrākei have been included without sufficient regard to the equally strong interests of others.

Important Questions

The issues raised in this inquiry go to very important questions about the Treaty claims settlement process in Aotearoa/New Zealand.

In previous inquiries about the interests of other tangata whenua groups, the Tribunal has kept its focus narrow, looking at how the process of reaching a draft settlement has been unfair in particular ways. Now, though, the Tribunal has addressed these same questions several times. In each case, we saw Māori communities at odds with each other because of the activities of the Crown to settle the Treaty grievances of one group, and the effects of that process on others.

Confronted in Tāmaki Makaurau with a settlement process and outcome that seems to us to be more flawed than any the Tribunal has inquired into, we think that the time has come to step back from the narrow focus taken previously. If these problems keep arising, and are indeed getting worse, is there really something fundamentally wrong with the way Treaty claims are being settled?

We think Treaty settlements are supposed to improve relationships. What we are seeing in the Tribunal, though, is that the process of settling is damaging more relationships than it is improving. How has this come about?

There seems to be a consensus that, as a country, we ought to settle Treaty claims, and we need to get the settlements behind us quickly so that we can all move on. The focus of Office of Treaty Settlements officials is therefore on achieving as many settlements as possible as speedily as possible. In several urgent inquiries now, the Tribunal has seen at close quarters how the office goes about its work. It chooses one strong group in a district and works exclusively with it to agree on a settlement. Over a period of several years, a working relationship is built, and ultimately a settlement is secured. This achieves the objectives of the

Crown and the settling group. But meanwhile, the other Māori groups in the district are left out. The Crown forms no relationship with them, and is interested in their Treaty claims and their connection with the district in question only to the extent that they bear on the settlement with the primary group. When face-to-face contact is finally made, it is too late. Meetings are held once there is a settlement on the table, and by then the parties' interests are polarised.

What is wrong with this approach? In a nutshell, it damages whanaungatanga.

Whanaungatanga – relatedness – lies at the core of being Māori. Te taura tangata is the cord of kinship that binds Māori people together through whakapapa; it is a braid that is tightly woven, tying in all its strands. It is unbroken and infinite.

When the Crown deals with one group in settlement negotiations, everything it does affects others who have interests in and connections to the area that is the subject of the negotiation. Often, the affected groups are kin to the settling group; always, they are neighbours. They all share history, interests in land, and whakapapa. In Tāmaki Makaurau, which has been intensively occupied by successive groups for generations, the layers of interests are complex and intense.

Because of the connections between all of the people, and all of their connections to the land, dealing with all of the interests well is subtle and challenging work. It involves the Office of Treaty Settlements team forming relationships not only with those who are settling but also with those who for the time being are not. It is vital that this part of the settlement process is done well, but for the most part it seems to us that it is not being done at all. The Office of Treaty Settlements' focus on the settling group is such that dealing with the other tangata whenua groups is very much secondary, both in terms of priority and timing.

The consequences of this are serious. The purpose of settling Treaty claims is, broadly speaking, peace and reconciliation. By settling, the Crown 'hopes to lay the basis for greater social cohesion'.[2] Such objectives can be achieved only when both the process and the outcome of negotiating and settling are manifestly fair – not only to the settling party but also to others affected. The burden on both Māori and Pākehā of the great wrongs that were done in the past[3] will not be lifted if the process of settling creates new wrongs. We consider that the process for settling now being followed is creating divisions within Māori society that are very damaging. Damage to whanaungatanga, to te taura tangata is a great wrong: it affects Māori society at its very core. As we will explain in this report, it also goes to the heart of the Treaty guarantees in article II.

As a country, we cannot benefit from this. The settlements being negotiated will not be regarded as fair and just; they will be seen as favouring one group, and riding roughshod over others. We fear that, like past attempts at settling that were later seen as being unfair, they will not endure.

This Report

Chapter 1 of this report ('Whakawhanaungatanga/Relationships') is really an extended introduction to the report in which we set the scene for the inquiry, and explain the themes that will be explored in the report. Relationships lie at the heart of it all.

We review previous cross-claims inquiries of the Tribunal, and recall the earlier situations where the Crown failed to manage relationships with all tangata whenua groups affected by their negotiation with only one. We examine the Office of Treaty Settlements' response to those previous Tribunals' reports. We outline the issues raised by the Crown choosing to negotiate with Ngāti Whātua o Ōrākei a fourth time in Tāmaki Makaurau. We explain why we think that Tāmaki Makaurau is an area with unique features that the Crown needed to take into account.

In chapter 2 ('Te Ara/Process'), we set out the policy context for Treaty of Waitangi settlements, and especially

for dealing with interests other than those of the settling group. We describe what has happened thus far in the negotiations between the Crown and Ngāti Whātua o Ōrākei to settle their claims in Tāmaki Makaurau, and the dealings to date with the other tangata whenua groups. What has the Office of Treaty Settlements done, and not done? What is wrong with what it has been doing, from the other groups' point of view? What is the standard that the negotiation and settlement process should meet?

In chapter 3 ('Ngā Hua/Outcome'), we look at where the Crown's process of negotiation with Ngāti Whātua o Ōrākei led. What is in the agreement in principle? What is the rationale for its contents? Has the Crown properly assessed the interests affected by it?

We bring our analysis and conclusions about both the process and outcome of the Crown's negotiations with Ngāti Whātua o Ōrākei together in chapter 4 ('Whakatau/Findings'), and chapter 5 ('Ngā Whakaaro mō te Tirīti/Treaty Breach and Prejudice').

What should happen as a result of all of this? In chapter 6 ('Whakahau/Recommendations'), we conclude that it is too late to rectify either the process or the outcome of the negotiations between Ngāti Whātua o Ōrākei and the Crown. We wanted to be able to recommend that the settlement could go forward, because we did not want to jeopardise the hard work of the Crown and Ngāti Whātua o Ōrākei to settle their legitimate grievances. But, sadly, the process has been too flawed for any of the proposed redress to proceed safely as currently conceived. We therefore reluctantly conclude that the negotiation with Ngāti Whātua o Ōrākei needs to be halted now, at this stage of the agreement in principle, hopefully to proceed again after remedial action is taken.

Chapter 6 sets out the path that we recommend the Crown now takes. We think the Crown should move quickly to initiate negotiations with the other tangata whenua groups in Tāmaki Makaurau. In some districts we think it would be in accordance with Treaty principle to settle only with one group and leave the other groups until later. But Tāmaki Makaurau is, we think, a special situation. There, the groups' interests are too intermingled for any settlement with one to go forward until the others' interests have been fully understood and, if at all possible, brought to the stage of a draft settlement. Then, all the interests can be considered together, and an arrangement arrived at that is fair to all.

The Crown's Provision of Relevant Documents

We need to say a few words about evidence.

We have had problems in this inquiry gaining access to all the relevant Crown documents in a timely manner.[4] As a Tribunal, we were concerned that relevant documents were not available to the Tribunal and the other parties when they needed to be. But perhaps even more concerning was the stance of Crown counsel when we sought material we believed was relevant and needed. Memoranda continued to justify the Crown's conduct in not supplying them.[5]

It was not until 9 May 2007, nearly two months after the four-day hearing in the inquiry, that the situation was resolved. Virginia Hardy, leader of the Crown Law Treaty team, intervened by filing a memorandum[6] in which she accepted that counsel for the Crown had exercised poor judgement in their failure to provide relevant documents to the inquiry. Ms Hardy insisted that there was, however, no bad faith involved. She sought leave for the Crown to review the Office of Treaty Settlements' files to ensure that all relevant material had been provided, and file any further documents within two weeks.

By this time, we were of course well advanced in the drafting of this report. Awaiting the filing of further documents would mean delay. Nevertheless, we considered it necessary to give the Crown the opportunity sought.

In order to minimise delay in the report's release, we allowed the Crown slightly less time than was asked for. In the event, the Crown could not meet the deadline, and

51 new documents were filed at the end of Friday 25 May 2007.

About these documents, we have these things to say:

- They are all relevant to this inquiry, and we do not understand how any informed analysis could have given rise to a view that they were not. The basis for excising parts of them is also unclear to us. A review of the Crown's provision of documents to urgent inquiries of the Tribunal is certainly required.
- Although the documents do not lead us in any new directions, they confirm views that were, until their arrival, largely speculation. It is critical for the effective operation of the Tribunal that the Crown's evidence and supporting documents concerning important matters are available to all parties *at the hearing*. We should not have to surmise what probably happened: it is the Crown's job to provide evidence on all issues in the inquiry.
- The way that documentary evidence was provided – late, reluctantly, and piecemeal – together with a comparison with what was said in evidence, leads us to believe that the Crown (and to some extent Ngāti Whātua o Ōrākei) decided not to be candid with the Tribunal about some matters. While it would be going too far to say that witnesses lied to us, a review of the recordings of the hearing in the light of the documents now before us reveals that witnesses definitely chose to provide partial answers to questions that ought to have elicited more information. One example is that the documents reveal that Ngāti Whātua o Ōrākei was reluctant from the outset to engage with 'cross-claimants'. It was a recurring theme in discussions between Ngāti Whātua o Ōrākei and the Crown. Obviously, this was well known to the Crown and Ngāti Whātua o Ōrākei witnesses who gave evidence on the process, because they both attended the many negotiation hui. And yet, at the hearing, neither of them made mention of it. When responding to questions about Ngāti Whātua o Ōrākei's role with 'cross-claimants', they prevaricated. The Tribunal and the other parties were not in a position to ask more probing questions, because the relevant documents were not released until after the hearing. This was not the only area of evidence where the documents now available make it clear that responses given at the hearing answered questions only in part.

Terminology

Finally, and because it needs to be said somewhere, we mention the language that we will use in this report to refer to the Tāmaki Makaurau tangata whenua groups who are applicants in this inquiry.

Previously, Māori groups who are not the groups with whom the Crown is settling, and who oppose various aspects of the settlement, have been referred to as cross-claimants. This expresses the idea that these are claimants whose claims cut across those of the claimant group with whom the Crown is settling.

A few years ago, the Crown began to use the term 'overlapping claimants' in preference to 'cross-claimants'. This was presumably because 'overlapping claimants' sounds less adversarial than 'cross-claimants'. Both terms carry the implication, however, that there is a primary group – the claimant group – and every other group's interests either cross or overlap the interests of that group. That idea of the primacy of one group relative to all the others finds favour only with the primary group, because every group conceives of itself as primary.

It may be thought that focusing like this on the language to use is precious. It is certainly particular, but not, we think, precious. That is because language is loaded. If, like members of the tangata whenua groups who are not Ngāti Whātua, you feel irritated and insulted every time you hear

yourselves referred to as overlapping claimants – because in your mind, yours is the primary claim, not the overlapping one – then it's worth finding different words.

In this report, we usually refer to Ngāti Whātua o Ōrākei as the mandated or settling group. In the Tāmaki Makaurau context, Ngāti Whātua o Ōrākei is the group that has satisfied the Office of Treaty Settlements' requirements for establishing that they are supported by their constituents to settle their Treaty claims once and for all.

We needed a way of referring collectively to Ngāti te Ata, Ngāi Tai ki Tāmaki, Marutūāhu, Te Kawarau ā Maki, and Te Taoū, who were the applicants before us. We call them the other tangata whenua groups in Tāmaki Makaurau.

This has not enabled us to avoid the words 'cross-claimants' and 'overlapping claimants' altogether. We use this terminology when we talk about the Crown's policy in its own terms.

Notes

1. See appendix I for a summary of the proceedings leading up to this report.
2. Margaret Wilson, then the Minister in Charge of Treaty of Waitangi Negotiations, in the foreword to the Office of Treaty Settlements' policy manual, *Ka Tika ā Muri, Ka Tika ā Mua: He Tohutohu Whakamārama i ngā Whakataunga Kerēme e pā ana ki te Tiriti o Waitangi me ngā Whakaritenga ki te Karauna – Healing the Past, Building a Future: A Guide to Treaty of Waitangi Claims and Negotiations with the Crown*, 2nd ed (Wellington: Office of Treaty Settlements, [2002]), usually referred to as the *Red Book*.
3. This language also comes from the former Minister's foreword to the Office of Treaty Settlements' manual.
4. Appendix II is an outline of what happened in this inquiry concerning the production by the Crown of relevant documents, and the steps taken to obtain them.
5. Crown counsel, memorandum in relation to filing of relevant documents, 18 April 2007 (paper 3.4.6); Crown counsel, memorandum in response to claimant submissions on additional Crown documents filed, 27 April 2007 (paper 3.4.15); Crown counsel, memorandum in response to 1 May 2007 memorandum of deputy chairperson, 4 May 2007 (paper 3.4.17)
6. Crown counsel, memorandum in response to 8 May 2007 memorandum of deputy chairperson, 9 May 2007 (paper 3.4.19)

CHAPTER 1

WHAKAWHANAUNGATANGA/RELATIONSHIPS

Te Tino Rangatiratanga and Whanaungatanga

The Treaty is about relationships. They lie at its very core. Primarily, and most obviously, the relationship at issue is between te iwi Māori and the Crown. But it is also about relationships between Māori. That is because the Treaty confirms rangatiratanga, and being a rangatira is about relationships too: between a rangatira and his people, and between different hapū and iwi that independently have and exercise rangatiratanga.

Because of the Treaty, Māori have two different kinds of relationships with the Crown.

At its most basic, article III confirms the rights of Māori as citizens of New Zealand. These are rights they have in common with non-Māori. They include all the entitlements and obligations of citizenship. Citizenship in New Zealand carries with it the benefit on the one hand of the stability and safety of a civilised state that guarantees the rule of law, and undertakes in the worst exigency to provide the necessaries of life. On the other hand it carries with it the obligation to pay taxes, and live within established laws or suffer the consequences.

But article II of the Treaty establishes a different connection with the Crown from that enjoyed by non-Māori in New Zealand. Article II guarantees te tino rangatiratanga, which is the absolute authority of chiefs to be chiefs, and to hold sway in their territories. By that guarantee, the Crown recognised and confirmed Māori relationships and property that were in existence when the Treaty was signed. Confirmation of te tino rangatiratanga is about the maintenance of relationships. In traditional Māori society, chiefs were only rarely autocrats. They sprang out of and were maintained in their positions of authority by their whanaunga; their kin. Whanaungatanga was therefore a value deeply embedded in the maintenance of rangatiratanga. It encompassed the myriad connections, obligations and privileges that were expressed in and through blood ties, from the rangatira to the people, and back again.

In the modern context, the Treaty continues to speak. The Crown's guarantee of te tino rangatiratanga continues, even where today the guarantee lacks the original context and content of possession by hapū Māori of lands and forests.[1]

Through the Treaty settlement process, today's Crown, the Government, acknowledges that the Treaty guarantee of te tino rangatiratanga has not consistently been honoured, and that as a nation we must recognise this and respond to it appropriately. A response is required because of the consequences for generations of Māori people, down to the present generation, of the Crown's obligations not having been consistently fulfilled.

One of the most devastating consequences of the failure to give effect to the guarantee of te tino rangatiratanga has been the breakdown of Māori social structures – the structures that created and expressed whanaungatanga. The ubiquitousness of modern, western models for living was always going to present a great challenge to communal societies. But the failure by the Crown to protect the landholding systems that bound Māori people together

made the fragmentation of Māori kin groups inevitable. Contemporary problems within Māori society are often linked to a lack of cohesion in families, both nuclear and extended. Demonstrating causation will always be hard, but it is plain that something serious has damaged te taura tangata, the ties that bind.

The renaissance in Māori culture in recent decades has seen a reassertion of kin ties through a strengthening of hapū and iwi. While this trend of reaffirming Māori identity has not gathered in all Māori – and arguably has missed some of the most needy – nevertheless it is a positive development. In many ways, it is today's expression of te tino rangatiratanga – that is, the authority of Māori kin groups to determine their own path and manage their own affairs.

The Present Situation

Nowadays, one of the most important periods in the history of hapū and iwi is when they engage with the Crown in a process to settle their Treaty grievances. Usually, this comes after engagement with the Waitangi Tribunal in a district inquiry, but sometimes not. In the Tāmaki Makaurau situation, there has been no Waitangi Tribunal district inquiry.

Being involved in hearings before the Waitangi Tribunal can be very affirming for the whānau, hapū and iwi of a district. The Office of Treaty Settlements typically focuses on settling with one 'large, natural group' in an area, but in a district inquiry the Waitangi Tribunal focuses on all the Māori claimant groups that together comprise the tangata whenua population. The retelling of traditional and personal stories in evidence before the Tribunal promotes understanding of whakapapa, and affirms the connections between people. Where settlement negotiations proceed without this background, the task of unravelling who's who and what's what can be particularly challenging.

That was the situation in the present case. In 2003, the Crown embarked upon Treaty settlement negotiations with Ngāti Whātua o Ōrākei about their Treaty grievances in Tāmaki Makaurau. Officers from the Office of Treaty Settlement set out on a process in the course of which they would form a strong relationship with Ngāti Whātua o Ōrākei. The relationship bore fruit. By mid-2006, an agreement in principle was in place. We heard in evidence that this situation is to the satisfaction of the Crown, and to Ngāti Whātua o Ōrākei. But it was apparent to us, hearing the parties to this urgent inquiry, that in gaining a draft settlement with Ngāti Whātua o Ōrākei, the Crown lost something perhaps equally important: the trust and goodwill of the other tangata whenua groups in Tāmaki Makaurau.

If the price of securing a deal with Ngāti Whātua o Ōrākei is to jeopardise other relationships – not only the relationship between the other tangata whenua groups and the Crown, but also those between the other tangata whenua groups and Ngāti Whātua o Ōrākei – then the price may well be too high.

But perhaps the more compelling question is whether the price needed to be paid. Is it really impractical to suggest that it is possible to secure a settlement with one group without alienating its neighbours and relatives?

The subject of this part of our report is relationships: what the Treaty requires, what non-settling groups want, and why the Office of Treaty Settlements is failing to meet the needs of groups other than the group with which it is negotiating a settlement.

Previous 'Cross-Claim' Inquiries

This urgent inquiry is the latest in a series that the Tribunal has conducted at the behest of groups upset about aspects of the Crown's settlement, and process of settling, with others. In other words, they were all situations where groups

not in settlement negotiations with the Crown considered that they were adversely affected by how the Crown was going about settling the Treaty claims of another group. The adverse effect arose from the Crown's acknowledgement of the interests of the group with which it was settling before it formed a relationship with neighbouring and/or related groups.

Since 2000, the Crown has concluded Treaty settlements with Te Uri o Hau (2000), Ngāti Ruanui (2001), Ngāti Tama (2001), Ngāti Awa (2003), Tūwharetoa (Bay of Plenty) (2003), Ngā Rauru Kītahi (2003), Te Arawa (Lakes) (2004), and Ngāti Mutunga (2005). The Tribunal has received at least 29 applications for urgent inquiries relating to settlements.[2] Eight urgent inquiries have been conducted. This tally includes this present inquiry, and another relating to the Crown's proposed settlement with Te Arawa groups. That urgent inquiry took place at about the same time as this one, and its Tribunal will report soon.

The applicants for urgent inquiries fall broadly into two categories. The first category is made up of people who say that those whom the Crown regards as having a mandate to settle their claims really do not have a mandate. We call these the mandate urgencies. They comprise The Pakakohi and Tangahoe settlement claims inquiry (2000), and three inquiries into the Crown's proposed settlement with part of the tribal grouping of Te Arawa (2004, 2005, and 2007).

Into the second category fall those applicants who say that the settlement to which the Crown and a mandated group are about to agree unacceptably infringes upon their legitimate interests. We call these the cross-claim urgencies. They are: *The Ngāti Maniapoto/Ngāti Tama Settlement Cross-Claims Report* (2001), *The Ngāti Awa Settlement Cross-Claims Report* (2002), and *The Ngāti Tūwharetoa ki Kawerau Settlement Cross-Claim Report* (2003). These claims arose when the Crown was settling with Ngāti Tama about land in which Ngāti Maniapoto said it had interests; when the Crown was settling with Ngāti Awa about land in which Ngāi Tuhoe and Ngāti Rangitihi said they had interests; and when the Crown was settling with Ngāti Tūwharetoa ki Kawerau about land in which Ngāti Awa said they had interests. The current urgent claims concerning the proposed settlement with Ngāti Whātua o Ōrākei in Tāmaki Makaurau fall into the same category, and have much in common with the others that the Tribunal has looked into.

The Tribunals that inquired into those previous claims had real misgivings about how the Crown pursued a settlement with the mandated group, without sufficiently understanding, acknowledging, or engaging with other groups with interests in the same area. In each case, though, the settlement process was well advanced by the time the Tribunal became involved. With a draft settlement on the table, those Tribunals concluded that it was really too late in the piece to mend the process problems; in fact, it was not clear that they could be mended. Under those circumstances, it seemed wrong to postpone the settlement between the Crown and the mandated group. To do so would be effectively to punish the mandated group, which in each case had waited a long time for a settlement, and had worked hard to achieve one. In each case, there was a delicate balancing exercise between two sets of interests. On the one hand were the interests of the group that had worked hard with the Crown to achieve a draft settlement that they wanted to proceed; on the other hand were the interests of the groups that had not been involved in that process, but whose interests had been negatively affected both by the defects in process and by the outcome. They wanted the settlement halted, or very substantially changed. In each case to date – and not always for the same reasons – the Tribunal chose to support the Crown and the settling group.

Those Tribunals did, however, try to impress on the Crown that the means by which settlements are arrived at are very important, and that, as regards dealing with the interests of claimants other than the group with whom they were settling, the Office of Treaty Settlements had erred. In their reports, they emphasised:

- The need for the Crown to recognise, deal with, and limit the effect of, the first-cab-off-the-rank factor[3] – that is, the benefits that flow to the first group in an area to settle with the Crown. Benefits arise from enhanced mana as a result of various kinds of redress and recognition conferred by the settlement. Usually, there are also economic advantages from going first.
- The need for the Crown, in dealing with one group, to ensure that it preserves its capacity to provide similar redress to others who demonstrate a comparable interest in the future.[4]
- The need for the Crown to avoid dealing conclusively with important sites in favour of one group, when the interests of others are not as well understood, and may subsequently prove to be as compelling.[5]
- The need for the Crown to communicate its policy for settling claims clearly and consistently so that consultation is effective.[6]
- The need for the Crown to be pro-active in doing all that it can to ensure that the cost of arriving at settlements is not a deterioration of intra- and inter-tribal relations.[7]
- While there is no problem in principle with the Crown's policy that settling claimants should assume responsibility for addressing cross-claims, at least in the first instance, sometimes the issues raised are extremely difficult ones, and the Crown must stand ready to work with the groups concerned to explore other options.[8]

The Ngāti Awa settlement cross-claims Tribunal said:

> where the process of working towards settlement causes fallout in the form of deteriorating relationships either within or between tribes, the Crown cannot be passive. It must exercise an 'honest broker' role as best it can to effect reconciliation, and to build bridges wherever and whenever the opportunity arises. Officials must be constantly vigilant to ensure that the cost of settlement in the form of damage to tribal relations is kept to an absolute minimum.[9]

The Ngāti Tūwharetoa ki Kawerau settlement cross-claims Tribunal said:

> We believe that it is very difficult to deal with cross-claimants fairly if they are brought into the settlement process only as it nears its conclusion. Inevitably, the Crown ends up defending a position already arrived at with the settling claimants, rather than approaching the whole situation with an open mind and crafting an offer with one group that properly addresses the interests of others with a legitimate interest.
>
> . . . . .
>
> We think that officials put too little emphasis on understanding the modern-day tribal landscape within which they were operating, and the potential effect on that landscape of the proposed mechanisms for redress. In particular, officials failed to understand that issues surrounding cultural redress go well beyond ensuring that redress of the same kind is available to others. This is a key difference, in our view, between cultural and commercial redress.[10]

These comments, made in respect of those earlier negotiations and settlements, apply even more strongly to the present one. Whereas the earlier inquiries concerned different aspects of process failure, all of them come together in the Tāmaki Makaurau situation – and here there are some new problems.[11] It appears to us that the approach of the Office of Treaty Settlements officers has not changed materially from those earlier cases to the present one.

Officials' Response to the Tribunal's Views

In the course of this inquiry, we learned that the Office of Treaty Settlements had reservations about the practicality of the Tribunal's advice set out in reports following the inquiries of 2001, 2002, and 2003.

In 2003, officials reported to the Minister in Charge of Treaty of Waitangi Negotiations on the Crown's approach to cross-claims.[12] The document was in part a response to

The Ngāti Tūwharetoa ki Kawerau Settlement Cross-Claim Report 2003, which the Tribunal released earlier that year.

Officials told the Minister that

> the Tribunal has set the bar too high in terms of perceptions of the Crown's obligations to cross-claimants and the steps that the Crown should take to meet those obligations. Its observations appear to be symptomatic of a limited understanding of the work and time that is required for negotiations, the difficulties of engaging with cross-claimants, and the pragmatic balancing exercise that is required between the interests of the settling groups and those of cross-claimants.
>
> The Crown's primary objective is to negotiate fair and durable settlements in a timely manner. While cross-claim processes should be robust, it should not delay settlements unduly.

The views of the Office of Treaty Settlements expressed here are entirely consistent with the approach revealed in evidence before us, in that securing a settlement with the mandated group is officials' focus and priority. The competing interests of others are an obstacle to be overcome with as little engagement of time and resources as possible. We saw little sign of a balancing exercise. It seemed that the resources available for the negotiation process are dedicated overwhelmingly to forming and maintaining a relationship with the group whose claims are to be settled. Forming a relationship with other groups has almost no priority. The thinking is that their turn will come when one day – at some unspecified time in the future – they become a settling group.

Although we could see why officials take the approach they do in response to the many pressures on them, we think that the priority they accord cross-claim issues in reaching settlements is too low. To treat other groups in such a cavalier fashion puts at risk the very objectives of the settlement process – durability of settlements, and the removal of a sense of grievance.

The Office of Treaty Settlements officials' advice to the Minister in 2003 was that they would adjust the process in response to Tribunal recommendations, but only to a very limited extent. They would: (1) engage in preliminary in-house research to identify overlapping claimant groups that have, or may have, interests in an area, and gauge the extent of those; (2) encourage and assist the settling group to initiate dialogue with overlapping claimants and establish a process for reaching agreement on their mutual interests; and (3) once terms of negotiation are signed, make contact with overlapping claimants, setting out the Office of Treaty Settlements' approach to overlapping claims and seeking information as to the nature and extent of such claims.[13]

The Office of Treaty Settlements witness at the hearing told us that the Ngāti Whātua o Ōrākei negotiation was the first in which these 'enhancements' of the overlapping claims process were applied.[14] Although we accept that changes have been made to the Office of Treaty Settlements' practice as regards other tangata whenua groups, in the Tāmaki Makaurau situation we saw that (a) the changes prefigured in the Office of Treaty Settlements' briefing to its Minister were implemented only in part;[15] and (b) even full implementation would not have sufficed. At hearing, the Crown's witness emphasised the Office of Treaty Settlements' commitment to its process, but we thought there was a lack of appreciation that a process is not an end in itself: it is something that happens to people. At root, processes are about relationships. In the Treaty context, as we have said, negotiating settlements is about running a set of interactions that bear on rangatiratanga. That is why the Office of Treaty Settlements officials must understand the groups' whanaungatanga, and protect it.

First Cab Off the Rank

The Crown has said, in this and previous urgent inquiries on cross-claims, that they have to start somewhere. There are many parts of New Zealand, and many Māori groups, and they cannot be negotiating a Treaty settlement with everyone simultaneously. It follows that there must

be a queue, and when you have a queue, some will be at the front, and others will be at the back. Those at the back will usually be annoyed that they weren't nearer the front. That's an inevitable circumstance of the settlement process, and we all have to live with it.

So then, given that there is a queue, for the Crown to pick Ngāti Whātua o Ōrākei as the first Tāmaki Makaurau candidate for concluding a settlement is certainly understandable. The Crown had dealt with them before,[16] and knew them to have robust and stable leadership. The Ngāti Whātua o Ōrākei Māori Trust Board has a statutory mandate,[17] neatly shortcutting one of the sometimes onerous pre-conditions to agreeing terms of negotiation.[18] The group was apparently united and resolute in its desire to go down the 'direct negotiations' route, rather than waiting for a Waitangi Tribunal hearing.[19] The Crown was satisfied that Ngāti Whātua o Ōrākei had substantial and well-founded Treaty claims to the Tāmaki isthmus,[20] and apparently regarded them as sufficiently numerous to constitute a 'large, natural group'.[21] Moreover, the Crown thought it was about time a full and final settlement was concluded in Tāmaki Makaurau.[22] All these factors conspired to give Ngāti Whātua o Ōrākei the nod of approval.

Unfortunately, though, this cannot be the end of it. And why not? Because in choosing Ngāti Whātua o Ōrākei – a choice not obviously exceptionable – the Crown

- continued a pattern of preferring Ngāti Whātua o Ōrākei over other groups for settlement purposes;
- had no real strategy for how it was going to deal with the other groups; and
- proceeded over the next few years to engage with Ngāti Whātua o Ōrākei in a way that in effect secured for it a primary place,[23] and for the others a secondary place.

Managing the Other Relationships

In the decision to grant urgency to this inquiry, the presiding officer set out as a reason for proceeding to hearing the fact that Ngāti Whātua o Ōrākei has already been in several settlement negotiations of various kinds with the Crown. These negotiations resulted in four previous settlements and part-settlements:

1. The passage of the Ōrākei Block (Vesting and Use) Act 1978 led to the return of title to 29 acres of land and a $200,000 loan from the Māori Trustee.
2. The Ōrākei settlement of 1991 saw the transfer of small areas of land and a cash payment of $3 million.
3. The 1993 Surplus Auckland Railway Lands on-account settlement gave $4 million to Te Runanga o Ngāti Whātua and the Ngāti Whātua o Ōrākei Trust Board.
4. The $8 million settlement in 1996 responded to the Trust Board's claim to compensation for the loss of preferential access to subsidised State housing in Ōrākei.[24]

Thus, Ngāti Whātua o Ōrākei had already been the subject of a number of settlement initiatives. Did this put the Crown under a greater obligation, in making its most recent decision to negotiate a settlement with Ngāti Whātua o Ōrākei alone,[25] to investigate alternatives?

At the hearing, it appeared from the Crown's evidence that the officials concerned were not really alert to the negative consequences that might ensue from putting Ngāti Whātua o Ōrākei in the top spot again, and leaving the other groups out. But it emerged from documents filed by the Crown after the hearing that at least one official was alive to the risks. Peter Hodge was reporting to Rachel Houlbrooke in 2003, when he wrote a number of memoranda relating to what he called engagement with cross-claimants in the context of the negotiations then under way with Ngāti Whātua o Ōrākei.[26] Looking back now with the benefit of hindsight, Mr Hodge's take on the situation was prescient. At the time he wrote, the Crown was encountering resistance by Ngāti Whātua o Ōrākei to engaging in dialogue with cross-claimants.[27] His memoranda recount

his concerns, and suggest strategies for overcoming the difficulties being encountered.

It is intriguing to find an official in the Office of Treaty Settlements expressing views that might have come from a Waitangi Tribunal report on these issues, when the Office in general was apparently not especially receptive to previous Tribunals' views. Mr Hodge's suggestions similarly failed to gain traction, it seems, as we can find no indication that what he said was heeded or acted upon – despite the fact that his analysis was cogent, and his suggestions both sensible and practicable. Documents that the Crown made available just before the completion of this report indicate that other officials were less enthusiastic than Mr Hodge about early engagement with 'overlapping' claimants.[28]

The issues addressed in Peter Hodge's memoranda lie at the heart of this inquiry. However, no other Crown evidence or submissions has thrown any light on them. All we know is that one Office of Treaty Settlements official put into writing concerns that relate to how the office could achieve substantive early engagement with cross-claimants and Ngāti Whātua o Ōrākei's reluctance to participate in that process in a helpful way, and what the Crown needed to do about that.[29] We know that he predicted danger ahead if these problems were not resolved.[30] They were not. His fears were realised. As noted, Peter Hodge's memoranda were among documents filed after the hearing, denying parties, and the Tribunal, the opportunity to ask questions about them. This is a situation we find very unsatisfactory.

Peter Hodge's memoranda put their finger on a potentially implosive aspect of the negotiation with Ngāti Whātua o Ōrākei, but from the evidence presented to us, it seems that he was ignored. We think that the failure to deal with the points he raised is a symptom of the same approach that led earlier to the Office of Treaty Settlements choosing to enter into negotiation again with Ngāti Whātua o Ōrākei alone. The Office of Treaty Settlements did not want to deal with the other tangata whenua groups in Tāmaki Makaurau. They were too many, too diffuse, too difficult, and none of them on its own was a 'large natural grouping'.

The focus of the Crown's Treaty settlement policy is to conclude settlements with deserving – and preferably also 'large' and 'natural' – groups of claimants. This is an unexceptionable objective, offering efficiency on all levels. But with finite resources for undertaking the work, and considerable political pressure to achieve settlements with as many groups as possible in as short a timeframe as possible, the Office of Treaty Settlements is really in the business of picking winners. Winners are groups who appear to offer the best chance of being able to deliver their constituency to a significant settlement.

On the face of it, this seems sensible. Picking winners is the rational response of young and able civil servants to the set of pressures they are under.

So why do we have a problem with it? Our reasons are these:

- Winners tend to be groups who, relative to other Māori groups, have already had successes. They are led by outstanding people like Sir Hugh Kawharu, they have good infrastructure (communication capability, sound accounting practices and good legal structures), and stable, committed membership. Arguably, though, those most in need of settlements – who may often be the very groups whose Treaty rights were least respected in the process of colonisation – are those who do not fulfil a 'success' profile. On the 'picking winners' basis, those groups will be last in the settlement queue.
- When the Crown targets for settlement the most high profile, effective group in a district, and leaves out the other tangata whenua groups, it reinforces the view that they matter less. When the Crown keeps doing it (in Auckland, Ngāti Whātua o Ōrākei has now been chosen four times), that implication is even stronger.
- When the winners are picked out, they feel and act more like winners. This can leave the other tangata whenua groups in the district feeling like losers. They

can feel that they have been relegated to a class of also-rans. Suspicion and resentment are the natural result.

- What will the Crown do to settle with all the smaller, more diffuse groups that, in the end, will be left over? There is no apparent strategy. If there is, those groups do not know of it. They feel as if their claims are in limbo, and destined to remain there.
- The purpose of settlements is to enable Māori to feel less aggrieved by Crown conduct of the past. Peace and reconciliation is not the obvious outcome when significant numbers are aggrieved anew by a process that does not respect them.

Thus, although the 'picking winners' strategy may seem efficient, to what end is it efficient? As a country, our motives for seeking to settle longstanding Treaty grievances are admirable. But settlement is only worth doing if we are doing it in a way that takes us further along the path towards peace and reconciliation. What we are finding in these settlement cross-claim inquiries is that 'overlapping claimants' are left looking – and feeling – like losers. In our opinion, this means that we must look long and hard at how we are going about settling, and seek ways to make changes so that those good intentions do not end up being only that.

The Special Features of Tāmaki Makaurau

Probably, there will always be casualties arising from the one-size-fits-all nature of government policies, but if there were ever an area where outcomes would benefit from the maximum flexibility of approach, this is it. Māori groups are not the same, and groups of Māori groups that together occupy different areas of the country, are definitely not the same. Every region has its own special features as a result of the combinations of people whose rohe is there. Add regional differences arising from factors such as settlement patterns and urbanisation, and you have sets of variables that cry out for tailored responses. We think that dovernment policy, though, militates against this. There is real emphasis on achieving settlements, and a standard approach that is applied fairly unquestioningly to all situations seems to offer the easiest fix.

In opening submissions, though, counsel for the Crown emphasised the importance of flexibility:

> Crown settlement policies are an important guide but are not always applied in a wholly rigid manner so as to preclude outcomes that are appropriate to the particular circumstances of an individual settlement. Retention of some flexibility in a process of this kind is essential.[31]

We are in agreement with the sentiment expressed here. However, the Crown's statements about why it did what it did in these negotiations consistently emphasised the role of policy in determining conduct. We did not see much appetite for flexibility, nor evidence of it.

We thought that the context for these negotiations meant that a flexible approach was necessary, because standard policy might not be appropriate to the Auckland situation. It seemed to us that the situation in Tāmaki Makaurau is very particular, if not unique.

Auckland is now a highly urbanised area with very valuable real estate. In the pre-contact era, Tāmaki was likewise seen by Māori as a desirable place to live, no doubt because of its warm climate, multiple harbours, and good volcanic soil. Unsurprisingly, successive waves of invaders competed for dominance there down the centuries, and the early establishment of Pākehā settlement on the shores of the Waitematā only added to its attractions. Thus, it was – and remains – an intensively occupied part of the country, where constant habitation by changing populations of Māori as a result of invasions, conquests, and inter-marriage has created dense layers of interests. The disposition of those interests as between the various groups identifying as tangata whenua there in 2007 is the subject of controversy. The tangata whenua groups involved in that debate

number about 10,[32] of which six played an active part in our inquiry.[33]

Defending its standard approach to securing settlements, the Crown insisted that Tāmaki Makaurau is 'not unique or fundamentally different from other areas'.[34] We disagree. We think that the combination of characteristics set out in the previous paragraph is unique. Moreover, unlike many other parts of the country that were intensively occupied by Māori, most land blocks did not go through the Native Land Court in the nineteenth century, and neither has the Tāmaki isthmus been the subject of a district inquiry by the Waitangi Tribunal. Compared with the usual situation, therefore, we have here less information about the occupation of the area by Māori in pre-contact times, and also about the effects of colonisation.[35]

We think that it would have been better if from the outset the Crown had recognised and acknowledged that the situation in Tāmaki Makaurau was and is complex. Apart from Peter Hodge, officers in the Office of Treaty Settlements appear not to have confronted the problems arising from cross-claimants. They certainly reassured their Minister that the situation was nothing out of the ordinary.[36] We think that this tendency to understate the difficulties meant that it took too long for officers to properly address what is, in our estimation, a situation that is specific and challenging, both as to the many groups' history and their contemporary manifestations.

We think it was important that the officers recognised this early, because only then could they have acted to manage the relationships involved.

What Was at Issue?

The trouble was, though, that the Office of Treaty Settlements did not see management of relationships as its role. Its view of how it needs to engage with what it calls overlapping claimants is clear, and narrow. It was restated in Ms Houlbrooke's evidence many times in the course of the hearing.[37] What the Office of Treaty Settlements wants to talk about to overlapping claimants is the redress the Crown proposes to offer the mandated group. It wants to know how other groups will be affected by that proposed redress. In Tāmaki Makaurau, therefore, the Office of Treaty Settlements' approach was that, until officers had sorted out the ingredients of a settlement with Ngāti Whātua o Ōrākei, and expressed them in an agreement in principle, there wasn't really anything to talk about with the other tangata whenua groups.

So the Crown made no overtures to meet with any of the other tangata whenua groups in Tāmaki Makaurau in the years prior to the agreement in principle (2006).[38] Any such meetings would take place only after the agreement in principle was in place.

We thought that this was a very limited view. To put it plainly, we think that the Office of Treaty Settlements has it wrong when it comes to dealing with what it calls overlapping claimants.

We went back, in preparing this report, to our previous reports on overlapping claims, and refreshed our memories about those earlier cases. Four years since the Tribunal's last inquiry into the handling of competing tangata whenua interests, we were dismayed to find that the Tāmaki Makaurau situation is basically a case of déjà vu. Virtually all the elements of the earlier cases arise again here and (perhaps because of the special Tāmaki Makaurau features discussed above), with worse effects. The Office of Treaty Settlements may claim that it has heeded our earlier advice, but it seemed to us that nothing has happened in the intervening years that improves the experience of 'overlapping' claimant groups.

Notes

1. In its English version, the Treaty guarantees to Māori 'full exclusive and undisturbed possession of their Lands and Estates Forests Fisheries and other properties'; the Māori version confirms 'te tino rangatira-

tanga o o rātou wenua o rātou kainga me o rātou taonga katoa'. At the time when the Treaty was signed, all of the resources listed in article II belonged to Māori. Since then, most of the lands and forests have passed into other ownership. In recent times, however, Māori have regained significant ownership of New Zealand's commercial fishery through Treaty settlements. As regards other taonga, a number of Waitangi Tribunal reports and court decisions have recognised the retention by Māori of taonga such as te reo Māori (and Crown obligations arising as a result).

2. It is possible that there are more. This is the number that could be found by staff in the Tribunal's registrarial section. However, separate statistics for settlement-related applications have not been kept.

3. Waitangi Tribunal, *The Ngāti Maniapoto/Ngāti Tama Settlement Cross-Claims Report* (2001), p 18

4. Ibid, pp 22–23

5. Ibid, pp 23–24, re Te Kawau Pā

6. Waitangi Tribunal, *The Ngāti Awa Settlement Cross-Claims Report* (2002), pp 85–87

7. Ibid, pp 87–88; Waitangi Tribunal, *The Ngāti Tūwharetoa ki Kawerau Settlement Cross-Claim Report* (2003), p 63

8. Waitangi Tribunal, *The Ngāti Tūwharetoa ki Kawerau Settlement Cross-Claim Report*, pp 63–64

9. Waitangi Tribunal, *The Ngāti Awa Settlement Cross-Claims Report*, p 87

10. Waitangi Tribunal, *The Ngāti Tūwharetoa ki Kawerau Settlement Cross-Claim Report*, pp 67, 69

11. In the previous claims, there was a problem with the Crown confronting new situations and effectively making policy in an ad hoc way. There is now more experience in dealing with competing interests of other tangata whenua groups, and more developed policy. Now we see ad hockery arising in departures from the stated policy, leading to a lack of consistency, and difficulty for claimants in predicting how officials will handle settlements. An example is the notion of predominance of interests, and in what circumstances officials will consider it to be applicable. In an earlier inquiry relating to Crown forests (*The Ngāti Awa Settlement Cross-Claims Report)* the Tribunal was told that predominance of interests was a concept that was applied only in the context of Crown commercial assets and had no role in cultural redress. Here, though, we were told that predominance of interests was the basis upon which interests in maunga were to be recognised as cultural redress: see ch 3, Ngā Hua, at pp 66, 77.

12. Rachel Houlbrooke, the manager policy/negotiations in the Office of Treaty Settlements, was the office's witness at the hearing. Her briefing paper dated 14 August 2003 to the Minister in Charge of Treaty of Waitangi Negotiations, is entitled 'The Crown's Approach to Cross-Claims including a Response to the Waitangi Tribunal's Cross Claims Report'. Paragraph 10 asks the Minister to note that the report will be used as a best practice guide within the Office of Treaty Settlements: doc A38(a), DB1.

13. Ibid, p 5

14. Rachel Houlbrooke, brief of evidence, 26 February 2007 (doc A38), para 11.1

15. The extent to which the changes were made is discusssed in chapter 3.

16. There had been four previous settlement initiatives. These are described later in this chapter under 'Managing the Other Relationships', pp 11–13.

17. Section 19(1) of the Orakei Act 1991 states: '. . . Trust board may from time to time negotiate with the Crown . . . any outstanding claims relating to the customary rights . . . of the hapu . . . the Trust Board shall have sole authority to conduct any such negotiations in respect of the hapu'.

18. Office of Treaty Settlements, *Ka Tika ā Muri, Ka Tika ā Mua: He Tohutohu Whakamārama i ngā Whakataunga Kerēme e pā ana ki te Tiriti o Waitangi me ngā Whakaritenga ki te Karauna – Healing the Past, Building a Future: A Guide to Treaty of Waitangi Claims and Negotiations with the Crown* [the *Red Book*], 2nd ed (Wellington: Office of Treaty Settlements, [2002]), p 35: 'The mandate of the claimant group representatives is conferred by the claimant group and then recognised by the Crown', p 45: 'Mandated representatives need to demonstrate that they represent the claimant group, and the claimant group needs to feel assured that the representatives legitimately gained the right to represent them. This can only be achieved through a process that is fair and open.'

19. Professor David Williams, a witness for Ngāti Whātua o Ōrākei, told the Tribunal that one of the motivations for Ngāti Whātua o Ōrākei seeking direct negotiation was that they were not scheduled to be heard by the Waitangi Tribunal for a long time: hearing recording, 14 March 2007, track 1.

20. Crown counsel, closing submissions (paper 3.3.21), para 3.5

21. The Office of Treaty Settlements' *Red Book* says (p 51) that one of the criteria that claimants need to meet to be admitted for negotiation is that they comprise a large natural group. In her evidence for the Crown (doc A38, para 41), Rachel Houlbrooke said that the Office of Treaty Settlements had advised its Minister in October 2002 that Ngāti Whātua o Ōrākei are not an iwi in their own right but a group of hapū within the wider Ngāti Whātua iwi. Officials estimated the Ngāti Whātua o Ōrākei population at between 3000 and 4000.

22. In the Crown's final day of hearing closing submissions, Crown counsel Mr Andrew noted as the fourth reason for the Crown's decision to negotiate with Ngāti Whātua o Ōrākei 'The importance of maintaining the momentum of settlements and achieving a comprehensive settlement in Auckland': paper 3.3.12, point 1.

23. The Crown knew that, in its negotiation with the Crown, Ngāti Whātua o Ōrākei were seeking to enhance their manawhenua. The

Crown knew that it had to respond to this aspiration, and particular items of redress were designed for that purpose: doc A34, pp 3–4; A67, DB40.

24. Rachel Houlbrooke, 'Ministerial Briefing: Ngāti Whātua o Ōrākei Negotiations', 24 February 2003, in David Taipari, Supporting Papers to Brief of Evidence (doc A33(a)), tab 3, para 2

25. Tiwana Tibble, the chief executive of the Ngāti Whātua o Ōrākei Māori Trust Board, agreed with Paul Majurey, counsel for Marutūāhu, that the relationship between Ngāti Whātua o Ōrākei and the Crown as parties to the negotiation of a Treaty a settlement effectively began with the letter dated 27 March 2002 from Ngāti Whātua o Ōrākei to the Office of Treaty Settlements: doc A38(a), DB5.

26. Peter Hodge, Office of Treaty Settlements internal memoranda, in Rachel Houlbrooke, supporting papers to brief of evidence (docs A67, DB13, DB14, DB16, DB21, DB23; A38(a), DB244–DB246)

27. Peter Hodge, 'Internal Memorandum: Ngāti Whātua o Ōrākei Cross-Claims: Reluctance to Engage with Cross-Claimants', 2 December 2003 (doc A66, DB246) paras 6–7

28. Documents A67, DB13, DB21

29. Hodge, (docs A66, DB244–246)

30. Hodge, (doc A66, DB246), para 10:

> 10. There are a number of reasons why Ngāti Whātua should engage with cross-claimants pre-AIP [agreement in principle] signing:
>
> . . . . .
>
> the risk of delay in the settlement process and changes being required to the conditional settlement offer (as the result of the Crown's consultation with cross-claimants or because the Crown accepts Tribunal recommendations flowing from a cross-claim challenge) is minimised. In an inquiry, a key issue for the Tribunal will be if Ngāti Whātua has engaged with cross-claimants;

31. Crown counsel, opening submissions, 12 March 2007 (paper 3.3.4)

32. Ngāti Te Ata, Te Kawerau ā Maki, Ngāi Tai ki Tāmaki, Ngāti Paoa, Waiōhua, Marutūāhu/Hauraki Māori Trust Board, Te Akitai, Te Taoū, Ngāti Tamaoho, Ngāti Wai, and Ngāti Whātua o Ōrākei.

33. Ngāti Te Ata, Te Kawerau ā Maki, Ngāi Tai ki Tāmaki, Marutūāhu/Hauraki Māori Trust Board, Te Taoū, and Ngāti Whātua o Ōrākei.

34. Crown's final day of hearing closing submissions (paper 3.3.12), point 1

35. We note that this was also substantially the view of the Crown's own most senior historian, Dr Donald Loveridge. In his report commissioned by the Office of Treaty Settlements entitled 'Ngāti Whātua o Ōrākei Claim: Appraisal of Evidence for Office of Treaty Settlements', 2 September 2003, he expressed the view that too little was known about land sales in the Auckland region for the Crown to concede Treaty breaches (p 10). His report makes many comments about the inadequate state of knowledge and the poor quality of the research that had been done. He said: 'All in all this is possibly one of the most complex areas in New Zealand as far as land sales go, and is also one of the most poorly documented and least studied' (pp 9–10); 'Stirling contributes nothing of substance to the debate with respect to Ngāti Whātua, and we still know relatively little about sales by other iwi' (p 10); 'It is most unfortunate that research in this part of the country has been driven by specific claims, rather than by the obvious need to understand and study developments in Tamaki and South Auckland as a single interactive process' (p 11, fn 16). In Rachel Houlbrooke, supporting papers to brief of evidence (doc A38(a), DB251).

36. Much referred to at the hearing was the document in which the Office of Treaty Settlements claims development manager, Tony Sole, advised the Minister in Charge of Treaty of Waitangi Negotiations that 'Cross-claim issues are relatively manageable' and that Ngāti Whātua o Ōrākei's mana whenua status 'does not appear to be challenged by other groups in the area': Tony Sole, 'Ngāti Whātua o Ōrākei and Ngāti Whātua of South Kaipara Mandate Process', ministerial briefing paper, 25 October 2002, in Rachel Houlbrooke, supporting papers to brief of evidence (doc A38(a), DB4), paras 48–50

37. Rachel Houlbrooke, brief of evidence, 26 February 2007 (doc A38), pp 3–7; Rachel Houlbrooke, summary of evidence, 14 March 2007 (doc A38(b)), pp 3–4; During the hearing, Ms Houlbrooke stated (hearing recording, 15 March 2007, track 4):

> What I think is that, in this pre-AIP period, the Crown needs to have a reasonable level of understanding of the interests of others and one way of determining that is to write to people, to seek information, to assess the level of information we've got from within the broad body of information that's available and, yes, within that process we could have had meetings with people to allow them, face-to-face, to tell us about their interests, but until you've got to an agreement in principle, until there's redress to talk about, we don't know whether those interests are going to be affected or not. There's nothing to talk about.

38. A few meetings did take place between other tangata whenua groups and the Crown (see the Stories, ch 2), but they were in no case initiated by the Crown. The Crown's strategy of deploying Ngāti Whātua o Ōrākei to sort out other tangata whenua groups' interests in Tāmaki Makaurau before release of the agreement in principle failed (see ch 2, concern 5).

CHAPTER 2

TE ARA/PROCESS

The Treaty Context

Our concerns about process flow from basic flaws in how the Office of Treaty Settlements conceives of its task.

The work of the Office of Treaty Settlements is entirely Treaty-related. Of all the departments, agencies, and institutions of the Crown, it is the one that lives and breathes the Treaty of Waitangi. It should model best practice as a Treaty partner. Its dealings with Māori (whether they are negotiating a Treaty settlement or not) should exhibit the characteristics implicit in a partnership: respect, fairness, honesty, and openness.

The standard of conduct required by the Treaty is not the same as the standard imposed by administrative law. The conception of fairness in administrative law arises from natural justice, and embodies the idea that those acting in an administrative capacity must act fairly, just like those whose functions are quasi-judicial. Any administrative act may now be held to be subject to the requirements of natural justice,[1] and 'the rules of natural justice – or of fairness – are not cut and dried. They vary infinitely.'[2]

But whereas the focus in administrative law is on the act, the focus in the Treaty is on the people: the duty to act fairly in the Treaty context arises first and foremost from the Treaty relationship. Obviously, officials in the Treaty sector must comply with the principles of natural justice, just like officials everywhere else. But in addition, when acting on behalf of the Crown in the Treaty relationship, their focus must be on the quality of that relationship. This layer of obligation involves understanding, respecting and upholding Māori values and institutions.

Rachel Houlbrooke, who represented the Office of Treaty Settlements at our hearing, talked in her brief of evidence about the 'intrinsic challenges' of dealing with 'overlapping' claim issues in every Treaty settlement. She spoke of Treaty obligations and the need to balance the interests of settling groups and 'overlapping' claimants. She also emphasised politics and pragmatism.[3]

We saw much of politics and pragmatism in the Office of Treaty Settlements' approach to the other tangata whenua groups in Tāmaki Makaurau. Recognition of Treaty obligations and the balancing of interests were much less apparent.

This Chapter

We begin this chapter by explaining how the Office of Treaty Settlements misconceived its task in negotiating with Ngāti Whātua o Ōrākei. It:

- focused exclusively on its relationship with Ngāti Whātua o Ōrākei at the expense of simultaneously building relationships with all the affected tangata whenua groups in Tāmaki Makaurau;
- cast the other tangata whenua groups in the role of 'interested parties' (as the law understands that term)

in relation to a public policy issue, entitling them only to a right to be consulted; and

- saw Treaty negotiations as analogous to negotiations in the commercial world, rather than recognising that negotiating and reaching a Treaty settlement is quintessentially about restoring damaged relationships.

Next, we present brief narrative accounts of the interactions between the Office of Treaty Settlements and each of the groups that were applicants in our inquiry.

Lastly, we identify seven serious concerns about the Office of Treaty Settlements' approach to negotiations, and its dealings with the applicants. We elaborate each in turn.

How the Office of Treaty Settlements Conceives of its Task

Once terms of negotiation were signed in 2003, the Office of Treaty Settlements had only one objective: to establish a relationship with Ngāti Whātua o Ōrākei that would enable a settlement to be concluded with them as quickly as possible. The 'overlapping claimants' were an inconvenience to be dealt with as summarily as possible: they were a distraction from the main task at hand. For three years up to the release of the agreement in principle, the Office of Treaty Settlements met fortnightly with Ngāti Whātua o Ōrākei, and in that time sent only one letter to the other tangata whenua groups in Tāmaki Makaurau. The gist of that letter was, 'Send us in all your information, but don't call us we'll call you.' Even after the agreement in principle was released, the intention was to deal with the other tangata whenua groups only in relation to the proposed settlement with Ngāti Whātua o Ōrākei (not their own claims), and then in short order.[4]

At the hearing, Rachel Houlbrooke told us that the Crown did have a Treaty relationship with the other groups.[5] But from what we saw in evidence of what actually happened, the Office of Treaty Settlements' view of what a Treaty relationship involves is different from ours.

The other tangata whenua groups in Tāmaki Makaurau seemed to be regarded as equivalent to interested parties in relation to a public policy issue – that is, they had a right to be consulted. But they did not have a right to be consulted throughout. The Office of Treaty Settlements wanted to limit consultation to the tail end of the negotiation process, when the arrangements with Ngāti Whātua o Ōrākei were virtually sewn up.

We do not agree that non-settling tangata whenua groups in relation to a Treaty settlement and interested parties in relation to a public policy decision are analogous. Nor are administrative law standards for what 'consultation' requires relevant.[6]

The Crown's process for dealing with other tangata whenua groups in Tāmaki Makaurau must be fair, certainly. But a process that would be considered fair in an ordinary bureaucratic context may not meet the standard required for fairness in a Treaty context. As we have said, the Treaty is about relationships, and the Crown is obliged to put that consideration to the fore in all its dealings with Māori. It goes over and above what might be considered fair in a context unrelated to the Treaty.

For example, when a commercial company like Wellington Airport is wanting to increase airport charges, and Air New Zealand is an airport user, Air New Zealand will be affected by Wellington Airport's decision, and this makes it an interested party. Fairness requires that such a situation, and such a relationship, gives rise to a duty to consult before a decision is made.

But the Crown's relationship with other tangata whenua groups in Tāmaki Makaurau is the same in Treaty terms as its relationship with Ngāti Whātua o Ōrākei. It owes no more and no less to one group than any other.

The Treaty relationship is characterised by obligations we are all familiar with – good faith, active protection, and so on. That overarching Treaty duty on the Crown affects all its dealings with te iwi Māori, and has no equivalent in

the commercial world. Obligations that arise because the Crown is making a decision that affects a hapū or an iwi – duties of the kind that Wellington Airport has to Air New Zealand when it is making a decision that affects Air New Zealand – only add another layer to the primary Treaty obligation.

When a Treaty settlement is being negotiated, there is a lot at stake both for the settling group and for others affected. This, combined with the obligations implicit in the Treaty relationship, means that the standard of process that the other tangata whenua groups in Tāmaki Makaurau can expect of the Crown is certainly higher than what is comprised in an obligation to consult.

The Office of Treaty Settlements not only saw other tangata whenua groups in Tāmaki Makaurau as equivalent to interest groups in relation to a public policy issue, it also mistakenly conceived the nature of the negotiation between the Crown and Ngāti Whātua o Ōrākei.

Instead of recognising the fundamental difference between negotiations to arrive at a Treaty settlement and deal-making between commercial entities, the Office of Treaty Settlements relied on the commercial elements of the Treaty settlement as defining its relationship with Ngāti Whātua o Ōrākei. That, in turn, provided the justification for the office's withholding information relevant to the negotiations – especially historical information – from the other tangata whenua groups.

Tikanga

The need for officials in the Office of Treaty Settlements to be aware of, and comply with, tikanga Māori in their dealings with Māori is another aspect of partnership under the Treaty.

In reflection after the hearing, it concerned us that there appeared to be so little in the way of a cultural overlay to the Office of Treaty Settlements' mode of operation, certainly as regards the other tangata whenua groups.[7] One of the startling omissions is that, when the Crown comes into a district to commence a Treaty negotiation process, officials do not initiate hui with all the tangata whenua groups.

It is not as if officials did not know that there were multiple groups with tangata whenua status in Auckland. They did. If tikanga were applied, the appropriate course would have been to call all the parties to initial hui (at least one) to explain to everyone what the Crown was doing in Tāmaki Makaurau, and how it would be going about it. This is a matter of courtesy, a matter of respect. In a pōwhiri, the Crown would acknowledge the presence and tangata whenua status of all the groups there together, and also their forebears and history. Conforming to such basic tikanga as this is vital for the maintenance of healthy relationships between the Crown (through its various agencies) and te iwi Māori. The Crown has available to it advice on matters of tikanga, and that advice should be sought and followed.[8]

The Office of Treaty Settlements might anticipate adverse reaction from other tangata whenua groups at a hui where it is announced that the Crown will embark upon settlement negotiations with Ngāti Whātua o Ōrākei alone. That is no reason for flouting tikanga, and not holding the hui. Hui are proper places for people to air their views, and if those views are negative, the Crown must deal with it.

In our experience, credit would be given for the Crown's doing things the right way. Māori people respect protocol, and feel themselves respected when their tikanga are followed.

Good will and good relationships take years to establish, but can be forfeited much more quickly. In tikanga terms, how could the other tangata whenua groups infer anything positive about their relationship with the Crown from the fact that the Crown came into Auckland on important business concerning the Treaty, and met and talked only with Ngāti Whātua o Ōrākei? That was a wholesale denial of the others' mana from the outset.

The Other Tangata Whenua Groups' Stories

We now narrate the story of interaction between the Crown and each group that appeared as an applicant before us in this inquiry. The Stories show the extent to which the Office of Treaty Settlements, and indeed the Crown generally, was prepared to engage with other tangata whenua groups in the period of negotiation with Ngāti Whātua o Ōrākei from 2003 up to mid-March 2007, when this inquiry convened. The Stories also talk about the groups' dealings with Ngāti Whātua o Ōrākei during this time.

In constructing the story of each group's interaction with the Crown, we have relied on evidence of the applicants, but also (perhaps even more heavily) on the evidence of the Crown. The Crown does not advance a different version of the facts. The parties differ as to what this Tribunal should make of the facts in terms of our jurisdiction.

The Ngāti Te Ata Story

The key players

Nganeko Minhinnick: Ngāti Te Ata claimant and spokeswoman
Roimata Minhinnick: Ngāti Te Ata claimant and son of Nganeko Minhinnick
Tuherea Kaihau: chairman of Te Iwi o Ngāti Te Ata
Kathy Ertel: lawyer for Ngāti Te Ata
Tony Sole: (then) manager of the claims development team in the Office of Treaty Settlements
Rachel Houlbrooke: leader of the Crown's team negotiating with Ngāti Whātua o Ōrākei[1]
Andrew Hampton: (then) director of the Office of Treaty Settlements

Nganeko Minhinnick

What happened

In April 1999, Ngāti Te Ata wanted to get into direct negotiations with the Crown to settle historical Treaty claims. They sent a deed of mandate to the Office of Treaty Settlements for approval, and met with officials in March 2000 to discuss the process. Then they sent in their traditional research explaining Ngāti Te Ata's interests in Tāmaki Makaurau.[2] Ngāti Te Ata claim manawhenua over the central Tāmaki isthmus – and so do Ngāti Whātua o Ōrākei.

Ngāti Te Ata met with officials again in June 2002 to hear more about Crown policy for settling historical Treaty claims.[3] However, in January 2003, Tony Sole wrote to Ngāti Te Ata to say that the Office of Treaty Settlements was still sorting out how to go about settling Ngāti Te Ata's claims. He said 'the Crown needs to clarify which of the kinship groups, if any, associated with Waikato-Tainui have claims outside of the Waikato-Tainui Raupatu claim area in south and central Auckland and Kaipara and how they might be represented in any negotiations.' The Office of Treaty Settlements saw Ngāti Te Ata as a kinship group associated with Waikato-Tainui. The letter said that, for the Crown, 'the issue of Ngāti Te Ata representation remains to be resolved'.[4] The Office of Treaty Settlements still had questions about the deed of mandate that had been submitted in 1999, and also how Ngāti Te Ata would participate in a 'large, natural group'.

By the time they received the Office of Treaty Settlements' letter of 1 July 2003, Ngāti Te Ata had heard no more about whether they would be admitted to negotiation with the Crown. The 1 July letter was the one sent out to all the other tangata whenua groups in Tāmaki Makaurau, telling them about Ngāti Whātua o Ōrākei's negotiation and seeking information about their interests in Tāmaki Makaurau.

Nganeko Minhinnick did as the letter asked. In August 2003,[5] she sent in more information about Ngāti Te Ata. Rachel Houlbrooke replied, saying that the Office of Treaty

Settlements would talk to Ngāti Te Ata again after the Crown had arrived at an agreement in principle with Ngāti Whātua o Ōrākei. If Ngāti Te Ata wanted to send in yet more information in the meantime, they could.[6]

Needless to say, Ngāti Te Ata were not happy with this situation. They had hoped to be entering into negotiation with the Crown themselves, but now it seemed that they would be on the sidelines while the Office of Treaty Settlements negotiated only with Ngāti Whātua o Ōrākei.

In October 2003, Tuherea Kaihau wrote to both the Office of Treaty Settlements and Ngāti Whātua o Ōrākei threatening legal action if the Crown did not halt the negotiations with Ngāti Whātua o Ōrākei and meet face-to-face to discuss Ngāti Te Ata's concerns.[7] Rachel Houlbrooke wrote back three weeks later, saying that the Crown was 'mindful of overlapping claim issues', and the Office of Treaty Settlements would consult further upon the release of the agreement in principle.[8]

Rachel Houlbrooke acknowledged in her letter that Ngāti Te Ata had tried to get discussions started with Ngāti Whātua o Ōrākei. She said that she would bring it up with the Ngāti Whātua o Ōrākei Trust Board.

The Ngāti Whātua o Ōrākei Trust Board responded, and a month later Ngāti Te Ata and Ngāti Whātua o Ōrākei met. Ngāti Te Ata put to Ngāti Whātua o Ōrākei the idea of working together in Treaty negotiations. Ngāti Whātua o Ōrākei said they would get back to them on it. Ngāti Te Ata heard nothing.[9]

Frustrated, Roimata Minhinnick took action in December 2003. He applied to the Waitangi Tribunal for an urgent hearing to prevent prejudice arising from a future settlement with Ngāti Whātua o Ōrākei.[10] Ngāti Te Ata told the Tribunal that they should have been included in the negotiations with Ngāti Whātua o Ōrākei from the outset.[11]

In March 2004, Roimata Minhinnick wrote to the Office of Treaty Settlements. He sought an assurance that any settlement with Ngāti Whātua o Ōrākei would not affect Ngāti Te Ata's interests in Tāmaki Makaurau.[12] Andrew Hampton responded a few days later saying that the Crown was 'taking account' of Ngāti Te Ata's interests when negotiating redress with Ngāti Whātua o Ōrākei.[13] In the same letter, Mr Hampton went on to request 'at least' a preliminary response from Ngāti Te Ata on the nature and extent of their interests in central Auckland. He was obviously unaware of the information Ngāti Te Ata had supplied previously, on at least three occasions.[14]

Andrew Hampton's letter also revealed for the first time what the Office of Treaty Settlements now had in mind for settling Ngāti Te Ata's historical claims. He said that the Crown wanted Ngāti Te Ata to work with other Waikato groups to develop an 'overarching strategy' for progressing their claims.

The Office of Treaty Settlements had conceived this plan without reference to Ngāti Te Ata. Nganeko Minhinnick was not happy. In February 2005, she wrote back saying that

Ngāti Te Ata and Waikato were not the same people, and Ngāti Te Ata wanted to negotiate and settle their own claims as an iwi. There was 'much disillusionment and anger' in Ngāti Te Ata[15] because of the Crown's unwillingness to accept this. After years of trying unsuccessfully to initiate negotiations with the Crown, and then trying unsuccessfully to develop an alliance with Ngāti Whātua o Ōrākei, there was still no settlement in sight.[16] Ms Minhinnick requested all documentation pertaining to the lands under negotiation between Ngāti Whātua o Ōrākei and the Crown, and the timeframe for reaching a deed of settlement.[17] She also requested an urgent meeting with Ministers of the Crown and representatives of the Office of Treaty Settlements.[18]

In April 2005, Mark Burton, the Minister in Charge of Treaty of Waitangi Negotiations, sent a letter referring Nganeko Minhinnick to his officials. A month later, the Office of Treaty Settlements wrote to Kathy Ertel offering a meeting to discuss Ngāti Te Ata's interests in the Auckland region.[19] At the Tribunal hearing, Ms Ertel said she never received this letter, and so did not respond to it.[20] The Office of Treaty Settlements, receiving no response, did nothing.

The agreement in principle between Ngāti Whātua o Ōrākei and the Crown was signed on 9 June 2006. Formal notice of this was sent to all the other tangata whenua groups in Tāmaki Makaurau by letter dated 13 June 2006. But Ngāti Te Ata must have got wind of the agreement before receiving notice, because on 12 June 2006, Ngāti Te Ata commenced efforts under the Official Information Act to get from the Crown information on the agreement in principle. The Office of Treaty Settlements talked to them about this on the phone on 7 July 2006, trying to clarify what documents were sought. Ngāti Te Ata took this opportunity to tell the office that 'they had concerns about the entire agreement in principle, including the Historical Account, Acknowledgements and redress such as the Antiquities Protocol and redress over Maungawhau and Remuera'.[21] Roimata Minhinnick set all this out in a letter dated 29 December 2006 and sought a meeting with the Office of Treaty Settlements at Tahuna Marae.[22]

The meeting took place on 19 February 2007. At the meeting, the Crown outlined the redress in the agreement in principle, and Ngāti Te Ata told the Crown again that they were unhappy that the Crown had negotiated with Ngāti Whātua o Ōrākei only. They also detailed their concerns about the redress in the agreement in principle.[23]

Notes

1. In 2004, Rachel Houlbrooke was also appointed manager of the policy, strategy, and legal team in the Office of Treaty Settlements.
2. Document A2, attachment B, para 35
3. Document A2, attachment B
4. Document A58, DB212

5. Document A38(a), DB62
6. Document A38(a), DB63, DB65. It seems that initially the Crown had no strategy for responding to claimants as they forwarded their information to the Office of Treaty Settlements. This is evident from an email query from Ms Houlbrooke, who was managing the process, to her colleagues (doc A38(a), DB13:

> From: Houlbrooke, Rachel
> Sent: Monday, 1 September 2003 15:31
> To: Bowie, Kerry; Filer, David
> CC: Wethey, Emma
> Subject: FW: Marutuahu Confederation Response to the OTS Letter of 1 July 2003
> Importance: High
>
> Kerry/David
> Cross claim response re: Ngāti Whatua. Do we have a strategy for responding to people as they come back?
>
> Rachel

7. Document A38(a), DB64, DB64(a)
8. Document A38(a), DB65. Ms Houlbrooke also enclosed a copy of the Office of Treaty Settlements' policy manual *Ka Tika ā Muri, Ka Tika ā Mua* (the *Red Book*) to assist Mr Kaihau 'in understanding the Treaty Settlement process'.
9. Document A2, para 45
10. Letter from Roimata Minhinnick to the Waitangi Tribunal, 23 December 2003 (doc A38(a), DB66, p 4). Ngāti Te Ata's application was adjourned in March 2005 in an effort to protect their interests through establishing a relationship with the Office of Treaty Settlements: doc A38(a), DB71. This application was eventually renewed in September 2006 after those attempts failed (paper 2.5.7).
11. Document A38(a), DB66, p 4, para 2.2
12. Document A2, attachment B
13. Ibid, attachment B, p 1
14. Ibid, attachment B, p 3. Ms Minhinnick specifically mentions Ngāti Te Ata's traditional research, which was supplied to the Office of Treaty Settlements in 2000: doc A38(a), DB67. However, Ms Minhinnick also provided an initial response on Ngāti Te Ata's interests in August 2003, as part of the Crown's 'overlapping' claims process: doc A38(a), DB62.
15. Document A2, attachment D, pp 2–3
16. Document A41, para 16; doc A2, attachment D, p 4
17. Document A38(a), DB69, p 2. Ms Minhinnick's initial Official Information Act request for documentation in February 2005 was broad in its scope. Consequently, the Office of Treaty Settlements asked her to refine it to particular issues of concern. The refined request for documentation was then released to Ms Minhinnick in March 2005: doc A38(a), DB67, p 4; doc A38(a), DB68; doc A38(a), DB70.
18. Document A2, attachment D, p 4
19. Ibid, attachment E; doc A38(a), DB72
20. This letter was provided as part of Ms Houlbrooke's document bank: doc A38(a), DB72; hearing recording, 14 March 2007, track 4.
21. Rachel Houlbrooke, brief of evidence, 26 February 2007 (doc A38), paras 249–250
22. Roimata Minhinnick, agreement in principle between the Crown and Ngāti Whātua o Ōrākei: Te Iwi o Ngāti Te Ata Waiōhua Manawhenua interests, 29 December 2006 (doc A38(a), DB147
23. Rachel Houlbrooke, brief of evidence, 26 February 2007 (doc A38), para 253

The Te Kawerau ā Maki Story

The key players

Te Warena Taua: Te Kawerau ā Maki claimant
Graeme Murdoch: historian for Te Kawerau ā Maki
Stephen Clark: lawyer for Te Kawerau ā Maki
Tony Sole: (then) manager of the claims development team in the Office of Treaty Settlements
Rachel Houlbrooke: leader of the Crown's team negotiating with Ngāti Whātua o Ōrākei[1]

Te Warena Taua

What happened

From 1997 to 2001, Te Kawerau ā Maki were involved in the Waitangi Tribunal's Kaipara district inquiry. By 2000, they were resolved upon getting into direct negotiation with the Crown to settle their Treaty claims.

In February 2000, Stephen Clark sent the Office of Treaty Settlements his legal submissions and Graeme Murdoch's historical research prepared for the Kaipara Tribunal hearings. He asked the Crown to assess the Treaty breaches affecting Te Kawerau ā Maki.[2]

In April 2001, Stephen Clark made a formal request to commence direct negotiations. The Office of Treaty Settlements replied that they needed a clearer understanding of the issues and interrelationships between the different groups in the south Kaipara area.[3] Getting the process right at the beginning would be more 'cost and time efficient' for both parties further down the track.[4]

Tony Sole met with Te Kawerau ā Maki in November 2002, seeking to understand the relationships between Te Kawerau ā Maki and the other groups in the Auckland and Kaipara districts. At the meeting, he suggested the possibility of tripartite negotiations involving Ngāti Whātua o Ōrākei, Ngāti Whātua of south Kaipara, and Te Kawerau ā Maki.[5] Te Kawerau ā Maki liked this idea, and confirmed their support in writing a few days later so that officials could put the proposal to the Minister.[6] But then a number of months went by without any response from the Office of Treaty Settlements.[7] Mr Clark wrote further letters and telephoned the office in early 2003 to find out what was happening. He was told that the office had no copy of Te Kawerau ā Maki's request to commence direct negotiations.[8] On 19 March 2003, Mr Clark wrote back citing letters sent by the office referring to the request: it must have a copy.[9]

In the same letter, Mr Clark asked whether the Office of Treaty Settlements had enough information to assess whether Te Kawerau ā Maki had well-founded Treaty claims and could therefore commence negotiations.[10] A month later, Tony Sole replied, saying that it was unlikely that Te Kawerau ā Maki would be able to commence negotiations in the

immediate future, as the Office of Treaty Settlements' historians would not be able to complete an assessment of the evidence until late 2003.[11] Moreover, it was still unclear whether Te Kawerau ā Maki constituted a 'large natural group' for the purposes of negotiation. But, said Mr Sole, 'We will remain in close contact with you as we address those issues.'[12]

Stephen Clark wrote back expressing surprise that the Te Kawerau ā Maki material sent in 2000 had still not been assessed. He also inquired whether tripartite negotiations – an idea initiated by the Crown – were still a possibility, because the Crown had stopped mentioning it. Mr Clark was obviously worried that if the tripartite negotiation idea had been dropped, and the Office of Treaty Settlements doubted that Te Kawerau ā Maki was a 'large natural group', it would not fit in anywhere. He said:

> In our view, unless the Crown comes to grips with settling these smaller iwi and larger hapū claims, it will not be possible to comprehensively settle all claims in the greater Auckland region. Thus I pose the question: if a group such as Te Kawerau ā Maki does not meet the definition of a large natural group of tribal interests, how are their claims ever to be negotiated and settled, or will the Crown simply never settle them?[13]

Tony Sole wrote back on 8 May 2003 – six days after terms of negotiation were signed with Ngāti Whātua o Ōrākei. He said tripartite negotiations were now unlikely because of the differing states of readiness of the claimant groups.[14]

From this time on, Te Kawerau ā Maki became 'overlapping' claimants in the Ngāti Whātua o Ōrākei negotiations. In this capacity, they received a copy of the Office of Treaty Settlements' standard letter of 1 July 2003, in which overlapping claimants were asked to tell the Crown about their interests. The letter did not acknowledge the large volume of material that Te Kawerau ā Maki had already supplied. Stephen Clark tried to reach Rachel Houlbrooke to remind her of this. He left two messages, but had no response.[15]

Te Kawerau ā Maki wanted to know what the Crown was doing in its negotiations with Ngāti Whātua o Ōrākei, but no information was forthcoming.

In October 2003, Te Warena Taua went to the media about the adverse affects on Te Kawerau ā Maki of a future settlement with Ngāti Whātua o Ōrākei. Ms Houlbrooke responded to Mr Taua's media statements by writing on 6 November 2003 to assure him that Te Kawerau ā Maki's interests would not be adversely affected, and requesting further information about their interests in Tāmaki Makaurau.[16] Again, it seemed that the Office did not know what information it had. Stephen Clark wrote to record his disappointment that the Office of Treaty Settlements was continuing to seek information on Te Kawerau ā Maki's interests considering what he had 'exhaustively supplied'.[17] Moreover, the Crown had still not responded to repeated requests by Te Kawerau ā Maki concerning their own negotiations.[18]

Te Warena Taua wanted to talk to the Crown officials about the 'overlapping' claims process. In December 2004 and January 2005, he wrote inviting Office of Treaty Settlements officials to attend hui in Auckland.[19] By this time, Te Kawerau ā Maki had entered into the Tainui Waka Alliance as a way of meeting the Crown's 'large natural group' criterion.[20] Mr Taua wanted to know whether this would satisfy the requirements. He also applied under the Official Information Act 1982 for the historical research underpinning Ngāti Whātua o Ōrākei's claims.[21]

The Crown responded that 'the Auckland area has a large number of overlapping interests', and that it would consult with Te Kawerau ā Maki concerning the proposed settlement redress package for Ngāti Whātua o Ōrākei once an agreement in principle was reached.[22].

The agreement in principle was signed in June 2006. The Office of Treaty Settlements did not meet with Te Kawerau ā Maki in the period between the signing of terms of negotiation with Ngāti Whātua o Ōrākei (May 2003) and the agreement in principle (June 2006).

As to whether Te Kawerau ā Maki's membership of the Tainui Waka Alliance qualified them as a 'large natural group', there was no response until the Crown filed its evidence for the urgent Tribunal hearing in February 2007.[23]

Nor were Te Kawerau ā Maki sent the historical material they had asked to see, even after the agreement in principle was signed. Of the other tangata whenua groups, only Marutūāhu was sent a copy of the historical information upon which the Crown had relied in its negotiation with Ngāti Whātua o Ōrākei. When they sent it through to Marutūāhu, the Office of Treaty Settlements overlooked Te Kawerau ā Maki's similar Official Information Act request,[24] and Te Kawerau ā Maki, of course, did not know that Marutūāhu had the historical research, so did not renew their request.

Upon release of the agreement in principle, the Crown sought responses from other tangata whenua groups. Te Kawerau ā Maki sent in its initial response on 15 September 2006, without the benefit of the historical documents.[25] At the hearing, Stephen Clark asked Rachel Houlbrooke if she thought it would have been useful for Te Kawerau ā Maki to have that historical research in front of them when they drafted their response to the agreement in principle within the six weeks initially allowed. Ms Houlbrooke accepted that it would have been.[26]

Four days prior to the hearing of this urgent inquiry in March 2007, the Office of Treaty Settlements met with Ngāi Tai, Te Taoū, and Te Kawerau ā Maki to 'discuss their concerns about the redress' in the agreement in principle.[27]

After the hearing, the Crown disclosed documents that revealed for the first time that the Office of Treaty Settlements had looked into Te Kawerau ā Maki's claims, and had formed a view on them.[28] The office did not tell Te Kawerau ā Maki this though, despite Stephen Clark's many inquiries about whether this work had been done. The office kept

both the assessment of Te Kawerau ā Maki's claims and the reasons for its decision not to involve Te Kawerau ā Maki in any settlement grouping with Ngāti Whātua o Ōrākei[29] completely in-house.

Notes

1. In 2004, Rachel Houlbrooke was also appointed manager of the policy, strategy, and legal team in the Office of Treaty Settlements.
2. Document A24(a), tab 12, para 3; doc A38(a), DB217
3. Document A24(a), tabs 1, 3
4. Ibid, tab 3
5. Document A38(a), DB217, p 1
6. Document A24(a), tab 6
7. Ibid, tab 7
8. Ibid, tab 9, para 2
9. Ibid, tabs 9, 10
10. Ibid, tab 10, para 3
11. Document A38(a), DB216, p 1
12. Ibid
13. Document A24(a), tab 12
14. Document A38(a), DB217
15. Document A24(a), tab 16, p 3, para 11
16. Document A38(a), DB58
17. Document A38(a), DB59, para 8
18. Ibid, para 14(b)
19. Document A24(a), tab 16, para 19; doc A24(a), tab 18, para 3(b)
20. Document A39(a), pp 7–8
21. Document A24(a), tab 16, p 4, para 17
22. Document A38(a), DB60
23. Paper 3.3.10, para 51; doc A38, pp 19–20, para 75. In her evidence in this inquiry, Ms Houlbrooke stated that the Office of Treaty Settlements advised Ministers in June 2006 that Te Kawerau ā Maki should be included in a comprehensive settlement of outstanding historical claims in south Kaipara. Until the hearing before us, this was not communicated to Te Kawerau ā Maki: doc A38, para 76.
24. Document A38(a), DB60, DB61
25. Document A24(a), tab 23
26. Hearing recording, 14 March 2007, track 3
27. Rachel Houlbrooke, brief of evidence, 26 February 2007 (doc A38), para 261
28. David Haines, internal memorandum to Rachel Houlbrooke and Roger Falloon, 24 April 2004 (doc A66, DB256)
29. Peter Hodge wrote an internal memorandum that may have been influential in which he expressed the view that to allow Te Kawerau ā Maki to be the subject of negotiations ahead of large, natural groups of Māori would undermine the Office of Treaty Settlements' policy: doc A58, DB214.

The Ngāi Tai ki Tāmaki Story

The key players

Emily Karaka: Ngāi Tai claimant
Te Warena Taua: Ngāi Tai claimant
Mark Stevens: sole trustee of Ngāi Tai ki Tāmaki Tribal Trust
Aiden Warren: lawyer for Ngāi Tai ki Tāmaki
Kathy Ertel: lawyer for Ngāi Tai ki Tāmaki Tribal Trust

Emily Karaka

What happened

In June 2003, Emily Karaka wrote to the Office of Treaty Settlements saying that Ngāi Tai were concerned that the Ngāti Whātua o Ōrākei negotiations would affect their interests in Tāmaki Makaurau. Ms Karaka said that Ngāi Tai hoped to be in a position to commence direct negotiations soon, and looked forward to a response from the Crown.[1] The next she heard was that the Crown was in negotiation with Ngāti Whātua o Ōrākei: the standard letter of 1 July 2003 introduced Ngāi Tai to the 'overlapping' claims process.[2]

In April 2004, Mark Stevens made a formal request to the Office of Treaty Settlements for information regarding the Crown's strategy for the settlement of Ngāi Tai's historical Treaty claims. As the sole interim trustee of the Ngāi Tai ki Tāmaki Tribal Trust, he told the Crown that the Trust was the duly authorised representative of Ngāi Tai for the purposes of Treaty claims, and that Ngāi Tai wished to commence negotiations.[3]

This request coincided with a Cabinet proposal to sell or possibly lease certain properties in the Auckland region, which Ngāi Tai said would decrease the pool of land available for Ngāi Tai to settle their Treaty claims in the future.[4] Of major concern to Ngāi Tai was the proposal to sell the former Māori Community Centre in downtown Auckland, because they regard it as a wāhi tapu.[5] Mr Stevens wrote letters strenuously seeking meetings, and an undertaking from the Office of Treaty Settlements that the Crown would make no decisions about the properties before formal consideration by Ngāi Tai.[6]

In June 2004, the Minister in Charge of Treaty of Waitangi Negotiations responded that the Crown was prioritising settlements with large natural groups, and that Ngāi Tai representatives should consider working with a Hauraki or a Waikato group to settle their historical claims against the Crown.[7]

Mark Stevens kept writing about the properties in downtown Auckland, and especially the Māori Community Centre, but he could not get anyone in the Crown to engage with him. An example of the Crown's dismissive attitude is the letter from Parekura Horomia, Minister of Māori Affairs in April 2005. The Minister says, 'I am confident that your

concerns have been sufficiently addressed or there is a process for them to be addressed, and do not consider that a meeting between us is necessary at this stage.'[8]

Mark Stevens replied, saying that, if the Office of Treaty Settlements did not address Ngāi Tai's concerns, they would have to bring legal proceedings to ensure that their interests in the properties were preserved.[9]

Mr Stevens never did get a meeting. None of his approaches elicited any favourable response at all.[10]

Not much later in 2005, it seems that the Crown had formed a view that Ngāi Tai should be included in a future Waikato-Tainui settlement of remaining Ngāi Tai historical claims to the Waikato River and Waitoa lands.[11] In July and September 2005, Ngāi Tai representatives told Ministers that they wanted to commence negotiation on all their remaining historical claims in Tāmaki Makaurau.[12]

Te Warena Taua told us in evidence that the Crown never sought Ngāi Tai's view on an appropriate strategy for settling their remaining historical claims. Nor did officials indicate to the group itself what their working strategy was.[13] The Office of Treaty Settlements proceeded on the basis that it would decide which large, natural group Ngāi Tai would fit into.

Now, the Crown's position is that Ngāi Tai's remaining claims will 'potentially be included' in future negotiations with mandated negotiators for all outstanding Waikato-Tainui historical claims.[14] This is not Ngāi Tai ki Tāmaki's preference, because the Waikato-Tainui arrangements do not include Tāmaki Makaurau. Thus, how and when Ngāi Tai ki Tāmaki might get into negotiation to settle their claims in Tāmaki Makaurau is unknown. Ngāi Tai worry that, in the meantime, the Crown will exhaust the financial reserves it has available for settlement redress in central Auckland.[15]

Notes

1. Document A38(a), DB45
2. Document A38, para 104
3. Document A38(a), DB46–DB47
4. Document A38(a), DB47, para 3. Properties up for Cabinet consideration included Sylvia Park and Hamlins Hill, Mount Wellington, Musick Point in Howick, and Rangitoto Island/Motutapu Island/Moutihi Island: doc A38(a), DB46.
5. This site was sold to Ngāti Whātua o Ōrākei in August 2004: doc A1, para 41.
6. Document A38(a), DB47, DB50–DB51
7. Document A38(a), DB48, p 3
8. Parekura Horomia, Minister of Māori Affairs, letter to Mark Stevens, 12 April 2005 (doc A38(a), DB52)
9. Document A38(a), DB53, para 5
10. Document A38(a), DB46, DB50–DB51, DB53, DB55–DB56
11. Document A38(a), DB226, para 10
12. Document A38(a), DB55–DB56

13. Document A22(c), paras 3–4; doc A22(d), para 5(a)
14. Document A38, para 81
15. Document A1, para 17

The Marutūāhu Story

Paul Majurey

David Taipari

The key players

Paul Majurey: Marutūāhu claimant and lawyer
David Taipari: Marutūāhu claimant
John McEnteer: claims manager of the Hauraki Māori Trust Board
Rachel Houlbrooke: leader of the Crown's team negotiating with Ngāti Whātua o Ōrākei[1]
Jay Eden: historian and policy analyst in the Office of Treaty Settlements
Andrew Hampton: (then) director of the Office of Treaty Settlements
John Clarke: Office of Treaty Settlements kaumātua

What happened

Uniquely in this process, Marutūāhu had as a tribal member a senior lawyer who consistently pursued their interests with the Office of Treaty Settlements. This put Marutūāhu in a very fortunate situation, because the Crown does not fund 'overlapping' claimants, and so usually they have very limited access to professional advice. Paul Majurey obtained for Marutūāhu a significantly greater level of engagement from the Office of Treaty Settlements than other groups achieved.[2]

From mid-2003 (which appears to be when he first heard about the commencement of negotiations between Ngāti Whātua o Ōrākei and the Crown),[3] Paul Majurey assiduously pursued all available channels on Marutūāhu's behalf to obtain information regarding Ngāti Whātua o Ōrākei's settlement negotiations.

In June 2003, Paul Majurey made a request under the Official Information Act 1982 for all documentation from the Office of Treaty Settlements relating to their activities with Ngāti Whātua o Ōrākei.[4] The Office of Treaty Settlements responded by releasing several internal documents and withholding others.[5] Mr Majurey made a further request for all the historical documentation tendered by Ngāti Whātua o Ōrākei in relation to their negotiations.[6] One document was released and four others were withheld.[7] The only document released was the Ngāti Whātua o Ōrākei Trust Board's Treaty claim summary.[8] The four documents withheld consisted of three historical research reports[9] and a synopsis of claim material, part of which was released to Marutūāhu prior to the release of the agreement in principle.

The Office of Treaty Settlements withheld the documents:

- on the grounds that the information is subject to an obligation of confidence and making the information available would be likely to prejudice the supply of similar information; and

- to enable the Crown to carry on future negotiations with Ngāti Whātua o Ōrākei without prejudice or disadvantage.[10]

Without the historical research, Paul Majurey responded to the request for overlapping claimants' information contained in the Crown's letter of 1 July 2003.[11] He said that 'the hapū and iwi of the Marutūāhu have mana whenua mana moana in Tāmaki Makaurau, including in the Area Claimed by Ngāti Whātua'.[12] He requested that the Office of Treaty Settlements not conclude an agreement in principle with Ngāti Whātua o Ōrākei before receiving both traditional and historical evidence from Marutūāhu supporting its position.[13] Otherwise, Marutūāhu feared the creation of 'fresh Treaty breaches'.[14]

On 25 September 2003, the Office of Treaty Settlements' reply to Mr Majurey thanked Marutūāhu for the information provided and said that the Crown would consult further after release of the agreement in principle and that, if Marutūāhu had any additional information about their interests, they should send it in.[15] The letter assured Mr Majurey that the Crown's process for considering 'overlapping' claims had been 'successfully applied during the negotiation and settlement of other Treaty claims'. Thus, it would not defer the negotiations with Ngāti Whātua o Ōrākei pending the receipt of Marutūāhu's traditional and historical research.[16]

Marutūāhu sought a review by the ombudsman of the Crown's decision to withhold the historical reports. Mr Majurey contended that Marutūāhu needed the historical information for analysis and review to ensure that settlements were durable and further grievances were avoided.[17] The ombudsman upheld the Crown's position, however, because releasing the historical research at that stage in the negotiation process would disrupt and inhibit the negotiation process. Release would also be likely to affect adversely the relationship of trust that had developed between Crown negotiators and the Ngāti Whātua o Ōrākei Trust Board.[18]

Marutūāhu then focused on seeking information about what was happening in the negotiation between Ngāti Whātua o Ōrākei and the Crown. The Office of Treaty Settlements did not see it as part of its role to update other tangata whenua groups. When information was sought – as it was by Marutūāhu – the office had a standard response.[19] It said that negotiations were 'progressing steadily', and that claimants would be invited to advise the Crown and Ngāti Whātua o Ōrākei of 'any views they may have in relation to the proposed redress' upon completion of the agreement in principle. It also said when it was hoped the agreement in principle would be finalised.[20] This was all the Office of Treaty Settlements was ever prepared to say about the negotiations.[21]

However, Paul Majurey's assiduity did meet with some reward. Although the Office of Treaty Settlements officials really did not want to meet with 'overlapping' claimants prior to the signing of the agreement in principle, they did meet twice with Marutūāhu.

The meetings were to discuss the historical research supporting the Marutūāhu case, prepared by Associate Professor Michael Belgrave, Dr Grant Young and Anna Deason.[22] Officials flew up to Auckland from Wellington to attend the first meeting on 27 April 2006. The Office of Treaty Settlements team comprised Rachel Houlbrooke, Jay Eden, and John Clarke. Jay Eden took notes. The notes record that Paul Majurey and John McEnteer expressed concern that they had 'missed the boat' in terms of the Crown's consideration of overlapping claims. They requested a further meeting between Crown historians and Drs Belgrave and Young to ensure that the historical basis for their customary interests was understood.[23] Although initially reluctant, the Office of Treaty Settlements officials agreed to a second meeting in Wellington four weeks later.[24]

Since the agreement in principle was released, Mr Majurey has continued to pursue the Office of Treaty Settlements about the Ngāti Whātua o Ōrākei settlement. He has asked questions about the agreement in principle, about the historical sources underpinning the agreed historical account, and about the removal of the resumptive memorials in the proposed Ngāti Whātua o Ōrākei right of first refusal area. He requested more meetings, and more meetings have been held: on 27 October 2006, and 19 February 2007.[25]

Notes

1. In 2004, Rachel Houlbrooke was also appointed manager of the policy, strategy, and legal team in the Office of Treaty Settlements.
2. In the Crown's final day of hearing closing submissions, 15 March 2007 (paper 3.3.12), Crown counsel says, with respect to the process of engagement with overlapping claimants, that 'The quality of the process is enhanced by active engagement from the overlapping groups themselves, as evidenced by Marutuahu': point 4. This paragraph fails to acknowledge that it is the Office of Treaty Settlements' policy *not* to engage with 'overlapping' claimants until after the agreement in principle. It was only Marutūāhu, with their whanaunga lawyer on the case, that managed to elicit substantive responses from the Crown.
3. Document A38(a), DB11
4. Ibid
5. Document A38(a), DB12
6. Document A33, tab 16
7. Ibid, tab 20
8. Wai 388 Treaty Claim: Tāmaki Makaurau, doc A13, vol 1
9. Two of the reports withheld were Bruce Stirling, 'Ngāti Whātua o Ōrākei and the Crown, 1840 to 1865', research report, February 2002 (doc A9); and Bruce Stirling, 'Ngāti Whātua, the Crown and North Shore Lands, 1840 to 1865', research report, August 2001 (doc A17).
10. The documents were withheld under sections 9(2)(ba)(i) and 9(2)(j) of the Official Information Act 1982: doc A38(a), DB89.
11. Document A38(a), DB23, DB62; doc A33, tab 21
12. Document A33, tab 21
13. Ibid
14. Ibid
15. Document A38(a), DB14
16. Ibid

17. Document A38(a), DB90, p 4
18. Ibid, pp 3–4; doc A38(a), DB91, p 6. All withheld material was eventually released to Marutūāhu on 14 June 2006, upon the release of the agreement in principle: doc A33, tab 49.
19. Document A38(a), DB15, DB17
20. Document A38(a), DB16, DB17; doc A38, para 92
21. In providing its standard response to Marutūāhu, the Crown did not consider it necessary to similarly inform all tangata whenua groups. The practice was to provide progress reports only to those who requested them: document A6.
22. This research was jointly commissioned by Marutūāhu and the Hauraki Māori Trust Board: docs A38(a), DB18–DB22.
23. Document A38(a), DB20, para 5
24. Ibid, para 6; doc A38(a), DB21
25. Rachel Houlbrooke, brief of evidence, 26 February 2007 (doc A38), paras 234–244

The Hauraki Māori Trust Board Story

Toko Renata

John McEnteer

The key players

John McEnteer: claims manager of the Hauraki Māori Trust Board
Toko Renata: chairman of Hauraki Māori Trust Board
Grant Powell: lawyer for the Hauraki Māori Trust Board
Andrew Hampton: (then) director of the Office of Treaty Settlements
Rachel Houlbrooke: leader of the Crown's team negotiating with Ngāti Whātua o Ōrākei[1]

What happened

The Hauraki Māori Trust Board shared many of the concerns of Marutūāhu about the negotiations between the Crown and Ngāti Whātua o Ōrākei. They worked together on a number of issues, particularly on seeking information from the Crown.[2]

In response to the Crown's 1 July 2003 letter, John McEnteer provided the Office of Treaty Settlements with a general outline of Hauraki claimants' interests in Tāmaki Makaurau.[3] Hauraki Māori claim extensive land, foreshore and seabed, and island interests in the area under negotiation, and he requested full disclosure on the nature and extent of any proposed remedy for Ngāti Whātua o Ōrākei.

John McEnteer received no response.[4] However, on 4 October 2004 in Wellington, he met with Andrew Hampton seeking an update on the negotiations with Ngāti Whātua o Ōrākei. There is nothing to explain how this meeting came about. Presumably after the meeting Mr Hampton asked Rachel Houlbrooke to provide Mr McEnteer with an update, because eight days later she sent the standard 'negotiations are progressing steadily' letter.[5]

The next contact John McEnteer had with the Office of Treaty Settlements was when he telephoned in March 2006 to find out when the agreement in principle would be released. He was told that it would be released in 2006 and that the Crown would consult further with the trust board then.[6]

John McEnteer also attended the discussion about the Belgrave, Young and Deason research with Office of Treaty Settlements officials in April 2006, referred to in the Marutūāhu Story. At that meeting, Mr McEnteer told the Office of Treaty Settlements officials that he had attended the hui in December 2004 convened by Ngāti Whātua o Ōrākei. He had made a presentation on the Hauraki Māori Trust Board interests, but 'Ngāti Whātua made no attempt to challenge or engage meaningfully' with what he said.[7] Ngāti Whātua o Ōrākei had made no contact with the trust board since that time. Mr McEnteer told the Office of Treaty Settlements officials that if any Hauraki/Marutūāhu

lands were included in the agreement in principle, there would be 'blood on the floor', perhaps reflecting his frustration.[8]

The Office of Treaty Settlements made no further contact with the Hauraki Māori Trust Board before sending the agreement in principle in June 2006, requesting a response to its contents by 31 August 2006. Mr McEnteer contacted the Office of Treaty Settlements to obtain more information so that he could ascertain the effect the agreement might have on Hauraki interests. He also sought a copy of the Stirling research, which at this time had been released to Marutūāhu alone. The Office of Treaty Settlements sent it to him.[9]

On 24 January 2007, John McEnteer and Toko Renata met with Office of Treaty Settlements officials in Wellington. The meeting was conducted on a 'without prejudice' basis, and we do not know what transpired.[10]

Notes

1. In 2004, Rachel Houlbrooke was also appointed manager of the policy, strategy, and legal team in the Office of Treaty Settlements.
2. Document A35, para 57
3. John McEnteer, letter to Rachel Houlbrooke concerning Treaty settlement negotiations between the Crown and Ngāti Whātua o Ōrākei, 29 August 2003 (doc A38(a), DB23)
4. Document A35, para 59; doc A38, paras 95–96
5. Document A38(a), DB24
6. Document A38, para 97
7. Jay Eden, Office of Treaty Settlements filenote of 27 April 2006 meeting with Paul Majurey and John McEnteer, 4 May 2006 (doc A38(a), DB19), para 14
8. Document A38(a), DB19, pp 2–3
9. Rachel Houlbrooke, brief of evidence, 26 February 2007 (doc A38), paras 245–248
10. Ibid, p 66, para 248

The Te Taoū Story

Pamera Warner

The key players

Pamera Warner: Te Taoū claimant
Lou Paul: Te Taoū claimant
Rachel Houlbrooke: leader of the Crown's team negotiating with Ngāti Whātua o Ōrākei[1]

What happened

Te Taoū's experience has been unique. Although they are properly considered as overlapping claimants in the Crown's terms, it is only recently that they have been treated as such. For most of the material period, they were regarded as a disaffected faction of Ngāti Whātua o Ōrākei.[2]

The Ōrākei Act 1991 provides for the Ngāti Whātua o Ōrākei Trust Board to represent the descendants of Tuperiri, who comprise the three hapū of Te Taoū, Ngā Oho and Te Uringutu. In 2002, the trust board's representative capacity was tested in the case *Warner v Attorney-General*. His Honour Justice Salmon ruled that the trust board does not represent any member of Te Taoū who does not descend from the ancestor Tuperiri. Both Pamera Warner and Lou Paul claim interests in Tāmaki Makaurau through a different tupuna.

Prior to commencement of the Ngāti Whātua o Ōrākei's negotiations, both Lou Paul and Pamera Warner told the Office of Treaty Settlements that the trust board did not represent them because they did not descend from Tuperiri. It appears, however, that the Office of Treaty Settlements did not classify them as overlapping claimants, as the 1 July 2003 letter to 'overlapping' claimants was not sent to either of them.[3]

Te Taoū claimants complained to the Office of Treaty Settlements and to the Minister in Charge of Treaty of Waitangi Negotiations that there was no serious or proper consultation about the trust board's mandate to negotiate Te Taoū's claims in Tāmaki Makaurau.[4] Numerous letters were sent. The Crown responded that it was satisfied that the trust board had sufficient support to represent its beneficiaries, and any outstanding claims would be addressed through the mandating process in south Kaipara.[5] This did not satisfy the Te Taoū claimants, who requested meetings to address their concerns.[6] In a letter to the Office of Treaty Settlements, Lou Paul stated that 'unless justice is seen to be done, and is in fact carried out meticulously, Māori grievances will be with this nation for many years to come.'[7] No meetings, however, were considered necessary at the time.[8] Ms Warner also requested that facilitation and mediation services be made available to resolve Te Taoū's disputes with Ngāti Whātua o Ōrākei. The Crown responded that it would only consider offering those after the agreement in principle. Rachel Houlbrooke encouraged Mrs Warner to engage with Ngāti Whātua o Ōrākei directly.[9]

The Te Taoū claimants were unwilling to comply with the Crown's 'send us your information' requests. Mr Paul expressed their 'real apprehension and a deep feeling of mistrust by forwarding all researched information to the Crown', particularly when their correspondence was being forwarded to the Ngāti Whātua o Ōrākei Trust Board.[10] The Minister in Charge of Treaty of Waitangi Negotiations told Mr Paul that the Crown forwarded information to Ngāti Whātua o Ōrākei because 'the Crown has sought to inform them of the full range of your concerns and supporting evidence.'[11] Mr Paul had repeatedly requested that Te Taoū be kept fully informed of all aspects of the Ngāti Whātua o Ōrākei negotiations, but the Crown's willingness to do so was 'noticeably lacking'.[12] Although Mr Paul kept writing to the Office of Treaty Settlements over a period of two years prior to the release of the agreement in principle,[13] he and Te Taoū were always kept at arm's length.

After the release of the agreement in principle in mid-2006, Lou Paul kept up his letter-writing campaign, and the Crown's replies continued to fob him off. The Minister wrote on 19 December 2006 encouraging Mr Paul to put his concerns to the Ngāti Whātua o Ōrākei Trust Board.[14]

Lou Paul was not sent letters on 21 November 2006 and 15 December 2006 that were sent to other 'overlapping' claimants. The letters elucidated the agreement in principle. Rachel Houlbrooke said in evidence that this omission was an oversight.[15]

Meanwhile, Pamera Warner also corresponded with the Office of Treaty Settlements. Her concerns were essentially the same as Lou Paul's. She and other Te Taoū representatives met with the Office of Treaty Settlements in Auckland on 19 January 2007. According to Rachel Houlbrooke, the purpose of the meeting was 'to clarify the redress included in the agreement in principle and to discuss the concerns of Te Taoū representatives'. Some further correspondence ensued.[16]

Notes

1. In 2004, Rachel Houlbrooke was also appointed manager of the policy, strategy, and legal team in the Office of Treaty Settlements.
2. *Warner v Attorney General* unreported, 18 November 2003, Salmon J, High Court, Auckland, CIV2000404-20–19
3. Document A38, para 84. Officials did not acknowledge Ms Warner and Mr Paul as 'overlapping' claimants until 21 October 2003 and 30 June 2004 respectively, despite being informed that they were not represented by the trust board prior to the commencement of the Crown's 'overlapping' claims process in July 2003: doc A38, paras 59–60; doc A38(a), DB27, DB31, para 5.1(c), DB218; doc A62, p 1. As the Crown has acknowledged, this problem has continued since the release of the agreement in principle, with officials failing to send Mr Paul correspondence on 21 November and 15 December 2006: doc A38, para 265.
4. Document A62, p 1; doc A38, para 60.3
5. Document A62, p 3; doc A38(a), DB218
6. Document A38(a), DB28, p 9; doc A38(a), DB38, p 2
7. Document A38(a), DB30, p 3

8. Document A62, p 14; doc A38(a), DB29
9. Document A38(a), DB29
10. Document A38(a), DB32, p 11
11. Document A38(a), DB43, p 2
12. Document A38(a), DB36, p 4, DB38, p 12
13. Document A38(a), DB30, DB32, DB34, DB36, DB38, DB40–DB42
14. Rachel Houlbrooke, brief of evidence, 26 February 2007 (doc A38), paras 262–264
15. Ibid, para 265
16. Ibid, paras 268–270

Summary of Concerns

Those were the stories of the other tangata whenua groups that were presented to us in evidence. We do not intend to elaborate upon them further. Instead, we move on to analyse the factual situation in Treaty terms.

These are the aspects of the Office of Treaty Settlements' dealings with other tangata whenua groups in relation to the Ngāti Whātua o Ōrākei negotiations in Tāmaki Makaurau that concern us:

1. Even though the Office of Treaty Settlements was negotiating with Ngāti Whātua o Ōrākei about matters of profound significance to other tangata whenua groups in Tāmaki Makaurau – including the possibility of offering exclusive interests in maunga as cultural redress – it resisted meeting with other groups, and kept communication with them to a minimum.
2. The Office of Treaty Settlements relied upon commercial sensitivity to keep secret both the communications between it and Ngāti Whātua o Ōrākei, and the historical information upon which the negotiating parties relied.
3. There was no process for dealing with the information about history and custom that the Office of Treaty Settlements sought from the other tangata whenua groups, and which they provided at their own expense.
4. There were deficiencies in the Office of Treaty Settlements' methodology for assessing Ngāti Whātua o Ōrākei's Treaty claims and the historical research that underpins them, and for dealing with the perspectives of other Tāmaki Makaurau Māori on custom and history.
5. The Office of Treaty Settlements failed to take responsibility for the implementation of its policy that the mandated group should discuss with the 'overlapping claimants' their interests in the settlement area, and for its policy that it would both assist Ngāti Whātua o Ōrākei and undertake consultation with 'cross claimant groups' itself.
6. The Office of Treaty Settlements did not have a plan for the settlement of the Treaty claims of the other tangata whenua groups in Tāmaki Makaurau, and did not canvass with those groups either the possibilities the Crown was debating internally, or the groups' own preferences and the reasons for them.
7. The Office of Treaty Settlements' commitment of time, resources, and energy to building a working relationship with Ngāti Whātua o Ōrākei was such that it excluded the possibility of running a parallel process in which relationships with the other groups were built – or at least initiated – at the same time. Talks with other groups would have provided a vehicle for:
    - understanding each group's customary interests in the group's own terms;
    - assessing, and talking with each group about, their own claims; and
    - planning a path towards settling those groups' own claims.

These deficiencies are inter-related.

If, for example, the Office of Treaty Settlements had devised a plan for how it would go about settling the Treaty claims of the other tangata whenua groups in Tāmaki Makaurau, and had worked with them towards implementing it, those groups would by now be in an entirely different position. They would have developed their own research, or would be moving along that track. They would have assimilated the other research that has been done on Crown/Māori history in Auckland, and developed their responses to it. They would have done infrastructural work to prepare for being in negotiation. This might involve establishing a legal structure for the group, and developing communication strategies. They would have developed their knowledge of the Crown's practices, and would have built working understandings and relationships with officials. They would have in place a plan for fulfilling the Crown's mandating requirements, and might be well along the path to achieving a mandate to negotiate. In other words, there would not now be the great disparity between

the situation of Ngāti Whātua o Ōrākei and most of the other tangata whenua groups.

We now address each of these concerns in turn.

Concern 1

Even though the Office of Treaty Settlements was negotiating with Ngāti Whātua o Ōrākei about matters of profound significance to other tangata whenua groups in Tāmaki Makaurau – including the possibility of offering exclusive interests in maunga as cultural redress – it resisted meeting with other groups, and kept communication with them to a minimum.

It is Crown policy that face-to-face meetings with 'overlapping' groups are not required during the pre-agreement in principle phase of negotiations because, until there is a substantive offer on the table to the settling group, there is nothing to discuss with the other groups.[9]

As the Stories tell, the Office of Treaty Settlements attended a couple of meetings with other tangata whenua groups in the pre-agreement in principle period, but the Office did not initiate them.

The Crown revealed nothing substantive about the negotiation with Ngāti Whātua o Ōrākei during this time.[10] All that the other tangata whenua groups were allowed to know about the settlement process and the agreement in principle was what was contained in the Office of Treaty Settlements' policy manual *Ka Tika ā Muri, Ka Tika ā Mua* (the *Red Book*) and in the two letters sent to them in 2003 and 2006.

The Crown's first letter, dated 1 July 2003,[11] informed the other tangata whenua groups in Tāmaki Makaurau of the negotiations with Ngāti Whātua o Ōrākei, and initiated its process of 'engagement' with the 'overlapping' claimants. The letter gave these assurances about the process the Office of Treaty Settlements would follow:

> **2.** . . . Throughout the course of settlement negotiations, the Crown would like to work with you (and other claimant groups) to ensure that the Crown and Ngāti Whātua o Ōrākei have a good understanding of your interests in the Auckland area, and to ensure that a settlement between the Crown and Ngāti Whātua o Ōrākei does not prejudice the Crown's ability to provide appropriate redress to other claimant groups and achieve a fair settlement of their historical claims.
>
> . . . . .
>
> **15.** As part of the settlement process, we will also seek information from and consult with you as follows:
>
> . . . . .
>
> ii: Initial contact with overlapping groups. *We are at this stage now*. Here, we are interested in seeking information from you as to the extent and nature of your claims in the Auckland area. This will assist the Crown and Ngāti Whātua o Ōrākei negotiators in developing redress that takes account of your interests. [Emphasis in original.][12]

It was a long, complicated letter, and asked a lot of the other tangata whenua groups. We do not think that this is a good way for the Crown to communicate with its Treaty partner. Hui are both more effective and more culturally appropriate – especially when the kaupapa is an important one, effective response may be critical, and groups may not have access to professional advice.

Moreover, recipients could not rely on the content of the letter. The Office of Treaty Settlements' ideas about the extent of its engagement with other tangata whenua groups must have changed at some time after sending this letter. As the Stories reveal, the Crown certainly did not 'work with [them]' '[t]hroughout the course of settlement negotiations'. Indeed, there was so little interaction that we cannot see how the Office of Treaty Settlements could have arrived at 'a good understanding' of the interests of the other tangata whenua groups in Auckland. Marutūāhu persuaded the Office of Treaty Settlements to meet with them twice to discuss the differing historical accounts. Two

meetings were certainly better than nothing. Submissions and evidence for Marutūāhu in this inquiry showed clearly, though, that from their point of view it was not enough.

Chapter 3 describes the extent of the information that the Crown provided to the other tangata whenua groups about redress.[13] Suffice to say here that the information in the 2003 letter and the *Red Book* (which was all they had to go on before the agreement in principle was released) was very general. On balance, it implied that where areas were contested, exclusive redress was unlikely. 'Exclusive redress' means redress of a kind that is available only to one settling group.

The Office of Treaty Settlements did not see itself as being under any obligation to prepare other tangata whenua groups for the offer to Ngāti Whātua o Ōrākei of exclusive cultural redress in iconic sites like maunga. The Crown's approach is that it will listen when 'overlapping' groups respond *after* the offer is on the table. We think that this approach misapprehends the role of sites of cultural significance in Māori culture. That the Office of Treaty Settlements did not consider it necessary to meet with groups to discuss what was in contemplation we think shows a lack of understanding of and respect for the other groups' mana. Tikanga dictates that hui are held with the other customary interest-holders before an offer of exclusive rights to one.

The apprehension that other tangata whenua groups felt as a result of knowing so little about where the negotiations between Ngāti Whātua o Ōrākei and the Crown might lead was obviously justified. Their concerns inspired some to try to get the Crown to agree not to proceed without bringing them into the picture first.[14]

The failure by the Crown to prefigure the possible outcomes – especially where exclusive redress was in contemplation – is certainly a problem in process terms.

Concern 2

The Office of Treaty Settlements relied upon commercial sensitivity to keep secret both the communications between it and Ngāti Whātua o Ōrākei, and the historical information upon which the negotiating parties relied.

The Crown viewed its negotiations with Ngāti Whātua o Ōrākei as analogous to those leading to a commercial contract. Implicit in this approach is the notion that others can achieve a competitive advant age if they obtain access to information deemed sensitive to the negotiations between the two parties.

What is unclear to us is how a Treaty settlement is analogous to a commercial contract. How does disclosure to other groups of material relating to one group's historical interests in an area jeopardise the relationship between the two negotiating parties, particularly when such documentation is freely available through a Tribunal process?

In her evidence for the Office of Treaty Settlements, Ms Houlbrooke referred to the agreed historical account, which forms part of the Crown apology in the agreement in principle:

> Given that the Agreed Historical Account was under active discussion throughout the entire negotiations period, it was appropriate to withhold historical research reports during this time.[15]

Why was it appropriate? How would the discussions between the Crown and Ngāti Whātua o Ōrākei about the agreed historical account have been affected by the other tangata whenua groups having the historical reports too? This was not explained, and we do not understand the logical basis for the Office of Treaty Settlements' position.

Nevertheless, its effect was clear. Historical research that would be publicly available before, during and after a Waitangi Tribunal hearing was withheld during the entire pre-agreement in principle period. In this same period, the other tangata whenua groups were expected to provide useful and relevant information to the Crown about their interests in Tāmaki Makaurau.

Seeking more balance between themselves and Ngāti Whātua o Ōrākei as regards access to information, some of the other tangata whenua groups sought documents under the Official Information Act 1982, and ultimately through the Ombudsman. As the Marutūāhu Story relates, the Ombudsman upheld the Office of Treaty Settlements' approach. The Ombudsman's terms of reference do not, of course, enable him to consider how the Treaty bears on questions of access to information in a Treaty settlement negotiation. We are not so limited.

It was interesting that, when the subject of secrecy was broached at the hearing, neither the Crown nor Ngāti Whātua o Ōrākei wanted to take responsibility for keeping the historical reports from the other parties. Rachel Houlbrooke, for the Office of Treaty Settlements, said that Ngāti Whātua o Ōrākei asked the Crown to keep the documents from the others,[16] whereas Tiwana Tibble for Ngāti Whātua o Ōrākei said that the requirement was the Crown's.[17] We thought that this indicated that neither party had a very good reason for the secrecy that was imposed. It seemed simply that there was a preference for non-disclosure, without analysis as to why.[18] The terms of negotiation, which both parties signed, said nothing about a requirement of confidentiality, except as regards 'any agreement reached in negotiations'.[19]

We think that, in denying access to the historical information underpinning the agreed historical account, the Crown was not focused on its Treaty duty to the other tangata whenua groups. Instead, its focus was really solely on building its relationship with Ngāti Whātua o Ōrākei. That is why the reasons for insisting on secrecy vis a vis the other tangata whenua groups were never tested for their Treaty compliance.

The result was that the other tangata whenua groups did not know what historical material the Office of Treaty Settlements and Ngāti Whātua o Ōrākei were relying on. The report by Bruce Stirling that Ngāti Whātua o Ōrākei commissioned, and relied on to substantiate their claims, was not available to any of the other tangata whenua groups until after the agreement in principle was released. Some received it even later.[20]

Ngāti Te Ata witness, Roimata Minhinnick, summed up the situation facing the applicants during this period:

> We have never intentionally withheld any information, and yet at the 19 September 2006 Judicial Conference, we first heard that the Crown held a referenced report of the agreed historical account of the AIP. We say that such a referenced report would have been useful in terms of assessing areas of conflict, and allowed for more informed discussions between ourselves and Ngāti Whātua to potentially reach common ground or mutual respect and understanding. Sharing that information in good faith may have assisted to ease potential conflict.[21]

By denying the other tangata whenua groups access to important material on which the Crown relied, and by resisting meeting with those groups and learning about their perspectives on that material, the Office of Treaty Settlements failed in two ways. It denied those groups information that the Treaty relationship dictates that they were entitled to. But it also denied itself the opportunity to make its own process more robust.

Concern 3

There was no process for dealing with the information about history and custom that the Office of Treaty Settlements sought from the other tangata whenua groups, and which they provided at their own expense.

In the letter of 1 July 2003, the Office of Treaty Settlements sought information as to the nature and extent of other tangata whenua groups' interests within the Area of Interest claimed by Ngāti Whātua o Ōrākei[22](see maps 1–3, facing page 1 for an illustration of the extent to which the interests of the various tangata whenua groups in Tāmaki Makaurau overlap). 'Overlapping' claimants were asked to tell the Crown about:

- the boundaries of the general area in which they have exercised customary interests;
- any specific land block interests within the area indicated on the attached map;
- any pā or kāinga;
- any other sites of major significance (such as wāhi tapu or mahinga kai);
- any information about the use of rivers or any other waterways;
- any other information that could assist the Crown in assessing 'overlapping claims', including ancestral associations.

The letter then states:

> **18.** While we appreciate that preparing a full response to this letter may be time consuming, it would be useful to gain at least an initial indication from you as to your interests. It would be helpful to us if you can provide this information by Monday 1 September 2003.[23]

Thus, the Office of Treaty Settlements gave other tangata whenua groups two months in which to tell the Crown everything about themselves – but said nothing about how the Crown would go about assessing information provided, or the use that would be made of it.

The other tangata whenua groups were not happy with this. The timeframe was too tight. They had no funding to purchase help. They saw Ngāti Whātua o Ōrākei and the Crown as being hand in glove, while they were being kept on the outer, and without access to the information that the negotiating parties were sharing. People felt apprehensive and mistrustful[24]– despite assurances in the letter of 1 July 2003 that the Office of Treaty Settlements would, if requested, protect the confidentiality of information deemed sensitive. Despite their misgivings, most groups felt that they had no choice but to forward their information.

Roimata Minhinnick, witness for Ngāti Te Ata, articulated how 'overlapping' groups felt:

> we are trapped within the framework that the Crown itself has determined. The Crown has set the rules of the overlapping policy approach, now we must engage in those rules . . . We have little faith in the process.[25]
>
> . . . We do not know the criteria by which our interests in Tamaki Makaurau are to be judged – the Crown has not, does not, or will not say what the standard is . . . The Crown does not make it clear, and it results in anger, confusion and the prevalence of misinformation and mistrust.[26]

We now know that, at the time when it was seeking information from the other tangata whenua groups, the Office of Treaty Settlements itself had no plan for what it would do with the information when it was provided.[27] The Stories reveal that on several occasions, officials asked for more information in circumstances that revealed that they did not know what had already been sent.[28] There is a strong implication that although the Office of Treaty Settlements collected the information from the other tangata whenua groups – thereby giving an appearance of interest and engagement – it actually did little with it.[29]

Concern 4

There were deficiencies in the Office of Treaty Settlements' methodology for assessing Ngāti Whātua o Ōrākei's Treaty claims and the historical research that underpins them, and for dealing with the perspectives of other Tāmaki Makaurau Māori on custom and history.

As we often said in the interlocutory stages of this inquiry, we are not inquiring into whether or not the Crown's assessment of Ngāti Whātua o Ōrākei's claims in Tāmaki Makaurau is correct. We are in no position to express an opinion on that question, because we have not conducted an historical inquiry.

We do have before us, however, the various historical reports that were relied on, and the opinions of other historians on those reports. We have looked at them for

one reason and for one reason only: to ascertain whether the Crown's process for dealing with historical information was sound.

The historical material relied on falls into two categories. Into the first category we put material that was generated specifically to inform the negotiation between Ngāti Whātua o Ōrākei and the Crown. Into the second category we put material that was used for that purpose, but was produced for other reasons.

The first category comprises:

- the two reports by Bruce Stirling (commissioned by Ngāti Whātua o Ōrākei) on Ngāti Whātua o Ōrākei's interests in (1) the Tāmaki isthmus; and (2) the North Shore;[30]
- the review of Bruce Stirling's reports that the Office of Treaty Settlements asked senior Crown historian Dr Donald Loveridge to undertake;[31]
- the review of the agreed historical account undertaken for the Office of Treaty Settlements by Professor Tom Brooking;[32] and
- the historical report by Professor Michael Belgrave, Dr Grant Young and Anna Deason,[33] commissioned by Hauraki interests to give a Hauraki perspective on customary rights in the area from Maraetai to Orewa.[34]

The second category includes:

- Russell Stone's book *From Tāmaki-Makau-Rau to Auckland*;[35]
- the report on Māori interests in Auckland prepared by Alan Ward in 1992 for the Crown Congress Joint Working Party to inform the process of arranging on-account Treaty settlements on Railways land in Auckland;[36]
- the 1869 decision of Judge Fenton following his Native Land Court investigation of title to the Ōrākei block;[37] and
- the report on Te Kawerau ā Maki that Graeme Murdoch prepared for the Tribunal's Kaipara inquiry.[38]

These various reports do not agree about the role and history of Ngāti Whātua o Ōrākei in Tāmaki Makaurau. Our job is to form a view on how the Office of Treaty Settlements went about evaluating, reconciling and/or differing from these views, and whether its process was a good one.

In submission and in evidence, the Crown claimed that its methodology was robust. However, the Crown's case never addressed its methodology for handling history generally; the focus was on the soundness of 'the methodology adopted in the development of the agreed historical account'.[39] These two things are not the same.

At the hearing, there were really two (interrelated) streams of engagement on the topic of historical methodology. One concerned whether the Office of Treaty Settlements had properly understood the need for, and had undertaken, an inquiry into customary rights of Māori in Tāmaki Makaurau in order to understand the respective interests of all the tangata whenua groups. The other concerned whether the assessment of the historical material for the agreed historical account was sound.

Coming to grips with the customary interests in Tāmaki Makaurau

This is a bald summary of the parties' respective views on evaluating customary interests in Tāmaki Makaurau:

The Crown: We did not, and did not need to, engage much with the other tangata whenua groups' respective customary interests, because the Office of Treaty Settlements' focus was on assessing Ngāti Whātua o Ōrākei's claims for the agreed historical account, and that did not involve any group but Ngāti Whātua o Ōrākei.

The applicants: Whether the Crown recognises it or not, in assessing Ngāti Whātua o Ōrākei's claims, the Crown was determining our customary interests too. We claim customary interests in many of the same areas. When the Crown makes a statement about Ngāti Whātua o Ōrākei's interests, it is judging ours at the same time.

Generally, the applicants advanced the view that the historical materials upon which the Crown relied were

exclusively of Pākehā origin, and were unlikely to be the best source of information on Māori customary rights.[40] The Pākehā authors were generally not in a position to critique the views of Judge Fenton in his influential decision on the Ōrākei Block, and instead tended to rely on it uncritically.[41] (Judge Fenton's judgment could loosely be described as pro-Ngāti Whātua.)

The Crown rejected these criticisms, although, as we observed, its arguments were chiefly directed to the integrity of the agreed historical account – which, according to the Crown, had nothing to do with the other tangata whenua groups.

This passage in the Crown's Opening Submission encapsulates the position that was put to us:

> The Crown's policy generally not to refer to other iwi or hapū (or, if necessary, such reference to be minimal) in the agreed historical account has been consistently applied in previous settlements and has a sound rationale. Such rationale was accepted by Ngāti Whātua o Ōrākei in this case. The agreed historical account is a record of the Crown's relationship with a particular claimant group and not others. It has been developed, inter alia, for the purposes of justifying the Treaty breach acknowledgements which are made only with respect to the group that is settling. It would not be feasible or necessarily desirable to make more than minimal reference to other iwi and hapū. They will have the opportunity to record their own relationship with the Crown in their own settlement.

Mentioning only the settling group in the agreed historical account is an element of settlement policy that we address later in chapter 3.[42] But the question as to whether other hapū and iwi are mentioned in the agreed historical account is one thing; whether their interests vis a vis the interests of Ngāti Whātua o Ōrākei are investigated and understood is another.

We were certainly concerned that the Crown did not accept the argument that, in order to ascertain whether and to what extent the Treaty was breached in relation to Ngāti Whātua o Ōrākei, a clear picture of the disposition of customary rights in Tāmaki Makaurau in the nineteenth century is a critical starting point.

As the Office of Treaty Settlements did not identify an inquiry into custom as part of its function, it is unsurprising that the sources relied on were not adequate for this purpose. We agreed with the criticism that the research we were pointed to was of exclusively Pākehā scholarship. The best source of information on custom will often not be found in a historical report, but in a conversation with matatau Māori,[43] whose scholarship is grounded in whakapapa. The Crown's policy is not to have meetings with other tangata whenua groups in Tāmaki Makaurau until after arriving at an agreement in principle, which rules out that kind of input. Prior to the hearing before us, the Crown showed no interest in engaging on the topic of custom with authorities like Te Warena Taua and Graeme Murdoch, whom the other tangata whenua groups themselves rely on.

The Office of Treaty Settlements did of course meet very often indeed with the late Sir Hugh Kawharu, a learned man in any terms, and an integral part of the Ngāti Whātua o Ōrākei negotiating team. But obviously it would be unwise to rely on Sir Hugh as the only expert on Tāmaki Makaurau Māori history when the topic is the customary rights of groups whose interests are in competition with those of his own hapū.

We have in Tāmaki Makaurau a situation where there are many groups claiming tangata whenua status, all of which challenge the prominence accorded to Ngāti Whātua o Ōrākei, both now and in the past. When the Crown says that its agreed historical account only concerns it and Ngāti Whātua o Ōrākei, it is denying reality. The agreed historical account is premised on the Crown's understanding of Ngāti Whātua o Ōrākei's interests in Tāmaki Makaurau as at 1840. If the Crown concludes that it has breached the Treaty in relation to Ngāti Whātua o Ōrākei in this way and in that way, it follows from those conclusions that it was Ngāti Whātua o Ōrākei that had the rights that were

infringed. Whether or not it is expressed or acknowledged, there is a finding about custom implicit in such conclusions. This was the view also of the independent expert that the Crown called in to review the draft agreed historical account. Professor Tom Brooking recommended that '[t]he Historical Account must fill in the pre-1840 situation' as 'the story [agreed historical account] makes little sense without such information.'[44]

Furthermore, the agreed historical account was not the only use to which the parties' historical assessments were put. Assessments of Ngāti Whātua o Ōrākei's interests also underpinned the offer to them of various kinds of redress.[45] The redress is discussed more fully in chapter 3, but the agreement in principle offers to Ngāti Whātua o Ōrākei both commercial redress and cultural redress. The commercial redress offered includes rights of first refusal to purchase surplus Crown property in designated areas. The cultural redress offered includes exclusive redress in maunga. Both these are examples of what is called 'exclusive' redress, which means that it is redress of a kind that is available only to one settling group. These offers both involved consideration not only of Ngāti Whātua o Ōrākei's interests, but of their interests relative to the interests of the other tangata whenua groups. The decision to offer to Ngāti Whātua o Ōrākei exclusive cultural redress in Maungawhau (Mount Eden), Maungakiekie (One Tree Hill) and Puketāpapa[46] (Mount Roskill), was expressly on the basis of an assessment that Ngāti Whātua o Ōrākei's interests in those sites were predominant.[47] Forming such a judgement necessarily involves assessing and weighing the relative customary interests of all the tangata whenua groups.

Thus, it is clear to us that the Crown and Ngāti Whātua o Ōrākei *were* making decisions about custom, both for the purposes of the agreed historical account, and for other purposes in the negotiation.

We are concerned that:

- the Crown does not acknowledge the customary implications of what it was doing, nor recognise its importance to others who were completely excluded;
- the Crown did not recognise the need to involve the other tangata whenua groups at all;
- the historical material relied on was not adequate for the task;
- the Crown's methodology for dealing with conflicting customary information was nowhere revealed in evidence or submission;
- the people within the Office of Treaty Settlements who were making decisions about customary interests were not sufficiently expert; and
- expert help was not sought.

When the agreement in principle was released in June 2006, the Crown assured other tangata whenua groups that their interests had been taken into account when formulating it.[48] As outlined above, however, the process by which those interests were assessed remained a mystery to those groups for the duration of the Crown's negotiations with Ngāti Whātua o Ōrākei. The redress offered to Ngāti Whātua o Ōrākei was also baffling to them, because they knew that officials had not talked to them, and did not properly understand their interests.

There is no doubt in our minds (nor in theirs) that redress offered to Ngāti Whātua o Ōrākei in the agreement in principle, and the version of history presented in the agreed historical account, do bear significantly on the relationship of all the tangata whenua groups with their tūrangawaewae[49] in Tāmaki Makaurau, and with each other.

The agreed historical account

The agreed historical account is part of the agreement in principle. It forms the first part of the Crown apology redress section of a deed of settlement.

The thrust of the Crown's case before us, as we have said, was that the Office of Treaty Settlements' focus on the

Māori/Crown history of Tāmaki Makaurau was on developing an agreed historical account with Ngāti Whātua o Ōrākei, and in process terms it was robust.

The agreed historical account outlines the historical relationship between the Crown and Ngāti Whātua o Ōrākei, providing the context and explanation for the Crown's acknowledgements of Treaty breach and the Crown apology to the settling claimant group.[50] It is intended to assist the general public to understand the basis for settlement by putting the offer of redress into the context of the losses suffered by the settling group through historical grievances.[51] In essence, the agreed historical account records events that took place after 6 February 1840 that gave rise to the need for the Crown to settle and make amends for breaches of the Treaty. The agreement in principle says that the agreed historical account, the Crown acknowledgements and the apology are the cornerstone of the Crown's settlement offer of redress.[52]

Testing historical material for the agreed historical account

What happened in the process of arriving at an agreed historical account of the historical relationship between Ngāti Whātua o Ōrākei and the Crown?

We look to the Crown for its account, because the applicants were not involved.

The *Red Book* explains that negotiation of an agreed historical account is conducted on a private 'without prejudice' basis.[53] Ms Houlbrooke explained in her evidence that '[t]he negotiations . . . are necessarily between the Crown and the claimant group, giving the Treaty partners an opportunity to discuss the grievances (and their respective perceptions and interpretations of the history that caused them) directly with each other.'[54]

The process usually involves a working party of historians for the Crown and the settling group whose input is made in committee discussion of particular issues. Claimant historians provide their view of the Treaty breaches and the historical events that gave rise to them. Crown historians prepare a draft text of the historical account, which is discussed and modified in the working party. The draft text is then distributed to the core negotiating teams and discussed further. Once approval of the text is reached by the two negotiating teams, it is reviewed by an 'eminent historian' to provide a check on the negotiation process. Then it becomes the agreed historical account, and forms part of the agreement in principle.[55]

During the Ngāti Whātua o Ōrākei negotiations, the Ngāti Whātua o Ōrākei's representatives on the historical working party were Sir Hugh Kawharu, Chairman of the Ngāti Whātua o Ōrākei Trust Board, and Professor David Williams, part-time historical and legal consultant to Ngāti Whātua o Ōrākei. The core Crown team comprised an Office of Treaty Settlements historian, initially Emma Wethey, and later Jay Eden, and John Clarke, a former Waitangi Tribunal member and now contractor to the Office of Treaty Settlements, who assisted in matters of tikanga.[56] Other senior historians from the Office of Treaty Settlements attended key meetings, as did Crown Law Office historian Dr Donald Loveridge.[57]

The Crown said at the hearing that the agreed historical account process was 'subject to a high level of ongoing review by OTS, the Crown Law Office and Ngāti Whātua o Ōrākei historians'.[58] The Crown emphasised the 'eminent historian' review of the draft agreed historical account conducted by Professor Tom Brooking in July 2005. Ms Houlbrooke confirmed that Professor Brooking was not asked to assess 'overlapping' interests as part of his commission.[59]

The Crown did not say in evidence or submission what took place in the working party meetings. We do not know what role the various historians played, and nor do we know anything about the role of John Clarke, kaumātua for the Office of Treaty Settlements.[60] Neither did the Crown's evidence mention Dr Loveridge's review of Bruce Stirling's reports that Rachel Houlbrooke commissioned through Crown Law,[61] nor how his review was handled in the process of developing the agreed historical account.

Dr Loveridge's report is scathing about the quality of the work undertaken by Mr Stirling.[62] His overall estimation was that too little good research has been done on 19th century land transactions in Tāmaki Makaurau[63] for the Crown to proceed safely to concede that it had breached the Treaty in relation to Ngāti Whātua o Ōrākei.[64] We were told that when Professor Brooking was asked to review the draft agreed historical account, the Office of Treaty Settlements forwarded to him copies of relevant material. The Crown filed a list of the materials sent to him. It comprises 80 items.[65] Not on the list, however, is Dr Loveridge's critical appraisal of Bruce Stirling's work. We do not know why.

The most evidence we have of the development of historical thinking within the Office of Treaty Settlements about Māori interests in Tāmaki Makaurau is in documents prepared by the Office of Treaty Settlements historian, Jay Eden. Mr Eden worked on the negotiations with Ngāti Whātua o Ōrākei almost from the beginning. His four memoranda included in the Crown's documents[66] show what the Office of Treaty Settlements was making of the Ōrākei Minute Books of the Native Land Court, and various secondary sources it consulted to inform it about Māori interests in Tāmaki Makaurau.[67] Mr Eden's assessments seem to have underpinned advice to Cabinet on the redress offer to Ngāti Whātua o Ōrākei in the agreement in principle.[68] The memoranda themselves outline Mr Eden's conclusions about the strengths of various groups' historical interests over significant cultural sites. They show that the Crown accepted Ngāti Whātua o Ōrākei's claim to manawhenua status over most of Tāmaki Makaurau. As discussed above, this acceptance was a necessary first step in order for the Crown to be able to acknowledge that its Treaty breaches had affected Ngāti Whātua o Ōrākei's interests in the land under consideration.

We do have concerns about the process the Crown ran to develop the agreed historical account with Ngāti Whātua o Ōrākei. We are not at all sure that it was robust.

Our misgivings are these:

- We do not have before us a full account of the historical method employed by the Crown. In particular, we do not know what principles were applied to assess contrary opinions in the research, who applied the principles, and what the result was.[69]
- The lack of information about the practices applied to assessing and reconciling differing views is of particular concern given that the Crown historians most closely involved with developing the agreed historical account were not senior. Both Emma Wethey and Jay Eden, Crown historians on the historical working party, are much younger, less experienced and less expert than both Sir Hugh Kawharu and Professor David Williams, the Ngāti Whātua o Ōrākei representatives on that body. In saying this, we mean no criticism of these young members of the Crown team whatsoever. Our focus is on the process. We look to methodology. For instance, did the evidence show that these staff members, although junior, were operating in an environment where they were guided and supported? Were there well-developed understandings within the Office about the principles to be applied where, for example, there were differing opinions of historians or other commentators about customary occupation? Were those understandings recorded anywhere? We saw no evidence of it. If there was direct supervision of the historical work, no one told us who supervised, and what they did. On the face of it, there appears simply to have been reliance on the work and judgement of historians who were much less experienced than their counterparts in the Ngāti Whātua o Ōrākei team.
- Responding to criticism of the influence that Mr Eden's work seems to have had in the development of the Office of Treaty Settlements' judgements about historical matters, the Crown told us that any individual's work needs to be seen in context. Sometimes a view expressed might be preliminary, and only intended for in-house consumption. There was 'a team of

historians at the Office of Treaty Settlements (OTS), oversight from a quality assurance panel of OTS managers and an independent review by an eminent historian, Professor Brooking of Otago University.'[70] But these assertions of robustness of process were unsupported by any detailed evidence of how this oversight and quality assurance works in practice. The same questions arise. What better qualified person oversaw Mr Eden's work, and applied what quality assurance practices to it? How did the quality assurance panel work, and who was on it? How were Mr Eden's early views worked on and (if necessary) revised? We were not told, and we do not know.

- The Crown said in submission that:

> the historical evidence does support the conclusion that the claims of Ngāti Whātua o Ōrākei are both valid and substantial. This is confirmed by the independent review of Professor Brooking.[71]

Professor Brooking is not himself an acknowledged expert on the Crown/Māori history of Tāmaki Makaurau, although he is a respected historian. He undertook his review in about one month 'from June 2005 to July 2005'.[72] For the rigour of his assessment in the time available to him, he was reliant on the material sent him by the Office of Treaty Settlements. We do not understand why he was sent the reports on Ngāti Whātua o Ōrākei's interests by Bruce Stirling, but not the Crown's own historian's very critical assessment of those reports. After all, Dr Donald Loveridge has done more work on the Auckland region than Professor Brooking. Professor Brooking might have been very influenced by Dr Loveridge's views. We think that the value of Professor Brooking's assessment to the process of developing the agreed historical account would certainly have been greater had he been sent all the relevant material, including material contradictory of the position taken in the agreed historical account.

- The agreed historical account states, and Ms Houlbrooke in her evidence emphasised, that it 'may be subject to further editing and amendment as the Crown and the trust board agree is necessary'.[73] The scope for agreement on changes after years of negotiation can only be a matter for speculation, but we think that the agreed historical account is presented in the agreement in principle as substantially a done deal between the Crown and Ngāti Whātua o Ōrākei. The example that Ms Houlbrooke gave in her brief of the kind of thing that may be changed is the reconciliation of footnotes that Professor Belgrave and Dr Young had said were wrong.[74]

Our assessment is that the Crown was not really engaged in rigorous testing of all the historical material. The Office of Treaty Settlements was focused on coming up with a version of history that the Crown can live with, and Ngāti Whātua o Ōrākei will agree to. This is part of the pragmatism and politics inherent in the kind of negotiation that the Office of Treaty Settlements is committed to.[75]

From the evidence presented to us, sound methodology is not a strong focus. Its importance is claimed, but not lived up to. What is the point of seeking influential opinions like that of Dr Donald Loveridge if, when they are received and they do not support the direction that officials are moving in, they are sidelined? That is what appears to have happened here. We do not know this for certain, because as we have said, the existence of Dr Loveridge's review was only revealed after our hearing. Thus, we have had no opportunity to ask questions about it, and must simply infer from the evidence filed. We note, however, that Dr Loveridge's views were not mentioned in any advice to the Minister that we saw. Dr Loveridge is probably the Crown's most senior historian. It was his stated opinion that the Crown should not concede Treaty breaches in the Auckland area relating to land sales 'without a better foundation than is at present available'.[76] We find it surprising that this was not put to the Minister.

Perhaps the Office of Treaty Settlements officials did

not think Dr Loveridge's views were very important in the context of the settlement negotiation.[77] If so, it supports our view that, once on the path to settling with a particular group, the Crown team is much more likely to find ways of arriving at a version of history that will work for the settlement than on insisting on getting it right.

This would be less troubling if:

- the Crown admitted that its approach to history is focused on outcome rather than process, and is informed by pragmatism rather than rigour;
- the history arrived at by this means did not have implications that go far beyond the two settling parties; and
- the negative effects were easily reversed.

Concern 5

The Office of Treaty Settlements failed to take responsibility its policy that the mandated group should discuss with the 'overlapping claimants' their interests in the settlement area, and for its policy that it would assist and undertake consultation with 'cross claimant groups' itself.

Under the heading 'Cross-Claims' in the terms of negotiation agreed between Ngāti Whātua o Ōrākei and the Crown in May 2003,[78] the parties:

- agreed that 'cross-claim issues over redress assets will need to be addressed to the satisfaction of the Crown and Ngāti Whātua o Ōrākei before a Deed of Settlement can be concluded';[79]
- noted 'that in areas where there are cross-claims the Crown encourages claimant groups to discuss their interests with neighbouring groups at an early stage in the negotiation process and establish a process by which they can reach agreement on how such interests can be managed';[80]
- stated that 'The Trust Board and the Crown will at an early stage in the negotiation process discuss the nature and extent of the interests of cross-claimant groups in the Ngāti Whātua o Ōrākei area of interest' and would then 'consider what further action on the part of Ngāti Whātua o Ōrākei is necessary to address cross-claim issues';[81] and
- undertook that the trust board would 'make reasonable endeavours at an early stage to assist in resolving cross-claims issues, and that the Crown would 'assist Ngāti Whātua o Ōrākei as it considers appropriate' and 'carry out its own consultation with cross-claimant groups.'[82]

As the Stories show, this document envisaged an approach to dealing with 'cross-claimant groups' that simply never came to fruition. In the period up to release of the agreement in principle, Ngāti Whātua o Ōrākei played no meaningful role in sorting out 'cross-claims', and neither did the Crown.

We now know that, even before the terms of negotiation were signed,[83] Ngāti Whātua o Ōrākei was resisting dealing with those whose interests were in conflict with theirs.[84] The Crown probably remonstrated with Ngāti Whātua o Ōrākei about this reluctance, but did not overcome it;[85] and the extent of the Crown's 'own consultation with cross-claimant groups' was minimal. The Crown's only initiative in the pre-agreement in principle period was the 1 July 2003 letter.[86]

That letter referred to the role that the Crown then expected Ngāti Whātua o Ōrākei (and apparently also funded them)[87] to play:

> **13.** In areas where there are overlapping claims, the Crown encourages the claimant group that is in negotiations to discuss their interests with neighbouring groups at an early stage in the negotiation process and establish a process by which they can reach agreement on how such interests can be managed.[88]
>
> **14.** We have encouraged the Ōrākei Trust Board to establish contact with you with the aim of establishing a process for and reaching agreement on mutual interests. We would also encourage you to get in touch with the Ōrākei Trust Board. As

> noted above, the Crown would prefer that Ngāti Whātua and your group can reach agreement as to overlapping interests. The Crown may be able to assist your group and Ngāti Whātua o Ōrākei to reach agreement.[89]

In chapter 1, we talked about what happened that gave rise to the memoranda written by Peter Hodge, member of the Office of Treaty Settlements negotiating team with Ngāti Whātua o Ōrākei in 2003 and 2004.[90] These memoranda[91] let us know that Ngāti Whātua o Ōrākei was at that time unwilling to engage with 'cross-claimants' as the Crown had hoped. Neither witnesses for the Crown nor Ngāti Whātua o Ōrākei mentioned this at the hearing. This is surprising to say the least,[92] because Mr Hodge's memoranda make it plain that it was a major issue in the negotiating teams' meetings towards the end of 2003, and at the beginning of 2004. At that time, Mr Hodge thought that the Crown should be making evident its broad expectations of the part Ngāti Whātua o Ōrākei should play. He suggested:

> It would be unrealistic to expect Ngāti Whātua to talk with each Wai number claimant, but reasonable for Ngāti Whātua to hold pre-Agreement in Principle meetings with 'key cross-claimants' who are representative of the tribal groups with interests in the Ngāti Whātua area of interest (eg, a tribal claims committee, a trust board, or a 'coalition' of Wai claimant groups).[93]

Mr Hodge thought officials should try to persuade Ngāti Whātua o Ōrākei from the stance that they were taking.[94] We do not know whether they did or not. None of the documents provided illuminate this question. There is certainly no evidence that the Crown offered to help Ngāti Whātua o Ōrākei by, for example, facilitating meetings itself. In November 2003, Peter Hodge suggested this to other Office of Treaty Settlements staff as a means of getting Ngāti Whātua o Ōrākei started in discussions with Tainui-affiliated groups and Marutūāhu/Hauraki claimants.[95]

We are particularly in the dark about why, once it was apparent that Ngāti Whātua o Ōrākei was not prepared to do what the terms of negotiation required with respect to cross-claimants, the Crown did not take over that role itself. From Mr Hodge's memorandum of 13 November 2003, that appears to be what Ngāti Whātua o Ōrākei wanted.[96] Moreover, documents that the Crown provided in late May 2007 indicate that, by 17 January 2005, the 'Ngāti Whātua' team within the Office of Treaty Settlements thought that:

> there is substantial likelihood of cross claim challenges to a settlement concluded between the Crown and Ngāti Whātua in Auckland. Waikato-Tainui and Hauraki-affiliated hapū claim historical and contemporary interests in the Tāmaki isthmus and North Shore. Te Kawerau ā Maki claims interests in West Auckland.[97]

Having (correctly) assessed this risk, why did the Office of Treaty Settlements not take steps to manage it? Did officials really believe that the best time to address cross-claims was *after* the release of the agreement in principle, which was bound to have a polarising effect? Would it not have been prudent – in order to head off opposition to the proposed settlement, even if for no Treaty-based reason – for the Crown to initiate talks with the other tangata whenua groups as soon as the likely problems were anticipated? Documents were provided too late for us to be able to explore these questions at the hearing.

We know for sure that during the three years that preceded release of the agreement in principle, Ngāti Whātua o Ōrākei held only one 'overlapping' claimant hui.[98] It took place at Ōrākei Marae on 11 December 2004. Rachel Houlbrooke said in her evidence that the focus of this hui was 'the general interests of neighbouring groups'.[99] Its focus was in fact more limited, however. The topic was the 'unfulfilled promises from the Crown to Ngāti Whātua o Ōrākei'.[100] The letter sent out told invitees that:

> issues such as 'mandating' or matters not related to the breaches that Ngāti Whātua o Ōrākei has with the Crown, cannot be dealt with at this meeting. Such matters likely rest with overlapping interests and the Crown directly.[101]

Thus, the hui was about Ngāti Whātua o Ōrākei's claims: it was specifically *not* an occasion for other tangata whenua groups to talk with Ngāti Whātua o Ōrākei about *their* claims and interests.[102]

Presumably Ngāti Whātua o Ōrākei hosted this hui in response to the Crown's expectation that the Trust Board would do at least something to fulfil its undertaking in the terms of negotiation to 'make reasonable endeavours' 'to assist in resolving cross-claims issues'.[103] However, it is difficult to imagine that anyone would believe that a hui to hear about Ngāti Whātua o Ōrākei's claims would assist in any material way.

In his evidence, Tiwana Tibble, Chief Executive of Ngāti Whātua o Ōrākei, said that Ngāti Whātua o Ōrākei took their lead from the Crown regarding their engagement with other groups during the negotiations:

> Ngāti Whātua o Ōrākei have not been involved in such a direct negotiations process and therefore had to learn from Crown officials what the Crown expected from us.[104]

He also said that until sign-off of an agreement in principle, all Ngāti Whātua o Ōrākei had to talk about was their own claims:[105]

> My understanding was at the first stage we needed to be involved in explaining what our claims were and seeking feedback . . . We thought that was necessary, amongst other things, to ensure so far as we could that there was no mis-information in circulation.[106]

In questioning at the hearing, Rachel Houlbrooke indicated that the Crown was not happy that the hui was designed in the way it was.[107] But for reasons into which we have no insight, that was how the hui proceeded. However unsatisfactory to the Crown it may have been, the Office of Treaty Settlements took no steps to rescue the situation, either then or later.

The Crown's submissions emphasise that addressing the other tangata whenua groups' concerns about the draft agreement in principle is very much a work in progress.[108] There is no suggestion, however, that it is still looking to Ngāti Whātua o Ōrākei to 'assist' as envisaged in the terms of negotiation.[109] We do not know why that is.

Concern 6

The Office of Treaty Settlements did not have a plan for the settlement of the Treaty claims of the other tangata whenua groups in Tāmaki Makaurau, and did not canvass with those groups either the possibilities the Crown was debating internally, or the groups' own preferences and the reasons for them.

A major plank of the Crown's Treaty settlement policy is what is called the 'large natural group' requirement. This is the Crown's preference to concentrate its negotiation activity on large groupings of Māori who have a natural connection with each other. This will usually be a whakapapa connection. In fact, the quintessential large, natural group is a tribe, exemplified in the settlements with Waikato-Tainui and Ngāi Tahu.

The rationale for preferring to negotiate settlements with large groups of Māori who have a natural connection with each other – rather than with small, discrete groups – is not hard to follow. It is the Government's goal to settle all historical Treaty claims by 2020,[110] so the more claims that can be settled through one negotiation, the better. The policy is the natural outcome of a rudimentary cost/benefit analysis, or – more colloquially – the inclination to want 'more bang for your buck'. Peter Hodge expressed this idea in a February 2003 internal memorandum where he addressed the question as to whether Te Kawerau ā Maki should be admitted to negotiation with the Crown. Mr Hodge thought they should not. He said, 'negotiations with small claimant groups take the same time and the same resources as negotiations with larger groups. Putting Te Kawerau ā Maki to the head of the queue would mean that negotiations with a large natural grouping would be delayed.'[111]

Treaty negotiations are costly – in human terms (time, effort), and financially. They are so expensive, in fact, that when the settlement is no more than, say, $5 million, there is often an uncomfortably small margin between the settlement value and the cost of the negotiation. This is obviously more likely to be an issue when the negotiation is with a smaller group, because a hapū-sized group will usually attract a more modest settlement than an iwi-sized one.

These are of course serious issues. Every hapū in New Zealand cannot have its own Treaty negotiation with the Crown. It would be prohibitively expensive, and would take a very long time.

Moreover, historically speaking, each hapū did not have a discrete and entirely different experience of Treaty breach by the Crown. Generally – and like all general statements, there are exceptions to it – most related Māori groups in an area had a broadly similar experience of colonisation, with the same headline events affecting them in more or less the same way. There is every reason for grouping these similarly-affected people together for the purposes of negotiating and settling their claims. Certainly, that is a reasonable rule of thumb.

Thus, we are in complete agreement with the Crown that a separate Treaty settlement negotiation for every group is neither necessary nor practicable.

That said, however, how we saw the large, natural grouping policy working in respect of the applicants in this inquiry cannot possibly be the best way of doing it. The Stories spell out the experiences of the applicants before us. In the years under scrutiny, Ngāti Te Ata and Te Kawerau ā Maki in particular strove very hard to be accepted as prospects for Treaty negotiations. Both groups could see that Ngāti Whātua o Ōrākei had a head start, and if they could not get Crown recognition as mandated groups, they might well miss the bus.

The situation is very disempowering for groups like these. While they understand the Office of Treaty Settlements' preference for negotiating with large, natural groups, if you are not a large, natural group – or if the Crown will not actually tell you you're not, but intimates that you probably won't be[112] – what do you do? As far as we could see, as the policy currently operates, the answer is this: you wait until the Crown tells you its 'strong preference' as to the grouping you should join up with.[113] At that point you either say 'yes' – however unnatural the grouping might seem to you – or the Crown will send you back to the queue, where you wait some more. What you are waiting for at that point is not at all clear. You probably wait until, many years later, the Crown has decided what to do with all the leftover groups that would not comply with the Crown's preferred groupings, and with the other smaller groups it hasn't got around to yet.

These very difficult problems are what makes it so important that the Crown makes really intelligent decisions about the best grouping in a district *before* it begins to negotiate with just one.

In her evidence for the Office of Treaty Settlements, Rachel Houlbrooke talked about how, in 2002, the Crown considered whether Ngāti Whātua o Ōrākei might fit into a wider South Kaipara grouping of claimants. Ultimately, it was decided that this was not viable.[114] So the Office of Treaty Settlements decided to press on with Ngāti Whātua o Ōrākei alone:

> in 2002–2003, OTS considered that Ngāti Whātua o Ōrākei were ready to negotiate, and it was not reasonable to delay any further. Negotiations with the Trust Board were considered important to maintain momentum of Treaty settlements, and to achieve the first comprehensive settlement in the Auckland region.[115]

In retrospect, it seems that this decision was precipitate.

In 2002, the Crown was determining what configurations of claimants it thought might work, and took into account some South Kaipara groups, and also Te Kawerau ā Maki (which like the South Kaipara groups had been involved in the Waitangi Tribunal's Kaipara Inquiry). But there is no evidence of the Crown holding hui to discuss possible

combinations with Māori groups themselves – who might well have more insight than the Crown into what kinds of combinations might work. And the applicants before us (apart from Te Kawerau ā Maki) do not seem to have been in contemplation at all. Why did the Crown not talk to Ngāti Te Ata, Ngāi Tai ki Tāmaki, Ngāti Paoa – all of whom were known to the Crown through their involvement in the early 1990s in the Crown Congress Joint Working Party process[116] that addressed claims to Auckland Railways land? Te Warena Taua told us about a plausible natural connection between the other tangata whenua groups in Tāmaki Makaurau through their Waiōhua ancestry.[117] In combination, they would certainly be more populous than Ngāti Whātua o Ōrākei. Before entering into terms of negotiation with Ngāti Whātua o Ōrākei, the Crown surely knew something of the overlapping interests of the many tangata whenua groups in Tāmaki Makaurau.[118] It ought to have been obvious that it would have been better to include as many as possible of the tangata whenua groups in a Tāmaki Makaurau settlement at the same time. If the Office of Treaty Settlements had spoken to Mr Taua in 2002 – as the Crown Congress Joint Working Party did in the early 1990s – that possible Waiōhua grouping would probably have come to the fore for consideration then. But the Office of Treaty Settlements seems never to explore ideas with Māori. Instead, it decides the best way to proceed, and imposes its preferences. To us, it seems likely that as a result many opportunities are lost.

We were dismayed, in Tāmaki Makaurau, to see how little sign there was of any of these questions being resolved with any sense of partnership. The tone and style of the Crown's interaction was uniformly that of the decision-maker: the Crown holds all the cards, the pack is mostly hidden, and then the Crown tells everyone how the hand will be played. The Stories show clearly how hard it was for groups to really know where they stood. So much was not revealed to them, and they were not admitted to serious discussion about any of the really difficult questions that the Office of Treaty Settlements was facing.

The experience of both Ngāti Te Ata and Te Kawerau ā Maki – the groups most intent upon being admitted for negotiation – was essentially the same. They ended up with nothing of what they wanted from the Crown, a strong feeling of having been treated shabbily, and no prospect of a negotiation. The Office of Treaty Settlements' application of the large, natural group policy to those of the other tangata whenua groups in Tāmaki Makaurau who were actively seeking to enter the Office's negotiation programme was unfortunately destructive of both trust and respect.

One of the very serious problems with how the large, natural group policy works is its lack of transparency. How can a group ascertain whether it will or will not meet the criteria? The criteria are fluid. For instance, Ngāti Whātua o Ōrākei were admitted to negotiation on the basis of an estimated population of 3000–4000.[119] This cannot really be regarded as a 'large' natural grouping of Māori. Indeed, in a memorandum to its Minister, the Office of Treaty Settlements described Ngāti Whātua o Ōrākei as a 'small-medium claimant group'.[120] Ngāti Whātua o Ōrākei is of course a hapū of a much larger grouping called Ngāti Whātua, the iwi. Why did the Office of Treaty Settlements not hold out for a settlement with the balance of Ngāti Whātua, rather than agreeing to settle with a hapū group? The real answer is that there were good reasons for wanting to admit Ngāti Whātua o Ōrākei to negotiations, and really none of them had to do with their being a large, natural group. Therein lies the problem. The 'large, natural group' requirement can be a complete obstacle to allowing a group on to the negotiation track if there are other reasons that make them a less desirable prospect. But when, like Ngāti Whātua o Ōrākei, a group has other things going for it, its modest size is a problem that can be overcome.

Nowhere in the evidence was there a clear statement of how the large natural group criterion will be applied in practice.[121] While some fluidity would be necessary to meet different situations, it should be possible to describe what is taken into account, and how the different considerations

are weighed. Complete uncertainty about how the policy will be applied carries with it a potential for unfairness in practice. The Office of Treaty Settlements runs the risk, if it is too vague about how it does what it does, of operating a process that lacks the important characteristics of transparency and, therefore, accountability. If the criteria applied by the Office of Treaty Settlements cannot really be understood, because they are applied differently all the time in response to considerations that are not articulated, the situation is unfair.

The other tangata whenua groups in Tāmaki Makaurau generally had difficulty in ascertaining where they stood, and as far as we could determine at the time of reporting, none is currently on track to being admitted to negotiation with the Crown any time soon.

Concern 7

The Office of Treaty Settlements' commitment of time, resources, and energy to building a working relationship with Ngāti Whātua o Ōrākei was such that it excluded the possibility of running a parallel process in which relationships with the other groups were built – or at least initiated – at the same time.

Having chosen Ngāti Whātua o Ōrākei as the Tāmaki Makaurau group with which to negotiate a Treaty settlement, the Crown quite properly focused on building a relationship.

We were told at our hearing in March 2007 that Ngāti Whātua o Ōrākei and the Crown continued to meet, but in the intensive negotiation period between signing the terms of negotiation in 2003 and the release of the agreement in principle in mid-2006, they met fortnightly. They routinely shared information – not only each other's information, but also information that the Crown received from other groups. The Crown provided funding for Ngāti Whātua o Ōrākei to participate in the negotiations. Rachel Houlbrooke did not give an exact figure in her evidence,[122] but at the hearing Stephen Clark, counsel for Te Kawerau ā Maki, asked her if she could confirm that for four years the Office of Treaty Settlements had 'funded Ngāti Whātua during those negotiations, attendance at meetings and the preparation of their research'. She said, 'Yes I can . . . there was an agreement from Ministers that a claimant funding contribution would be provided to the Ngāti Whātua o Ōrākei Trust Board, and that has happened.'[123] The process obviously worked for Ngāti Whātua o Ōrākei. At the hearing, they joined with the Crown in vigorously defending the negotiation and settlement. Tiwana Tibble, witness for Ngāti Whātua o Ōrākei, told us that he could not think of a better process.[124]

All of this is unexceptionable *until* it is contrasted with the Crown's investment in relationships with the other tangata whenua groups in Tāmaki Makaurau.

We completely reject the Crown's analysis that, until there was an agreement in principle with Ngāti Whātua o Ōrākei, there was nothing to talk to the others about. We have discussed that already in chapter 1.[125] For us, it is simple. The Crown's Treaty relationship with the other tangata whenua groups in Tāmaki Makaurau was just as important as its Treaty relationship with Ngāti Whātua o Ōrākei. It was not negotiating a settlement with those other groups, but that did not mean that it could ignore them until it suited the Crown. The work that the Crown was doing with Ngāti Whātua o Ōrākei affected the others profoundly, as we have said. It had a direct bearing on their customary interests vis-à-vis those of Ngāti Whātua o Ōrākei and each other, and it affected outsiders' perception of them as legitimate tangata whenua groups. Then there was the need for the Crown to properly understand the basis of their interests in order to ensure that the arrangements it was entering into with Ngāti Whātua o Ōrākei were fair. And the practical reality, pointed out by Peter Hodge in late 2003, was that if the other groups were kept at arm's length until a deal had been sewn up with Ngāti Whātua o Ōrākei, the other groups would challenge it. These are powerful reasons for the Crown to invest in a relationship

with all of the tangata whenua groups from the beginning.

But as we know, that is not what happened. Now, four years down the track from the commencement of negotiations with Ngāti Whātua o Ōrākei, the situation is this: There are no established relationships of trust and familiarity between officials and key people in the other tangata whenua groups. Aside from the 1 July 2003 and 13 June 2006 letters,[126] the Office of Treaty Settlements made no overtures to them, and although it responded sometimes to a group's overture, its response was not on any principled basis. The group that got the most attention was the group that was most persistent and had as a tribal member an indefatigable lawyer who was a partner in a large commercial law firm.

Although the other tangata whenua groups were asked in two letters from the Crown to supply information,[127] there was no funding available to them. The need for those groups to be able to purchase professional advice in order to participate fully was most obvious after the agreement in principle was released. In order to assess the implications of the commercial redress offered to Ngāti Whātua o Ōrākei, financial and valuation advice is necessary. It is the Crown's policy, however, that groups are eligible for funding only after they have a recognised mandate.[128] This is a Catch-22 situation for non-settling groups, because entering into the mandating process is itself costly, and there is no funding to assist with that until the Crown has agreed that a particular group is ready to negotiate with the Crown. None of this was explained to the other tangata whenua groups , and it is not explained in the *Red Book*.[129]

It seems to us that the most powerful reason for constructing a proper programme of engagement with non-settling tangata whenua groups is this inquiry. Groups that are angry about and alienated by a poor process will seek whatever avenue for protest they can find. If the process has been poor, they will get a favourable response. The result is that the considerable investment of time, effort and resources in the settlement with the mandated group is put at risk.

Notes

1. H W R Wade and C F Forsyth, *Administrative Law*, 7th ed (Oxford: Clarendon Press, 1994), p 515
2. *R v Home Secretary ex parte Santillo* [1981] QB 778, per Denning MR
3. Rachel Houlbrooke, brief of evidence, 26 February 2007 (doc A38), para 5
4. By the time the Tribunal convened its judicial conference in Auckland in September 2006, the Office of Treaty Settlements had already communicated with the other tangata whenua groups seeking feedback on the agreement in principle. The letter gave eight weeks for them to express their concerns, and at that time it was expected that consultation would take place over about three months (taking account of the Christmas break). See for example letter Rachel Houlbrooke to Paul Majurey, 21 November 2006 (doc A38(a), DB120), where she said:

> As we stated in the meeting on 27 October, the Crown is planning to allow a period of time for further concerns to be raised by overlapping claimants, and for possible discussions to take place between those groups, the Crown and Ngati Whatua o Orakei about the contested elements of the Crown's AIP offer and the rationale for that offer. This phase of the overlapping claims process will end in mid February 2007 when OTS will report to the Minister to seek his preliminary decision on the redress items that have been contested.

5. Rachel Houlbrooke, brief of evidence, 26 February 2007 (doc A38), para 5
6. For instance, *Wellington Airport* v. *Air New Zealand* [1993] 1 NZLR 671, to which reference was made in this inquiry, is authority for what 'consultation' requires when the word 'consultation' has been used (for instance, in legislation) to describe a party's obligation. That is not the situation here.
7. We do not know to what extent the Office of Treaty Settlements officials conducted themselves in accordance with tikanga Māori in their dealings with Ngāti Whātua o Ōrākei, because we heard no evidence on this.
8. It might be expected that the Office of Treaty Settlements would involve Te Puni Kōkiri when it goes into a new district. The only document produced to us revealing any involvement of Te Puni Kōkiri is doc A67, DB26, 15 September 2004. It is an email following a meeting between the Office of Treaty Settlements and Te Puni Kōkiri staff. It was agreed at the meeting that the Office of Treaty Settlements would 'meet with the TPK regional office to update them on the settlement process and progress in negotiations with Ngāti Whātua o Ōrākei, and learn more about their understanding of the dynamics "on the ground" in Auckland.' This date is well after the Office of Treaty Settlements' entry into Auckland. There is no information as to whether the follow-up occurred.

9. Rachel Houlbrooke, brief of evidence, 26 February 2007 (doc A38), paras 12–13. Also, Ms Houlbrooke said in response to questioning by Aiden Warren (hearing recording, 15 March 2007, track 1):

> The process we undertake is that until an agreement in principle is signed, until there is a proposed redress to discuss, we tend not to meet directly. But since that time we have offered to do so and have now done so. And may well do so again in future.

10. Requests for updates by applicants and their counsel were generally met with the response that negotiations were 'progressing steadily' and that 'overlapping claimants' would be invited to advise the Crown and Ngāti Whātua o Ōrākei of 'any views they may have in relation to the proposed redress' upon completion of the agreement in principle, an estimated date for which was given. Those responses were only provided to parties who requested information: see doc A38(a) DB24; doc A38(a) DB16, p 26; doc A38(a) DB17. This is set out in the Stories. It is revealed in documents that the Crown made available just before completion of this report that the Crown considered that secrecy was important in order to manage media response to the proposed settlement: doc A67 A27, paras 20–22.

11. Rachel Houlbrooke, brief of evidence, 26 February 2007 (doc A38), para 84

12. Document A38(a) DB10, paras 1–2

13. See ch 3: 'The components of settlement redress'

14. See Stories of Ngāti Te Ata, Ngāi Tai, and Marutūāhu

15. Rachel Houlbrooke, brief of evidence, 26 February 2007 (doc A38), para 141

16. Rachel Houlbrooke in response to questioning by Paul Majurey, hearing recording, 14 March 2007, track 2

17. The Ombudsman wrote to Marutūāhu on 18 February 2005 (doc DT 41, attached to Taipari evidence), stating:

> In your e-mail of 14 December 2004, you referred to a hui which took place on Saturday 11 December 2004 and commented that:
>
> 'Sir Hugh Kawharu, in response to discussion about OTS withholding the historical reports, advised that Ngati Whatua were not responsible for the documents being withheld – "that was the decision of OTS".'
>
> In response, I would note that I have consulted directly with Mr Tiwana Tibble, the Chief Executive of Ngāti Whātua . . . regarding this matter. Mr Tibble explained that the Ngāti Whātua . . . is opposed to the release of the information at issue and described the prejudice that he believed would likely result to the negotiation process if the documents were released.

Tiwana Tibble, brief of evidence, 26 February 2007, (doc A41(a)), attachment F; Tiwana Tibble, oral evidence in response to questioning by the Tribunal, hearing recording, 13 March 2007, track 4

18. Documents that the Crown made available very late in the piece, just as this report was being finalised, revealed another Crown motivation for secrecy. As early as 20 August 2004, in a memorandum updating the Minister in Charge of Treaty of Waitangi Negotiations on the negotiations with Ngāti Whātua o Ōrākei, Rachel Houlbrooke addressed the need for confidentiality (doc A67, DB27, paras 20–22). She identified the need to contain 'information and speculation about the negotiations until an agreement in principle is reached.' This communications strategy was dictated by the 'high level of sensitivity around these negotiations'. She attributed this to five factors:

a. there is a very high level of public use and visibility of potential cultural redress sites in central Auckland (particularly the volcanic cones);
b. most of these sites have been vested in, or are controlled and managed by local councils (the ACC in particular), which means that they are likely to be directly affected by the redress package;
c. Ngāti Whātua's area of interest is heavily cross-claimed;
d. There has not been a Treaty settlement in this area (the closest is Te Uri o Hau), which means that the Auckland public, the ACC and the media are not familiar with the settlement process and redress instruments; and
e. Most national media organisations are based in Auckland.'

19. Terms of negotiation between the Crown and Ngāti Whātua o Ōrākei, 2 May 2003, clause 20, doc A38(a), DB3

20. The Crown released the Stirling reports to Marutūāhu on 14 June 2006 (Te Warena Taua, summary of evidence, 13 March 2007, (doc A39(a)), tab 49). The Crown did not release the Stirling report to Te Kawerau ā Maki and Ngāi Tai ki Tāmaki until 29 September 2006, after Stephen Clark requested them at the first Tāmaki Makaurau Judicial Conference 10 days earlier (paper 3.1.34). The Crown also released the referenced agreed historical account, and the Crocker and Horan reports, to claimants on 29 September 2006: supporting papers to evidence, David Taipari, 26 January 2007 (doc A33(a)), p 201.

21. Roimata Minhinnick, brief of evidence, 9 October 2006, (doc A2), para 35

22. Document A38(a), DB10

23. Ibid, p 6

24. Document A38(a), DB32, p 11

25. Roimata Minhinnick, brief of evidence, 9 October 2006 (doc A2), para 18

26. Ibid, para 25

27. Document A38(a), DB13

28. Document A38(a) DB67; docs A24(a), annexures 9 and 10

29. After the hearing, the Crown filed further documents in several tranches. In an earlier tranche, filed as document A66, were successive versions of a spreadsheet that identified 'overlapping' claimants

(doc A66, DB249–DB255). In submission, Grant Powell, counsel for the Hauraki Māori Trust Board noted (paper 3.4.11, para 3(c)):

> While the Crown has supplied various versions of a spreadsheet detailing contact details for overlapping claimants, the spreadsheets do not reveal any actual progress in identification or consideration of Hauraki interests.

Likewise, Paul Majurey, counsel for Marutūāhu, noted in submission: (paper 3.4.12, paras 10–12):

> On 1 July 2003 (two months after the Crown – Ngati Whatua TON [terms of negotiation] and the same day OTS forwarded its pro-forma 'overlapping claimants' letter), OTS produced a memorandum described as 'a starting point for the cross-claims strategy for Ngati Whatua' (doc A66, DB250). This document was updated on 2 October 2003 (doc A66, DB252), 2 December 2003 (doc A66, DB253) and 27 January 2004 (doc A66, DB255). The sum of the Crown's 'high level of awareness' of the Marutuahu tribes is reflected as follows:
>
> Ngāti Tamaterā are identified in each version as Ngati Tamatea.
>
> In document A66, DB250, the solitary entry in the column headed 'General Area of Interest' is (in handwritten form) 'Ngati Maru – Sylvia Park'.

Mr Majurey noted that the Ngāti Maru column in the chart was left completely blank in subsequent versions of the document: docs A66, DB252, DB253, DB255.

There are signs in the five spreadsheets filed of information being gathered about some groups, but remarkably little considering the amount of information that the other tangata whenua groups told us they had submitted to the Crown.

The last spreadsheet filed was dated 27 January 2004. We infer that this was when the information on other tangata whenua groups stopped being updated, as none of the documents filed indicate any other means by which the Office of Treaty Settlements recorded this information.

30. Bruce Stirling, 'Ngāti Whātua o Ōrākei and the Crown 1840–1865', February 2002 (doc A9); 'Ngāti Whātua, the Crown and North Shore Lands 1840–1865', August 2001 (doc A17)
31. Donald Loveridge, 'Ngāti Whātua o Ōrākei Claim: Appraisal of Evidence', 2 September 2003 (doc A66, DB251)
32. Tom Brooking, 'Assessment/Critique of the Ngāti Whātua Historical Account', undated (doc A56)
33. Associate Professor Michael Belgrave, Dr Grant Young and Anna Deason, 'Tikapa Moana and Auckland's Tribal Cross-Currents: The Enduring Customary Interests of Ngāti Paoa, Ngāti Maru, Ngāti Whanaunga, Ngāti Tamaterā, and Ngāi Tai in Auckland', April 2006; (doc A6)
34. This work was no doubt commissioned to provide a Hauraki counterpoint to what Hauraki parties suspected would be an inclination towards Ngāti Whātua o Ōrākei in Stirling's reports on their interests. It should be recalled that at the time the report from Belgrave et al was commissioned, Hauraki interests had not yet seen Stirling's reports, because of the Crown's policy of withholding historical material from other tangata whenua groups until after an agreement in principle was released. They were therefore surmising as to the reports' content.
35. R C J Stone, *From Tāmaki-Makau-Rau to Auckland* (Auckland: Auckland University Press, 2001) (doc A21)
36. Alan Ward, 'Supplementary Historical Report on Central Auckland', 1992 (doc A15)
37. Francis Dart Fenton, *Important Judgments delivered in the Compensation Court and Native Land Court, 1866–1879* (Auckland: H Brett, 1879) (doc A8), pp 52–96
38. Graeme Murdoch, 'Te Kawerau ā Maki and The Crown in Kaipara: a traditional/historical report', March 2000 (doc A12)
39. Crown counsel, opening submissions, 12 March 2007 (paper 3.3.4), para 18
40. Historian for Te Kawerau ā Maki, Graeme Murdoch, said in his summary of evidence, 13 March 2007 (doc A25(a)), pp 5–7:

> It is clear that the historical sources consulted by the Crown in developing the AIP and the AHA lack the traditional Maori components of evidence normally associated with a Waitangi Tribunal Inquiry . . . The Crown does not appear to have considered the rich source of regional Maori history contained within the carvings and other adornment of the ancestral meeting house *Tumutumuwhenua* at Orakei Marae.
>
> . . . . .
>
> It is my opinion that, because of the inadequacy of the published sources consulted; the Crown should have made greater use of primary material, and especially Maori material, in determining customary rights and associations pertaining to the proposed cultural redress properties in particular.
>
> . . . . .
>
> A significant amount of oral history and documented knowledge pertaining to customary relationships with Tamaki Makaurau still remains with Te Kawerau ā Maki, and . . . It has not been heard in a public forum.
>
> . . . . .
>
> I believe that the historical sources consulted by the Crown should have been augmented by OTS commissioned reports examining customary relationships relating to the AIP area, at very least in relation to those places proposed for cultural redress. They should also have included wider research into the relevant Maori oral evidence contained within Auckland, Kaipara, Mahurangi, Hauraki and Waikato NLC [Native Land Court] Minute Books.

Te Warena Taua, witness for Ngāi Tai ki Tāmaki and Te Kawerau ā Maki, said in his further statement of evidence, 5 March 2007 (doc a22(c), pp 4–5:

> Given the clear complexities of the interests in the Tamaki isthmus and the number of groups who claim interests, it is my strong view that the Crown should have as a starting point commissioned quality research on the traditional history of the area, outlining the whakapapa links between the overlapping groups and an identification of the various levels of interests. This type of research should have been undertaken at an early stage of the process by a suitably qualified person and made available to all overlapping claimants. To base settlement redress on historical research only and evidence that a certain iwi sold land without traditional research has lead in this situation to wrong determinations by the Crown that now have the predominant interests in certain sites or areas.

Te Warena Taua said in his brief of evidence, 26 January 2007 (doc A39, attachment G):

> The ancestral rights of different iwi and hapū on the isthmus at 1840 need far more investigation and inquiry. Te Kawerau ā Maki insist that OTS engage in considerably more research and consultation with all parties prior to concluding any settlement with Ngāti Whātua o Ōrākei.

41. Graeme Murdoch in response to questioning by Peter Andrew, hearing recording, 13 March 2007, track 4
42. See ch 3: 'What Do the Applicants Object To? – Agreed historical account' and 'What Does the Crown Say? – Agreed historical account'
43. Māori who are learned in matter of custom.
44. Tom Brooking, 'Assessment/Critique of Ngāti Whātua Historical Account', undated (doc A56), p 4
45. This is evident from Jay Eden's memoranda:
1 November 2004 – Historical appraisals of Ngāti Whātua priority sites (doc 38(a), DB93)
4 October 2005 – Exclusive RFR [right of first refusal] Area for Ngāti Whātua o Ōrākei (doc 38(a), DB100)
30 April 2006 – Assessment of overlapping claims for items of exclusive redress proposed for Ngāti Whātua o Ōrākei (doc 38(a), DB97)
46. The view was given to us in Graeme Murdoch's evidence that the proper Māori name for this maunga is Puketewiwi: doc A7, para 4.16. We make no determination as to this, but for avoidance of confusion use the name in the Office of Treaty Settlements' documents.
47. Rachel Houlbrooke, brief of evidence, 26 February 2007 (doc A38), paras 159–160
48. Document A38(a), DB104
49. Literally, standing place for the feet; metaphorically, the whenua that is most intrinsically one's own.
50. Rachel Houlbrooke, brief of evidence, 26 February 2007 (doc A38), p 7
51. Office of Treaty Settlements, *Ka Tika ā Muri, Ka Tika ā Mua* [the *Red Book*], 2nd ed (Wellington: Office of Treaty Settlements, [2002]), p 85
52. Agreement in principle for the Settlement of the Historical Claims of Ngāti Whātua o Ōrākei, 9 June 2006 (doc A49), p 3
53. *Ka Tika ā Muri, Ka Tika ā Mua,* p 86
54. Rachel Houlbrooke, brief of evidence, 26 February 2007 (doc A38), p 7
55. *Ka Tika ā Muri, Ka Tika ā Mua* p 86
56. Rachel Houlbrooke in response to questioning by the Tribunal, hearing recording, 15 March 2007, track 3
57. Document A42(b), para 9; doc A56, para 3.4
58. Rachel Houlbrooke, summary of evidence, 13 March 2007 (doc A39(b)), paras 3.4, 3.6
59. Rachel Houlbrooke in response to questioning by Paul Majurey, hearing recording, 15 March 2007, track 3
60. The only reference in the documents to what John Clarke did was revealed recently in doc A67, DB22, which is a record of a meeting between the Office of Treaty Settlements and Ngāti Whātua o Ōrākei in November 2003. It says that for the next meeting 'The Crown offered to invite John Clarke, Crown kaumatua to attend meetings, when necessary to strike a balance between English and te reo Māori in negotiations.'
61. Document A66, DB243
62. Dr Loveridge said Stirling was 'highly partisan in his arguments and conclusions', and relied uncritically on Philippa Wyatt's evidence to the Kaipara Tribunal, which he describes as 'fundamentally flawed': doc A66, DB251 pp 3–5, 36–37. Professor Brooking had copies of both Wyatt's and Stirling's reports, but not the Loveridge 'Appraisal'.
63. Dr Donald Loveridge, 'Ngāti Whātua o Ōrākei Claim: Appraisal of Evidence for Office of Treaty Settlements' 2 September 2003 (doc A38(a), DB251), p 32:

> A fair amount has been written by historians about the early years of Ngāti Whātua's relationship with the Crown. Almost all of the recent literature, unfortunately, has been written for the purposes of Treaty claims. This means that much of it has been written in haste, with a focus on specific Crown actions relating to one iwi or hapū. A wider perspective on the region as a whole is usually lacking, as is consideration of the wider context of the Crown's actions. I would argue that both are necessary to understand Ngati Whatua's history during the early settlement period. The quality of the reports in many cases is poor, sometimes due to incomplete research, and sometimes due to a doctrinaire or partisan approach which had led to a very narrow approach to the issues and events in question.

64. Document A66, DB251, p 10
65. The bibliography of material sent to Professor Brooking is contained in documents attached to Crown Memorandum, 9 March 2007 (doc A56).
66. The 19 May 2006 memoranda was co-authored with Ms Sonja Mitchell.

67. In addition to the memoranda cited in note 45, see also '19 May 2006 – Ngāti Whātua o Ōrākei proposals for Statutory Acknowledgements – historical assessment': doc 38(a), DB98.
68. Document 38(a), DB94 and DB96
69. For instance, it would have been very instructive for us to have been told how the Crown dealt with the strong views expressed by Dr Loveridge in his 'Appraisal' (doc A66, DB251). The Crown's evidence not only failed to tell us about this, it did not tell us that the 'Appraisal' existed until after the hearing.
70. Opening Crown submissions, 12 March 2007, paper 3.3.4, para 18.1
71. Opening Crown submissions, 12 March 2007, paper 3.3.4, para 18.2
72. Rachel Houlbrooke in response to questioning by Paul Majurey, hearing recording, 15 March 2007, track 3
73. Rachel Houlbrooke, brief of evidence, 26 February 2007 (doc A38), para 152
74. Ibid
75. Rachel Houlbrooke, brief of evidence, 26 February 2007 (doc A38), para 5
76. Document A66, DB251, p 10
77. Two historical reports done for the Office of Treaty Settlements (M Horan, 'Pre-emption Waiver Investigations: 1844–48', October 2004 (doc A10) and T Crocker, 'Assessment of Iwi interests and Crown Purchases in the Waitakere Area', 15 February 2005 (doc A7)) may have been commissioned in response to Dr Loveridge's concerns. They cover two of the areas of weakness identified in his 'Appraisal'.
78. Terms of negotiation between the Crown and Ngāti Whātua o Ōrākei, May 2003 (doc A38(a), DB3)
79. Ibid, clause 17
80. Ibid, clause 18
81. Ibid, clause 19
82. Ibid, clause 19
83. Memorandum by Peter Hodge to the Office of Treaty Settlements Orākei Group, 3 March 2003 (doc A67, DB7), p 3: 'Cross-claims: Orakei are reluctant to engage with cross-claimants, and deny that groups cross-claiming into central Auckland have legitimate claims'.
84. Document A66, DB245 and 246; see ch 1, 'Managing the Other Relationships'
85. Rachel Houlbrooke in response to questioning by Stephen Clark, hearing recording, 14 March 2007, track 3
86. Document A38(a), DB10
87. Rachel Houlbrooke in response to questioning by Stephen Clark, hearing recording, 14 March 2007, track 3
88. Document A38(a), DB10
89. Ibid, p 5
90. See ch 1, in the section entitled 'Managing the other relationships'
91. Doc A66, DB245 and 246
92. Questions were asked of Ngāti Whātua o Ōrākei's witness Tiwana Tibble about why Ngāti Whātua o Ōrākei did not play a role in addressing cross-claims, as was originally envisaged. The substance of his reply was that Ngāti Whātua o Ōrākei was too busy focusing on the agreed historical account with the Crown, and did not really know what was expected of it: response to questioning by the Tribunal, hearing recording, 13 March 2007, track 4.
93. Document A66, DB246, para 9(1)
94. His Internal Memorandum of 13 November 2003 (doc A66, DB245), para 3, said:

> '*cross-claims*: Ngāti Whātua do not agree with the Crown's policy that groups in negotiation should engage with cross-claimant groups, but consider that the Crown should deal with cross-claimants.'

He commented further (doc A66, DB245, paras 8–10):

> *Cross-claims*
>
> 8. Ngāti Whātua's lack of commitment to conferring with cross-claimants is a serious concern. It runs counter to Crown policy on cross-claims and to recent Tribunal findings on cross-claims (particularly those contained in the Ngāti Awa and Ngāti Tūwharetoa cross-claims reports).
>
> 9. We need to convince Ngāti Whātua that it is in their best interests (as well as the Crown's) to initiate discussions with cross-claimants. To do otherwise would involve considerable legal risk for both parties (ie. a successful cross-claims challenge to the settlement) and would establish an undesirable precedent for negotiations with other claimant groups. I suggest that this be discussed and agreed with Ngāti Whātua as a matter of priority and certainly before any further meetings occur.
>
> We should also think about how the Crown can assist Ngāti Whātua in this process. For example, the Crown could offer to facilitate two initial meetings between Ngāti Whātua and (1) Tainui-affiliated groups and (2) Marutūāhu/Hauraki claimants.

In his memorandum of 2 December 2003 (doc A66, DB246, paras 6–7), Mr Hodge developed his concerns, saying:

> 6. . . . We may find ourselves in a situation where an AIP is signed before any real dialogue has taken place between Ngāti Whātua and the cross-claimants. The risk here is that agreement over contested redress between Ngāti Whātua and cross-claimants will then be difficult to achieve. This is because lines of communication and relationships will not have been established, Ngāti Whātua will be inclined to 'defend' the contents of the settlement offer, and cross-claimants (who may see the AIP [agreement in principle] as a done deal) are likely to challenge the offer rather than engage in dialogue.
>
> We need to address this reluctance as a matter of priority in the New Year. When discussing cross-claims with Ngāti Whātua it would be useful to be clear as to what the Crown's broad

expectations of dialogue are (in relation to dialogue pre-AIP) and why Ngāti Whātua should start talking with cross-claimants pre-AIP.

95. Document A66, DB245, para 10
96. Document A66, DB245, para 3
97. Internal Memorandum from Ngāti Whātua team to QA Panel, 17 January 2005 (doc A67, DB31), para 1.5
98. As discussed in the Stories, some groups managed to initiate hui with Ngāti Whātua o Ōrākei prior to release of the agreement in principle, for example: hui between Ngāti Te Ata and Ngāti Whātua o Ōrākei on 10 December 2004 and 7 June, 2005; hui between Ngāti Paoa and Ngāti Whātua o Ōrākei on 15 March 2005.
99. Rachel Houlbrooke, 'Ngāti Whātua o Ōrākei: Overlapping Claims Process', 19 September 2006 (doc A47), p 2
100. Tiwana Tibble, supporting papers for main brief, 26 February 2007 (doc A41(a), D1–D7, E)
101. Stephen Clark, Response following judicial conference on 19 September 2006 (paper 3.1.28), attachment A
102. See the Hauraki Māori Trust Board Story, note 4
103. Terms of negotiation between the Crown and Ngāti Whātua o Ōrākei, May 2003 (doc A38(a), DB3), clause 19
104. Tiwana Tibble, supplemental brief of evidence, 13 March 2007 (doc A41(b)), p 2
105. Ibid, p 6
106. Ibid pp 2–3
107. Rachel Houlbrooke in response to questioning by Stephen Clark, hearing recording, 14 March 2003, track 3
108. Crown counsel, closing submissions (paper 3.3.21), paras 6.3, 6.10, 8.1
109. Terms of negotiation between the Crown and Ngāti Whātua o Ōrākei, May 2003 (doc A38(a), DB3), clause 19
110. Māori Purposes Bill, 27 June 2006
111. Document A58, DB214
112. This was the situation for both Te Kawerau ā Maki and Ngāti Te Ata: see their Stories.
113. The Crown talked about its strong preferences with respect to the large natural group that the other tangata whenua groups in Tāmaki Makaurau might join. See the following in Rachel Houlbrooke, supporting papers to brief of evidence (doc A38(a)): Letter from Office of Treaty Settlements to Tiwana Tibble, 17 June 1999 (DB8); Letter from the Office of Treaty Settlements to (unknown), 1 July 2003 (DB10); Letter from the Office of Treaty Settlements to Pamera Warner, 21 October 2003 (DB27); Letter from Minister's Office to Lou Paul, 30 June 2004 (DB31); Letter from Minister's Office to Lou Paul, 21 February 2005 (DB37); Letter from Minister's Office to Lou Paul, 16 March 2006 (DB39); Letter from Minister's Office to Mark Stevens, 29 June 2004 (DB48); Email from the Office of Treaty Settlements to Emily Karaka, 12 October 2005 (DB57); Letter from the Office of Treaty Settlements to Mohi Manuka, 30 September 2003 (DB74); Letter from the Office of Treaty Settlements to M Peti, 29 January 2004 (DB78); Letter from the Office of Treaty Settlements to Hori Mariner, 4 October 2004 (DB80); Letter from the Office of Treaty Settlements to Rima Edwards, 24 November 2006 (DB203).
114. Rachel Houlbrooke, brief of evidence, 26 February 2007 (doc A38), para 56
115. Ibid, p 17
116. The Crown Congress Joint Working Party was a joint venture between the Crown and the New Zealand Māori Congress. The Crown representatives on the Joint Working Party were employees of the Treaty of Waitangi Policy Unit, which later became known as the Office of Treaty Settlements.
117. Te Warena Taua said in response to questioning by the Tribunal that the following groups would comprise part of a large, natural group whose common descent was through their Waiōhua ancestry: Te Uringutu, Ngaoho, Te Taoū, Ihumatao, Te Kawerau ā Maki, Ngāti Te Ata, Ngāti Tamaoho, Ngāi Tai, Ngāti Pohua of Waiōhua, Te Uri Karaka (called Ngāti Paoa now), Ngāti Pao, Ngāti Pare (part of Te Akitai).
117. Rachel Houlbrooke said that by the end of 2002, the Crown had ascertained that there was sufficient research on the public record to enable Ngāti Whātua o Ōrākei and the Crown to proceed to settlement: Rachel Houlbrooke, brief of evidence, 26 February 2007 (doc A38), paras 53–54.
118. Ibid, para 41
119. Document A67, DB10, para 8
120. The indications in the *Red Book* of the criteria that groups need to meet to get into negotiation are all very general. For example, see pp 41 and 44.
121. In the documents provided by the Crown just before completion of this report, it is revealed that the funding agreed for Ngāti Whātua o Ōrākei to achieve an agreement in principle was $114,000 (doc A67, DB17, p 4 and DB23, p 1). However, this was the figure on 7 August 2003, when it was envisaged that an agreement in principle would be achieved by late 2004. We do not know whether funding was later increased, but we assume that it would have been.
122. Questioning at hearing, hearing recording, 14 March 2007, track 3
123. Tiwana Tibble, response to questioning by the Tribunal, hearing recording, 13 March 2007, track 4
124. See section entitled 'What was at issue?'
125. Document A38(a), DB10 and DB104
126. Ibid
127. Rachel Houlbrooke, response to questioning by Kathy Ertel, hearing recording, 14 March 2007, track 4
128. The *Red Book* says that the Crown will help claimants with certain expenses, and these include the costs of pre-negotiations – obtaining a mandate (payable once the Crown recognises the mandate), agreeing terms of negotiation, and starting formal negotiations: *Ka Tika ā Muri, Ka Tika ā Mua*, p 54.

CHAPTER 3

Ngā Hua/Outcome

Introduction

In chapter 2, we examined the process by which the Crown dealt with the interests of other tangata whenua groups in negotiating an agreement in principle between the Crown and Ngāti Whātua o Ōrākei. In this chapter, we look into the outcome of that process – the redress package proposed by the agreement in principle. Redress is the word the Crown uses 'for all the ways the Crown can make amends for the wrongs it has done'.[1]

The other tangata whenua groups in Tāmaki Makaurau have a number of concerns with the proposed redress. Generally, there is concern that Ngāti Whātua o Ōrākei, by being the first group in Tāmaki Makaurau to settle its Treaty grievances, will obtain advantages that cannot be matched by later settlements with the other groups.

They also expressed concern about:

- the agreed historical account's failure to mention any tangata whenua group in Tāmaki Makaurau other than Ngāti Whātua o Ōrākei;
- the proposal to vest in Ngāti Whātua o Ōrākei exclusively the fee simple estate in Maungakiekie (One Tree Hill), Maungawhau (Mount Eden Historic Reserve), and Puketāpapa (Winstone Park Domain, Mount Roskill), thereby precluding other tangata whenua groups from obtaining any redress relating to those maunga in their future Treaty settlements, despite the importance of the maunga to all tangata whenua groups in Tāmaki Makaurau;
- the proposal to grant Ngāti Whātua o Ōrākei non-exclusive cultural redress in certain sites, thereby precluding the use of those sites as exclusive redress for other tangata whenua groups, even though there has been no thorough investigation of other groups' interests in them;
- the proposal to grant Ngāti Whātua o Ōrākei a right of first refusal over numerous Crown-owned properties in central Auckland and on the North Shore, without considering other groups' potential cultural interests in the properties, and leaving unanswered the question as to how the Crown can provide comparable redress to other tangata whenua groups whose claims may prove to be similarly serious; and
- the proposal that the Crown sell to and lease back from Ngāti Whātua o Ōrākei $80 million of North Shore Defence Force land, with the purchase price to be set off substantially against a rental holiday to the Crown, leaving unanswered the question as to how the Crown can provide comparable redress to other tangata whenua groups in Tāmaki Makaurau whose claims may prove to be similarly serious.

In this chapter, we:

- outline the Office of Treaty Settlements' policy on the different components of settlement redress;
- set out the cultural and commercial components of the Ngāti Whātua o Ōrākei settlement proposal, as contained in the agreement in principle;
- explain the concerns of the other tangata whenua

groups about the proposed redress for Ngāti Whātua o Ōrākei; and
- explain the Crown's rationale for each of the contested components of the proposed settlement package.

The Components of Settlement Redress

The Office of Treaty Settlements' policy manual *Ka Tika ā Muri, Ka Tika ā Mua* (the *Red Book)* explains that a typical settlement package comprises the Crown apology; the financial and commercial redress; and the cultural redress.[2]

The Crown apology

The Crown apology includes the historical account; the Crown's acknowledgements of Treaty breaches; and its formal statement of regret for the injustices and Treaty breaches suffered by the claimant group. These three elements of the apology are interrelated. The statement of regret is 'a clear response to the matters set out in the historical account and Crown acknowledgements', and its scope and language 'should reflect the seriousness of the grievances for which the Crown apologises, and the nature of the settlement.'[3]

Cultural redress

Cultural redress recognises 'the claimant group's spiritual, cultural, historical or traditional associations with the natural environment, sites and areas within their area of interest.'[4] It does not form part of the redress quantum, for it is made up of such items as Crown gifts of wāhi tapu and the acknowledgement of the settling group's rights to co-manage, or to be involved in statutory processes affecting, particular areas. Cultural redress, which can be either exclusive or non-exclusive in nature,[5] aims to meet the following 'linked interests':

- protection of wāhi tapu (sites of spiritual significance) and wāhi whakahirahira (other sites of significance) possibly through tribal ownership or guardianship;
- recognition of claimant groups' special and traditional relationships with the natural environment, especially rivers, lakes, mountains, forests, and wetlands;
- giving claimant groups greater ability to participate in management and making decision-makers more responsible for being aware of such relationships; and
- visible recognition of the claimant group within their area of interest.[6]

Whereas the Crown apology and financial and commercial redress are clearly linked to the nature and extent of the Treaty grievances being settled, there is no such link between the grievances and cultural redress. Rather, the *Red Book* states that cultural redress is important for 'contributing to a balanced settlement package that meets cultural as well as economic interests of the claimant group'.[7]

Rachel Houlbrooke, witness for the Office of Treaty Settlements', put it this way in her evidence:

> [Cultural redress] recognises the losses suffered by historical grievances and the value placed by Māori on land and the natural environment.
>
> In broad terms, the Crown attempts to design a cultural redress package that includes a range of specific items of cultural redress spread across the wider claim area. In this way the various individual claimants within the overall claim umbrella are more likely to be accepting of the settlement offered.[8]

Exclusive cultural redress

The *Red Book* gives no clear explanation of the Crown's policy on providing exclusive cultural redress to a mandated group when there are other tangata whenua groups

in the settlement area. Information is scattered through different sections of the book, making it difficult to get a coherent picture, and the statements made are either general or qualified.

For example, in the discussion of 'overlapping claims or shared interests', it says that exclusive redress in the form of the transfer of a particular site or property may not always be appropriate where there are overlapping claims.[9] But nothing more is said to explain when and why exclusive redress would, or would not, be appropriate.

The *Red Book* states that, where there are valid overlapping claims to a site or area, exclusive redress, whether commercial or cultural, will be offered only 'in specific circumstances'.[10] The example of specific circumstances that is given relates to licensed Crown forest land, which is commercial redress. The one statement in this section of the book that seems particularly relevant to maunga is as follows:

> Exclusive redress may also be considered where a claimant group has a strong enough association with a site to justify this approach (taking into account any information or submissions about the association of overlapping claimants with that site). This exception would apply to sites, such as wāhi tapu, where no other site could be used as alternative redress.[11]

This statement does not articulate how the concept of 'predominance' of interest might be applied to cultural redress, nor how 'predominance' might be assessed. It was the Crown evidence in this inquiry that revealed that the Office of Treaty Settlements applies the idea of predominance of interests when it is considering exclusive cultural redress in an area where there are 'overlapping' claims. At the hearing, the Tribunal asked Rachel Houlbrooke to point to where the applicants could have known that, where there are a number of tangata whenua groups, the Crown might offer an iconic maunga as exclusive cultural redress to one group because the Crown considered its interests predominant.[12] Ms Houlbrooke could point to nothing in the materials available. She was asked to comment on the fact that, indeed, her letter of 1 July 2003 gives an entirely contrary impression. It says:

> 11. The Crown can only settle the claims of the group with which it is negotiating, not the claims of other groups with overlapping interests. We anticipate that other claimant groups may be able to negotiate their own settlements with the Crown. *In settling the claims of one group, the Crown does not seek to determine which group has a predominant interest in a general area. Rather, the Crown recognises that a number of groups may have interests in the same general area. The settlement process is also not intended to establish or recognise claimant group boundaries*. [Emphasis added.][13]

Ms Houlbrooke replied that the highlighted passage was intended to mean that the Crown does not determine whether a group has a predominant interest in 'the wider region'.[14] The passage does not mean that the Crown will not determine who had the 'predominant interest' in iconic maunga. In fact, said Ms Houlbrooke, when the Office of Treaty Settlements is considering 'the provision of exclusive cultural redress, the issue of which group has a predominant interest *is* one that the Office of Treaty Settlements does focus on'.[15]

Unfortunately, though, this indication by Ms Houlbrooke in response to questions at the hearing was the first that the Tribunal, or any of the other tangata whenua groups, knew of this aspect of policy. Apparently, where there are competing interests in a site of cultural significance, the Office of Treaty Settlements will conduct its own assessment of whether the settling group's interests are predominant. If the officials think that they are, this is a basis for its being offered to that group as exclusive cultural redress. Obviously, when that occurs, no other groups with interests in the site can subsequently receive any cultural redress in relation to it.

Financial and commercial redress

Financial and commercial redress is the part of the settlement that is given a monetary value, called 'the redress quantum'. More specifically, 'financial redress' refers to the portion of the total settlement that the claimant group receives in cash, while 'commercial redress' refers to any Crown assets that contribute to the total redress quantum.

The *Red Book* states that the total redress quantum 'should relate fundamentally to the nature and extent of the Crown's breaches of the Treaty and its principles.'[16] Thus, like the Crown apology, the redress quantum is clearly related to the Treaty breaches that have caused the grievances that are being settled. It does not, however, provide full compensation for the effects of those grievances. Such compensation would be neither calculable nor affordable.[17] Instead, financial and commercial redress contributes 'to re-establishing an economic base as a platform for future development'.[18]

Properties that are made available for commercial redress are generally regarded as being substitutable: they do not have any particular cultural significance or other connection with the Treaty claims that are being settled. The *Red Book* makes particular reference to situations where there are 'overlapping' claims:

> Claimant groups can only receive commercial assets if they are in their area of interest, but sometimes other claimant groups have claims that cover the same area. In such cases of overlap, the Crown will only transfer properties where these overlaps have been addressed by the claimant groups or where it is able to offer similar properties to the overlapping group of groups.[19]

Rights of first refusal

One possible element of a redress package that is commercial in nature but is not included in the redress quantum, is a right of first refusal over property owned by the Crown or a Crown entity.[20] A right of first refusal is a form of exclusive redress: once it is given to one group, no other group can be given rights in the subject property, because any other rights would be incompatible with the right of first refusal. No doubt that is the reason why the *Red Book* states that a right of first refusal is not usually available on a property 'in an area subject to unresolved overlapping interests between claimant groups'.[21]

Rachel Houlbrooke explained at the hearing that the Crown treats rights of first refusal as having no financial value, and so these rights are not included in the redress quantum.[22] We look at the valuation of rights of first refusal later in this chapter.[23]

The Proposed Cultural and Commercial Redress

Cultural redress

As cultural redress for Ngāti Whātua o Ōrākei, the agreement in principle proposes that:

- The Crown will vest in the Ngāti Whātua o Ōrākei Governance Entity[24] the fee simple estate in four sites 'of significant historical and cultural importance to Ngāti Whātua o Ōrākei',[25] namely, Maungakiekie (One Tree Hill), Maungawhau (Mount Eden Historic Reserve), Puketāpapa (Winstone Park Domain, Mount Roskill) and the Purewa Creek Stewardship Area. These sites will be transferred on the basis that:
  - existing rights of public access and use will be protected through legislation;
  - the current reserve status under the Reserves Act 1977 remains over the sites;
  - current leaseholders' rights, and interests of third parties, will be protected;[26] and
  - a joint management body comprising equal members of Ngāti Whātua o Ōrākei and the Auckland City Council will be established to manage the sites.[27]

- The Auckland City Council will give the Ngāti Whātua o Ōrākei/Auckland City Council joint management body an advisory role in relation to the management of Owairaka (Mount Albert Domain), Ohinerau (Mount Hobson Domain), Taurangi (Big King Recreational Reserve), and Te Kopuke (Mount Saint John Domain). This advisory function will be achieved through a memorandum of understanding between Ngāti Whātua o Ōrākei Governance Entity and the Auckland City Council.[28]
- The Crown will provide statutory acknowledgements[29] over Owairaka, Ohinerau, Te Kopuke, Taurangi, Otahuhu (Mount Richmond Domain), North Head Historic Reserve,[30] and, possibly, over the land held for Defence purposes at Kauri Point,[31] and over Mount Victoria and Kauri Point Domain.[32]
- The Crown will issue protocols[33] to the Ngāti Whātua o Ōrākei Governance Entity via the Ministers of Conservation, Fisheries, and the Arts, Culture and Heritage.[34]
- The Minister in Charge of Treaty of Waitangi Negotiations will send letters to the Auckland City Council, Auckland Regional Council, North Shore City Council, Manukau City Council and Waitakere City Council, encouraging each to enter into a memorandum of understanding with Ngāti Whātua o Ōrākei about its interaction with the Ngāti Whātua o Ōrākei Governance Entity.[35]
- The Crown undertakes to explore changing:
  —the existing place name One Tree Hill to the dual place name Maungakiekie/One Tree Hill;
  —the existing place name Mount Eden to the dual place name Maungawhau/Mount Eden; and
  —the existing place name Purewa Creek to Pourewa Creek.[36]
- The Crown might provide non-exclusive redress relating to Rangitoto and Motutapu. It is said that a decision about this will be made after discussion between the Crown and the Ngāti Whātua o Ōrākei Trust Board and consultation with other relevant claimant groups.[37]

Financial and commercial redress

The financial and commercial redress package proposed by the agreement in principle comprises:

- Financial redress of $10 million, which includes $2 million received by Ngāti Whātua o Ōrākei as redress for the 1993 railways settlement.[38]
- The opportunity to purchase at market value at the time of sale surplus Crown land, through a right of first refusal 'that covers the core Ngāti Whātua o Ōrākei area in central Auckland',[39] for a period of 100 years[40] (see map 4, facing page 1).
- The opportunity to purchase up to $80 million worth of land underneath the residential Naval properties owned by the New Zealand Defence Force on the North Shore.
- A right of first refusal for a period of 100 years over the remainder of the North Shore Naval housing[41](see map 4).
- A right of first refusal for a period of 100 years over four police stations in West Auckland, namely, the Henderson, Te Atatu, Massey and New Lynn Police Stations[42] (see map 4).
- Possibly, a right of first refusal over some Housing New Zealand Corporation properties within the Right of First Refusal Area. It is said that a decision about this will be made after Housing New Zealand Corporation has explored the possibility.[43]

A final point about the agreement in principle is that it states, in paragraph 64, that the legislation that implements the Ngāti Whātua o Ōrākei settlement will provide for the removal of certain statutory protections[44] on land in the Specified Area (the same as the Right of First Refusal Area). It also provides that the landbanking arrangements in relation to Ngāti Whātua o Ōrākei will cease.

What Do the Applicants Object To?

Agreed historical account

As we have seen in chapter 2, the other tangata whenua groups in Tāmaki Makaurau criticised the methodology by which the Office of Treaty Settlements informed itself historically, and formulated the agreed historical account. In addition, they objected to the omission from the account of any reference to tangata whenua groups other than Ngāti Whātua o Ōrākei. This is because not mentioning the other groups implies:

- that they have no presence in Tāmaki Makaurau;
- that their claims do not need to be taken into account in considering Ngāti Whātua o Ōrākei's claims; and
- that because Ngāti Whātua o Ōrākei's Treaty breaches have been acknowledged, any claimed breaches by other groups that contradict Ngāti Whātua o Ōrākei's claims have been rejected, even though the other groups' claims have not been investigated.

Another element of the agreement in principle increased the other groups' anxiety. Included in it, in an attachment entitled 'Agreed Historical Account', is a part called 'B. Preamble: Ngāti Whātua before 1840'. This four-page account of Ngāti Whātua o Ōrākei's historical relationship with the area under negotiation, and of their grievances, is written exclusively from Ngāti Whātua o Ōrākei's perspective. Its status in the document is not really clear,[45] but because of the title of the attachment, the inference is that it forms part of the agreed historical account.

The Crown and Ngāti Whātua o Ōrākei filed evidence in this hearing clarifying that the Preamble is not in fact part of the agreed historical account, despite its inclusion in an attachment with that name. It was written solely by Ngāti Whātua o Ōrākei. Ms Houlbrooke said that the Preamble is similar to the Prefaces incorporated in previous deeds of settlement: 'where the Crown has agreed for claimant groups to record waiata, whakapapa or associations with their tribal area before 1840, much of which is grounded in oral history'.[46]

Focusing once more on the real agreed historical account, the applicants said that, once the account is incorporated into legislation, its exclusive focus on Ngāti Whātua o Ōrākei and the Crown will acquire an enduring and official status that will be too easily misunderstood. The risk is that people who do not know the history of Tāmaki Makaurau will read the agreed historical account in the Ngāti Whātua o Ōrākei settlement legislation as if it is the complete, authorised, account of Māori relationships with the Crown in the area. They will then see Ngāti Whātua o Ōrākei in that light, with a correspondingly adverse effect on the mana of the other tangata whenua groups in Tāmaki Makaurau.

Associate Professor Belgrave and Dr Young put it this way:

> a statement to be included in statute that confirms the occupation rights of one group alone and allows them to be interpreted very generously will inevitably be seen by others with their own traditions of occupation as further evidence of an attempt to deny their traditions.[47]

Graeme Murdoch, giving evidence for Te Kawerau ā Maki, explained that he and kaumātua of Te Kawerau ā Maki see the agreed historical account as far more than a record of the interaction between the Crown and Ngāti Whātua o Ōrākei:

> The AIP and the AHA are seen as providing a permanent and official statement about the Māori history of [the] region. These documents and the agreements, protocols, and other redress that follow from them, have significant implications for the mana of the iwi and hapū of the region, . . . and for their descendants' ability to exercise kaitiakitanga over their ancestral lands and other taonga.[48]

Exclusive cultural redress

We heard strong objections to the proposal to vest three maunga exclusively in Ngāti Whātua o Ōrākei. These

objections were differently expressed. Some said directly that, contrary to the Crown's assessment, Ngāti Whātua o Ōrākei does not have the 'predominant interest' in those iconic sites.[49] Most asserted that the cultural significance of the maunga to all tangata whenua groups in Tāmaki Makaurau means that their vesting in Ngāti Whātua o Ōrākei exclusively would improperly elevate that group's mana to the detriment of the other groups. Graeme Murdoch, for example, giving evidence for Te Kawerau ā Maki, said that while the Crown has a responsibility to settle well-founded Treaty claims:

> When it comes to actually meddling with mana and with current kaitiakitanga then it's a much more dangerous thing and I think they need to have far greater knowledge in front of them to do that. I made the point that normally a judge in the Land Court or the Tribunal would do that.[50]

The concerns really go to both process and outcome. This was evident in the arguments made by the Marutūāhu claimants. First, Paul Majurey contended that the proposal to vest the three maunga exclusively in Ngāti Whātua o Ōrākei is inconsistent with the Office of Treaty Settlements' own policy statements. Mr Majurey referred to a meeting between Marutūāhu representatives and the Claims Development Team of the Office of Treaty Settlements on 29 January 2003. The team gave a Powerpoint presentation that included this information about exclusive redress:

> 'Exclusive redress' – eg transfer of sites and assets, only used if:
>
> —no overlapping interests, or
>
> —all parties agree, or
>
> —redress is substitutable[51]

On the basis that none of the criteria listed was met in the present case, Mr Majurey cross-examined Ms Houlbrooke about whether that statement accurately reflected Crown policy, and whether Marutūāhu were entitled to rely on it. Ms Houlbrooke replied that the Crown policy could not be reduced to three bullet points because there were subtleties in the way it was applied. She agreed that Marutūāhu were entitled to rely on the presentation as representing Crown policy, but added that she assumed the *Red Book*, with its fuller explanation of exclusive and non-exclusive redress, had also been given to the Marutūāhu claimants at the meeting.[52] (Although, as we noted above, we do not think that the *Red Book* does provide clear information about what happens where cultural redress sites are subject to competing claims.)

Mr Majurey also put to Ms Houlbrooke the proposition that the Crown should take a 'conservative, cautionary approach' before conferring exclusive rights in maunga, because of the huge importance placed upon maunga by Māori and the Crown's Treaty duty of active protection. She agreed.[53] Mr Majurey then asked Ms Houlbrooke to comment on an extract from a Crown document. The extract expresses a fairly tentative view on the strength of Ngāti Whātua o Ōrākei's interests in Maungawhau (Mount Eden) vis a vis those of Marutūāhu. It says, 'On balance, Ngāti Whātua would appear to have the stronger historical interests in relation to Maungawhau'.[54]

Was this, Mr Majurey asked, the strongest statement in the documents about the predominance of Ngāti Whātua o Ōrākei's interests in Maungawhau? Ms Houlbrooke could point to nothing stronger.

Mr Majurey also challenged the Crown's rationale for including Puketāpapa (Mount Roskill) in the exclusive cultural redress. He noted that this proposal was added to the agreement in principle belatedly, after the Cabinet Business Committee had approved the other two maunga as exclusive redress. The Committee's Minute records that Mount Roskill would be transferred on the same basis as those maunga only 'if this is required to reach a settlement with Ngāti Whātua o Ōrākei in the final discussion of settlement redress'.[55] Mr Majurey submitted that if Mount Roskill:

> is truly a maunga with which Ngāti Whātua o Ōrākei has a predominant interest (a la the 'OTS test'), then it would have

been offered in a non-conditional manner (as occurred with Maungawhau and Maungakiekie).[56]

Other applicants observed that each culturally significant site is unique and has its own unique significance for the hapū associated with it. Exploring the implications of this for cultural redress in Treaty settlements, Crown counsel asked John McEnteer, witness for Hauraki claimants, whether those claimants had 'very many more' cultural redress properties in the wider Hauraki rohe than are situated within the Tāmaki isthmus.[57] Implicit in the question was the idea that the other groups could look elsewhere for sites of cultural significance to their wider kin group. Mr McEnteer rejected the idea that claimant groups could 'pick and choose' cultural redress from any of the culturally significant parts of their rohe, as if one site would substitute for another. He explained that he had helped organise a waka journey to the places of utmost significance in the Hauraki tribal area. The waka trip included:

> the Matakana Island area . . . and . . . around the peninsula and over to the barrier, Great Barrier Island, and through around the, we'd say Hauraki Gulf, Waiheke Island, and extremely importantly the North Head, and for it to pass and to be located if you like at North Head prior to its arrival very near the Ōrākei marae . . . [58]

He was making the point that the significance of the places in Tāmaki Makaurau was unique to Tāmaki Makaurau, for reasons unique to Tāmaki Makaurau. The Crown's approach, he said, revealed a lack of understanding of the 'basic precepts of what is tika.'[59]

Non-exclusive cultural redress

The offer to Ngāti Whātua o Ōrākei of non-exclusive redress in a site precludes any other tangata whenua group in Tāmaki Makaurau obtaining, in its own future Treaty settlement package, exclusive redress there.

This is of major concern to Ngāi Tai ki Tāmaki in relation to Rangitoto and Motutapu. Emily Karaka gave evidence of Ngāi Tai's relationship with the Department of Conservation through the Motutapu Outdoor Recreation Trust, which has a 50-year plan to revegetate the island, and to build a Ngāi Tai ki Tāmaki marae.[60]

Te Kawerau ā Maki identified Kauri Point, Mt Victoria and North Head as sites where Ngāti Whātua o Ōrākei's non-exclusive redress could unfairly limit their prospect of exclusive redress in the future.[61]

Other groups also pointed to the increased mana and local influence that Ngāti Whātua o Ōrākei will derive from being the 'first cab off the rank' in Tāmaki Makaurau. They said that Ngāti Whātua o Ōrākei's recognition through items of non-exclusive cultural redress would reinforce the notion that Ngāti Whātua o Ōrākei is the predominant or only tangata whenua group in Tāmaki Makaurau with whom central and local government bodies must work. It is important to other groups that they also continue to be recognised as kaitiaki in the region.[62]

Commercial redress, including the rights of first refusal, and the sale and leaseback arrangement

When it comes to commercial redress, the overriding concern of the other tangata whenua groups in Tāmaki Makaurau is that the Crown will not be able to offer them anything equivalent to what is on offer to Ngāti Whātua o Ōrākei. At times this prompted the claimant groups to ask questions about the value of the commercial and related redress that Ngāti Whātua o Ōrākei has already received and is now being offered. The point of those questions was not to suggest that Ngāti Whātua o Ōrākei might be getting a larger settlement than it should be getting. It was that the other tangata whenua groups need to be able accurately to assess the value to Ngāti Whātua o Ōrākei of the various elements comprising the redress. Only then can they ascertain whether the Crown retains the capacity to

replicate that redress in the event that their own claims are found to be comparable with those of Ngāti Whātua o Ōrākei.

In order to be assured that their own Treaty settlements will not be prejudiced by the Ngāti Whātua o Ōrākei settlement, the other tangata whenua groups in Tāmaki Makaurau want reliable information about:

- the Crown's ability to provide comparable redress to them once the commercial elements of the Ngāti Whātua o Ōrākei agreement in principle are implemented; and
- the value of any financial advantages that will accrue to Ngāti Whātua o Ōrākei as a result of its settling first, so that those advantages can be taken into account in the other groups' settlements.

It is the Crown's perceived reluctance to provide this information and, in some instances, to acknowledge its relevance, that lies at the heart of the concerns raised about the commercial redress proposed in the Ngāti Whātua o Ōrākei agreement in principle.

In summary, the concerns are these:

- there is insufficient information available to enable the other tangata whenua groups to analyse properly the commercial redress offered to Ngāti Whātua o Ōrākei;
- rights of first refusal have value for their recipients, and the value of the proposed rights to Ngāti Whātua o Ōrākei should be taken into account by the Crown when it is negotiating future Treaty settlements in Tāmaki Makaurau;
- benefits arising from being the first-settling group in an area should be taken into account when future Treaty settlements in the area are being negotiated;
- because of the uniqueness of the North Shore Naval land which is proposed as commercial redress for Ngāti Whātua o Ōrākei, the Crown will not be able to offer comparable redress in future to other tangata whenua groups in Tāmaki Makaurau;
- key elements of the North Shore Naval land proposals are uncertain and will not be certain until after a Deed of Settlement is signed, which prevents other tangata whenua groups in Tāmaki Makaurau from analysing the proposals at the time when their feedback is sought;
- the North Shore Naval land sale and leaseback arrangement is valuable to Ngāti Whātua o Ōrākei and this should be taken into account by the Crown when future Treaty settlements in Tāmaki Makaurau are negotiated;
- there are further uncertainties in the agreement in principle's commercial redress proposals, including whether paragraph 64 will be modified or abandoned, and this too prevents the other tangata whenua groups from properly assessing the proposed settlement; and
- rights of first refusal, which are exclusive commercial redress, are being offered to Ngāti Whātua o Ōrākei in areas where other tangata whenua groups have interests and some of the sites that are proposed as subject to rights of first refusal are sites of particular cultural significance to others.

We elaborate these in turn.

Insufficient information to analyse proposed redress

For the purposes of the Tribunal's hearing, the Crown produced maps that identified not only the properties in Tāmaki Makaurau over which it is proposed to offer a 100-year right of first refusal to Ngāti Whātua o Ōrākei, but also the other Crown-owned properties over which a right of first refusal could be granted to other tangata whenua groups in future. Missing, however, was any detailed information about any of the properties, including their current value. Also missing was an account of how the properties over which it is proposed to give Ngāti Whātua o Ōrākei a right of first refusal were chosen. This fuelled concerns that Ngāti Whātua o Ōrākei knew more than any other group about the value of the properties over which it was being offered a right of first refusal, and about the

likelihood that those properties would become surplus to the Crown's needs sooner than others.

In questioning, John McEnteer, for Hauraki claimants, confirmed that the other tangata whenua groups need: an analysis of what was being offered to Ngāti Whātua o Ōrākei, an analysis of what remained 'on the Crown's books' for use as possible redress in future, and a comparison of those things. They need it 'because how do we know that we're not being offered, in terms of the Crown's current position, the crumbs? I mean you just don't know.'[63]

Value to recipient of rights of first refusal

Mr McEnteer also commented on the Crown's practice of classifying rights of first refusal as 'value neutral' in settlements. (This classification means that, for accounting purposes within the Crown, no monetary value is ascribed to them.) Mr McEnteer said that, although the Crown does not ascribe a value to rights of first refusal and so does not count them in the redress quantum, the rights are capable of being valued using a combination of merchant banking and valuation expertise.[64] Crown counsel cross-examined Mr McEnteer on this, suggesting that the 'value neutral' classification was an accurate reflection of the fact that the holder of a right of first refusal cannot predict when or whether a Crown property might become surplus. This was Mr McEnteer's response:

> any group in fact looking at first of all negotiating the location of an RFR will have in its mind the sequencing of properties of the Crown and the way in which they may fall to be surplus. Because that is a direct route to increasing the capital value of the settlement and the wealth, and the economic wealth, of the iwi. So first off you would look at a Right of First Refusal and endeavour to negotiate that in a manner that provided maximum commercial return. Secondly, while it is not entirely predictable, the precise sequence that the Crown may determine properties to be surplus and therefore available to exercise that right, throughout a relatively lengthy negotiation period and by the particular tribal group undertaking a range of work, one of which I've referred to as a Crown asset audit, you are able to determine the best assumptions or the best scenario to look at the fall of those properties coming due.[65]

Mr McEnteer referred to certain school and hospital properties as having a long lead time before they finally become surplus, and of the affected communities knowing the properties' fate well in advance:

> It's not just a sort of willy nilly sort of arbitrary thing where somebody wakes up one day in the Crown and says we'll flick that property off. It's not that at all. It doesn't work like that.[66]

Benefits of settling first

More generally, Mr McEnteer discussed the financial advantages that a group obtains by reaching a Treaty settlement ahead of others. He contended that Ngāi Tahu's $170 million settlement was widely known to have been worth tens of millions of dollars more than that, even by the time it was implemented.[67] He also referred to the Auckland Railway Station, over which Ngāti Whātua o Ōrākei had exercised a right of first refusal, saying that Ngāti Whātua o Ōrākei's involvement with the development of that site 'has gone straight to the bottom line of that organisation [ie Ngāti Whātua o Ōrākei] now being a multi-million dollar business'. He said that the present offer to Ngāti Whātua o Ōrākei – and particularly the rights of first refusal over prime property in central Auckland and on the North Shore – would enable Ngāti Whātua o Ōrākei to use the opportunities and money available to it now and in the future to create more wealth and opportunities:

> in commercial property terms, if you are the first to get your hands on the property, you have a considerably greater advantage than those who might follow later because you get to pick the eyes out of the portfolio. . . . the entity that settles first, who's able to obtain a property and say pass it on in some development way and make a margin of say one or two, three

> or five million on a particular transaction, they of course have the use of that fund sitting in a bank at say 7.5 percent for at least 10 years by the time at the current rate of settling with OTS we could be waiting a long, long time.[68]

In sum, Mr McEnteer contended that it is possible to value the benefits arising from being the first group to settle. In order for later-settling groups to be treated equitably, the detriment to them of settling later must be factored into the commercial and related redress ultimately offered to them by the Crown. At present, all that is taken into account by the Crown in later settlements is the effect of inflation on the financial (cash) redress provided in an earlier Treaty settlement.[69]

Lack of certainty about operation of North Shore Naval land redress

A pervasive concern about the agreement in principle's proposals for the North Shore Naval land was that, in light of the desirable location of the land and its residential use, the Crown would have nothing comparable to offer other tangata whenua groups in Tāmaki Makaurau in future Treaty settlements.[70] It was also said that there was too little information available about the agreement in principle's proposals for the North Shore Naval housing land to enable the other groups to assess their value to Ngāti Whātua o Ōrākei.

Certainly, the information generally available prior to the Tribunal's hearing did not disclose how the proposed sale and leaseback and right of first refusal arrangements for the North Shore Naval land would be implemented. Once those matters were clarified at the hearing, another concern was heightened. Since the proposed arrangements will not be finalised in key respects until after a Deed of Settlement is signed, the other tangata whenua groups' ability to assess them right now is adversely affected.

The Crown's evidence made plain that the proposed sale and leaseback arrangement would involve the transfer of ownership to Ngāti Whātua o Ōrākei of land beneath some of the Naval housing, to the value of $80 million,[71] together with a simultaneous lease in perpetuity of that land back to the Crown. Payment of an unknown proportion (up to 100 percent) of the $80 million purchase price would be effected by Ngāti Whātua o Ōrākei's grant of a rental holiday (of up to 35 years) to the Crown. As we explained above, the arrangement is not included in the Ngāti Whātua o Ōrākei redress quantum because, in Treasury terms, it is 'value-neutral' to the Crown.[72]

Grant Powell, counsel for Hauraki claimants, submitted that the Crown had provided inadequate information about the fact that Ngāti Whātua o Ōrākei would be purchasing the land without having to pay a significant proportion (perhaps all) of the $80 million purchase price in cash up front.[73] Ms Houlbrooke agreed that this 'mortgage-like' arrangement assisted mandated groups to acquire land and said that, now Ngāti Whātua o Ōrākei had negotiated this arrangement, other groups could expect to benefit from similar arrangements in future settlements.[74]

The agreement in principle also proposes that Ngāti Whātua o Ōrākei have a right of first refusal for 100 years over all of the North Shore Naval housing land that is not subject to the sale and leaseback arrangement. Ms Houlbrooke explained that there are about 35 hectares of Naval housing land on the North Shore, divided into 10 blocks, which are identified by street names and contain a total of about 120 houses. The number of properties to which the right of first refusal would apply is not yet known, however, because it is not yet known how much land will be included in the sale and leaseback arrangement. Once the land beneath the houses is valued, at the time the Deed of Settlement is signed, the land that is to be purchased for $80 million can be identified, and the sale and leaseback arrangement finalised. Ngāti Whātua o Ōrākei will have a right of first refusal over the balance of the land, should any of it become surplus to the Crown's requirements in the next 100 years.[75]

Value to Ngāti Whātua o Ōrākei of sale and leaseback arrangement

The other tangata whenua groups challenged the Crown's policy of not ascribing a value to any part of the North Shore Naval land proposal. Counsel for the Hauraki claimants particularly questioned the logic behind the conclusion that the sale and leaseback arrangement is value-neutral to the Crown when the Crown will not only lose the ownership of land but will also be liable to pay rent on it in perpetuity – a liability it does not have while it is the land's owner.[76] More generally, the Tribunal heard that the sale and leaseback arrangement will be of great value to Ngāti Whātua o Ōrākei in the future and that, to be fair relative to other tangata whenua groups in Tāmaki Makaurau, that value should be factored into their Treaty settlement negotiations.[77]

Uncertainty about other agreement in principle proposals

Paragraph 39 of the agreement in principle records the possibility that Housing New Zealand houses in the Ngāti Whātua o Ōrākei Right of First Refusal Area may also be subject to a right of first refusal. Housing New Zealand Corporation, and not the Crown, owns the houses. We understand that Housing New Zealand has not yet agreed to the concept of Ngāti Whātua o Ōrākei being offered a right of first refusal over some of its houses. There are in fact many critical questions at large. Will Housing New Zealand come to the party? What will the Crown (who owns Housing New Zealand and can direct it if it chooses) do if the Housing New Zealand Board says 'no'? If the Board says 'yes', how many houses will be included? And would other tangata whenua groups in Tāmaki Makaurau be able to get the same?[78]

These uncertainties are particularly germane because, as Ms Houlbrooke acknowledged, the Housing New Zealand portfolio of residential properties is the only source of real estate comparable to the North Shore Naval houses that is – or may be – available to the Crown for settling Treaty claims in Tāmaki Makaurau. The other tangata whenua groups need to know exactly which residential properties are proposed to be subject to rights of first refusal to Ngāti Whātua o Ōrākei so that they can properly assess the proposal, and the Crown's ability to provide comparable redress to them in future Treaty settlements.[79]

There is uncertainty about another important aspect of the agreement in principle. Paragraph 64b states that the Deed of Settlement will record Ngāti Whātua o Ōrākei's agreement that the legislation that implements the settlement will remove protective memorials on land in the Right of First Refusal Area.[80] The Crown now says that this provision is being reviewed,[81] but we do not know how long that will take, nor its outcome.

Memorials on land titles have been removed as part of Treaty settlements in Auckland before. John McEnteer drew the Tribunal's attention to the Finance Act 1995. Section 2 of that Act achieved in relation to six Newmarket properties what paragraph 64b proposes in the Ngāti Whātua o Ōrākei Right of First Refusal Area.[82] Needless to say, the other tangata whenua groups do not want this to happen again, but currently have no means of ascertaining whether it will.

Cultural concerns about exclusive commercial redress

The remaining concerns are different in kind from those outlined above. They concern the overlap between commercial redress offered to Ngāti Whātua o Ōrākei in the agreement in principle, and cultural concerns of other tangata whenua groups.

In questioning, Aiden Warren, counsel for Ngāi Tai ki Tāmaki, raised with Rachel Houlbrooke Ngāi Tai concerns about the offer of a right of first refusal to Ngāti Whātua o Ōrākei over an area including the Auckland High Court. He asked Ms Houlbrooke whether the Office of Treaty Settlements knew that the area near the High Court was a pā site that Ngāi Tai regarded as a possible item of cultural redress in their future Treaty settlement. Ms Houlbrooke

acknowledged that Ngāi Tai had informed the Crown that Ngāi Tai claimed interests in the area of today's High Court. She added that the sites within the Right of First Refusal Area were all commercial redress for Ngāti Whātua o Ōrākei. This prompted Mr Warren to ask if Ms Houlbrooke agreed that the claimants would not see the offer to Ngāti Whātua o Ōrākei as 'straight out commercial redress' in some circumstances. Ms Houlbrooke replied that Ngāi Tai had asserted cultural interests, and that the evidence it had provided was helpful.[83]

Counsel for Te Kawerau ā Maki, Mr Stephen Clark, drew attention to the proposal to give Ngāti Whātua o Ōrākei a right of first refusal over four West Auckland police stations. The stations are situated on the Hikurangi Block, and the original vendors of that block were not Ngāti Whātua o Ōrākei alone, but came from four tangata whenua groups.[84] Mr Clark submitted that Te Kawerau ā Maki asserts exclusive interests in West Auckland, and that the right of first refusal offer to Ngāti Whātua o Ōrākei gives them 'the first bite of the cherry and quarantines those properties for [Ngāti Whātua o] Ōrākei only.'[85]

What Does the Crown Say?

In a nutshell, the Crown's case is that it dealt fairly with 'overlapping claimants' in the pre-agreement in principle period. Now that the redress proposed for Ngāti Whātua o Ōrākei is on the table, the Office of Treaty Settlements will meet face-to-face with 'overlapping claimants' to hear their concerns, and address them. To the extent that there were process problems before the agreement in principle was released (and this is denied), there will be no lasting ill-effects because the proposed redress can, if necessary, be substantially changed. The Crown is 'genuinely open to changing its mind on aspects of the redress.'[86] For this reason, it was submitted that the Tribunal must exercise particular care in its examination of the Crown's conduct to date and not 'pre-empt the outcome of any substantive decisions yet to be made.'[87]

The Crown's openness to changing its mind about redress

In her evidence for the Crown, Rachel Houlbrooke referred to two Deeds of Settlement as examples of the Crown's openness to changing redress proposed in an agreement in principle. One was the Ngāti Awa settlement. Ms Houlbrooke said that, as a result of discussion with overlapping claimant groups after the agreement in principle was released, the proposed provisions for the site Kaputerangi and the Matahina Forest were changed.[88] While Kaputerangi was vested exclusively in Ngāti Awa, as had been proposed in the agreement in principle, the Deed of Settlement said that Ngāti Awa acknowledged the significance of the site to other iwi, and would state this in any published material it produced about the site.[89]

The other settlement referred to was with Ngāti Tama. There, four cultural properties that had been offered in the agreement in principle were left out of the Deed of Settlement.[90]

Agreed historical account

The Crown says that the omission from the agreed historical account of other tangata whenua groups is not intended to imply that Ngāti Whātua o Ōrākei is the only group with historical interests. Rather, the Crown prefers not to mention groups who are not party to the negotiations because they may not agree with the text or interpretation that is developed.[91] The Crown's stance was supported by Professor David Williams, witness for Ngāti Whātua o Ōrākei:

> to say that the Agreed Historical Account does not speak of what happened with other people is beside the point because

what happened to other people will be set out on equivalent later occasions when those other claimants respectively perform the equivalent exercise. It is all very well to complain that the history presented is a slanted history of all of Tāmaki. It does not purport to be a history of Tāmaki.[92]

For the Crown, Rachel Houlbrooke rejected the argument that the agreed historical account implicitly dismisses Treaty claims of other tangata whenua groups in Tāmaki Makaurau without proper investigation. She emphasised that an agreed historical account will be part of every settlement, and that it supports the acknowledgements of Treaty breach made by the Crown to the settling party. Ms Houlbrooke would not accept that statements about Treaty breach as between the Crown and Ngāti Whātua o Ōrākei necessarily have implications for other tangata whenua groups with claims in the same district.[93] Crown counsel pursued this issue in his questioning of Marutūāhu witness, Associate Professor Michael Belgrave. The witness stated his view that, by providing exclusive redress in an area to one group, the Crown was making a decision about other groups' Treaty claims in that area. Mr Andrew then sought, but failed to obtain, Associate Professor Belgrave's agreement with the proposition that the 'key decision' being taken by the Crown was a limited one, about the redress that would be available to the other groups.[94]

Exclusive cultural redress

The nub of the Crown's argument with respect to exclusive cultural redress was that its offer to Ngāti Whātua o Ōrākei is fair because:

- as regards the three maunga offered as exclusive redress, Ngāti Whātua o Ōrākei interests were predominant in the years around 1840;
- offering Ngāti Whātua o Ōrākei exclusive interests in three maunga is a fair share, as it leaves capacity to offer to other tangata whenua groups both exclusive and non-exclusive redress in other maunga; and
- the other tangata whenua groups connect to important cultural sites outside Tāmaki Makaurau, whereas Ngāti Whātua o Ōrākei's interests are concentrated in Tāmaki Makaurau, so it is fair to give Ngāti Whātua o Ōrākei particular recognition in iconic sites there.

Ms Houlbrooke said in evidence that the Crown needs to be conservative in its approach to maunga as redress because of the great importance placed by Māori upon maunga.[95] The Office of Treaty Settlements *was* conservative: Ngāti Whātua o Ōrākei originally sought exclusive cultural redress in relation to nine sites but the two sites of highest priority for Ngāti Whātua o Ōrākei were Maungakiekie and Maungawhau.[96]

Redress proposed for Ngāti Whātua o Ōrākei leaves enough for other groups

Defending its decision to offer Ngāti Whātua o Ōrākei three maunga as exclusive redress, the Crown said that this still leaves three maunga in Tāmaki Makaurau for the other groups. Mount Wellington (Maunga Rei), Mount Mangere, and Rangitoto are potentially available as exclusive redress in settlements with other tangata whenua groups, plus other sites that can be the subject of non-exclusive redress.[97] Musick Point is among the remaining 'iconic cultural redress sites'.[98]

Fairness of distribution thus seemed to be a value that the Crown thought important in the allocation of exclusive cultural redress.

Other groups have access to cultural sites outside Tāmaki Makaurau

A companion idea is the third point made by the Crown: that those tangata whenua groups in Tāmaki Makaurau whose rohe extend beyond the boundaries of the Ngāti Whātua o Ōrākei settlement area might need fewer cultural

redress sites within that area, because they have access to others elsewhere.[99] In closing submissions, Crown counsel said:

> In considering the question of retention of capacity for redress, the Crown must obviously look broadly at this issue having regard to the various iwi and hapū involved. While the issue of retention of capacity for redress must be considered and applied in relation to Tāmaki Makaurau, it is relevant, as part of any informed Crown assessment, to have regard to the fact that a number of the overlapping groups, particularly those who claim extensive and large areas of interest, may well have the advantage of a greater range and number of potential Crown assets available to them as redress. Submissions to the contrary, suggesting that these factors are irrelevant, are rejected.
>
> As Professor Williams noted in his evidence, the number of cultural redress sites available on the Tāmaki Isthmus is very limited.[100]

Cultural sites are about tikanga and group identity. The relationship between tikanga and the notion of fair distribution of exclusive interests in iconic sites was entirely unclear. Also unclear is why the Crown regards Ngāti Whātua o Ōrākei, a hapū of Ngāti Whātua nui tonu, as requiring cultural redress sites on the Tāmaki isthmus, whereas the other tangata whenua groups, who similarly connect to wider tribal groupings, can look to those wider interests for their cultural redress.

We also note that Ngāti Whātua o Ōrākei did not indicate any commitment to acknowledging others' interests in the three maunga that are proposed to be vested exclusively in Ngāti Whātua o Ōrākei. Speaking of the proposed redress package, Professor David Williams said:

> it leaves all the special maunga of other people well intact. Maunga Rei is not sought in any form of redress. It has not been sought by Ngāti Whātua even although, if you had a Tribunal hearing Ngāti Whātua would claim it and would say there's a tuku from our ancestors to Ngāti Pāoa and you'd have all of that argued out. But Ngāti Whātua didn't do that. They said 'we're generous. We'll not make claims there. We'll take a narrow approach because we know the Crown has a limited offer that they can make to us because Mr Graham and his government set a benchmark, the Labour government has accepted that benchmark, there is little available.' The Crown has to accept that policy but we're dealing with process. Process is the right of Ngāti Whātua to achieve a small practical outcome which it's entitled to do and I think that is what's tino rangatiratanga.[101]

Non-exclusive cultural redress

The Crown did not accept that other tangata whenua groups needed to be concerned that the statutory acknowledgements and other arrangements recognising Ngāti Whātua o Ōrākei would lead central and local government bodies to elevate Ngāti Whātua o Ōrākei at the expense of other groups. Those arrangements for Ngāti Whātua o Ōrākei could be replicated for the other groups when they reached their own settlements. In some cases, there were arrangements in place already recognising the role of other tangata whenua groups. The Department of Corrections has understandings with various tangata whenua groups in relation to Mount Eden prison, and there is an arrangement in place between the Waitakere City Council and Te Kawerau ā Maki. Further, Ms Houlbrooke said that she had met with all four local authorities in Auckland on a number of occasions and had explained to them that Ngāti Whātua o Ōrākei's recognition in a settlement should not impact negatively on their recognition of other tangata whenua groups in Tāmaki Makaurau.[102]

Commercial redress

Commercial redress for Ngāti Whātua o Ōrākei leaves plenty for others

The Crown's principal response to the concerns about the proposed commercial redress was to highlight how many of the Crown's properties in Auckland were not being offered to Ngāti Whātua o Ōrākei.

Ngāti Whātua o Ōrākei's proposed Right of First Refusal Area in central Auckland comprises only 20 percent of its Area of Interest, and even in that smaller area, parts had been excluded out of deference to others' interests. Also, Ngāti Whātua o Ōrākei's Area of Interest does not include Te Paeoterangi Block, in recognition of the interests of Te Kawerau ā Maki. Thus, other tangata whenua groups in Tāmaki Makaurau have a much greater range of redress items available to them, both cultural and commercial, than has been offered to Ngāti Whātua o Ōrākei.[103]

Current value of right of first refusal properties not relevant

The Crown also contended that, in order to compare the Crown's right of first refusal offer to Ngāti Whātua o Ōrākei with future offers to other tangata whenua groups, it is not necessary to have information about the current value of all the properties over which rights of first refusal might be granted now or in future. Rachel Houlbrooke said that mechanisms such as rights of first refusal provide opportunities for a claimant group to access land through the settlement process, but at the market value at the time the property becomes surplus to Crown requirements. It is only then that the right of first refusal redress becomes 'real'. Before that, there is no telling if or when it might happen. The right time to value a right of first refusal property is therefore when it becomes surplus.

The Crown also told us that the Crown has approximately 180 other Crown properties in Tāmaki Makaurau that could be subject to rights of first refusal for other tangata whenua groups. The properties comprise:

> a large number of schools, there are a number of police stations, there are several court buildings, there are some other things like and Child, Youth and Family houses. There is a generally equivalent spread though of the nature of these properties across the area of interest.[104]

These properties are 'of a relatively similar nature' to the approximately 125 properties in Ngāti Whātua o Ōrākei's Right of First Refusal Area.[105] Rachel Houlbrooke said that the other tangata whenua groups do not need to know the current value of these properties in order to make a comparison. They need to know how many remain for future settlements left, and whether they are well spread through the district.[106]

The possibility of redress comparable to North Shore Naval housing land

As discussed above ('Uncertainty about other agreement in principle proposals', p75) Ms Houlbrooke responded to questions about the availability for future settlements of Crown property comparable to the North Shore Naval housing land by referring to land owned by Housing New Zealand Corporation. She raised the possibility of rights of first refusal being available for others over Housing New Zealand Corporation properties. She said there was 'a significant number' of Housing New Zealand properties on the North Shore.[107] She agreed, however, that Housing New Zealand's stance on this was as yet unknown. Documents filed after the hearing revealed that Housing New Zealand had been asked more than a year earlier (before February 2006) about the possibility of rights of first refusal being given over its properties.[108]

The Crown's negotiating position has mitigated the 'first cab off the rank' advantage

Ms Houlbrooke said that the Crown had consistently borne in mind the interests of other tangata whenua groups when

responding to Ngāti Whātua o Ōrākei's requests for particular redress. Thus, although Ngāti Whātua o Ōrākei was the first cab off the rank, that did not mean that it got everything it asked for. Although Ngāti Whātua o Ōrākei had asked for the Right of First Refusal Area to be extended to the North Shore, the Crown, mindful of other groups, had not agreed.[109] Also, Ngāti Whātua o Ōrākei had wanted a right of first refusal over more than the four police station properties in West Auckland but 'the Crown required a reduction in number out of deference to others.'[110]

Also relevant to the 'first cab off the rank' concerns, was Ms Houlbrooke's explanation of how inflation is taken into account to protect groups that settle later. The Crown looks at the effect of inflation on the financial redress component of the redress quantum and makes adjustments to ensure fairness in later settlements.[111] Financial redress is the cash component of the redress quantum only, so it does not include any property component like lease-back arrangements and rights of first refusal. Resisting the idea that these arrangements can be valued, Ms Houlbrooke cited Treasury policy.[112] This meant that the Crown did not engage with the notion that the benefits to Ngāti Whātua o Ōrākei of the sale and leaseback arrangement will increase over time, in the same way that inflation increases the value of cash over time. Nor did the Crown accept that a right of first refusal, if it becomes exercisable and is exercised, confers a benefit that will similarly increase in value over time.

Commercial redress does not denote exclusive cultural interests

We noted earlier ('Cultural concerns about exclusive commercial redress', p75) that Ms Houlbrooke emphasised that the sites in the Right of First Refusal Area were for commercial, not cultural, redress. Indeed, with regard to Ngāi Tai's concerns about Ngāti Whātua o Ōrākei having a right of first refusal over the Auckland High Court site, she said to their counsel, Mr Warren, 'you are conflating commercial and cultural redress'. She then explained that the Office of Treaty Settlements wanted to focus the commercial redress on Ngāti Whātua o Ōrākei's 'area of particular interest'.[113] Later, when asked by the Tribunal whether the proposed rights of first refusal on the North Shore similarly reflected Ngāti Whātua o Ōrākei's particular interests there, Ms Houlbrooke provided this explanation:

> In relation to commercial redress it doesn't have a direct link to cultural interests or cultural predominance. I think the RFR area was offered on the basis that it was sought and appropriate to include in order to settle Ngāti Whātua's claims and that there was adequate commercial redress available to others. The fact that the RFR boundary is associated with those early land block boundaries is really a pragmatic one. You have to draw a boundary somewhere and so it was a useful guide to drawing that boundary but it wasn't the determining factor in terms of providing a right of first refusal area. It is the core, central broadly, *it is the core area of interest for Ngāti Whātua o Ōrākei but that RFR area does not denote an area of exclusive interest*. In order to develop a redress package that is adequate to settle the claims of Ngāti Whātua o Ōrākei, as you know, in terms of commercial redress there is a quantum of 10 million dollars, there's the RFR area and it was determined that it was appropriate to also provide some commercial redress over the Naval housing land, in order to build a credible package to settle Ngāti Whātua's claims. It's not, *by giving commercial redress on the North Shore, it's not saying that's an exclusive cultural area for Ngāti Whātua*. [Emphasis added.][114]

We note the apparent inconsistency between the passages we have underlined above and the statement in the *Red Book*, quoted earlier, that a right of first refusal 'is not usually available on designated properties where that property is in an area subject to unresolved overlapping interests between claimant groups.'[115] Another area where we discern inconsistencies is as to whether the grant of an area of rights of first refusal means that the Crown considers that no other group has interests in that area. Although Ms Houlbrooke told the Tribunal in evidence that the grant

of the area does not indicate that the Crown has made such a determination, a memorandum filed late indicates otherwise. It is a memorandum from Dean Cowie and Rachel Houlbrooke to Nikki Edwards (a Treasury official). It says:

> **Auckland proposal**
>
> We also propose to offer the Trust Board an RFR area over their core "exclusive" area and an RFR over certain properties outside this core area.
>
> *Crown Properties*
>
> The Ngāti Whātua o Ōrākei area of interest includes central Auckland, Waitakere and the North Shore. The area of interest is heavily overlapped, however our assessment is that there is a core area in central Auckland over which the Crown could offer exclusive redress.
>
> . . . . .
>
> **Proposal**
>
> [Passage excised by the Crown] Such flexibility could include offering the Trust Board an RFR over the area in which the Crown is confident Ngāti Whātua o Ōrākei has exclusive interests, as opposed to offering an RFR over specific properties. This is clearly the Trust Board's preference.[116]

Removal of protective memorials

Rachel Houlbrooke told the Tribunal that the Office of Treaty Settlements is reviewing the content of paragraph 64 of the agreement in principle as part of its process of considering overlapping claims.[117] At the hearing, the Crown did not provide information about the 1995 Finance Act which removed protective memorials from certain land and seemed to be similar to paragraph 64's proposal that the settlement legislation remove all protective memorials from properties in the Ngāti Whātua o Ōrākei Right of First Refusal Area. The Tribunal asked the Crown to provide further information about this.[118]

It appears that the Crown thought it necessary to legislatively remove the memorials from six Newmarket properties in order to finalise the 1993 Central Auckland Railcorp Settlement with Ngāti Whātua o Ōrākei and Ngāti Pāoa. The removal of the memorials by statute is notable because, under section 8D of the Treaty of Waitangi Act 1975, only the Waitangi Tribunal has the power to remove memorials. An earlier application to the Tribunal for the removal of the memorials from the six properties in question had, however, been unsuccessful. That is because the Tribunal will not exercise its power to remove memorials when there are objections from any Waitangi Tribunal claimant whose claim relates to the memorialised land.[119] With regard to the Newmarket Railway land, Ngāti Whātua o Ōrākei and Ngāti Pāoa agreed, as part of their settlements, to the memorials being lifted, but a number of tangata whenua groups with unheard claims relating to the land objected.

From the information supplied by the Crown after our hearing, it seems that Parliament stepped in to remove the memorials because the Crown was satisfied that Ngāti Whātua o Ōrākei and Ngāti Pāoa, as the settling parties in relation to the memorialised land, were the appropriate groups to give consent to the memorials' removal. The fact that the Waitangi Tribunal had not removed the memorials was seen to be a result of the memorial system's establishment at a time before direct settlement negotiations between the Crown and claimant groups were contemplated. The Railways Land Settlement was a direct settlement and the Tribunal had confirmed that, by settling with Ngāti Whātua o Ōrākei and Ngati Pāoa, the Crown would not be in breach of Treaty principles.[120]

We note that there is an important difference between the Railways Land situation and the current situation. There, the Crown believed that all tangata whenua groups with interests in the land had consented to the memorials' removal. Here, that would certainly not be the case if only Ngāti Whātua o Ōrākei consents to the removal of the memorials in the Right of First Refusal Area. The Crown has acknowledged that the Right of First Refusal Area is not one in which Ngāti Whātua o Ōrākei has exclusive interests.[121] As Ms Houlbrooke said of the Right of

First Refusal Area: 'it is the core area of interest for Ngāti Whātua o Ōrākei but . . . does not denote an area of exclusive interest.'

Notes

1. Office of Treaty Settlements, *Ka Tika ā Muri, Ka Tika ā Mua* (the *Red Book*), 2nd ed (Wellington: Office of Treaty Settlements, [2002]), p 44
2. Ibid, p 84
3. Ibid, pp 85–86
4. Ibid, p 84
5. The Crown uses the term 'exclusive redress' for an item used in settlement that is available only to one settling group. 'Non-exclusive redress' refers to redress from which more than one settling group can benefit.
6. *Ka Tika ā Muri, Ka Tika ā Mua*, p 96. The *Red Book* also emphasises that when cultural redress involves natural resources of general public importance, the interests of New Zealanders as a whole must be provided for in any arrangements concerning those resources (p 98)
7. Ibid, p 98
8. Rachel Houlbrooke, brief of evidence, 26 February 2007 (doc A38), paras 25–26
9. *Ka Tika ā Muri, Ka Tika ā Mua*, p 59
10. Ibid, p 59
11. Ibid, p 60
12. Hearing recording, 15 March 2007, track 4
13. Rachel Houlbrooke, 'Re: Treaty Settlement Negotiations between the Crown and Ngāti Whātua o Ōrākei', 1 July 2003 (doc A38(a), DB10), paras 10–12
14. Rachel Houlbrooke, in response to questioning by the Tribunal, hearing recording, 15 March 2007, track 4. The Crown's closing submissions reiterated this point and submitted that, to the extent that there is any ambiguity in the paragraph contained in Ms Houlbrooke's 1 July 2003 letter, the Crown may need to consider rewording it for future purposes: closing submissions for the Crown (paper 3.3.21), para 5.4.
15. Rachel Houlbrooke, in response to questioning by the Tribunal, hearing recording, 15 March 2007, track 4
16. *Ka Tika ā Muri, Ka Tika ā Mua*, p 87
17. Ibid, p 88
18. Ibid, p 87. See also the Foreword to the *Red Book*, p 3, where the (then) Minister in Charge of Treaty of Waitangi Negotiations states that financial and commercial redress is not token compensation but is 'an honest and sincere attempt to provide just redress within the context of a modern society.'
19. *Ka Tika ā Muri, Ka Tika ā Mua*, p 90
20. Ibid, p 88
21. Ibid, p 91
22. Rachel Houlbrooke, in response to questioning by Paul Majurey, hearing recording, 15 March 2007, track 3
23. See ch 3, 'Value to recipient of rights of first refusal', p 73.
24. The nature of the Governance Entity is described in para 65d of the agreement in principle.
25. Media summary of the agreement in principle, Closing submissions for the Crown, 22 March 2007 (paper 3.3.21) attachment, p 5
26. Agreement in Principle for the Settlement of the Historical Claims of Ngāti Whātua o Ōrākei, 9 June 2006 (doc A49), para 15
27. Ibid, para 16
28. Ibid, paras 17–18
29. These are acknowledgements, in legislation implementing a Deed of Settlement, of the settling group's special association with particular sites or features on Crown-owned land. Statutory acknowledgements are not exclusive: more than one group can be acknowledged in respect of a site or feature. One effect of a statutory acknowledgement is to enhance the ability of the acknowledged group to participate in certain processes under the Resource Management Act 1991: *Ka Tika ā Muri, Ka Tika ā Mua*, p 132. The statutory acknowledgements proposed in the Ngāti Whātua o Ōrākei agreement in principle are elaborated in doc A49, paras 23–25.
30. Agreement in principle for the Settlement of the Historical Claims of Ngāti Whātua o Ōrākei, 9 June 2006 (doc A49), para 21
31. A decision about the Kauri Point land is said to be subject to further analysis of potential implications for the continued operations of the Defence Force and any potential impact on the adjacent North Shore City Council land: Agreement in Principle for the Settlement of the Historical Claims of Ngāti Whātua o Ōrākei, 9 June 2006 (doc A49), para 21g.
32. Decisions about Kauri Point Domain and Mount Victoria are said to be subject to the Crown seeking the views of the North Shore City Council: Agreement in Principle for the Settlement of the Historical Claims of Ngāti Whātua o Ōrākei, 9 June 2006 (doc A49), para 22.
33. These are statements made by the Crown of a particular government agency's intentions to interact with a settling group in particular ways in the future and to exercise its powers in relation to specified matters in the group's area of interest. Protocols are not exclusive. They can be enforced in judicial review proceedings: *Ka Tika ā Muri, Ka Tika ā Mua*, pp 133–134
34. Agreement in Principle for the Settlement of the Historical Claims of Ngāti Whātua o Ōrākei, 9 June 2006 (doc A49), paras 26–29 and attachments D–G
35. Ibid, para 33
36. Ibid, para 30
37. Ibid, para 35
38. Ibid, para 36

39. This phrase is used in the media summary of the agreement in principle, which was sent to other tangata whenua claimants in Tāmaki Makaurau together with a letter from Office of Treaty Settlements dated 13 June 2006: Rachel Houlbrooke, in response to questioning by Grant Powell, hearing recording, 15 March 2007, track 3. The map accompanying the media summary shows the Ngāti Whātua o Ōrākei 'Area of Interest' but does not identify the 'core Ngāti Whātua o Ōrākei area in central Auckland': (paper 3.3.21), attachment. That area is the Right of First Refusal Area shown in the map attached to the agreement in principle as attachment H (doc A49).

40. Agreement in Principle for the Settlement of the Historical Claims of Ngāti Whātua o Ōrākei, 9 June 2006 (doc A49), para 38a–c

41. Ibid, paras 40–47 and 38d. Page 13 of the Office of Treaty Settlements' media summary explains that the opportunity to purchase the land is in fact part of a 'sale and leaseback' (to the Crown) arrangement that will, by means of a rental holiday for the Crown of up to 35 years, 'reduc[e] the upfront costs to Ngati Whatua o Orakei' in making the $80 million purchase: closing submissions for the Crown, (paper 3.3.21), attachment, p 6. We discuss this arrangement further under the heading 'Insufficient information to analyse proposed redress', p 72.

42. Agreement in Principle for the Settlement of the Historical Claims of Ngāti Whātua o Ōrākei, 9 June 2006 (doc A49), para 38e

43. Ibid, para 39

44. These were devised as a result of the Court of Appeal's 1987 decision in *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 641. A number of statutes now provide that Crown land that is transferred to or vested in a State-owned enterprise becomes liable to resumption by the Crown (upon payment of market value to its owner) for return to Māori ownership upon the Waitangi Tribunal's binding recommendation to that effect. (See ss8A – 8HJ Treaty of Waitangi Act 1975.) A memorial on the certificate of title of such land gives notice of the possibility of resumption to the world, including to those who subsequently purchase the land from the State-owned enterprise. Paragraph 64 of the agreement in principle provides that the settlement legislation will declare that the statutory provisions authorising protective memorials no longer apply in the Ngāti Whātua o Ōrākei Right of First Refusal Area (para 64a), and that it will also remove all existing protective memorials on land in that area (para 64b).

45. This was the opinion also of Associate Professor Belgrave and Dr Young in their 'Review of the Agreement in Principle for the Settlement of the Historical Claims of Ngati Whatua o Orakei' in December 2006: (doc A26(a)), paras 136–137.

46. Rachel Houlbrooke, brief of evidence, 26 February 2007 (doc A38), para 153

47. Rebuttal evidence of Belgrave and Young (doc A50), para 17

48. Graeme Murdoch, summary of evidence (doc A25(a)), para 26

49. Te Warena Taua said in evidence for Ngāi Tai ki Tāmaki that Maungakiekie was an ancient burial ground for Te Waiōhua people. In relation to Maungawhau, Mr Taua stated that in the last few years, at the request of the Department of Conservation, he and his cousin had retrieved bones that had been uncovered by the movement of stock, and reburied them in a place listed confidentially with the Department: hearing recording, 13 March 2007, track 2. Emily Karaka referred to the Memorandum of Partnership that Ngāi Tai ki Tāmaki together with Ngāti Whātua o Ōrākei, Te Kawerau ā Maki, Ngāti Te Ata and others have with the Department of Corrections in relation to the prison at Maungawhau: (doc A23(b)), para 7(b)

50. Graeme Murdoch, in response to questioning by Peter Andrew, hearing recording 13 March 2007, track 4

51. Office of Treaty Settlements, 'Presentation by OTS Claims Development to Hauraki Marutūāhu claimants', 29 January 2003 (doc A33(a)), tab 1

52. Rachel Houlbrooke, in response to questioning by Paul Majurey, hearing recording, 14 March 2007, track 3

53. Ibid

54. Document A38(a) DB97, para 44

55. Cabinet Business Committee Minute, 23 May 2006 (doc A65, attachment 7), para 4.3.5

56. Memorandum on behalf of Marutūāhu (paper 3.4.4), para 4. These submissions were made in response to the Crown's filing, after the hearing, of Cabinet Minutes requested by the Tribunal.

57. John McEnteer, in response to questioning from Peter Andrew, hearing recording, 15 March 2007, track 1

58. Ibid

59 Ibid. 'Tika' means right, or correct.

60. Emily Karaka, brief of evidence, 26 January 2007 (doc A23), paras 15–17

61. Opening submissions of Te Kawerau ā Maki (paper 3.3.14), para 19

62. See, for example, Mark Stevens, in response to questioning by the Tribunal, hearing recording, 13 March 2007, track 2; Te Warena Taua, hearing recording, 13 March 2007, track 2

63. John McEnteer, in response to questioning by the Tribunal, hearing recording, 15 March 2007, track 1

64. Ibid

65. John McEnteer, oral evidence in response to questioning by Peter Andrew, hearing recording, 15 March 2007, track 1

66. Ibid

67. John McEnteer, oral evidence in response to questioning by the Tribunal, hearing recording, 15 March 2007, track 1

68. Ibid

69. Rachel Houlbrooke, in response to questioning by the Tribunal, hearing recording, 15 March 2007, track 4; Closing submissions for the Crown (paper 3.3.21), para 2.4

70. See for example Marutūāhu written closing submissions, 22 March 2007 (paper 3.3.22), para 60; Closing submissions on behalf of Te Kawerau ā Maki, 22 March 2007 (paper 3.3.20), para 107

71. The exact land is to be selected after it has been valued, which is to be done at the time the Deed of Settlement is signed: Rachel Houlbrooke, in response to questioning by Grant Powell, hearing recording, 15 March 2007, track 2
72. Agreement in Principle for the Settlement of the Historical Claims of Ngāti Whātua o Ōrākei, 9 June 2006 (doc A49), para 45
73. Closing submissions from the Hauraki Māori Trust Board, 15 March 2007 (paper 3.3.6), para 2.4
74. Rachel Houlbrooke, in response to questioning by Grant Powell, hearing recording, 15 March 2007, track 2
75. Rachel Houlbrooke, in response to questioning by the Tribunal, hearing recording, 15 March 2007, track 4; Rachel Houlbrooke, brief of evidence (doc A38), para 210.2.2
76. Rachel Houlbrooke, in response to questioning by Grant Powell, hearing recording, 15 March 2007, track 2
77. See for example closing submissions on behalf of Te Kawerau ā Maki, 22 March 2007 (paper 3.3.20), para 106
78. Rachel Houlbrooke, in response to questioning by Paul Majurey, hearing recording, 15 March 2007, track 3
79. See for example Marutūāhu written closing submissions, 22 March 2007 (paper 3.3.22), para 60
80. The origin and purpose of these memorials are explained in note 44 of this chapter.
81. Rachel Houbrooke, brief of evidence, 26 February 2007 (doc A38), para 226
82. John McEnteer, brief of evidence, 31 January 2007 (doc A35), para 45
83. Rachel Houlbrooke, in response to questioning by Aiden Warren, hearing recording, 15 March 2007, track 1
84. Rachel Houlbrooke in response to questioning by Stephen Clark, hearing recording, 15 March 2007, track 3
85. Opening submissions for Te Kawerau ā Maki (paper 3.3.14), para 18
86. Opening submissions for the Crown (paper 3.3.40, paras 97–100
87. Closing submissions of the Crown, 22 March 2007 (paper 3.3.21), para 6.3
88. Rachel Houlbrooke, in response to questioning by Paul Majurey, hearing recording, 15 March 2007, track 3
89. Ngāti Awa Deed of Settlement, 27 March 2003 – Part 2, p 75, para 4.2.3
90. Rachel Houlbrooke, in response to questioning by Paul Majurey, hearing recording, 15 March 2007, track 3; Closing submissions of the Crown, 22 March 2007 (paper 3.3.21), para 6.1
91. Rachel Houlbrooke, summary of evidence (doc A38(b)), para 33
92. David Williams, brief of evidence (doc A42), para 17
93. Rachel Houlbrooke, in response to questioning by the Tribunal, hearing recording, 15 March 2007, track 4
94. Hearing recording, 13 March 2007, track 1
95. Rachel Houlbrooke, in response to questioning by the Tribunal, hearing recording, 15 March 2007, track 4
96. Rachel Houlbrooke, brief of evidence, 26 February 2007 (doc A38), para 158
97. Rachel Houlbrooke, in response to questioning by Paul Majurey, hearing recording, 15 March 2007, track 3
98. Closing submissions for the Crown (paper 3.3.21), para 7.8
99. Rachel Houlbrooke, brief of evidence, 26 February 2007 (doc A38), para 156.2
100. Closing submissions for the Crown (paper 3.3.21), paras 7.10–7.11
101. Professor David Williams, in response to questioning by the Tribunal, hearing recording, 14 March 2007, track 1
102. Rachel Houlbrooke, in response to questioning by the Tribunal, hearing recording, 15 March 2007, track 4
103. Closing submissions for the Crown (paper 3.3.21), para 2.5
104. Rachel Houlbrooke, in response to questioning by Paul Majurey, hearing recording, 15 March 2007, track 3
105. Documents filed late raise a question as to whether Ngāti Whātua o Ōrākei's Right of First Refusal Area contains only 125 properties. The agreement in principle is unclear as to whether properties that the Crown purchases after the settlement will also be subject to the right of first refusal.
106. Rachel Houlbrooke, in response to questioning by Paul Majurey, hearing recording, 15 March 2007, track 3
107. Rachel Houlbrooke, in response to questioning by Paul Majurey, hearing recording, 15 March 2007, track 3
108. Document A67, DB42
109. Rachel Houlbrooke, in response to questioning by Tribunal, hearing recording, 15 March 2007, track 4
110. Rachel Houlbrooke, in response to questioning by Stephen Clark, hearing recording, 15 March 2007, track 3
111. Rachel Houlbrooke, in response to questioning by the Tribunal, hearing recording, 15 March 2007, track 4; Closing submissions for the Crown (paper 3.3.21), para 2.4
112. Rachel Houlbrooke, in response to questioning by Grant Powell, hearing recording, 15 March 2007, track 3
113. Rachel Houlbrooke, in response to questioning by Aiden Warren, hearing recording, 15 March 2007, track 1
114. Rachel Houlbrooke, in response to questioning by Aiden Warren, hearing recording, 15 March 2007, track 1
115. Rachel Houlbrooke, in response to questioning by the Tribunal, hearing recording, 15 March 2007, track 4 [emphasis added]
116. *Ka Tika ā Muri, Ka Tika ā Mua*, p 91
117. Document A67, A34 pp 3–4
118. Rachel Houlbrooke, brief of evidence, 26 February 2007 (doc A38), para 226. Ms Houlbrooke added that the review was being conducted as part of the post-agreement in principle phase of the settlement process,

the timeframe for which was not known: in response to questioning by Paul Majurey, hearing recording, 15 March 2007, track 3

119. This was filed on 10 April 2007 (doc A65).

120. The basis for the Tribunal's approach is that memorials exist to provide protection for all Tribunal claimants whose claims have been, or may yet be, determined to be well-founded. Therefore, until such time as all Waitangi Tribunal claims in an area have been determined, and redress for all well-founded claims provided, the protection provided by memorials on land in the area should remain unless all claimants with claims relating to that land agree that the memorials can be removed.

130. See Helen Carrad, 'Aide Memoir – Newmarket Properties', 6 December 1994 (doc A65, attachment 3), p 2

121. Rachel Houlbrooke, in response to questioning by the Tribunal, hearing recording, 15 March 2007, track 4

CHAPTER 4

Whakatau/Findings

Outline

In chapter 4, we set out our findings:

(a) in summary;
(b) in detail, as to process; and
(c) in detail, as to outcome.

Summary of Findings

In summary, our findings are these:

- The Office of Treaty Settlements did not balance the need to pursue and tend a relationship with Ngāti Whātua o Ōrākei in order to achieve settlement, with its Treaty obligation also to form and tend relationships with the other tangata whenua groups in Tāmaki Makaurau. The mode of dealing with the other tangata whenua groups left them uninformed, excluded, and disrespected.
- The explanation of the process for dealing with 'overlapping' claimants in the Office of Treaty Settlement's policy manual *Ka Tika ā Muri, Ka Tika ā Ma* (the *Red Book*) is summary and unhelpful. It deals only in broad principles, and gives no clear idea as to how they will be applied or achieved.
- The *Red Book*'s treatment of how cultural redress will be handled in situations where there is competition over sites and recognition provides no insight into how problems will be identified and addressed.
- The Office of Treaty Settlements' letter to other tangata whenua groups of 1 July 2003 offers them more hope: officials wanted to work with these groups '[t]hroughout the course of settlement negotiations' to arrive at 'a good understanding of [their] interests in the Auckland area.'[1]
- What the Office of Treaty Settlements actually did, however, was wholly inadequate. Neither the broad outlines of aspiration and principle in the *Red Book*, nor the expectations raised by the 1 July 2003 letter, were fulfilled. The office's performance also fell short of the standard required for a good administrative process in Treaty terms, and this is the standard that should apply.
- The draft settlement was not supported by a robust process, particularly as regards cultural redress. Non-exclusive redress was also offered when officials were in no position to assess the potential strength of others' claims to exclusive interests in those sites.
- The offer to Ngāti Whātua o Ōrākei of exclusive redress in maunga was purportedly on the basis of a predominance of interests. This approach was not adequately prefigured and is anyway inapplicable to cultural redress.
- The expression of the commercial redress in the agreement in principle is neither complete nor, in some key areas, clear, so it's not possible to know from that document what is on offer, nor how much it is worth.
- Because it is not possible to ascertain what Ngāti

Whātua o Ōrākei is being offered, the other tangata whenua groups cannot assess whether or not to rely on the Crown's assertion that it can do the same for others.

Findings about Process

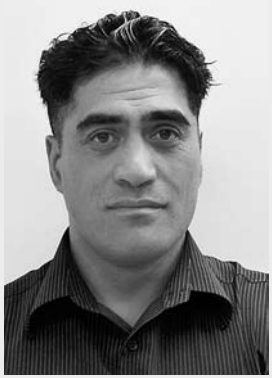
- Although we think that the Crown's large, natural group policy has a sensible underpinning, its implementation on the ground in Tāmaki Makaurau was not sensible. A more considered and rational approach was required to identify the best grouping for negotiation in Tāmaki Makaurau, and identifying such a grouping should always involve talking to all the tangata whenua groups who will ultimately be affected by a settlement in their area (see ch 2, 'Concern 6'). The strategy for identifying the best grouping should be informed by a full appreciation of the extremely negative effects on whanaungatanga if the approach chosen is wrong (see ch 1, 'Te Tino Rangatiratanga and Whanaungatanga', 'The Present Situation').
- Characterising the other tangata whenua groups in Tāmaki Makaurau as overlapping claimants instantly put the settling group, Ngāti Whātua o Ōrākei, in the top spot, and the others in a place where their interests are only relevant to the extent that they relate to the interests of the primary group. This approach will always alienate other tangata whenua groups. It is integral to their own sense of identity that they do not regard others' interests as being any more important than theirs (see Introduction, 'Terminology'; ch 2, 'Concern 7').

Te Warena Taua
Witness for Ngāi Tai ki Tāmaki Tribal Trust
told the Tribunal how in his view all the Tāmaki Makaurau people were related through their Waiōhua descent:
'. . . See, we enjoy a partnership with one another. But I can tell you what, these claims and cross-claims are seeing people walk straight past one another in the street. Not because of our own doing, but because of the grievances that we have, and having to come here today to put before the Tribunal and the Crown our stories – you have not heard ours yet, the cross-claimants'. I despise being called a cross-claimant. I despise being pitted against my own whanaunga.'[2]

- Negotiating Treaty settlements is in itself a political act. It has resonance throughout the Māori world. It does not impact only on the group with whom the Crown is dealing. Mana and influence in their rohe go to the core of a group's Māori identity. Being chosen and recognised, being the subject of officials' efforts and attention and funding, being the subject of discussion and research – all these go to increase a group's mana. The Crown needs to recognise and manage this reality. It is not enough to say that the others' turn will come, because (a) there is no certainty as to how or when their turn will come; (b) they have every reason to believe that they may be waiting a very long time; and (c) the Crown is not putting resources into conveying reliable information about the path forward in a way that will assuage suspicion and resentment (see ch 1, 'Managing the Other Relationships'; ch 2, 'Concern 6').
- The Office of Treaty Settlements officers seem to be

oblivious to the impact their dealings with a group in settlement negotiation can have on relationships among Māori groups in the same area. The dealings themselves are significant, independently of what the outcome is. Sequestering themselves with one group and conducting secret negotiations on the basis of documents that others are not allowed to see of course arouses suspicion, and provides the seeds of resentment, both towards the mandated group and the Crown. Māori are anyway often suspicious of people in authority; they have often been adversely affected by things done by officials that they have not been properly informed about and have not understood. The way that the Office of Treaty Settlements is going about its business runs the risk that its representatives will be perceived as being in exactly the same category as, say, local government officials planning to take Māori land for a road. In these situations, perception is all. There is an onus on the Office of Treaty Settlements to manage perceptions, because perceptions affect relationships profoundly. Relationships are, after all, at least as much about emotions as they are about a rational application of the intellect (see ch 1, 'What Was at Issue?'; ch 2, 'Concern 1').

Roimata Minhinnick
Witness for Ngāti Te Ata:
Kathy Ertel (leading evidence): Has the relationship between Ngāti Whātua and Ngāti Te Ata been stressed by the process that the Crown's undertaken in developing the AIP [agreement in principle]?
Roimata Minhinnick: I think there's been a lot of unease, and I think that's been typical from these hearings. Our relationship with Ngāti Whātua used to be very strong, and my personal relationship with, for example, Grant [Hawke], I mean, we used to share pipis over my kitchen table with my kids laughing and playing, and that kind of relationship is certainly not the same now. I would say there is some tension, enormous tension, and it's kind of being played down really, but it's certainly in the back of everybody's mind, certainly ours . . .[3]



- It is not only perceptions that the Crown needs to manage. Because they are the group negotiating with the Crown rather than being an 'other group' in Tāmaki Makaurau, Ngāti Whātua o Ōrākei was routinely privy to the documents, correspondence, research, and maps to which others were only latterly and variously given access. Knowledge is of course power, but the Crown did not see it as its role to ensure that the other tangata whenua groups shared the power that knowledge brings: only the Crown and Ngāti Whātua o Ōrākei knew the whole agenda, and had access to all the material that informed the agenda. Not only were Ngāti Whātua o Ōrākei automatically given all relevant material, but they also had about 100 meetings with the Crown,[4] in which much information was of course exchanged. This put Ngāti Whātua o Ōrākei in a much stronger position than anyone else on the Māori side. The relative positions as regards information have been ameliorated to some extent by this Waitangi Tribunal process, in which documents were made available to all participants. It is not at all clear though when, or indeed if, the other groups would ever have been as fully informed without it (see ch 2, 'Concern 1').

Mark Stevens
Witness for Ngāi Tai ki Tāmaki:

. . . The Crown's prejudiced approach in determining settlement of the Auckland settlement area without due care, with inadequate and selective research, with little consideration for any independent Māori research, without the assistance of the Waitangi Tribunal, with a lack of consideration and indeed neglect for the overlapping claimant position, and without accurate maps which after four years are all of a sudden commissioned and which illustrate the negligence of the Crown approach.[5]

- The claimant group in negotiation with the Crown is in receipt of funding from the Crown, and none of the other tangata whenua groups receive any Crown funding. Nor is there any immediate prospect of their doing so. The Crown's position is that only groups that have been mandated to negotiate a settlement can receive funding, and this effectively excludes those groups the Crown defines as overlapping claimants. The availability of funding only to the group negotiating with the Crown is an important point of distinction between that party and others. It enables them to purchase advice and information, and to be on more of an equal footing with the Crown. It seems again to mark out one group for favour and privilege, while the others are in a lower tier, with no obvious access to the first tier (see ch 2, 'Concern 7').
- Handling the information in the negotiation between Ngāti Whātua o Ōrākei and the Crown as though the context was a commercial one, and subject to commercial conventions as regards confidentiality misrepresented the true nature of the bargaining process. What is really at stake in a Treaty negotiation is whether the parties can arrive at an accommodation between Treaty partners that will restore a damaged relationship. In its fundamental nature, it is not a cut-and-thrust commercial arrangement. To use the conventions of commercial dealing is to promote a fiction as an excuse for secrecy (see ch 2, 'Concern 2').
- In order to deal confidently with the Crown, the other tangata whenua groups will want to feel that the Crown is as informed about, and as interested in, their interests as those of the group with which the Crown is settling. The Crown has already preferred one group to another to the extent that it has chosen to negotiate with it. It rubs salt into the wound if the Crown's only interest in the other groups is to talk about how their interests relate to those of the mandated group: they want to be valued in their own right first (see ch 1, 'Managing the Other Relationships'; ch 2, 'Concern 1', 'Concern 7').

Te Warena Taua
Witness for Te Kawerau ā Maki:

We got to tell [the Crown] what we thought about what they thought because they never came to us to ask about what we thought, and that's how it happened – and we've really been playing chase up or chasing them and finding out that someone got a letter and we say we didn't get a letter so let's write to them. It has had a huge impact on a group like ours who has got no funding to maintain our claims to this point even . . .[6]

- In previous cross-claim settlement inquiries, the Tribunal has consistently advised the Office of Treaty Settlements to engage *early* with other tangata whenua groups.[7] 'Engaging', in this context, does not mean writing letters. Certainly, it does not mean only writing letters. Meeting with people may cost more time and money, but when it comes to talking with Māori

about their customary interests it is the *only* form of communication that demonstrates respect for what they have to say, and for the preferred Māori way of saying it: kanohi ki te kanohi. Even in the 21st century, Māori remain primarily oral people. Written communication should only complement face-to-face communication. It cannot substitute for it (see ch 1, 'What Was at Issue?'; ch 2, 'Concern 1').

- We saw a lack of awareness of the Crown's obligation to comply with tikanga. There were no powhiri involving other tangata whenua groups when the Crown came into Tāmaki Makaurau, and no hui with them even when the Crown was contemplating the offer of exclusive rights in maunga to Ngāti Whātua o Ōrākei. To leave proper engagement with other tangata whenua groups until after everything had been arranged with Ngāti Whātua o Ōrākei is itself a breach of tikanga, because it fails to acknowledge their mana and status as tangata whenua. The Crown pointed to the involvement of John Clarke as indicating its awareness of tikanga concerns. But there was only one piece of evidence about Mr Clarke's contribution, and this suggested that his role was mainly to add facility in te reo Māori to the Crown's side in discussions with Ngāti Whātua o Ōrākei.[8] Much more attention to tikanga is comprised in the Crown's Treaty duty when the kaupapa is Treaty negotiations and settlements (see ch 2, 'Tikanga', 'Concern 4').
- The Office of Treaty Settlements' policy for dealing with 'overlapping claims' is to require those asserting an interest to discuss them in the first instance with the mandated group. This is a policy that needs to be carefully managed to have a prospect of successfully resolving cross-claims. As practised at present, it has every appearance of simply brushing off the interests of those whose perception differs, or may differ, from that of the Crown and the mandated group. In Tāmaki Makaurau, the Crown's insistence on getting other tangata whenua groups to discuss their contrary views with Ngāti Whātua o Ōrākei in the first instance had the following consequences:

— It reinforced the perception that Ngāti Whātua o Ōrākei were in the primary position.

Mark Stevens
Statutory Manager of Ngāi Tai ki Tāmaki Tribal Trust:
The Crown's negotiation process, when it begins negotiations with a claimant, automatically relegates other claimants in a settlement area into a subservient role, and with little or no due care or good faith sends them a letter in reply regarding any overlapping issues . . .[9]

— It made explicit the subordination of the other tangata whenua groups as regards access to the Crown: the Crown was prepared to deal directly with Ngāti Whātua o Ōrākei as a matter of course, but other groups were dispatched to deal with Ngāti Whātua o Ōrākei as the port of first (and sometimes only) call.

— In interposing Ngāti Whātua o Ōrākei between themselves and the other tangata whenua groups in Tāmaki Makaurau, the Crown put at risk its Treaty relationship with those other groups. It appears from the evidence filed late that the Crown did not step in to assist communication with the other tangata whenua groups even when officials knew that Ngāti Whātua o Ōrākei were not discharging this responsibility, which they signed up to in the terms of negotiation. Even when the other groups complained to officials about how Ngāti Whātua o Ōrākei were not responding to them, the Crown maintained what was effectively a pretence that Ngāti Whātua o Ōrākei would do this work.

Tiwana Tibble
Chief Executive of Ngāti Whātua o Ōrākei, questioned by Paul Majurey (right), Counsel for Marutūāhu:
Paul Majurey: In the terms of negotiation, and I'm referring to clauses 17–19, you'll recall won't you, that Ngāti Whātua agreed to be involved in early engagement with cross claim groups. You recall that?
Tiwana Tibble: Yeah in terms of what that actually meant at the time, I think we learnt as we worked through it, the different kind of steps. So the term you use is not as specific as we know it to be now.[10]

— Getting Ngāti Whātua o Ōrākei to front the joint views of Ngāti Whātua o Ōrākei and the Crown about interests in Tāmaki Makaurau again made it seem as though Ngāti Whātua o Ōrākei and the Crown were together in an alliance, and all the other groups were outside it (see ch 2, 'Concern 5').

- The Crown undertook in the terms of negotiation (clause 19) to 'carry out its own consultation with cross-claimant groups.' We consider that the Crown's Treaty duty to other tangata whenua groups goes beyond a duty of consultation (see ch 2, 'How the Office of Treaty Settlements conceives of its task').However, what the Crown actually did was much less even than consultation. Prior to the release of the agreement in principle, it sent one long, complicated letter, and that was its only initiative (see ch 2, 'Concern 5'). Throughout, other tangata whenua groups tried to get the Crown to engage with them, but substantially the Office of Treaty Settlements resisted these overtures. The Stories included in chapter 2, 'Te Ara/Process' make this plain.
- Implicit in the Crown's Treaty settlement policy is the hope that other tangata whenua groups will compromise their own interests and support the mandated group in its settlement endeavours. This hope would have a prospect of fulfilment if, simultaneously with its dealings with (in this case) Ngāti Whātua o Ōrākei, the Crown had worked with the other tangata whenua groups to agree a strategy for them to address *their* Treaty grievances with the Crown. This would involve agreeing to the other groups forming part of a grouping for negotiating purposes that met their aspirations for identity and alliance rather than insisting on the Crown's 'strong preference' for a grouping that accorded with its perceptions (see ch 2, 'Concern 6').
- The Office of Treaty Settlements' lack of interest in coming to grips with whether the Treaty claims of the other tangata whenua groups are well-founded undermines confidence in the process being based on analysis and principle, and reinforces fears that the decisions being made are arbitrary, and possibly influenced by factors (like the personal mana of individuals) that are hard to control (see ch 2, 'Concern 3', 'Concern 4').
- Assessments of Ngāti Whātua o Ōrākei's customary interests underpinned the agreed historical account's statements about Treaty breach, and the offer to them of exclusive redress – especially maunga. Nevertheless the Crown did not acknowledge the customary implications of what it was doing; did not recognise the necessity to involve other tangata whenua groups; relied on historical material that was inadequate; did not disclose the methodology for dealing with conflicting customary information; and did not have or obtain sufficient expertise to make decisions about customary interests (see ch 2, 'Coming to grips with customary interests in Tāmaki Makaurau').
- The process that the Crown ran to develop the agreed historical account with Ngāti Whātua o Ōrākei was not fully described in evidence. Thus we do not know what principles and guidelines were in place to assist staff in making difficult judgements. We were

not pointed to any. Nor was the extent of supervision clear. Therefore we were concerned that the judgement of young and inexperienced members of staff seemed influential. Quality assurance included the involvement of senior historians like Dr Donald Loveridge and Professor Tom Brooking. However, the evidence did not explain how Dr Loveridge's very critical appraisal of key research was responded to, and his assessment was not among the materials sent to Professor Brooking. Nor was the Minister told of Dr Loveridge's misgivings. Was this because they were addressed somehow? We do not know. In the end, we certainly could not agree with the Crown that its was a robust methodology – although, if the evidence had been comprehensive (describing who did what, when), we may have been persuaded that it was. That said, the Crown had every opportunity to put in all its information, and the fact that there was none that filled the gaps we saw supports an adverse inference (see ch 2, 'The agreed historical account process').

- Our inference from the material we saw was that the Crown's focus in its negotiation with Ngāti Whātua o Ōrākei was on reaching an accommodation on history that the parties could live with. Finding a way to agree was, it seemed to us, more important than methodological soundness. It may be that this is what settling requires. If that is so, then it should be admitted. The agreed historical account should not have any pretensions: it is not an objective history, it is a vehicle for agreement en route to settlement. At present, the agreed historical account appears to be an authoritative historical account, and its statements about Ngāti Whātua o Ōrākei carry negative implications for other tangata whenua groups that are not easily reversed (see ch 2, 'The agreed historical account process').
- How can the Office of Treaty Settlements measure the importance of and effect on Ngāti Whātua o Ōrākei of the Crown's actions and omissions without knowing about and comparing what was going on with their immediate neighbours? We do not think it can. The Crown's explanation of the connection between the three parts of the Crown apology makes plain that each settlement involves an assessment by the Crown of the extent of the Treaty breaches and prejudice suffered by the settling group. Inevitably, that assessment makes a judgement about the Treaty breaches and prejudice suffered by other groups with competing claims. Yet the Crown consistently denied this. It maintained that it could gather 'adequate' information about other groups and their Treaty claims in order to offer redress to Ngāti Whātua o Ōrākei for its Treaty grievances. It said that all it was doing was pre-empting the provision of certain kinds of redress in future to other groups; but it was not pre-judging anyone else's Treaty claims. That assumes that Ngāti Whātua o Ōrākei's experiences with the Crown are completely unrelated to other groups' experiences, or that the groups' inter-related accounts all match perfectly, such that there is no multiplicity of account nor any dissent among groups as to who held which rights, and so on. That is just not possible. In reality, we think that the Crown does form a view on the relative strengths of the competing groups' claims, but does not acknowledge the fact because of the implications for its process if it did comply with the rules of natural justice (see ch 2, 'Coming to grips with customary interests in Tāmaki Makaurau'; ch 3, 'Agreed historical account').
- Initiating face-to-face meetings only after the ingredients of a settlement with Ngāti Whātua o Ōrākei have been agreed is the worst way possible to establish a positive connection with other tangata whenua groups. As soon as there is a settlement on the table, those groups have something to *object* to, to react *against* – and this with no prior history of positive, affirming interactions. This is a context that renders almost impossible the establishment of a connection of trust between the other tangata whenua groups and the Crown (see ch 1, 'The Present Situation').

- In order to feel confident that their views are heard and understood, the other tangata whenua groups will want to be sure that the officials they are dealing with know who they are. This means that they will want to deal with the same officials consistently so that personal relationships develop. It also means that they will want the officials to be interested in, and understand, who they are in a Māori sense. They will want the Crown to make overtures, not simply respond when called upon. Officials must come to grips with the underpinning for the various assertions of customary rights that the other tangata whenua groups make. In order to do this, they should read relevant sources prior to the initial meeting, and then engage with the members of the group face-to-face about their stories of origin, and their places and events of tribal/hapū identity. While it would not be expected that officials would be expert in whakapapa, they need to have engaged with enough of the Māori knowledge inherent in customary interests to really understand where people are coming from, and why the perceptions of the various groups differ. They also need to understand how that information feeds into the modern iwi political landscape (see ch 2, 'Coming to grips with customary interests in Tāmaki Makaurau').
- Regular update hui on the progress of negotiations and the topics being canvassed with the mandated group would help the other tangata whenua groups feel that they are in the picture. Their views could be sought in general, rather than only on (for example) specific items of redress. Gradually, officers would come to know which members of the group are expert about what, who can be relied on to know people or information, who is good at keeping in touch. This is how familiarity and trust is built over time. These are essential elements of a relationship (see ch 2, 'Concern 1').
- The Crown says that it is open to receiving information that would lead to changes in the agreement in principle, and it is premature for the Tribunal to get involved. However, the evidence before the Tribunal suggests that the Office of Treaty Settlements did little that was constructive with the information supplied by other tangata whenua groups when it was first solicited. For the most part, it was no more than a pretence of engagement with those groups and their information. These behaviours have understandably undermined confidence that any further submissions of information will be differently received (see ch 2, 'Concern 3').
- Releasing the agreement in principle without giving the other tangata whenua groups any warning of (at least) the possibility of offering Ngāti Whātua o Ōrākei exclusive cultural redress in maunga was a mistake. We now know that the Crown had many reasons for wanting to keep the whole proposed settlement confidential (see ch 2, 'Concern 2', in particular, the reference to documents filed late), but these were not sufficiently compelling to justify its overlooking its duty to the other tangata whenua groups. That duty included respect for their mana in the areas to be offered exclusively to Ngāti Whātua o Ōrākei, and keeping them informed. As it is, the Crown's conduct has been destructive of its relationship with these groups.
- The Crown faced the difficulty, in dealing with the other tangata whenua groups in Tāmaki Makaurau, that one or two of them were not united. Engaging with a group for which a number of people claim to be speaking – and who do not necessarily agree – is certainly a challenge. However, the Crown must find a better answer to this problem than holding the whole group at arm's length, and being even more than usually reluctant to engage with them. This is what we saw in the Crown's response to Te Taoū and Ngāi Tai ki Tāmaki, for example. We think that the Crown needs to devise a strategy for dealing with groups that lack leadership and cohesion, so that it can

demonstrate that it is engaging with the group's interests even when it is hard to engage productively with the group's spokespeople.

Findings about Outcome

- The policy of enshrining in the agreed historical account only matters that relate to the mandated group and the Crown, as if these players were somehow apart from and unaffected by the rest of the world, is a denial of the reality of history in Aotearoa. Whatever Ngāti Whātua o Ōrākei was doing with the Crown in the past, there was always another interwoven story about its neighbours and relatives, and what they were doing. A failure to come to terms with and reflect this reality in the settlement downplays the importance of context, and affronts the mana of others who were also important actors. It also affects the rangatiratanga of Ngāti Whātua o Ōrākei: who they are has fundamentally to do with the other tangata whenua groups in Tāmaki Makaurau (see ch 3, 'Agreed historical account').

Dr Michael Belgrave
Historian, witness for Marutūāhu, in response to questioning by Crown Counsel, Peter Andrew:
I think that the preamble [of the agreed historical account] does allow, and I think the preamble is valuable in doing that, does allow claimants to lay out their traditions and histories. One of the difficulties of the process about that, is that for

reasons that make perfect sense in the negotiations, the claimants cannot refer to others. And that creates, I think, a real constraint, because if we are talking about a process of rangatiratanga – of recognising claimants' tino rangatiratanga, or their rangatiratanga under Article 2 – then that is actually about their relationships with others, as much as it is about their relationships with a specific piece of land. So, that key aspect of people's identity is immediately stripped out of a process that reduces it just to claimants saying who they are, without the ability to do that in a broader way. And that is one of the reasons why we think that if you can get that process of negotiation over custom shifted back earlier, then it may be highly appropriate, because it has been negotiated and discussed, for claimants to say things that could in other circumstances be highly controversial in the preamble.[11]

- The logical consequence of the policy of mentioning only the settling group in its agreed historical account with the Crown is troubling. Why? If we take the present agreed historical account as an example, the applicants before us certainly disagreed with the version of history agreed between Ngāti Whātua o Ōrākei and the Crown. When they come to negotiate settlements with the Crown, they will want their agreed historical accounts to say something different. If the agreed historical accounts with all the settling groups reflect their different realities, it raises the spectre of a raft of different histories recorded in many agreed historical accounts. Obviously, they cannot all purport to be authoritative. It seems to us that the true function of the agreed historical account in each settlement needs to be acknowledged: it is an account that primarily expresses the view of the settling group, but in terms that are not too objectionable to the Crown (see ch 2, 'Testing historical material for the agreed historical account'). Thus, it is more accurately characterised as an accommodation between the parties in the context of a settlement negotiation, rather than a robust history. If this were expressed, it would relieve the

anxieties of the other tangata whenua groups whose historical accounts differ from the settling group's.

- Although the Office of Treaty Settlements insists that the contents of the draft settlement in the agreement in principle remain open to change, no one really believes it. That is because we all know that when we have been working towards something for three or more years, and we finally have something to show for it (in this case the agreement in principle), we are already emotionally and intellectually committed to its content. As human beings, we know this surely and deeply. We may be prepared to change it, but usually only very reluctantly. And because the agreement in principle is an agreement between the Crown and Ngāti Whātua o Ōrākei, the very act of working together to defend their joint achievement will inevitably promote further bonding between those parties. The 'us and them' scenario between the Crown and Ngāti Whātua o Ōrākei on the one hand, and the other tangata whenua groups on the other, is exacerbated. This was evident at the hearing (see ch 2, 'Testing historical material for the agreed historical account'; ch 3, 'The Crown's openness to changing its mind about redress').
- The examples the Crown pointed to of the Crown agreeing to change draft settlements in response to overlapping claimants' protests[12] have all occurred in the wake of a Waitangi Tribunal hearing and recommendations of the Tribunal. The Crown's dealings with overlapping claimants without Tribunal involvement do not inspire confidence in the Crown's willingness to respond to those claimants' concern without that kind of incentive. Cabinet itself has approved the terms of the agreement in principle, and would need to approve any changes to them. The Ngāti Whātua o Ōrākei negotiating team would also need to agree to any change to the terms of the agreement in principle being made in the deed of settlement. Accordingly, we consider that it is the parties' intention and expectation that the redress proposed in the agreement in principle will be the settlement redress unless something substantial upsets that plan. This is why this Tribunal does not accept the Crown's submission that our involvement is premature.
- Another reason for the Tribunal to be involved now is that although the Crown says it will receive new information, the Office of Treaty Settlements will apply its current policy to that information. Thus, if what the information does is effectively challenge the policy, there is no prospect that it will change the outcome. The Crown has indicated no willingness to rethink its policies regarding 'overlapping' claimants (or in fact in any other area). Its stance before us at hearing was that, although there may have been small oversights along the way (like not sending a document to one of the other tangata whenua groups), overall there was nothing wrong with the Crown's approach.
- The question that the Office of Treaty Settlements posed itself in order to decide whether to grant exclusive redress to Ngāti Whātua o Ōrākei with respect to maunga was whether Ngāti Whātua o Ōrākei's were the predominant interests in the maunga.[13] We think this is often the wrong question where cultural redress is concerned,[14] but *always* the wrong question where there are multiple interests in maunga. That is because maunga are iconic landscape features for Māori. They are iconic not because of their scenic attributes, but because they represent an enduring symbolic connection between tangata whenua groups and distinctive land forms. Sometimes, these land forms are the physical embodiment of tūpuna.[15] Thus, associations with maunga are imbued with mana and wairua that occupy the spiritual as well as the terrestrial realm. Maunga express a group's mana and identity. This connection and expression is an integral part of Māori culture. Great caution must be exercised in dealing with such places simply as land assets, or in accordance with any determination of predominance

not generated by those who hold the interests. Where there are layers of interests arising from the connection with the maunga of different groups through time, how is it possible to grade those interests? What is being evaluated for that purpose? Where values are spiritual, emotional, ancestral and symbolic, we think that granting redress on the basis of an assessment of 'predominance' is a crude and insensitive approach. The various interests differ in kind as well as intensity, and are not susceptible to a qualitative assessment of any sort – certainly not one that is made by outsiders.

Dr Michael Belgrave
Historian, witness for Marutūāhu, in response to questioning by Crown Counsel, Peter Andrew:
Michael Belgrave: 'Predominance' is a little unclear still. I mean my understanding of 'predominance' is basically if you sold the land, and we have no record of a complaint by anyone else, then that gives you a predominant interest. There is no definition. There is no real strict definition of 'predominance' that I can see in the paperwork.
Peter Andrew: But there is an opportunity for you now – you, obviously claimant groups – to express concern to the Crown about those sorts of issues, isn't there?
Michael Belgrave: I have to feel, I mean I have to feel that in this process you're standing in front of a juggernaut that is going at 120 miles per hour trying to wave a red flag.
Peter Andrew: Just a minute on that, Ngāti Whātua first approached the Crown in 1999, and you would accept although negotiations did not start till 2003, that it has taken quite a considerable period of time to get just this far, to an agreement in principle, hasn't it?
Michael Belgrave: It's taken a huge amount of time, and in that time, particularly from the commencement of negotiations in 2003, everyone else has been shut out of the agenda of the negotiations as it affected them. Everyone else has been unaware that Ngāti Whātua went into those negotiations with a piece of research that states its customary traditions over Tāmaki, but does not actually recognise the existence of alternative customary traditions. I am not saying that that research should have assessed the different traditions, but it should have acknowledged them. So without that basic information of what is going on, other claimants are really completely shut out. The Crown is saying 'go and negotiate with other claimants', and I ask the question 'why should they take that seriously?' They [Ngāti Whātua o Ōrākei] have got the ear of the Crown, and they are saying to other claimants 'just give us this information, we will look after your interests'. And, I do have to admit that in terms of the, you know, the Crown has taken some notice of that in terms of the areas it has defined for exclusive redress. But it has not provided a process where claimants can meaningfully engage with that material until now. And our argument is that is far too late. Cabinet has been told, on the basis of the evidence before us, there are no other customary interests we have to take into account.[16]

- Two aspects of the Office of Treaty Settlements' approach to granting exclusive cultural redress we found very surprising. With respect to the allocation of exclusive cultural redress in maunga, the Office of Treaty Settlements witness seemed to think that a fair distribution was called for. We know of no connection between tikanga, the spiritual and emotional connection between Māori people, their iconic landscape features, and fairness. Secondly, we were surprised by the view that groups that had connections with tribes outside Tāmaki Makaurau could get their exclusive cultural redress elsewhere, leaving the local sites for Ngāti Whātua o Ōrākei. This was clearly expressed by Crown counsel in submission as a justification for the cultural redress that had been offered to Ngāti Whātua o Ōrākei.[17] Again, we know of no tikanga underpinning this approach. Moreover, we thought it surprising that the theory could be advanced in support of exclusive cultural redress for Ngāti Whātua o Ōrākei in Tāmaki Makaurau, when (like the other tangata whenua groups) Ngāti Whātua o Ōrākei form part of a larger tribal grouping with interests outside Tāmaki Makaurau (see ch 3, 'What do the applicants object to?': 'Exclusive cultural redress').
- The use of 'predominance of interests' as a basis for

giving exclusive rights in cultural sites to one group – even when other groups have demonstrable interests that have not been properly investigated – is a Pākehā notion that has no place in Treaty settlements. Where there are layers of interests in a site, all the layers are valid. They derive from centuries of complex interaction with the whenua, and give all the groups with connections mana in the site. For an external agency like The Office of Treaty Settlements to determine that the interests of only one group should be recognised, and the others put to one side, runs counter to every aspect of tikanga we can think of. It fails to recognise the cultural resonance of iconic sites, and the absolute imperative of talking to people directly about what is going on when allocation of exclusive rights in maunga is in contemplation (see ch 2, 'Coming to grips with the customary interests in Tāmaki Makaurau'; ch 3, 'What do the applicants object to?: Exclusive cultural redress').

Graeme Murdoch
Historian witness for Te Kawerau ā Maki, in response to questioning by Crown Counsel, Peter Andrew:

Peter Andrew: It seems clear from what you are saying you accept the Crown has a responsibility to settle well-founded Treaty claims of Ngāti Whatua in Tamaki?
Graeme Murdoch: Yes I do accept that. But I suppose I should add that I accept that they should have all the evidence on the table and that they should know, particularly when it comes – as you'll see in my evidence I make quite a lot of emphasis about the cultural redress properties. It is all very well producing an agreed historical account, which at the end of the day is a powerful document, but when it comes to actually meddling with mana and with current kaitaikitanga then it's a much more dangerous thing and I think they need to have far greater knowledge in front of them to do that. I made the point that normally a judge in the Land Court or the Tribunal would do that.[18]

- There is inconsistency between the Office of Treaty Settlements' policy statements about redress in situations where there are 'overlapping' claims, and the redress offered to Ngāti Whātua o Ōrākei in the agreement in principle. The notion of a 'predominant interest' justifying exclusive redress is indicated in the *Red Book* only in relation to commercial redress. Yet Ngāti Whātua o Ōrākei have been offered maunga as cultural redress on this basis (see ch 3, 'What do the applicants object to?': 'Exclusive cultural redress'). The *Red Book* states that properties made available for commercial redress are generally regarded as substitutable. It makes no such statement about cultural redress properties. Yet the Office of Treaty Settlements told us that other tangata whenua groups can obtain cultural redress in properties outside Tāmaki Makaurau, in other parts of their rohe.[19] The *Red Book* states that a right of first refusal (a form of exclusive redress) is not usually available on a property in an area subject to unresolved 'overlapping' claims. Ngāti Whātua o Ōrākei have been offered rights of first refusal over multiple properties in such an area. Moreover, the Office of Treaty Settlements' evidence about the nature of Ngāti Whātua o Ōrākei's interests is inconsistent. We were told that the right of first refusal area was not one in which Ngāti Whātua o Ōrākei are recognised as having exclusive interests. Yet in documents from the Office of Treaty Settlements to their Minister, Ngāti Whātua o Ōrākei's interests in the right of first refusal area are described as being exclusive (see ch 3, 'Commercial redress does not denote exclusive cultural interests'). If it is difficult for the Tribunal to

discern the true position after a hearing and close examination of hundreds of pages of evidence and supporting documents, other tangata whenua groups have little hope of knowing what is what.

- The agreement in principle offers to Ngāti Whātua o Ōrākei non-exclusive redress in North Head Historic Reserve, Taurangi (Big King Recreation Reserve), Te Kopuke (Mount Saint John Domain), Owairaka (Mount Albert Domain), Ohinerau (Mount Hobson Domain), Otahuhu (Mount Richmond Domain), and possibly the Defence Force land at Kauri Point, Kauri Point Domain, Mount Victoria, Rangitoto and Motutapu. The problem with this is:

  — The offer is made even though the Office of Treaty Settlements is in no position to assess the potential strength of others' claims to exclusive interests in those sites (see ch 2, 'Coming to grips with the customary interests in Tāmaki Makaurau', 'Testing historical material for the agreed historical account'; ch 3, 'What Do the Applicants Object To?: Exclusive cultural redress').

  — The grant of non-exclusive interests to Ngāti Whātua o Ōrākei precludes other groups subsequently having an exclusive interest in those sites included in a Treaty settlement. This means that the Crown, in the context of its negotiation and settlement of Ngāti Whātua o Ōrākei's claims, has effectively judged the likely strength of the other tangata whenua groups' connections with those sites with no real engagement either with the groups or with their customary interests (see ch 2, 'Coming to grips with the customary interests in Tāmaki Makaurau'; ch 3, 'What Do the Applicants Object To?: Non-exclusive cultural redress').
- The expression of the commercial redress in the agreement in principle is neither complete nor, particularly in relation to rights offered in respect of the North Shore Naval Housing land, clear, so it is not possible to know from that document what is on offer, nor how much it is worth. The Crown's assessment that the rights to North Shore Naval Housing land have no value is neither plausible nor helpful to the other tangata whenua groups in Tāmaki Makaurau (see ch 3, 'Insufficient information to analyse proposed redress', 'Lack of certainty about operation of North Shore Naval land redress', 'Uncertainty about other agreement in principle proposals').
- Because it is not possible to ascertain what Ngāti Whātua o Ōrākei is being offered, the other tangata whenua groups cannot assess whether or not the Crown is right when it says it retains assets to do the same for others, should their claims prove to be comparable (see ch 3, introduction to 'Commercial redress, including the rights of first refusal and the sale and leaseback arrangement').
- Whatever advantages are inherent in the offer to Ngāti Whātua o Ōrākei as a result of its being the first settlement in Tāmaki Makaurau, there is currently no policy to (a) fund other tangata whenua groups to ascertain from experts what those advantages are, and what they might be worth; or (b) compensate the other tangata whenua groups for these advantages when they come to settle with the Crown; or (c) take account of any increase in value of the non-cash components of the redress in the intervening period between the settlement with Ngāti Whātua o Ōrākei and subsequent settlements; or (d) take into account the increased price of land when the opportunity to purchase land comprises part of the commercial redress in those future settlements (see ch 3, introduction to 'Commercial redress, including the rights of first refusal and the sale and leaseback arrangement', 'The Crown's negotiating position has mitigated the 'first cab off the rank' advantage').
- The Crown has said that it will review paragraph 64 of the agreement in principle. This is the paragraph that would remove protective memorials on all land within the Ngāti Whātua o Ōrākei Right of First Refusal

Area. It is our clear view that this paragraph should not form part of any settlement that does not settle all tangata whenua interests in Tāmaki Makaurau. As the Office of Treaty Settlements acknowledged at the hearing, the area within which Ngāti Whātua o Ōrākei has a right of first refusal is not one in which they have exclusive customary interests (see ch 3, 'Removal of protective memorials').

- Although others have customary interests in the Ngāti Whātua o Ōrākei Right of First Refusal Area, Ngāti Whātua o Ōrākei's right of first refusal is not framed so as to take account of those: they have exclusive rights there in respect of any of the Crown's properties that become surplus. This has consequences for groups who may have cultural ties to those sites. The Crown has not accounted for this possibility in its framing of redress for Ngāti Whātua o Ōrākei (see ch 3, 'Cultural concerns about exclusive commercial redress').

Notes

1. Rachel Houlbrooke, 'Re: Treaty Settlement Negotiations between the Crown and Ngāti Whātua o Ōrākei', 1 July 2003, (doc A38(a), DB10), para 2
2. Te Warena Taua, on behalf of Ngāi Tai ki Tāmaki, hearing recording, 13 March 2007, track 2
3. Roimata Minhinnick, on behalf of Ngāti Te Ata, hearing recording, 13 March 2007, track 2
4. Closing submissions for Marutūāhu (paper 3.3.23), para 7; Tiwana Tibble, on behalf of Ngāti Whātua o Ōrākei in response to questioning by Paul Majurey, hearing recording, 13 March 2007, track 4
5. Mark Stevens, on behalf of Ngāi Tai ki Tamaki Tribal Trust, hearing recording, 13 March 2007, track 2
6. Te Warena Taua, in response to questioning by Peter Andrew, hearing recording, 13 March 2007, track 2
7. Waitangi Tribunal, *The Ngāti Tūwharetoa ki Kawerau Settlement Cross-Claim Report* (Wellington: Legislation Direct, 2003) p 78.
8. Document A67, DB22
9. Mark Stevens, oral evidence, hearing recording, 13 March 2007, track 2
10. Tiwana Tibble oral evidence on behalf of Ngāti Whātua o Ōrākei, hearing recording, 13 March 2007, track 4
11. Associate Professor Michael Belgrave, oral evidence on behalf of Marutūāhu, hearing recording, 13 March 2007, track 1
12. The examples related to the provisions about Kaputerangi and part of the Matahina Forest in the Ngāti Awa Deed of Settlement, and the removal of four cultural properties as redress in the Ngāti Tama/Maniopoto Settlement: see Crown closings (paper 3.3.21) paras 6.1–6.3
13. Rachel Houlbrooke, brief of evidence, 26 February 2007 (doc A38), paras 160, 168
14. In *The Ngāti Tūwharetoa ki Kawerau Settlement Cross-Claim Report* (pp 69–70) the Tribunal said that while the Crown's 'dominant interest' paradigm might be a rational basis upon which to deal with competing claims to Crown forest assets, awarding interests in cultural sites is a different thing entirely, and should proceed on a different basis:

> . . . When it comes to cultural redress, and the relationship of communities to culturally significant and sometimes tapu areas close to their tūrangawaewae, . . . the Crown's approach to awarding interests in contested areas must be even more scrupulous . . . Although the Tribunal in The Ngāti Awa Settlement Cross-Claims Report approved the rationale for the Crown's policy with respect to cross-claims to commercial redress [which was one based on predominance of interests], it should not be inferred that the same or similar approach to cultural redress will be found to be compliant with Treaty principles.'

15. Ancestors
16. Michael Belgrave, on behalf of Marutūāhu, hearing recording, 13 March 2007, track 1
17. Crown's closing submission (paper 3.3.21) paras 7.10 and 7.11
18. Hearing recording, 13 March 2007, track 4
19. Crown's closing submission (paper 3.3.21) paras 7.10 and 7.11

CHAPTER 5

Ngā Whakaaro mō te Tirīti/Treaty Breach and Prejudice

Our Jurisdiction

Section 6 of the Treaty of Waitangi Act 1975 sets out the Tribunal's jurisdiction. We must determine whether the acts or omissions complained of were inconsistent with the principles of the Treaty, and whether those acts or omissions caused prejudice. If the claims are well-founded, the Tribunal may recommend to the Crown that action be taken to remove the prejudice or to prevent other persons from being similarly affected in the future. Those recommendations may be in general or specific terms, and should be practical.[1]

The findings set out in chapter 4 establish that the Crown erred both in its process and in the outcome of the process.

The Crown's conduct was inconsistent with the principles of the Treaty of Waitangi in the following ways.

Failure to Fulfil the Duty to Act Reasonably, Honourably, and in Good Faith

The Crown failed to fulfil its duty to act reasonably, honourably, and in good faith[2] as follows:

- The Crown's policy for dealing with what it called overlapping claimants, set out in the *Red Book* and the Office of Treaty Settlements' letter to claimants of 1 July 2003, promised a level of interaction with other tangata whenua groups and their information that was not forthcoming. The level of interaction promised was anyway too limited to be effective for these purposes.
- The Crown's main way of interacting with other tangata whenua groups was to write to them seeking their customary information. This gave the impression that there was a process for assessing that information, but in fact the information, when provided, fell into a vacuum. It is not at all clear that officials, who were focused on dealing with Ngāti Whātua o Ōrākei in negotiations with them, really ever came to grips with the material tendered. In the *Lands* case, Justice Richardson observed that:

> The responsibility of one Treaty partner to act in good faith and reasonably towards the other puts the onus on a partner, here the Crown, when acting within its sphere to make an informed decision, that is a decision where it is sufficiently informed as to the relevant fact and law to be able to say it had proper regard to the impact of the principles of the Treaty.[3]

  We think that the Crown was under such an obligation here to be fully informed before making material decisions affecting Māori, but it did not fulfil that obligation to the other tangata whenua groups in Tāmaki Makaurau.
- It was the Crown's policy that, when overlapping claimants asserted interests, the mandated group would deal with them. Thus, it was Ngāti Whātua o Ōrākei's

job to deal with the other tangata whenua groups in Tāmaki Makaurau. As it transpired, Ngāti Whātua o Ōrākei did not want to perform this task. The Crown knew this, but it did not intervene to change a practice that was clearly not working. It took no steps even to do what it said it would in the terms of negotiation, namely 'consult' with 'overlapping' claimants in the pre-agreement in principle period.[4]

- The Office of Treaty Settlements did work internally to assess some of the claims and histories proffered by other tangata whenua groups and to work out into which 'large, natural group' of settling claimants they could be fitted. Typically, they did not involve the people concerned in any of their deliberations, nor did they tell them about the views officials had formed about their claims and histories, even when those views affected their actions.
- In responding to the overtures and requests of other tangata whenua groups in Tāmaki Makaurau, the Office of Treaty Settlements was generally uncooperative. Officials responded mainly to groups that had persistent lawyers. This general reluctance to engage with those other tangata whenua groups extended into the conduct of this inquiry. The office took a narrow view of the documents it ought to provide and made available some relevant documents only after the hearing and upon direction by the Tribunal. It is difficult to avoid the conclusion that the office has been less than open in its dealings with the Tribunal. This impression is confirmed by the fact that it appears from the content of documents filed late that the sole official who gave evidence for the office answered some questions at the hearing in ways that were misleading.

Failure to Give Effect to the Principle of Active Protection

The principle of active protection expresses the Crown's obligation to take active steps to ensure that Māori interests are protected.

In the negotiations in Tāmaki Makaurau, all of the Crown's focus was on Ngāti Whātua o Ōrākei, with the result that the interests of the other tangata whenua groups were overlooked, downplayed, and sidestepped. They may also have been misjudged. We do not know this, because we have not ourselves conducted an inquiry into the relative merits of the historical Treaty claims of Tāmaki Makaurau tangata whenua against the Crown.

In training all its resources on Ngāti Whātua o Ōrākei alone, the Crown had insufficient regard for, or understanding of, the whanaungatanga of Ngāti Whātua o Ōrākei and the other tangata whenua groups in Tāmaki Makaurau. The importance of whanaungatanga relates to the guarantee of te tino rangatiratanga in article II. It emphasises the need for the Crown to:

- understand the relationships (arising both from whakapapa and from politics) between all the groups;
- act wherever possible to preserve amicable tribal relations;[5] and
- act fairly and impartially towards all iwi, not giving an unfair advantage to one, especially in situations where inter-group rivalry is present.[6]

We add that, if the Crown were to continue down the path prefigured in the agreement in principle, this settlement would, we think, certainly create new grievances for the other tangata whenua groups. We adopt these words from the Tribunal's *Taranaki Report*:

> the settlement of historical claims is not to pay off for the past, even were that possible, but to take those steps necessary to remove outstanding prejudice and prevent similar prejudice from arising; for the only practical settlement between peoples is one that achieves a reconciliation in fact.[7]

We think that, in focusing as it did on its relationship with Ngāti Whātua o Ōrākei, the Crown forgot that it has the same sort of obligation to *all* groups. If its well-intentioned conduct towards one creates further grievances for others, then the process has gone awry. Instead of achieving reconciliation in fact, we are heading in the other direction.

Prejudice

The principal prejudice in this inquiry arises from damaged relationships. Instead of supporting the whanaungatanga that underpins rangatiratanga, the Crown's actions have undermined it. Te taura tangata is the braid of kinship that binds the tangata whenua groups of Tāmaki Makaurau to each other, and to the whenua. While the situation arising from an unfair process that has created two tiers of tangata whenua in Tāmaki Makaurau persists, te taura tangata will continue to unravel.

In summary, the other tangata whenua groups in Tāmaki Makaurau are prejudiced because:

- Their relationships with their Ngāti Whātua o Ōrākei whanaunga have deteriorated, and there is no obvious means of restoring the damaged ties that bind.
- The ability of the other tangata whenua groups to act as, and be recognised as, tangata whenua and kaitiaki in Tāmaki Makaurau has been diminished. (Their interests will be worse affected if the settlement proceeds, because of their indefinite relegation to a second tangata whenua tier in Tāmaki Makaurau.)
- They have lost confidence in the Crown, and doubt their ability to establish a positive relationship with the Office of Treaty Settlements.
- They have invested mental, emotional, and financial resources in engaging with the Office of Treaty Settlements and (to a lesser extent) Ngāti Whātua o Ōrākei in a process that had no intention of delivering to them.
- There is no currently viable strategy for dealing with the other tangata whenua groups, and this leaves them in limbo with respect to the settlement of their own Treaty claims.

Notes

1. See the preamble and section 6(4) of the Treaty of Waitangi Act 1975.
2. The Tribunal said in its *Report of the Waitangi Tribunal on the Orakei Claim*, 3rd ed (Wellington: GP Publications, 1996) at page 207 that: 'The Treaty signifies a partnership between the Crown and Maori people and the compact rests on the premise that each partner will act reasonably and in utmost good faith towards the other.' In this passage, the Tribunal drew on the language of the judges' decision in the *Lands* case (*New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 (CA)). In the later case *Te Runanga o Wharekauri Rekohu v Attorney-General* [1993] 2 NZLR 301 (CA), at page 304, the then president of the Court of Appeal, Justice Cooke, summarised the views of the judges in the *Lands* case by saying that the bench there had unanimously held that 'the Treaty created an enduring relationship of a fiduciary nature akin to a partnership, each party accepting a positive duty to act in good faith, fairly, reasonably, and honourably towards the other'.
3. *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641, 682 (CA)
4. Terms of negotiation, cl 19
5. Waitangi Tribunal, *The Ngati Awa Settlement Cross-Claims Report* (Wellington: Legislation Direct, 2002), pp 87–88
6. Waitangi Tribunal, *Maori Development Corporation Report* (Wellington: Brookers Ltd, 1993), pp 31–32
7. Waitangi Tribunal, *The Taranaki Report: Kaupapa Tuatahi* (Wellington: GP Publications, 1996), p 315

CHAPTER 6

Whakahau/Recommendations

Outline

This chapter is organised as follows:

(1) introductory discussion;
(2) recommendations to remove the prejudice in the current situation; and
(3) recommendations to prevent others being similarly affected in the future.

Introductory Discussion

We thought long and hard about what to do about the situation that confronted us in Tāmaki Makaurau. Conceiving of a path forward has not been easy. We were faced with drivers that were very difficult to reconcile. On the one hand, we do not want to get in the way of the Crown settling with Ngāti Whātua o Ōrākei. It seems wrong to us that Ngāti Whātua o Ōrākei should suffer for the defects in the Crown's process. Although, as regards the protection of the interests of other tangata whenua groups, Ngāti Whātua o Ōrākei probably made the Crown's job of delivering a good process harder, ultimately it is the Crown's process. It is the Crown's responsibility to manage the self-interest of a settling group so that the interests of other tangata whenua groups are not unfairly jeopardised. We now confront the difficulty of doing justice to other tangata whenua groups without adversely affecting Ngāti Whātua o Ōrākei, given that they are now in expectation of receiving the benefits of settlement which come to them via a faulty process. If Ngāti Whātua o Ōrākei gets all that the Crown has offered to them, how will the interests of the other tangata whenua groups be protected? And what will be the value of a settlement that is so flawed?

We explored the possibility of recommending that the settlement with Ngāti Whātua o Ōrākei should proceed with modifications, and recommending that the Crown also take steps immediately to bring the other tangata whenua groups into a settlement programme as a 'large natural group'. The problem with this is that if you take out of the offer to Ngāti Whātua o Ōrākei the redress that really concerns us, there is really nothing much left.

We have no issue with the quantum of the proposed settlement between the Crown and Ngāti Whātua o Ōrākei. The quantum is a matter entirely for them. What concerns us is the unfairness to the other tangata whenua groups inherent in both the cultural and commercial redress now on offer to Ngāti Whātua o Ōrākei.

Fairness

There are two factors that we think heighten the need for fairness in this settlement context. We have referred to them both before:

- The Crown provides redress and not compensation for losses. This means that people's satisfaction with what they get is not a function of a numerical

calculation; it flows from pragmatism, from a sense that within the limits of what is achievable politically, justice has been done, and they have been dealt with fairly.

- In Tāmaki Makaurau, the Crown has chosen to settle separately with tangata whenua groups that are closely related to each other. The importance of protecting the relationships between these groups exacerbates the need for the content of the settlements to be demonstrably fair.

As to fairness, we have identified these key areas of concern in the proposed settlement with Ngāti Whātua o Ōrākei:

- The Crown is unwilling to admit, and therefore lacks a strategy for managing, the advantages that will flow to Ngāti Whātua o Ōrākei as a result of its settlement being the first in Tāmaki Makaurau.
- It is not clear whether the Crown really does have at its disposal the commercial assets that will enable it to replicate the kind of commercial redress it is offering to Ngāti Whātua o Ōrākei, and if it does not there is doubt as to whether it can deliver fair settlements to other tangata whenua groups in Tāmaki Makaurau.

(These risks are, of course, interrelated, because if our fear about the second area of risk is well-founded, it means that Ngāti Whātua o Ōrākei would derive a further benefit from going first.)

- The Crown proposes recognising cultural interests of Ngāti Whātua o Ōrākei through exclusive and non-exclusive cultural redress that will make it impossible to grant non-exclusive and exclusive redress to others in a number of significant sites. This is unfair because the others' interests are not as well known or understood as Ngāti Whātua o Ōrākei's, but the Crown's ability to recognise them appropriately when they are known will be compromised by the earlier settlement.

We discussed these risks in Chapter 3: Ngā Hua/Outcome. With respect to the proposed commercial redress, we do not have enough evidence before us to identify and value what is on offer to Ngāti Whātua o Ōrākei, and therefore what is left for the other tangata whenua groups. We think it important that the risk that what is on offer to Ngāti Whātua o Ōrākei cannot be replicated is taken seriously. There needs to be a full analysis by the Crown and other tangata whenua groups before the settlement with Ngāti Whātua o Ōrākei goes any further.

Put plainly, it is imperative that the Crown is in a position to do for other Tāmaki Makaurau tangata whenua groups what it is offering to do for Ngāti Whātua o Ōrākei. This view is consistent with the two principles by which the Crown says it is guided in reaching decisions on overlapping claims.[1] The second of these is its 'wish to maintain, as far as possible, its capability to provide appropriate redress to other claimant groups and achieve a fair settlement of their historical claims.'[2]

In the Tāmaki Makaurau situation, there can be no doubt that:

- tangata whenua groups will be in a good position to compare closely their claims and the Crown's response to them by way of redress in settlement; and
- they will expect to be dealt with even-handedly: this is a legitimate expectation.

In order to maintain the integrity of its settlement programme – and simply in order to be fair – the Crown needs to ensure that it meets these expectations.

In addition to fairness, the cultural redress on offer puts tikanga in issue in this inquiry.

Cultural redress

It is plain that cultural redress has a rationale different from that of the other major components of a settlement package. Stated simply, cultural redress serves the vitally important function of recognising the tangata whenua status of mandated groups and, therefore, their special relationship with features of the natural landscape of their

area. While that relationship could be recognised independently of the Treaty settlement process, and already is to some extent,[3] it is clear that the incorporation of cultural redress in a Treaty settlement will make the arrangement far more meaningful and satisfying for a claimant group. Importantly too, in the context of settlements that do not and cannot compensate for the grievances being settled, cultural redress could well provide the unique 'sweetener' for a proposed settlement package. In light of this, it is vitally important that cultural redress not be deployed in a manner contrary to tikanga Māori.

Exclusive cultural redress

In the agreement in principle, the Crown proposes granting to Ngāti Whātua o Ōrākei exclusive interests in the maunga Maungakiekie (One Tree Hill), Maungawhau (Mount Eden), and Puketāpapa (Mount Roskill). Exclusive interests are also to be granted in the Pūrewa Stewardship (coastal) area. The exclusive redress is purportedly based on Ngāti Whātua o Ōrākei's predominance of interests in those sites.

We do not know whether the interests of Ngāti Whātua o Ōrākei in these three maunga are 'predominant' in relation to the interests of others and, as we have said, we think this is the wrong approach to adopt when there are multiple interests in maunga. We do not think that it has a basis in tikanga.

It was plain on the evidence before us – and available also to the Office of Treaty Settlements – that, as regards the three maunga, there are multiple interests. The interests are multiple both in number and in kind. This is a consequence of the intensive occupation of Tāmaki Makaurau by Māori over the centuries, and the different groups' fluctuating levels of influence and activity in different places over that time. In situations like this, we believe that the grant of redress should take into account and reflect the multi-layered nature of these multiple interests. It is true that, because the Treaty of Waitangi was signed in 1840, breaches of the Treaty can only date from that time. Māori history did not begin then, though, and in dealing with cultural redress the Crown must confront the reality of layers of interests accreting over centuries. Even if Ngāti Whātua o Ōrākei's interests were predominant in 1840, this is not a basis for the award to them of exclusive interests in cultural sites. The analysis of relationships and movements district-wide is a detailed and sophisticated one, and changes since 1840 are also relevant. Contemporary Māori politics are material too.

Aa a matter of policy, the Office of Treaty Settlements consults with other tangata whenua groups only after the agreement in principle with the mandated group is in existence. A consequence is that redress is agreed between the Crown and the mandated group without meaningful input from other affected Māori. As we have said, we agree neither with this policy nor the mode of its implementation. But certainly, where such a policy exists, the Office of Treaty Settlements should never grant exclusive interests in taonga of iconic status unless it can be completely confident that the interests of the mandated group are the only interests it needs to take into account. We think it unlikely that there could be such confidence in respect of any group in Tāmaki Makaurau, but in any event certainly not yet. This is because only Ngāti Whātua o Ōrākei's interests and preferences have thus far been the subject of intensive scrutiny.

The response of the Office of Treaty Settlements to this view may be that the agreement in principle enshrines a draft proposal only, and there can be no harm in that. The offer itself will flush out any contrary views.

Such a response comprehends neither the sensitivities around interests in maunga, nor the delicate interplay between interests and mana in relationships between tangata whenua groups themselves. A draft settlement that recognises the interests of one group only and exclusively, carries the implication that the interests of the others are such that they can either be ignored or denied. This sets one group above the others, and against the others, as

regards the mana and wairua inherent in the maunga, and this is quite simply a bad thing to do. It causes destructive feelings of envy and resentment that are not easily allayed. It also adversely affects the relationship between the Crown (which through the Office of Treaty Settlements, its Minister, and Cabinet, supports the proposal of redress)[4] and the other tangata whenua groups. To us, therefore, it is clear that even to propose such redress at this stage is a mistake.

We think that, in Tāmaki Makaurau, there are no maunga about which it could confidently be said that only one group has interests. There are layered interests in respect of all the maunga. We express no view on the relative strength of the associations. We do not think it necessary to do so, but moreover we do not want to do so. We have had fewer than four days' hearing, and the historical evidence raises as many questions as it answers. Quite simply, we do not know enough. Neither does the Office of Treaty Settlements.

Non-exclusive cultural redress

The agreement in principle offers non-exclusive redress in the sites identified in its clauses 21, 22 and 35. Our concern is that, upon further investigation, it may be that these are areas in respect of which other tangata whenua groups have interests that ought to be acknowledged through the grant of exclusive redress. Right now, the Crown is fully informed about the interests and preferences of Ngāti Whātua o Ōrākei, but not those of the other groups. In our opinion, the Crown will only be in a position to decide whether any group should receive non-exclusive redress in these places *after* it has determined that no group should receive exclusive redress. Such a determination can only be made safely and fairly once there has been a correspondingly intensive investigation of the interests of the other groups in these places, and engagement in settlement negotiation to ascertain where the groups' respective settlement priorities lie.

We think it is vital that the nature and extent of the interests of the other tangata whenua groups in these culturally important sites is fully understood before Ngāti Whātua o Ōrākei is granted non-exclusive interests that precludes the granting of exclusive interests to others.

Can the problems be sorted out by hui?

Counsel for Marutūāhu, Paul Majurey, asked the Tribunal to recommend that the Crown immediately place the Ngāti Whātua o Ōrākei negotiation on hold, and:

> Urgently undertake the necessary steps to remedy the prejudice that has permeated these negotiations, for example hui-a-iwi, and independent research (Māori and historical) on 'overlapping claimant' interests.[5]

We were attracted to the idea that hui-a-iwi be used as a means of sorting out understandings about the customary interests in Tāmaki Makaurau, and their modern expression.

But to be meaningful, Ngāti Whātua o Ōrākei would need to be there too. All of the tangata whenua groups in Tāmaki Makaurau would need to participate for a hui process to yield results. While the draft settlement with Ngāti Whātua o Ōrākei remains on the table, we do not think that hui of the sort that are required can succeed.

Right now, there is no incentive for Ngāti Whātua o Ōrākei to participate in the kind of frank and open exchange on these issues that would enable them to be worked through to a conclusion that all could live with. Ngāti Whātua o Ōrākei has too much at stake. Inevitably, we think – and we imply no fault on Ngāti Whātua o Ōrākei's part when we say this – they will want to defend the status quo (their draft settlement and special recognition by the Crown). Equally inevitably, the other tangata whenua groups will want their competing histories honoured, and the settlement re-crafted to reflect their realities These two sets of objectives are too far apart to be

capable of resolution through hui; if anything, hui might even damage relationships further. It is simply too late in the process for there to be any reasonable expectation that Tāmaki Makaurau Māori themselves could sort out the settlement-related take that were presented to us.

Nor, actually, did we think that now is necessarily the right time for the commissioning of further research into the interests of the other tangata whenua groups. We have already commented on shortcomings in the process of gathering together and analysing the histories that underpin the traditional interests of Tāmaki Makaurau Māori. We think that the stage needs to be set for the involvement in settlement negotiations of all the other tangata whenua groups, and then an assessment made of:

- what information there is about all the interests;
- whether that information has been properly addressed and discussed (we do not think that, thus far, it has);
- what process would best serve for addressing and discussing it; then
- whether more information is required; and
- what information it is, and who can provide it.

Thus, although we think there will be a role for hui down the track, we think that the time is not now. Institutional changes in approach need to be set in place first, and these are suggested in our recommendations.

The first step, unfortunately, is that this draft settlement really must be stopped in its tracks.

This does not mean that the draft settlement with Ngāti Whātua o Ōrākei has no future. Rather, we see a scenario in which that draft settlement is held in abeyance while another draft settlement (or possibly draft settlements[6]) with which it is intrinsically linked is negotiated. Once the Crown has negotiated a draft settlement with the other tangata whenua groups, they can all be looked at together so that the Crown can then work out with those groups:

- a proper recognition of cultural interests by way of redress relating to the sites located in the area covered by the draft settlement between Ngāti Whātua o Ōrākei and the Crown; and
- fair access to the commercial redress available.

What happens now?

We think that the Crown must afford the other tangata whenua groups in Tāmaki Makaurau that appeared before us the opportunity to enter into a negotiation and settlement relationship with the Crown. This is because we believe the Crown cannot say right now with any confidence that it knows enough about all the groups' relative interests to be awarding exclusive rights to any, nor to be precluding the possibility that exclusive rights may need to be awarded to any. Nor can the Crown say with any confidence that its offer of commercial redress to Ngāti Whātua o Ōrākei does not undermine its ability to benefit the other groups similarly, because:

- it has not valued what it is offering to Ngāti Whātua o Ōrākei;
- it does not know whether other properties comparable to those in the North Shore Naval housing area can be made available to other claimants; and
- it has not taken into account whether the offer of areas of rights of first refusal to Ngāti Whātua o Ōrākei will overlap with sites of cultural significance to the other tangata whenua groups.

Our recommendations now follow.

Recommendations to Remove Prejudice in the Current Situation

(1) The draft settlement with Ngāti Whātua o Ōrākei should now be put on hold, until such time as the other tangata whenua groups in Tāmaki Makaurau have negotiated with the Crown an agreement in principle, or a point has been reached where it is

evident that, best endeavours notwithstanding, no agreement in principle is possible.

(2) As a matter of urgency, the Crown should do all it can to support the other tangata whenua groups in Tāmaki Makaurau so that they can enter into negotiation with the Crown to conclude their own Treaty settlements as soon as possible.

(3) This will involve the Crown in:

— providing information and financial support to enable the groups to obtain mandates from their constituencies to enter into settlement negotiation with the Crown about their claims in Tāmaki Makaurau;

— agreeing that these groups together constitute a large natural grouping for the purposes of settling their Treaty claims in Tāmaki Makaurau – provided that this approach meets with the preferences of the groups themselves;[7] and

— giving them priority over other groups whose entry into settlement negotiation had been planned.

(4) In the process of working with the other tangata whenua groups in Tāmaki Makaurau, the Crown will need to do the work on all the customary interests that was not done preparatory to the draft agreement in principle with Ngāti Whātua o Ōrākei.

(5) Once all the areas of interest and influence are on the table, it will be possible to sort out:

— whether cultural redress involving the grant of exclusive interests in any maunga is appropriate (we think this is unlikely, but want to leave open the opportunity for tangata whenua groups to hui on this issue to determine what their tikanga dictates);

— an appropriate distribution of the commercial redress available;

— recognition of all the groups in all their areas of influence through exclusive and non-exclusive cultural redress; and

— historical accounts of the groups' interactions with the Crown that either (a) properly recognise each other's existence and differing accounts; or (b) state that each reflects that group's reality, and is not intended to be reconciled with the others' accounts.

(6) With respect to commercial redress, we recommend that the Crown funds the other tangata whenua groups in Tāmaki Makaurau to enable them to analyse the redress on offer to Ngāti Whātua o Ōrākei, and form a view on what other available commercial redress is comparable.

Recommendations to Prevent Others Being Similarly Affected in Future

These recommendations go to the practice and policy of the Office of Treaty Settlement as set out in its policy documents.

The Office of Treaty Settlements' policy manual for negotiating Treaty settlements is set out in the *Red Book*. As we have said, the book does address overlapping claims, but to a minimal extent. Its focus is on the relationship between the settling group and the Crown. That focus is an important and proper one, but so is the focus on the tangata whenua groups with whom the Crown is not for the time being settling.

We recommend:

(7) that Crown policy and practice with respect to managing relationships with groups other than the settling group is explained more fully in the *Red Book*; and

(8) that the *Red Book* is amended so as to make policy and practice as regards tangata whenua groups other than the settling group both compliant with Treaty principles, and fair.

We now outline the areas where we consider that the Crown needs to amend its practice and policy.

(a) Who to engage with?

Before agreeing to enter into discussions about terms of negotiation with any tangata whenua group, the Crown should first hold hui in the region to discuss:

- the connections between the people;
- the possibilities for groupings of people; and
- the path forward for those with whom the Crown will not be negotiating for the time being.

(b) What kind of engagement?

The Office of Treaty Settlements needs to identify early the other tangata whenua groups that will be affected by the settlement, and commit to a programme of hui that will continue throughout the negotiation.

Communication should not be by letters alone; letters should be used only to supplement face-to-face communication.

The Office of Treaty Settlements needs to take the initiative with the other groups: it has the information about the negotiation; it has the resources; it needs to make the running with all affected groups, and not only with those who are well-informed and responsive.

The Office of Treaty Settlements' focus should be on building relationships. This involves getting to know the groups and the individuals within them sufficiently to be able to identify where their various strengths lie, and get a feel for how the groups function.

Engagement is not only a means of getting to know what the other groups want in relation to the settling group.

The Office of Treaty Settlements should not wait until after the redress has been agreed in principle with the settling group. This is too late to form a relationship with the other groups.

(c) What is the customary underpinning?

The Office of Treaty Settlements needs to make a commitment to understanding the customary underpinning of the tangata whenua groups' positions.

In order to do this, officials will need to engage with Māori sources of knowledge, both written and oral. Sometimes it may be necessary to seek external advice on customary interests. This will usually be Māori advice; it needs to be local and specific, and not general.

With respect to customary matters, officials need to engage with and understand concepts of layers of interests, rather than 'predominance' and ranking.

(d) What information should be available?

The Crown needs to be honest about the true nature of Treaty settlement negotiations. To what extent do the conventions of commercial confidentiality really have a part to play?

The Office of Treaty Settlements needs to work out and state what kinds of information must be withheld. Such information should be kept to a minimum; officials should proceed on an ethic of openness.

The Office of Treaty Settlements needs to avoid getting into situations where, for instance, historical reports are 'owned' by anybody. The principle should be that if material of that kind is to be relied upon in settlement negotiations, it is available to all.

(e) How to manage the mana implications of negotiations?

Negotiating Treaty Settlements is a political act. It has implications for the mana of all concerned. The Office of Treaty Settlements needs to develop techniques to manage the implications of choosing to deal only with one group in an area. This will involve communicating with other stake-

holders (especially local authorities) about what is happening, why it is happening, and what it means for local understandings. This will take time and resources.

(f) Who should be funded?

Currently, the Crown provides funding only to the group with whom it is for the time being negotiating. In certain circumstances, it will be appropriate for the Crown also to fund other tangata whenua groups to:

- commission historical research on key issues; and
- obtain advice on certain legal and/or commercial matters that affect them.

(g) Whose job is it to engage with the other tangata whenua groups?

Ultimately, it is the Crown's job to manage the effects on other tangata whenua groups of their negotiations and settlement with the settling group.

Sometimes it will be appropriate to assist the settling group to manage its relations with its neighbours and relations. In this case, the Crown should take a backseat role, but not entirely hands-off. It must remain in touch with the management of those relations, because ultimately it is responsible. It must ensure that:

- it understands what is going on;
- its own relationship with those groups is not jeopardised; and
- the price of obtaining a settlement is not too high in terms of damaged intra- and inter-tribal relations.

It is important for the Crown to manage the perception that it is leaving the engagement to the settling group because it does not want to engage with the other groups itself.

Generally it will work better to focus the engagements between the settling group and other tangata whenua groups on:

- developing understandings about areas of influence;
- working out ways of dealing with areas where there are multiple interests.

It is unlikely to work well if the only topic of engagement is ascertaining the other groups' views on the settling group, its view of its claims, and what it is likely to be offered by the Crown.

(h) What are the principles underpinning the Crown's engagements?

The Office of Treaty Settlements needs to sort out, and the policy needs to reflect, the extent to which the Crown is seeking to understand whether the claims of both the settling group and other tangata whenua groups are well-founded.

The policy needs to answer these questions:

- What does the Office of Treaty Settlements need to know about the claims of all the claimant groups affected by the proposed settlement?
- Does the Office of Treaty Settlements evaluate and compare them?
- If not, why not? If so, how?
- What should be said about other tangata whenua groups in relating past interactions of the Crown and the settling group?
- How do the answers to these questions bear on the negotiation and settlement with the settling group?

(i) What is the role of the notion of predominance of interests?

The Crown's settlement policy needs to make plain how and why predominance of interests is a paradigm that has

a place with respect to commercial redress, but has no place in determining cultural redress.

Notes

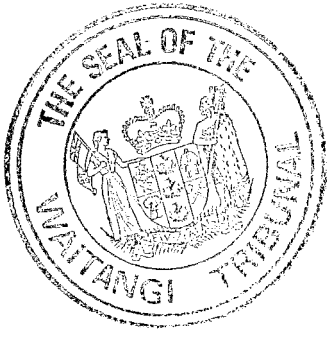
1. Office of Treaty Settlements, *Ka Tika ā Muri, Ka Tika ā Mua* [the *Red Book*], 2nd ed (Wellington: Office of Treaty Settlements, [2002]), p 59
2. Ibid
3. See, for example, the agreements relating to consultation or management of particular sites that have been reached in different parts of New Zealand between tangata whenua groups whose Treaty grievances have not been settled and local councils and/or central government agencies.
4. In the documents filed on 25 May 2007, the Crown included a heavily excised copy of the document (doc A67, DB44) by which the Prime Minister, Minister of Finance and Minister in Charge of Treaty of Waitangi Negotiations approved the commercial and financial redress proposed in the agreement in principle. The proposed cultural redress had been approved by Cabinet earlier, and it had also been agreed that the three Ministers would approve the final financial and commercial redress proposal. (doc A65, attachment 7)
5. Marutūāhu closing submissions, 16 March 2007 (paper 3.3.23), para 16
6. Ideally, in order to save time, the other tangata whenua groups in Tāmaki Makaurau would co-operate to fit together into one grouping for the purposes of settling with the Crown. Whether or not that will prove possible remains to be seen; it is to be determined by those groups and the Crown.
7. The suggestion of Te Warena Taua (witness for Te Kawerau ā Maki and Ngāi Tai ki Tāmaki) that all the groups together form a grouping as Waiōhua-descended people seemed sensible to us. In response to questions about the possible size of such a grouping, Mr Taua said that he thought that a Waiōhua 'confederation' would number about 9000 from 9 or 10 different groups. However, we think that the decision as to grouping for negotiation and settlement purposes must be one that meets the groups' own conception of identity and affiliation.

Dated at Wellington this 12th day of June 2007

C M Wainwright, presiding officer

J R Morris, member

J W Milroy, member



INQUIRY PROCEEDINGS SUMMARY

The first application for an urgent inquiry into the Crown's settlement negotiations with Ngāti Whātua o Ōrākei was received on 5 January 2005 from Ngāti Te Ata Waiōhua (Wai 1231). This application was withdrawn by the Ngāti Te Ata claimants on 31 March 2005 when they chose to raise their concerns directly with the Office of Treaty Settlements.

A further application for an urgent inquiry into the negotiations was received on 4 May 2006 from the Te Taoū claimants for Wai 756 and 1114. A judicial conference was scheduled to hear claimants and the Crown on this application on 19 September 2006. Before this conference, a memorandum was received from the Ngāti Te Ata claimants seeking to reactivate their application for an urgent hearing, and new applications were received from Ngāi Tai ki Tāmaki Tribal Trust (Wai 1363) and Marutūāhu (Wai 1366).

All four applications were heard at the judicial conference, which was held at Hoani Waititi Marae in Auckland. Also in attendance at the conference were representatives for Te Kawerau ā Maki, Ngāi Tai ki Tamaki, the Hauraki Māori Trust Board, Te Rūnanga o Ngāti Whātua and the Ngāti Whātua o Ōrākei Māori Trust Board. Several unrepresented claimants also attended the conference and made submissions from the floor.

A further judicial conference was held to consider the applications, as well as several other applications concerning Crown settlement policy, on 22 November 2006 at Pipitea Marae. In directions following this conference Judge Wainwright granted the applications for an urgent inquiry into the Crown's negotiations with Ngāti Whātua o Ōrākei. In these directions, she also specified, owing to the limited hearing time available in an urgent hearing, which parties would be heard. These were Ngāti Te Ata, Ngāi Tai ki Tāmaki Tribal Trust, Ngāi Tai ki Tāmaki (Wai 1364), Te Kawerau ā Maki (Wai 1365), Marutūāhu, the Ngāti Whātua o Ōrākei Māori Trust Board and the Crown.

Subsequent to this direction, several applications were received from other claimants also seeking to participate in the inquiry. Leave was granted to Te Taoū (Wai 756 and 1114) and the Hauraki Māori Trust Board (Wai 100) to participate on a limited basis. An application by Te Rūnanga o Ngāti Whātua to participate in the hearing was withdrawn by the claimants on 9 February 2007.

Hearings were held from 12 March 2007 to 15 March 2007 at the Centra Airport Hotel, Auckland. As well as the claims heard in the inquiry, the hearings were also attended by counsel for Te Taoū (Wai 1146) and Ngāti Tamatera (Wai 349, Wai 720, and Wai 778).

APPENDIX II

THE FILING OF DOCUMENTS BY THE CROWN

11 January 2007	Tribunal directions set 26 February 2007 as the deadline for the filing of Crown evidence (paper 2.5.12).
26 February 2007	Rachel Houlbrooke's evidence with accompanying bundle of documents filed (docs A38, A38(a)).
6 March 2007	Tribunal directions identify that no information relating to the Office of Treaty Settlements claims development team has been filed and request that such information be filed 'as soon as possible' (paper 2.5.16).
9 March 2007	The Crown files the Brooking peer review in response to a request by counsel for Marutūāhu (doc A56). The Crown files a list of section 27B properties in the proposed right of first refusal area in response to an email request from the Tribunal that same day (Wai 1362, doc A57). The Crown files claims development team documentation (Wai 1362, doc A58).
12 March 2007	The Wai 1362 hearing begins.
14 March 2007	The Crown and Te Taoū file an agreed additional bundle of documents relating to Te Taoū (doc A62).
15 March 2007	The Crown files the Minister's press release concerning the Ngāti Whātua o Ōrākei agreement in principle in response to a verbal direction of the Tribunal at the hearing (doc A63). The Wai 1362 hearing concludes.
10 April 2007	The Crown files further evidence concerning the removal of section 27B memorials in Newmarket in 1995 in response to a verbal direction of the Tribunal at the hearing (doc A65).
13 April 2007	The Tribunal directs the Crown to file certain internal memoranda referred to in documents contained in the Crown's document bundle. The Crown is also directed to file 'without delay' any other potentially relevant documents not yet filed (paper 2.7.2).
16 April 2007	The Tribunal directs the Crown to file an unexpurgated version of document A38(a)(DB232), an internal memorandum concerning Te Kawerau ā Maki from which portions had been excised (paper 2.7.3).

18 April 2007 The Crown files 170 pages of further documents, including the memoranda requested on 13 April 2007 and the unexpurgated memorandum requested on 16 April 2007 (doc A66).

1 May 2007 The Tribunal directs the Crown to file any further Crown documents illuminating unanswered questions (paper 2.7.5).

4 May 2007 The Crown files a memorandum stating that it 'has given careful consideration to the Tribunal's direction. It has concluded that there are no documents additional to those already filed which it holds which might illuminate these matters' (paper 3.4.17).

8 May 2007 The Tribunal issues a direction indicating its dissatisfaction with the Crown's filing practice in the inquiry to date (paper 2.7.6).

9 May 2007 The Crown files a memorandum in response to the Tribunal's 8 May 2007 direction, stating that:

> Having reviewed the documents . . . which the Crown provided to the Tribunal on 18 April 2007, I accept that they are relevant to the inquiry and should have been provided to the Tribunal and parties in advance of the hearing. There was an error of judgement in the initial assessment of the relevance of these documents.

The Crown undertakes to re-examine all Office of Treaty Settlements files relating to the Tāmaki Makaurau negotiations to 'ascertain whether there may be any additional documents relevant to the issues before the Tribunal' (paper 3.4.19).

10 May 2007 The Tribunal directs the Crown to file by 23 May 2007 any additional relevant documents discovered as a result of the review of Office of Treaty Settlements files (paper 2.7.7).

25 May 2007 The Crown files an additional 395 pages of documents as a result of its review of Office of Treaty Settlements files (doc A67).

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